OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOL. XXVI

January 1, 1937, through December 31, 1937

ORLAND S. LOOMIS
Attorney General

MADISON, WISCONSIN
1937

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee ____from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee _____from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison _____from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point__from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh _____from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay _____from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee ____from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ____from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ____from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam ____from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point _____from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend __from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc _____from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ____from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ____from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh _____from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville _____from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison _____from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock __from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson _____from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel _____from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee __from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison _____from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay __from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee __from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston ____from Jan. 4, 1937, to ____

ATTORNEY GENERAL'S OFFICE

ORLAND S. LOOMIS	Attorney General
LEO E. VAUDREUIL	Deputy Attorney General
JOSEPH E. MESSERSCHMIDT	Assistant Attorney General
MORTIMER LEVITAN	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS[1]	Assistant Attorney General
JAMES R. WEDLAKE	Assistant Attorney General
LEON E. ISAACSON[2]	Assistant Attorney General
ALBERT G. HAWLEY[3]	Assistant Attorney General

[1] Appointed Feb. 23, 1937.
[2] On leave of absence, effective Feb. 6, 1937.
[3] Appointed Feb. 12, 1937.

OPINIONS

OF THE

ATTORNEY GENERAL

OF

WISCONSIN

VOL. XXVI

Public Lands — State does not have title to land lying in sixteenth section between original government meander line and actual shore line of lake under circumstances stated.

January 9, 1937.

LAND DEPARTMENT.

You state that certain lands in section 16, town 38 north, range 7 east, 4th principal meridian, are shown on the government plat as being covered by the water of South Two Lakes. The government meander line lies south of the north boundary of section 21. The actual meander line runs partly north of the north boundary of section 21, thus leaving some dry land north of that boundary line. You desire to know whether the state can claim the land north of the north boundary of section 21 or whether that accrues to the owner of the adjacent property in section 21. The state's claim would arise under the so-called 16th section grant, approved August 6, 1846, and referred to in art. II, sec. 1, Wisconsin constitution.

This act, among other things, granted to the state each 16th section of land in the state, and, where such section had been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as possible were granted in lieu thereof.

There are two reasons why the state can not claim this land. First, the government intended to convey 640 acres

multiplied by the number of 16th sections in the state. If a 16th section did not contain 640 acres compensation was made by the conveyance of other lands. It does not appear that the state failed to receive all that the federal government intended to grant.

Second, the land in all probability belongs to the owner of the adjacent land in section 21. We do not have a description of the land embraced in this patent, but generally in the absence of gross error and fraud a land owner so situated takes title to the actual shore line and is not restricted to the government meander line. *United States v. Lane,* 250 U. S. 662; *Railroad Company v. Shurmeir,* 74 U. S. (7 Wall.) 272; *Mitchell v. Smale,* 140 U. S. 406; *Shuffeldt v. Spaulding,* 37 Wis. 662; *Brown v. Dunn,* 135 Wis. 374; *Lee Wilson Co. v. U. S.,* 245 U. S. 24.

Our court in several cases has held to the so-called eighth line rule which it seems now to have repudiated and which is definitely in conflict with federal decisions. This rule is as follows: Where lands exist between the meander line and the true shore line, the owner of the land shown on the government plat as abutting the lake may seek the shore as his natural boundary, provided that in the search he does not cross the next regular subdivision line. This rule originated in *Whitney v. Detroit L. Co.,* 78 Wis. 242, based on the earlier case of *Martin v. Carlin,* 19 Wis. 477 and on *White v. Luning,* 93 U. S. 514. The latter case was considered by the Wisconsin supreme court to stand for the proposition that course and distance control over a natural monument, although a fence was the monument in the *White* case. Usually fences are artificial monuments. Clark on Surveys and Boundaries, sec. 8. In the *Whitney* case the court also indicated that gross error and fraud existed. But if that were true it had no authority to allow the lot owner to cross the meander line to the next 16th line. In *Underwood v. Smith,* 109 Wis. 334, the rule was approved, although that case did not come within the rule. The case of *Lally v. Rossman,* 82 Wis. 147, was decided squarely on the *Whitney* case. The rule seems to have been repudiated in *Wisconsin Realty Co. v. Lull,* 177 Wis. 53 and in *Blatchford v. Voss,* 197 Wis. 461 and *Baackes v. Blair,* 269 N. W. 650 (Wis.).

Previously, in *Shuffeldt v. Spaulding,* 37 Wis. 662, the federal rule obtained and in *Brown v. Dunn,* 135 Wis. 374, the eighth line rule did not govern. It seems safe to assume, therefore, that the eighth line rule is not a rule of property in this state. It certainly is not a rule in the federal court, where the question must be finally determined.

Therefore the state could not sustain title to land lying in a 16th section between the original government meander line and the actual shore line of a lake under the circumstances stated.

WHR

Elections — Legislature — Election Contests — Legislature is judge of its own elections, returns and qualifications of its members.

Courts do not have jurisdiction to determine election contests involving members of state legislature.

January 12, 1937.

THEODORE DAMMANN,
Secretary of State.

We acknowledge receipt of your letter of January 12, 1937, in which you inquire as to which name of the two persons, Alvin A. Handrich or Edwin E. Russell, should be certified to the assembly as entitled to a seat therein at the session commencing January 13, 1937.

You have transmitted with your letter a certified copy of the original certificate of the county board of canvassers of Waupaca county, dated November 10, 1936, issued prior to the recount proceedings; also a certified copy of the certification and determination of said board issued after the completion of recount proceedings, dated November 28, 1936, certifying the name of Alvin A. Handrich; also a letter which you received from the county clerk dated January 4, 1937.

You have also transmitted with your letter a letter from the county clerk of Waupaca county dated January 7, 1937, informing you of the fact that proceedings have been had in the circuit court for Waupaca county, and that such court has issued an order canceling the certificate heretofore issued by the county clerk to Alvin A. Handrich and substituting in place thereof a new certificate to Edwin E. Russell; also a certified copy of the judgment of the circuit court for Waupaca county served upon you January 12, 1937, which ordered the county clerk of Waupaca county to issue a certificate of election to Edwin E. Russell.

In looking through these papers we find that the certified copy of the certification and determination of the board of canvassers, dated November 28, 1936, indicates that Alvin A. Handrich received 5,464 votes, while Edwin E. Russell received 5,463 votes. The certified copy of the judgment served upon you indicates that Edwin E. Russell received 5,466 votes and that Alvin A. Handrich received 5,465 votes.

The question that confronts you is whether or not you should, in certifying the name of the assemblyman elect from Waupaca county to the assembly, recognize the report made to you after the recount proceedings by the board of canvassers of Waupaca county, or whether you should recognize the certified copy of the judgment of the circuit court for Waupaca county.

It is our opinion that you should recognize the report of the board of canvassers executed after the recount and dated November 28, 1936, and that you should not recognize the certified copy of the judgment of the circuit court for Waupaca county. Our conclusion is based upon the fact that the circuit court for Waupaca county did not have any jurisdiction to issue the order or judgment canceling the certificate issued to Alvin A. Handrich by the county clerk based upon the proceedings of the board of canvassers, whose certification and determination was dated November 28, 1936.

Art. IV, sec. 7, of the constitution of the state of Wisconsin provides:

"Each house shall be the judge of the elections, returns, and qualifications of its own members; * * *."

There is nothing in the constitution which gives the circuit court any jurisdiction. This same question was considered in I Op. Atty. Gen. 259, at page 260, wherein it was held:

"Under this provision (referring to the constitutional provision) the Assembly is the sole judge and the courts have no jurisdiction of the matter." Citing *State ex rel. Anderton v. Kempf,* 69 Wis. 470.

In a later case, that of *State ex rel. La Follette v. Kohler,* 200 Wis. 518, at page 556, discussing the above-mentioned constitutional provision, the court said:

"* * * No similar provision respecting other officers is to be found in the constitution. The power to prescribe what constitutes a lawful election rests with the legislature, and in the absence of a provision of the constitution vesting the jurisdiction in some other branch of the government it is within the jurisdiction and power of the courts to determine in the manner provided by law whether or not an election of all other public officers has been held in accordance with the manner prescribed by law and to enforce the penalties and give effect to the law in accordance with its terms. * * *."

We are, therefore, clearly of the opinion that the circuit court of Waupaca county had no jurisdiction to cancel the certificate of election issued by the county clerk of Waupaca county upon the certification and determination of the board of canvassers dated November 28, 1936. The certification and determination of the board of canvassers is before you and upon such record you should certify the name of Alvin A. Handrich as assemblyman-elect for Waupaca county to the 1937 session of the Wisconsin assembly.

The dispute between Edwin E. Russell and Alvin A. Handrich is one to be determined by the assembly itself. This power rests solely in the assembly. Sec. 13.16, Stats., provides the procedure to be followed in a contested election, particularly as it pertains to the election of a member of the assembly. It is as follows:

"Any person wishing to contest the election of any senator or member of the assembly shall, within thirty days

after the decision of the board of canvassers, serve a notice in writing on the person whose election he intends to contest, stating briefly that his election will be contested and the cause of such contest; and shall file a copy thereof in the office of the secretary of state at least ten days before the day fixed by law for the meeting of the legislature. * * *."

We have cited this section of the statutes to you as further substantiation of our opinion that the remedy of Edwin E. Russell was not a resort to the circuit court of Waupaca county but by proceeding to bring the matter before the assembly as the law provides.

OSL

Public Officers — County Surveyor — Taxation — Tax Sales — County may, by sec. 75.25, Stats., employ surveyor to determine correct description of assessable property.

January 27, 1937.

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

You ask for an interpretation of sec. 75.25, Stats., in so far as it relates to the charging back of taxes by reason of tax certificates which are invalid because of imperfect descriptions.

You call particular attention to that portion of the section which reads as follows:

"* * * 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."

You say:

"That portion italicized seems to carry with it the idea that the land so reassessed will be correctly described.

"Dane county holds a number of tax certificates which are invalid because of imperfect descriptions and most of the real estate included in these particular tax certificates cannot be correctly described without the services of a surveyor.

"Can the county hire a surveyor for the purpose of obtaining correct descriptions? If a surveyor may be hired to do this work, who shall bear the expense, the county or the particular town, city or village?"

The powers of a county board are such only as are expressly granted or necessarily implied from the statutes. *Frederick v. Douglas,* 96 Wis. 411. The statute, quoted in part above, seems to contemplate that if a tax is invalid because of incorrect description of property such tax shall be reassessed upon property correctly described. It is the duty of the clerk to specify the correct description. Obviously such duty requires, first of all, the determination of the correct description, a determination that at times requires the services of one possessing the technical knowledge of a surveyor. Such knowledge is not a prerequisite to holding the office of county clerk. It is our opinion that the board impliedly is given the power to use such means as are necessary to determine such descriptions.

You ask whether the county or the particular town, city, or village in which the incorrectly described land is located shall bear the expense of determining correct descriptions. We find no basis for charging such expense to such town, city, or village or any other body or person. In the absence of authority to shift such expenses it must be borne by the county.

LEI

Courts — Statute of Limitations — Taxation — Common School Tax — County may avail itself of protection of statute of limitations, sec. 330.19, against claims, but it may also waive such defense.

January 27, 1937.

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

You state that after the common school tax equalization law was passed in 1927 (sec. 59.075, Stats.), your office made distribution of the state funds upon the basis of reports from county and state superintendents, and also notified the county board in each county, giving them the number of elementary teachers in the county, which figure the county board used as a basis for levying the county tax of $250.00 for each elementary teacher in the county.

Watertown, Wisconsin, is situated in both Jefferson and Dodge counties, most of the school buildings being in Jefferson county. However, one grade school building happens to be in Dodge county. There are eight elementary teachers at this building. By mistake, this building was reported as being in Jefferson county, with the result that Jefferson county has been assessed $2000.00 per year tax for elementary teachers which should have been assessed by Dodge county. Consequently, Dodge county now owes Jefferson county some $14,000.00, of which $4000.00 is apparently subject to the statute of limitations.

In view of this situation, you ask for our opinion upon several questions.

You inquire first whether Dodge county is legally liable for the entire amount of $14,000.00 which has been assessed by Jefferson county but which should have been assessed by Dodge county.

It is our opinion that Dodge county may avail itself of the six year statute of limitations provided by sec. 330.19, subsecs. (3) and (4). These subsections cover:

"(3) An action upon any other contract, obligation or liability, express or implied, except those mentioned in sections 330.16 and 330.18."

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

Reliance was placed upon these sections in an opinion in XX Op. Atty. Gen. 285 to the effect that the six year period runs against the right to claim against the county in favor of towns, villages and cities for refund of support of indigent tubercular patients at the county sanatorium.

Also the opinion was expressed in XX Op. Atty. Gen. 131 (reversed by XII Op. Atty. Gen. 76, on a point not material here), that the claim of a county for the support of an insane man outlaws in six years under sec. 4222 (now sec. 330.19 (4)).

This is in accordance with the general rule expressed in 37 C. J. 716:

"A city, or town, or county, or borough, or village, may avail itself of the statute of limitations."

Secondly, you inquire whether, in the event Dodge county is not legally liable for all of the $14,000 claim, it is permitted to pay the entire amount, in view of the fact that it apparently recognizes the justice of the claim and is willing to pay it.

It is our opinion that Dodge county may pay the entire claim including the portion subject to the statute of limitations if it desires to do so.

The moral obligation is still there, and:

"A statute limiting the time within which actions shall be brought has been said to be for the benefit and repose of individuals and not to secure general objects of policy or morals, and hence it is a general rule that the protection may be waived by one entitled to rely upon it—unless the statutory provision is jurisdictional—including a state and a municipal corporation." 37 C. J. 721.

In other words, the defense of the statute of limitations to be available must be pleaded. *Lockhart v. Fessenich,* 58 Wis. 588.

Sec. 59.07, subsec. (3) empowers the county board at any legal meeting to:

"Examine and settle all accounts of the receipts and expenses of the county, examine, settle and allow all accounts, demands or causes of action against such county, and when so settled to issue county orders therefor as provided by law."

We believe this statute is sufficiently broad to permit of the allowance in full of this claim, if such is the wish of the county board. It seems clear that if the claim were disallowed and suit were brought for the full amount against Dodge county, and the defense of the statute of limitations were not raised, a valid judgment would result against Dodge county. This being true, there would appear to be no sound reason why the Dodge county board could not in its discretion allow the full claim in the first instance without suit being brought.

The answer to the second question makes unnecessary any consideration of the third and fourth questions asked in your request.

WHR

School Districts — Union High School Districts — Property of old high school district becomes property of new district upon annexation of additional territory and forming of new district by such union.

January 27, 1937.

RICHARD W. ORTON,
District Attorney,
Lancaster, Wisconsin.

You state that a number of years ago the city of Fennimore and part of the township of Fennimore comprised a high school district known as district number two; that at an election duly held, the district was changed to include the city of Fennimore, the town of Fennimore and the town of Mt. Ida and is now known as a

union free high school district. You say that a question has come up relative to the property owned by the old district before the change was made. You state it is your understanding from reading sec. 40.64, subsec. (5), Stats., that all the property owned by the old district became the property of the new district and you would like our opinion in the matter.

Sec. 40.64 (5), Stats., reads as follows:

"If an existing high school district is included in the new high school district territory, the establishment of a high school district, as herein provided, shall annul such existing high school district, and the property and liabilities thereof shall become the property and liability of the new district."

This statute is clear and unambiguous and we believe there is no room for construction. See *City of Wauwatosa v. Union Free High School District,* 214 Wis. 35, 39; *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511; *Groeschner v. John Gund Brewing Co.,* 173 Wis. 366, 181 N. W. 212; *Oconto Co. v. Town of Townsend,* 210 Wis. 85, syllabus No. 9.

You are advised that we agree with your conclusion and that the property of the old district upon the union or annexation of the territory became the property of the new district.

JEM

Public Officers — District Attorney — Village Board — Offices of district attorney and member of village board are incompatible.

January 27, 1937.

PAUL E. ROMAN,
District Attorney,
Manawa, Wisconsin.

You inquire, under date of January 8, whether the district attorney in a county such as Waupaca county is estopped from serving as a member of a village board while he is district attorney.

We find no express language in the statute providing that these two offices are incompatible, but it has been held in an official opinion that the offices of district attorney and mayor of a city are incompatible. Op. Atty. Gen. for 1912, 786. It was held that whenever the interests of the city and the interests of the county were adverse he could not do his full duty by both the city and the county if he were acting as district attorney as well as mayor. The same reasoning would properly apply to a member of a village board when acting as district attorney.

You are therefore advised that we believe the two offices are incompatible.

JEM

Appropriations and Expenditures — Library Equipment — Public Officers — District Attorney — County board may supply district attorney's office with law library equipment such as Mason's Wisconsin Annotations and Shepard's Wisconsin Citations, although it is not obliged to do so.

January 27, 1937.

EARL E. SCHUMACHER,
Ex-District Attorney,
Beaver Dam, Wisconsin.

You inquire whether the county is required to or should furnish the district attorney with Mason's Wisconsin Annotations and Shepard's Wisconsin Citations.

It seems to us that this is pretty much a question of policy to be worked out between the district attorney and the county board. Some counties furnish the office of district attorney with law libraries, although they are not obliged to do so. We call your attention to XXII Op. Atty. Gen. 71, wherein it was said, at p. 72:

"* * * I think it is commonly accepted in this state that an attorney who offers himself as a candidate for district attorney, if successful, will have the use and access of the law library belonging to the county, and that his own personal library will be available as it may become necessary to use such personal library."

This was said in connection with an opinion to the effect that the district attorney may not collect rent from the county for use of his private law library.

Some of the more populous counties have supplied their district attorneys with well equipped law libraries and other counties have done no more than to leave the district attorney to his own library and the law library belonging to the county.

We are unable to find any statute which either expressly or impliedly requires the county board to make any provisions respecting a law library for the district attorney.

You have referred us to the following language in XXI Op. Atty. Gen. 152, at p. 153:

"The payment of postage allowance and the supplying of the county offices with stationery, ink and other like supplies being a liability of the county irrespective of salary allowances, the county board may prescribe the manner of such payment."

We do not think that this language is applicable to your question in that the publications you mention are commonly understood by the legal profession to constitute a part of law library equipment rather than coming under the classification of stationery, postage stamps, ink and other consumable supplies of like nature.

However, if the district attorney can show the county board how he will be aided in the discharge of the county's legal business by being supplied with the publication mentioned, we see no reason why the county may not make provision for their purchase.

WHR

Criminal Law — Fish and Game — Carrying Weapons — It is unlawful to carry in automobile any gun or rifle unless same is unloaded and knocked down or inclosed within carrying case.

January 29, 1937.

CHARLES P. CURRAN,
District Attorney,
Mauston, Wisconsin.

In your recent communication you referred us to sec. 29.22, Stats., entitled "General restrictions on hunting" and which provides in subsec. (1) as follows:

"* * *; and no person shall carry with him in any vehicle or automobile, any gun or rifle unless the same is unloaded and knocked down or unloaded and inclosed within a carrying case. * * *"

You say that A was arrested for having a loaded gun in his automobile. At the time A was arrested he was not hunting but was returning from a hunting trip. The question now is: Did A violate the above section of the statute by having a loaded gun in his car or does the above section apply only in a case where a person has a loaded gun in his automobile while he is hunting?

In an official opinion by this department in XXII Op. Atty. Gen. 1024, it was held that carrying a loaded gun in a vehicle unless the same is unloaded and knocked down or unloaded and inclosed within a carrying case is in violation of sec. 29.22 and is a criminal offense. We refer you to said opinion, which we approve.

In addition to the authorities cited in said opinion we refer you to *State v. Alt,* 215 Wis. 387.

You are therefore advised that it is our opinion that A has violated sec. 29.22, Stats.

JEM

Constitutional Law — Courts — Statute which provides penalty of imprisonment by stating minimum number of years that may be imposed but does not state maximum is constitutional.

February 1, 1937.

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

You have submitted the question whether sec. 162.06 of the Wisconsin statutes which provides that any person who acts as a well driller without having a permit or registration of renewal thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not less than thirty days or by both such fine and imprisonment, is valid. You point out that this section does not specify a maximum term of imprisonment and the question has arisen whether that might render the statute unconstitutional. You ask for an official opinion on that question.

Art. I, sec. 6 of the Wisconsin constitution provides:

"Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted."

In 16 C. J. 1359-1360, the following rule is laid down:

"The failure of a statute to fix a maximum fine does not render it unconstitutional under a provision forbidding excessive fines. In England the statutes seldom fixed the amount of a fine to be imposed for their violation, but left it to the discretion of the court, subject only to the limitation of the Bill of Rights prohibiting excessive fines; and the amount of each fine varied according to the character of the crime, the quality and financial condition of the parties, and many other circumstances."

See *In re Yell,* 107 Mich. 228, 65 N. W. 97. On page 97 the court said:

"There is no express constitutional requirement that the legislature shall, in enacting penal statutes, fix the maximum penalty. * * *"

A well considered case is referred to, that of *Frese v. State* (Fla.), 23 Fla. 267.

While the above authorities are conclusive on the question of whether a statute which states a minimum fine and provides no limit for the maximum is valid and constitutional, it does not expressly hold that, where a punishment of imprisonment is provided and only the minimum is stated, such a statute is constitutional. We have found no decision holding that a statute which provides for imprisonment and only gives the minimum number of years that may be imposed but does not state the maximum is unconstitutional for the reason that it has failed to state a maximum penalty. To leave the number of years of imprisonment to the discretion of the court seems to be approved.

"* * * It has been held, however, that where the punishment for an offense is for a term of years, to be fixed by the court, it never should be made to extend beyond the average period of the life of persons in prison, which seldom exceeds twenty-five years. * * *" 16 C. J. 1362-1363.

In the absence of authority to the effect that a statute such as we have here is unconstitutional, we are constrained to hold that this law is constitutional.

JEM

Civil Service — Legislature — Public Officers — Lieutenant governor may appoint secretary or assistant by virtue of sec. 16.09, subsec. (2), par. (a), Stats., without in any way conflicting with provisions of sec. 13.14, subsec. (1), Stats.

February 2, 1937.

THEODORE DAMMANN,
Secretary of State.
Attention C. A. Nickerson, *Auditor.*

You state in your letter of January 27, 1937, that the lieutenant governor has certified to your department a pay roll in favor of his secretary, Helen L. Albee, under the provisions of sec. 20.01, subsec. (2m), par (b), Stats., and you request our opinion as to whether or not the appointment of a woman to this position conflicts with the provisions of sec. 13.14, subsec. (1), Stats., that male persons only shall be employed in the legislature.

Par. (a), subsec. (2), sec. 16.09 authorizes appointment without civil service of one deputy or assistant, and of one stenographer by each elective executive officer. The lieutenant governor without question is an elective executive official, and under this section of the statutes is entitled to appoint one deputy or assistant and one stenographer.

The appropriation from which the salary of a secretary to the lieutenant governor is paid is provided for in ch. 113, Laws 1935, sec. 20.01 (2m) (b), Stats. This is on the basis of six dollars per day during and for two weeks after *sine die* adjournment of the legislature.

Sec. 13.14, subsec. (1), Stats., provides that male persons only shall be employed in the legislature and you question whether the secretary appointed by the lieutenant governor in this instance is a legislative employee and, being a female, could not be paid from this appropriation.

It is our opinion that the mere fact that the salary of the secretary is paid from an appropriation made to the legislature and for the expense incidental to its session is not controlling. The source of the payment may be from the legislative appropriation, but the source of the appointment is from an elective executive officer. The appropriation stat-

ute, sec. 20.01 (2m) (b), specifically provides that the secretary may be appointed under par. (a), subsec. (2), sec. 16.09. This relates to the appointment made without civil service. All legislative employees under the statute are under civil service. As the secretary appointed is exempt, without civil service, it seems clear that the legislature did not intend to classify the secretary of the lieutenant governor as a legislative employee.

While it is true that the legislature has provided that only male employees can be employed during a session, this statute was enacted prior to the statute granting equal rights to women. Before equal rights were granted to women by statute there was no discrimination as to sex in the appointment of the secretary to an elective executive officer. To rule at this time that only a male person could fill this position would in our opinion be violating the spirit of the statute granting equal rights to women.

It is, therefore, our opinion that the appointment of Helen L. Albee as secretary to the lieutenant governor does not conflict with the provision of sec. 13.14, subsec. (1), Stats., and that payment to her may be made in accordance with the appropriation made in ch. 113, Laws 1935, sec. 20.01 (2m) (b), Stats.

OSL

Courts — Actions to Quiet Title — Taxation — Tax Sales —Misjoinder of causes of action by county in suits to quiet title to lands is waived if objection is not raised by demurrer or answer.

February 4, 1937.

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

You state that Dane county has taken tax deeds on some four hundred pieces of property and that you now propose to bring actions to quiet title to such property under secs.

75.39, 75.40 and 75.41, Stats.

You are concerned with the question of combining several descriptions in one action, and state that this is being done in one of the northern counties. Occasionally a demurrer is interposed for improper joinder of actions and the district attorney then dismisses as to the particular person who demurs. While such procedure does not conform to the rules of good pleading, it nevertheless has the merit of practicability in saving the expense of separate suits, particularly in view of the fact that the lands are of very little value.

Our opinion is asked on the effectiveness of a judgment in an action to quiet title in such cases where no party takes advantage of the defective complaint by demurring.

Sec. 263.12 of the statutes provides:

"If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action."

We believe this statute is clearly applicable here, and that the objection of misjoinder of causes of action does not come within the exceptions stated in the statute, since it does not go to the jurisdiction of the court, and neither is there failure to state a cause of action.

We call your attention to the following authorities:

"A demurrer lies, according to the code, where 'several causes of action have been improperly united,' and it is held that failure to demur on that score waives any objection. * * *" Bryant, Wisconsin Pleading & Practice (2 ed.), sec. 351.

See also *Schultz v. Andrews & Co.*, 172 Wis. 91; *Harrigan & Gilchrist*, 121 Wis. 127, 278; *Jones v. Hughes*, 16 Wis. 683.

We therefore conclude that a judgment in an action of this sort is valid, notwithstanding the fact that several causes of action are improperly united in the complaint, if the defendants fail to raise any objection to the complaint.

OSL
WHR

Bridges and Highways — Taxation — Drainage Districts — County may be purchaser at sale of land which is subject to drainage assessments held pursuant to sec. 89.37, subsec. (4), par. (d), Stats., if such county holds general property tax certificates upon land to be sold.

February 5, 1937.

CHARLES P. CURRAN,
District Attorney,
Mauston, Wisconsin.

In your communication of January 23, 1937, you state that Juneau county desires to convey to the United States large tracts of land; that title to a considerable portion of said tracts was acquired by Juneau county through sales held pursuant to sec. 89.37, subsec. (4), par. (d), Stats., which relates to the sale of land subject to unpaid drainage assessments; and that in many instances, at the time of such sales, said county held neither tax deeds nor drainage assessment deeds to the tracts in question, but did hold general property tax certificates upon such tracts. You refer us to our opinion reported in XX Op. Atty. Gen. 307, which holds that a county may not be a purchaser at a sale of land held pursuant to said statute if the county merely holds drainage assessment certificates upon said land, but may be such purchaser if it holds drainage assessment deeds or tax deeds upon the land to be sold. You ask whether a county is authorized to be a purchaser at such sale if it holds general property tax certificates upon the property to be so sold.

A county may be a purchaser at a sale of land which is subject to drainage assessments, held pursuant to sec. 89.37 (4) (d) if such county holds general property tax certificates upon the land to be sold.

In XX Op. Atty. Gen. 307 it was held that a county may not be a purchaser at a sale of land held pursuant to sec. 89.37 (4) (d) if such county holds only drainage assessment certificates upon the land to be sold. The basis for such holding was the fact that drainage assessment certificates are held by a county merely as a trustee for a drainage district, and consequently the county has no financial

interest to protect at such sale (XX Op. Atty. Gen. 307, 309; sec. 89.37 (4) (b), Stats.). On the other hand it was held that a county may be such purchaser if it holds a tax or drainage assessment deed upon the land to be sold because in such cases the county has an interest to protect. XX Op. Atty. Gen. 307, 310, 311.

Inasmuch as general property tax certificates held by a county represent a direct financial interest in land and are in no way held in a trust relationship, it is our opinion that XX Op. Atty. Gen. 307 should be extended so as to authorize a county to bid at such sale if it holds such certificates upon the land to be sold. Sec. 89.37 (4) (d) specifically provides that a *county* may make application to the circuit court for the sale of lands subject to certain unpaid drainage assessments. That it has such right was held by our court in *In re Wood Co. Drainage Dist.*, 201 Wis. 368, 371. Although relating only to the right to make such application, the language of the court in that case indicates at least that a county which holds tax certificates upon land has an interest to protect. The court said on p. 371:

"It is contended by appellants that the county did not have such an interest in these delinquent tax and drainage certificates as to enable it to make the petition which instituted these proceedings. That the county had an interest in the collection of the general taxes unpaid upon these lands would seem apparent; * * *."

Practical considerations also demand that a county be authorized to be such purchaser. Sec. 89.37 (4) (d) provides:

"* * * When lands shall have been finally sold under order of the court as provided herein, they shall be released from all lien of assessments levied prior to the time of such sale."

Whether the word "assessments" means general property tax assessments as well as drainage assessments, has not been decided by our supreme court. It would appear, however, that "assessments," as there used, means all assessments. Otherwise, as a practical matter there would be few,

if any, purchasers at such sale. It is common knowledge that much of the land sold pursuant to the statutory provision in question is not considered worth the delinquent taxes. It seems imperative, therefore, that the county should be allowed to bid at such sale up to such amount as it has a financial interest represented by general property tax certificates.

LEI

Civil Service — Counties — County Ordinances — Public Officers — Deputy Sheriff — County board does not have authority to establish civil service commission for appointment of deputy sheriffs.

February 8, 1937.

OSCAR M. EDWARDS,
District Attorney,
Racine, Wisconsin.

You have submitted to this office a copy of an ordinance "To provide for civil service examination for deputy sheriffs, their term of office, and the method of dismissal," and request our opinion as to the validity of this ordinance.

The ordinance submitted was adopted by the county board of Racine county pursuant to the provisions of ch. 349, Laws 1933, which chapter is designated as sec. 59.21 of the Wisconsin statutes. In determining the validity of this ordinance, we must bear in mind that the governing bodies of counties have only such powers as are expressly granted or necessarily implied from the statutes. *Frederick v. Douglas County,* 96 Wis. 411; *Spaulding v. Wood County,* 218 Wis. 224; XXII Op. Atty. Gen. 189; XXIV Op. Atty. Gen. 424, 429; XXV Op. Atty. Gen. 92, 316, 379. The statutory authority for the appointment of deputy sheriffs under civil service is found in sec. 59.21, subsec. (8), to wit:

"(a) 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."

Section II of the ordinance provides:

"A person to be eligible to apply for the position of deputy sheriff must be a male citizen of the United States and the state of Wisconsin, in good health, not less than 21 years of age nor more than 45, and a resident of Racine county for three full years immediately preceding the date of application. No person shall be eligible who has been convicted at any time or place of a criminal offense amounting to a felony."

The qualifications above stated are not the qualifications required by the statute itself. The only statutory requirement is that the candidate shall have been a resident of the county for at least one year prior to the date of the examination. We are of the opinion that the qualifications as stated in the ordinance are not valid for the reason that the qualifications stated are different than those provided or required by statute.

Subdivision A of section III of the ordinance provides for the appointment of a civil service commission by the chairman of the Racine county board of supervisors. The legislature has not authorized the appointment of a civil service commission by any governing body of the county.

Inasmuch as there is no statutory authority for the appointment or creation of a civil service commission, subdivision A, providing for such commission, must be held invalid.

Section VII of the ordinance provides for the temporary suspension of deputy sheriffs by the sheriff for the infraction of the rules and regulations of the department. No statute authorizes the sheriff to make any such suspension. Par. (b), subsec. (8), sec. 59.21, Stats., provides:

"The persons appointed shall hold the office of deputy sheriff on good behavior, but may be removed from such office at any time by an affirmative vote of three-fourths of the members-elect of the county board in such county upon charges of malfeasance or neglect of duty preferred to such board by the sheriff or any citizen and after notice and hearing before such county board."

It will be noted that the entire power to remove the deputy sheriff for malfeasance or neglect of office is vested in the county board itself and not the sheriff. You will also note that the statute gives no authority to the sheriff to suspend any deputy and without such statutory authority he does no have this power and it cannot be conferred upon him by ordinance.

You have also submitted an amendment to the ordinance which has been passed by the county board. This amendment authorizes the civil service commission appointed by the chairman of the county board to request the county physicians to examine the applicants for physical fitness and physical ability, and to conduct an examination themselves into the character, reputation, morality and general qualifications of all candidates and to grade the applicants on the following basis:

Written examination as per C (3) _____	50%
Physical examination as per C (4) _____	20%
Character, etc., as per C (5) _____	30%
Final _____	100%

Inasmuch as there is no statutory authority for the appointment of a civil service commission, this amendment must be held invalid.

There has been some misunderstanding as to who has the power to conduct the examination of the applicants. Sec. 59.21, (8) (a) in part provides:

"* * * The director of the state bureau of personnel shall *upon the request of the county board* conduct such examination according to the methods used in examinations for the state civil service * * *."

We have italicized the words, "upon the request of the county board" for the reason that it has been suggested these words may be construed to give the option to the county board to establish its own civil service commission. We are of the opinion that these words do not give any such option to the county board, but that they simply designate a time when the examinations are to be held. The state bureau of personnel has no method of knowing when examinations are required in the several counties of the state for the position of deputy sheriffs. The state bureau of personnel can act only at such time that it is called upon to conduct the examination by the county board.

In writing this opinion we are mindful of the opinion in XXIV Op. Atty. Gen. 747, concerning this same matter and addressed to the district attorney of Kenosha county. Upon further consideration we take this opportunity of reversing the former opinion..

LEV

Charitable and Penal Institutions — Industrial School for Boys — Indians — Indian boys found guilty of misdemeanor in local Indian court cannot be committed to and accepted by Wisconsin industrial school for boys.

February 9, 1937.

BOARD OF CONTROL.

You have inquired whether Indian boys found guilty of a misdemeanor in a local Indian court can be committed to and accepted by the Wisconsin industrial school for boys at

Waukesha. You enclose a letter from Ralph Fredenberg, superintendent, Keshena Indian Agency, Keshena, Wisconsin, in which he says:

"The Menominee Indians are wards of the federal government, and all major crimes are tried by the federal court. However, misdemeanors committed on the reservation are punishable in the local Indian court, and the county court assumes no jurisdiction unless the offense takes place off the reservation.

"For some time we have had difficulty keeping certain boys in school. * * * Under what arrangement can the state accept these boys in the industrial school? Will the state contract with the federal government for maintenance of such boys under the same arrangement made with each county, and will boys committed by our Indian court be accepted without further recommendations of the county court? There is no federal institution for such cases, and we have no other recourse than application for entry in a state institution."

Minors are generally committed to the industrial school by sec. 48.15 of the Wisconsin statutes. In an official opinion of this department in IV Op. Atty. Gen. 1121, it was held that this statute does not apply to federal prisoners. See 18 U. S. C. A. secs. 706 and 707. The Wisconsin statute provides that United States prisoners may be cared for at the jail. See sec. 55.11, subsec. (2), Stats. United States prisoners may also be cared for at the state prison under sec. 53.16, Stats. No similar provision for taking them to the industrial school for boys is found in the statutes. In the above cited opinion it was held that the federal court cannot commit a boy to the industrial school for boys at Waukesha. It was also said in that opinion:

"The authority of a federal judge to commit or sentence a prisoner to a state institution, if such authority exists, must be found in the federal statutes. And the right or authority of the keeper of a state institution to receive into custody and detain a prisoner so committed, if such authority exists, must be found in a state statute. * * *."

It was then held that there was no statute for empowering the federal court to commit or sentence a criminal to the Wisconsin industrial school for boys. We have found no

statute authorizing that at the present time; thus we conclude that Indian boys found guilty of a misdemeanor in a local Indian court cannot be committed to or accepted by the Wisconsin industrial school for boys.
OSL
JEM

Public Officers — De Facto Officer — Deputy Sheriff — No action should be brought to recover compensation which deputy sheriff received while acting as deputy sheriff under due appointment and who has received compensation for his services, there having been no *de jure* officer claiming it.

February 9, 1937.

CHARLES L. LARSON,
District Attorney,
Port Washington, Wisconsin.

You state that several years ago the then sheriff of Ozaukee county appointed as deputy sheriff a resident of the county who was not a citizen of the United States. The appointee had been born in Canada and erroneously believed his father to be a citizen of the United States. He filed the official oath and bond and performed services as other deputies, for which he was paid by Ozaukee county.

You inquire whether an action for the recovery of the fees paid over a period of years would be proper. You state this person has since become a citizen of the United States.

Under the above facts it is apparent that the deputy sheriff was a *de facto* officer. 8 Amer. & Eng. Encyc. of Law (2d) 788; *State ex rel. Schneider v. Darby,* 179 Wis. 147, 159; 46 C. J., 1056, sec. 370.

It is a general rule, well established, that a *de facto* officer is entitled to pay for services if there is no *de jure* officer who can claim the salary. *State ex rel. Elliott v. Kelly,* 154 Wis. 482; *State ex rel. Kleinsteuber v. Kotecki,* 155 Wis. 66. Your question is therefore answered in the negative.
JEM

Indigent, Insane, etc. — Poor Relief — Legal Settlement — Under facts stated where A has his family in one place and works in another but supports his family and visits them, he must be held to have legal settlement in village where his family lives.

February 9, 1937.

WILLIAM K. MCDANIEL,
District Attorney,
Darlington, Wisconsin.

You have submitted a question as to the legal settlement of a man whom we will designate as A. The facts are as follows: Mr. A and family, consisting of his wife and children, originally lived in the town of Lamont. Later they moved to the village of Argyle. After living there for some time Mr. A left Argyle and went to work in the town of Fayette. The wife and children of A have been residing continuously in the village of Argyle for a period of two or three years. Apparently they never had, until several months ago, received any relief. Mr. A., who was not on good terms with his father-in-law, has been living away from his family for several years, during which time he has worked on a farm in the town of Fayette. During this period he has continuously contributed as much as he could to the support of his family. Although there are conflicting opinions as to whether or not he has spent any time with his family, it is well understood that he has left the town of Fayette practically every week-end, supposedly going to Argyle to see his family. However, it is doubtful whether he spent the week-ends in the same house, due to the strained relations between his father-in-law and himself. You state that A is asking for relief and the question comes up whether or not he has, by this working in the town of Fayette, built up a new residence, or whether his legal residence remains with his family in the place of their abode.

Sec. 49.02, subsec. (4), Stats., provides:

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

Subsec. (1), sec. 49.02 reads:

"A married woman shall always follow and have the settlement of her husband * * *."

The same is also true as to his children under subsec. (2) of sec. 49.02.

Under the facts stated by you it would seem that A and his family have a legal settlement in the village of Argyle. While A did leave said village, apparently for temporary purposes to acquire a job to support his family, he did not move his family from the village of Argyle and did support them at that home and apparently visited them and never was estranged from his wife and children.

In sec. 6.51, Stats., rules are given for determining the qualifications of electors, and in subsec. (2) it is provided as follows:

"That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning."

Subsec. (3), sec. 6.51 reads thus:

"A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or county, town or ward of this state for temporary purposes merely, with an intention of returning."

Subsec. (7) of said section reads:

"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."

Subsec. (8) provides:

"If a married man has his family fixed in one place and does his business in another, the former shall be considered and held to be his residence."

While these rules are laid down for the purposes of establishing his residence for election purposes, and not for relief purposes, we believe, however, that they are useful in determining the question of residence for relief purposes also. We are persuaded that under the facts stated A and his family must be considered as having his residence and, therefore, his legal settlement in the village of Argyle.
JEM

Appropriations and Expenditures — Tax commission expenses in discharging duties under secs. 70.64, 70.75 and 70.85, Stats., are chargeable to appropriation provided by sec. 20.09, subsec. (2).

February 9, 1937.

TAX COMMISSION.

You call our attention to sec. 20.09, Stats., which appropriates to the tax commission specific sums of money for the performance of the functions of the various divisions of the commission.

Sec. 20.09, subsecs. (1) and (2), read as follows:

"(1) On July 1, 1933, one hundred forty-one thousand nine hundred seventy-two dollars annually, beginning July 1, 1934, one hundred forty-three thousand one hundred seventy-two dollars for general administration and for salaries and necessary expenses, and for the general functions of said commission in the general property tax field other than specifically provided for hereafter in this section. Of this there is allotted:

* * *

"(2) Annually, such sums as may be necessary to defray the expenses of executing the functions of reassessments and review of assessment proceedings as provided in section 70.64 and 70.75 to 70.85, inclusive, of the statutes."

Under sections 70.64, 70.75 and 70.85, the tax commission is charged with the duty of reviewing assessments of taxa-

tion districts and with reassessments and revaluation of general property. In the conduct and supervision of this work expenses are necessarily incurred by the commissioners for travel, hotel accommodations, etc., and you inquire whether such items of expense are properly chargeable to the appropriation made available by subsec. (1), or to the appropriation made available by subsec. (2) of sec. 20.09.

It is our opinion that such expenses are properly chargeable to the appropriation provided by sec. 20.09, subsec. (2).

The appropriation provided by sec. 20.09, subsec. (1), is "for general administration and for salaries and necessary expenses, and for the general functions of said commission in the general property tax field *other than specifically provided for hereafter in this section.*"

This is a general statute, which definitely provides that it does not apply where there are other specific provisions further on in the section.

On the other hand, subsec. (2) specifically relates to the expenses incurred in executing reassessments and review of assessment proceedings as provided in sections 70.64 and 70.75 to 70.85, inclusive.

It would have been difficult for the legislature to use more explicit language in answering the question that has been raised. The statute is so clear and unambiguous as to leave no room for construction, and if there were any doubts, then the latter subsection, being specific, must prevail over the former, which provides an appropriation for general administration and general functions of the commission.

This is in accord with the principle of statutory construction that, where a statute contains a general provision covering a subject as a whole and also a special clause or provisions relating to a particular element included in such subject, such special provision must prevail. *State ex rel. Donnelly v. Hobe,* 106 Wis. 411; See, also, *Kollock v. Dodge,* 105 Wis. 187, and *Hite v. Keene,* 137 Wis. 625.

WHR

Public Officers — State Treasurer — Trade Regulation — Beer Tax — Under sec. 139.03, subsec. (1) and sec. 139.26, subsec. (3), par. (b), Stats., state treasurer may prescribe design of beer and intoxicating liquor stamps.

State treasurer may, but is not obliged to, continue use of stamps bearing former treasurer's name.

February 10, 1937.

SOLOMON LEVITAN,
State Treasurer.

You state that your predecessor in office, Mr. Robert K. Henry, left on hand some 15,855,606 liquor and wine stamps and 1,337,678 beer stamps, bearing his signature as state treasurer; it cost the state $9,054.40 to have these stamps prepared; it appears that the supply is so large in one infrequently used denomination as to be sufficient for the next 173 years, in another denomination to last 56 years, another denomination to last for 36 years, another for 10 years; and in other denominations for periods ranging from several months to 10 years.

You state further:

"Mr. Henry is no longer state treasurer, but he has left us a heritage of this enormous supply of stamps with his signature as state treasurer.

"I am unwilling to request the destruction of property which cost the state $9,054.40. I cannot issue instructions for the destruction of these stamps, nor, until I obtain an opinion concerning the legality of these stamps, can I be a party to the circulation in perpetuity of stamps bearing the name of the one who no longer holds the office under authority of which the stamps were issued.

"So, therefore, I am writing to request your opinion whether the law permits my office to issue, after January 4, 1937, these stamps, bearing the name of Robert K. Henry, as state treasurer."

It is our opinion that you may continue to use the stamps on hand, although you are not obliged to do so.

Sec. 139.03, subsec. (2), Stats., provides that beer stamps shall be of such design and denomination as shall be designated by the state treasurer.

In the case of intoxicating liquor and wine, sec. 139.26 (3) par. (b), provides:

"The state treasurer shall prescribe, prepare and have available for sale, stamps of such denominations and quantities as he may deem necessary for the payment of the taxes imposed by this chapter."

That the previous state treasurer in the exercise of his duties considered that the interests of the state would be best served by selecting a stamp design including his name is a matter of policy and artistic taste, concerning which we express no opinion. Neither do we wish to comment on the fact that these stamps may have been ordered in some denominations in such quantities as would do credit to one having the life expectancy hopes of a Methuselah. Nor do we care to discuss the implications of continued tenure in office involved in the ordering of such a volume of stamps carrying the name of the then state treasurer. These are matters of but passing interest and bear no relationship to the legal question involved, which is a simple one.

Under the statutes above referred to, the selection of these stamp designs is vested in the state treasurer. If a succeeding treasurer feels that his predecessor displayed poor artistry in prescribing and designing such stamps, he is at liberty to give full range to his own genius and creative urge in improving the design. The possibilities are really quite unlimited. No difficulties are presented by way of signature if, perchance, the name on the stamp were to be considered as the signature of your predecessor, since if the stamps did require the signature of the state treasurer, it would not be his signature as an individual but as a state treasurer. It is immaterial who the particular individual holding the office may be, because the signing is the act of the officer, rather than of the individual, and because that act is a ministerial one. *State ex rel. Carel v. Nelson,* 56 Wis. 290, *Dreutzer v. Smith,* 56 Wis. 292.

As to destroying the stamps on hand in the event that you disapprove of the present design and form, we can only suggest that this is a matter of policy for you to decide. It is entirely possible that some state treasurer in the next 173 years will feel that the present stamp with your predecessor's name, offers possibilities for improvement. When and how that change is to be made is not for this department to determine. It may even be advisable to change such forms

from time to time regardless of their suitability, so as to discourage counterfeiting. These are matters for your consideration. As above pointed out, you have the statutory power to prescribe the design and inferentially the power to change the design from time to time. How well you exercise this power is your sole responsibility.
WHR

Workmen's Compensation — County is liable for compensation insurance premiums for employees employed by register of deeds or sheriff on fee basis.

February 11, 1937.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire, Wisconsin.

In your letter of February 3, 1937, you request an opinion as to the liability for the payment of workmen's compensation premiums for employees in the office of the register of deeds of your county. It appears that the register of deeds is paid on a fee basis and not a regular salary; that out of the fees received by him, he pays all of the clerical help in his office. The sheriff's office operates on the same basis. You desire to know whether or not the compensation premiums shall be paid by the county or whether they shall be paid by the officers themselves.

Sec. 102.04, Stats., designates who shall be considered employers subject to the provisions of the workmen's compensation act. Subsec. (1) is as follows:

"The state, each county, city, town, village, school district, sewer district, drainage district and other public or quasi-public corporations therein."

By the terms of the above quoted statute, it is very apparent that counties are considered employers within the meaning of the act. Sec. 102.07 defines the term "employe" as used in this chapter. Subsec. (1) provides as follows:

"Every person, including all officials, in the service of the state, or of any municipality therein, whether elected or under any appointment, or contract of hire, express or implied. * * *."

Subsec. (4) provides:

"Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer * * *."

Under the terms of subsec. (1), sec. 102.07, the register of deeds is an employee under the act. By virtue of subsec. (4), sec. 102.07, every employee of the register of deeds is also subject to the provisions of the act, whether such employee is paid by the register of deeds or whether he is paid by the county itself. Inasmuch as employees of the register of deeds are subject to the provisions of the act, the county would be liable for compensation for any injury sustained by them while acting as such employees and the insurance carrier who covers the county would be entitled to the premiums based upon the compensation paid to said employees.

It is therefore our opinion that the county is liable for such premium and that the auditor was warranted in including such salaries in his computation.

LEV

Elections — Nominations — Ruling of secretary of state that nomination papers under sec. 5.27, Stats., may not be circulated more than sixty days prior to election is controlling in absence of statute.

February 12, 1937.

CHARLES L. LARSON,
District Attorney,
Port Washington, Wisconsin.

You refer us to sec. 5.27, subsec. (2), Stats., which provides a method of nominating candidates for town and village offices. The same section of the statutes states "such nomination paper shall be filed in the office of the town or village clerk at least fifteen days before election." You say the statute is silent as to the length of time before the election in which papers can be filed.

You inquire what rule would govern the maximum number of days prior to an election in which nomination papers for such candidates can be filed.

Sec. 5.27 (2) fixes no limitation as to when one may start circulating nomination papers. Sec. 5.05 (4), Stats. has a sixty day limit. The secretary of state has always ruled that the sixty day limit of that section applies to circulation of papers under sec. 5.27, Stats., and has refused to file any papers circulated before this period. It is to be noted, however, that sec. 5.27 (2), refers to only certain particular sections as applying to the circulation of papers. Until the law is changed and enlarged by the legislature to refer to such section, the ruling of the secretary of state should be accepted as controlling and correct.

OSL
JEM

Elections — School Districts — School Elections — In referendum vote on change from district school plan to city school plan under sec. 40.52, Stats., question should contain concise statement of nature thereof.

February 12, 1937.

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

You inquire whether, in submitting to the electors the question of changing from the district school plan to the city school plan, it is sufficient to word the referendum:

"Shall the election of members of the school board be changed to the regular city election?"

The other wording which is suggested in the alternative in your request reads as follows:

"Shall [name of municipality] abolish the district plan of school organization and adopt the city school plan under provisions of 40.52, Wisconsin statutes?"

As suggested in the request the real issue is not the change in the method of election, as indicated in the first proposed wording of the referendum, but it is rather the change from one type of school plan to another which would result in the abolition of the annual district school meeting, with its authority to levy a school tax and conduct other business, and the substitution therefor of the city school plan, which transfers the fiscal authority to the city council.

It is our opinion that the second wording is much to be preferred. Such wording has the advantage of more clearly stating the real issue, as well as of referring to the statute under which the change is made so that there can be no argument as to what is really being voted upon.

We invite your attention to sec. 6.23, subsec. (8), Stats., which provides:

"Whenever a proposed amendment to the constitution, or any measure or other question shall be submitted to a vote

of the people, a concise statement of the nature thereof shall be printed in accordance with the act or resolution directing its submission upon a separate ballot provided for that purpose, and underneath the question as thus stated shall appear the words 'yes' and 'no,' and after and to the right of each of said words there shall be a square. * * *"

This department has expressed the opinion that the provisions of sec. 6.23 are to be followed in school elections. XXII Op. Atty. Gen. 518.

The first wording of the question should be avoided as being ambiguous and for the reason that it does not fairly state the real issue involved in the election.

We therefore advise that the provisions of the above quoted section be strictly followed in voting upon any change under sec. 40.52, Stats., and that the language of the question as voted in the second wording thereof, coupled with compliance with the other requirements of sec. 6.23, subsec. (8), will properly present the question to the electors.

OSL
WHR

Courts — Public Officers — Circuit Judge — Under sec. 256.19, Stats., interest of circuit judge as depositor in defunct bank is probably such as would disqualify him from presiding in proceedings to liquidate such bank.

February 12, 1937.

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

You inquire, at the request of your circuit judge, whether sec. 256.19, Stats., disqualifies a judge from making orders concerning compromise of claims, payment of dividends, and other matters arising in the liquidation of a bank by

the state banking department, where the judge is a depositor in such bank.

It is our opinion that sec. 256.19 technically deprives a judge of power to act in a bank liquidation proceeding wherein he is pecuniarily interested as a depositor, although it is true that both the possibilities and probabilities of any impropriety in such matters are highly remote and that the banking department in the impartial administration of a bank liquidation would be most unlikely to bring before the judge any ex parte order which would not be fair to all parties concerned.

Sec. 256.19, Stats., provides:

"In case any judge of any court of record shall be interested in any action or proceeding in such court or shall have acted as attorney or counsel for either of the parties thereto such judge shall not have power to hear and determine such action or proceeding or to make any order therein, except with the consent of the parties thereto."

In the case of *Board of Supervisors of Jefferson County v. Board of Supervisors of Milwaukee County*, 20 Wis. 139, our court indicated that where the judge's interest was minute, and if no objection were taken to his sitting in the cause, or had there been necessity that he should act, notwithstanding this interest, in order to prevent a failure in the administration of justice, the supreme court would have held him competent. In that case the circuit judge of Milwaukee county had an interest in the action adverse to the plaintiff, as an inhabitant and taxpayer of Milwaukee county and he was reversed on an appeal from his order refusing to change the place of trial. This case indicates that the question is partly one as to the degree of the judge's interest, and that it is also partly a question of whether an objection is made to his presiding. However, it would appear to us that the interest of a judge as a depositor in a closed bank is undoubtedly much more direct than would be his interest as an inhabitant and taxpayer of a county which is party to a lawsuit. In fact, the interest in the latter case is so slight that it is seldom challenged by counsel representing a party adverse to the county in which the judge is a resident and taxpayer.

It is entirely possible that the courts might hold in the matter of a liquidation of a bank that the judge's interest as a depositor would be such as to positively prohibit him from acting, even in the absence of objection at the time by an interested party, and hence the proceeding might be subject to collateral attack.

The exception contained in the words "except with the consent of the parties thereto" is of little help here, since as a practical matter, it would be most inexpedient, if not impossible, to secure the consent of all the parties interested in a bank liquidation proceeding.

It would, therefore, seem better to avoid any such question of irregularity and that the validity of the liquidation proceeding ought not to be jeopardized by any action which might be construed as being in contravention to either the letter or the spirit of sec. 256.19, Stats.

WHR

Public Officers — State Treasurer — There is no statute prohibiting state treasurer from having his checks signed by machine with revolving die.

February 16, 1937.

SOLOMON LEVITAN,
State Treasurer.

In your communication of January 20 you referred to an opinion of the attorney general under date of February 17, 1920 (IX Op. Atty. Gen. 82) in which it was held that the state treasurer could delegate the signing of his checks or drafts to another, either his deputy or a clerk, and you also refer to an opinion under date of February 15, 1923 (XII Op. Atty. Gen. 68) which held that the state treasurer could sign his checks with a rubber stamp.

You state that for the past ten years your office has been using a sign-o-graph machine for the signatures on drafts,

one signature by the operator making five signatures on drafts. You state there is a machine now on the market which is being used by the United States government and many large corporations which signs checks with a revolving die. It is very fast and a great time saver. The machine is very safe, being automatically locked when not in use and cannot be started except with a key in possession of the operator.

You inquire whether there is any law upon the statute books which would prohibit the state treasurer from having his checks signed in this manner.

You are advised that we are unable to find any statute which prohibits the state treasurer from having his checks signed in the manner indicated.

JEM

Appropriations and Expenditures — Pay Rolls — Public Officers — Public Service Commission — As long as no quorum of public service commission is in existence, secretary of state has no authority to audit and authorize payment of salaries and expense claims upon certification of sole acting commissioner.

February 16, 1937.

PUBLIC SERVICE COMMISSION.

Attention Wm. M. Dineen, *Secretary.*

You state that the secretary of state has advised that he will decline to audit or issue warrants or other authority for the payment of pay rolls or expense claims of members of the staff of the public service commission, which have been duly certified by Commissioner Hunt, so long as no quorum of the commission is in existence. You ask whether the secretary of state is not under the duty of auditing and authorizing the payment of these pay rolls and expense claims upon certification of the acting commissioner.

As long as no quorum of the public service commission is in existence, the secretary of state has no authority to audit and authorize the payment of salaries and expense claims upon certification of the sole acting commissioner.

Subsec. (1), sec. 195.01, Stats., provides in part:

"A public service commission is hereby created to be composed of three commissioners to be appointed by the governor and confirmed by the senate, but no commissioner shall act until confirmed. * * *"

Subsec. (6), sec. 195.01, Stats. provides:

"On the second Monday of February in each odd-numbered year the commissioners shall meet at the office of the commission and elect a chairman, who shall serve for two years and until his successor is elected. Two of said commissioners shall constitute a quorum, and a vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the commission."

According to the statutes, the public service commission is composed of three commissioners and any two of them may exercise the rights of the commission. If there is only one commissioner, the powers of the commission simply cannot be exercised. The secretary of state audits the pay rolls under the provisions of subsec. (2), sec. 14.31, Stats., when "certified by the proper officers." Under the provisions of sec. 14.37 "The certificate of * * * the proper officers of any other board or commission organized or established by the state, shall in all cases be evidence of the correctness of any account which may be certified by them." In view of the fact that the power of the public service commission cannot be exercised in the absence of two commissioners, there is no officer in that department who may exercise the power of certifying the pay roll or to the correctness of any accounts.

ML

Municipal Corporations — Charter Ordinances — Where charter ordinance purports to abandon city-manager form of government under ch. 64, Stats., and restore mayor-alderman plan under ch. 62, it must not conflict with ch. 62, and provisions of this chapter are controlling over those portions of charter ordinance which are in conflict with said chapter.

February 19, 1937.

LESTER R. JOHNSON, *Chief Clerk, Assembly.*

You have referred to this office Resolution No. 14, A. on a number of questions arising out of the city election held in Stevens Point on April 8, 1936, when the electors of that city voted in favor of a charter ordinance abolishing the city manager form of government, under ch. 64 of the statutes, and adopting the mayor-aldermanic form of government under ch. 62 of the statutes.

The first question reads as follows:

"1. Should the provisions of the adopted ordinance providing for one alderman from each ward be followed, or the provisions of chapter 62, providing for two aldermen from each ward?"

The charter ordinance provides on this point:

"The city of Stevens Point hereafter shall be organized and governed under the provisions of ch. 62, Wisconsin statutes known as mayor-alderman plan. The city council shall consist of one alderman from each ward; * * *."

It is apparent that the provisions of the ordinance and the provisions of chapter 62 are in conflict, since sec. 62.09, subsec. (1), par. (a), provides for two aldermen from each ward. However, it is provided in sec. 62.09, subsec. (1), par. (b), among other things:

"* * * The council may, by ordinance, adopted by a two-thirds vote of all its members and approved by the electors at the general or special election, provide that there shall be one alderman from each ward. * * *."

It is probable that the vote taken on April 8, 1936, constitutes a substantial compliance with the statute as far as the voters are concerned. While the statute above quoted contemplates action by the council first, yet election laws are to be liberally construed so as to give effect to the will of the electors.

There appears to be no good reason why the council in its discretion may not now provide by a two-thirds vote for one alderman from each ward, but until this is done, the first question is answered by saying that in so far as the ordinance and sec. 62.09, subsec. (1), par. (a), are in conflict, the statutory provision as to the number of aldermen must prevail over the provisions of the ordinance.

The second question reads:

"2. Shall the positions of clerk, treasurer, and comptroller of said city be elective or appointive positions?"

The ordinance provides:

"* * * all city officers (except mayor, alderman, justice of peace, supervisors and school board members) shall be appointed by the council."

Here again the ordinance conflicts with the statute so far as the positions of treasurer and comptroller are concerned, since sec. 62.09 (3) (a) provides that the treasurer and comptroller shall be elected by the voters. Hence, as to these two offices, the statute is controlling rather than the ordinance.

The situation as to the selection of the clerk is somewhat different, as he comes within the group of officers mentioned in sec. 62.09 (3) (b), which provides:

"The other officers shall be selected in the manner in force at the time of the enactment of chapter 62 of the statutes until the method of their selection shall be changed in the manner provided by section 66.01."

Since the charter ordinance was apparently adopted last spring pursuant to the provisions of sec. 66.01, it would ap-

pear that the manner of the selection of the clerk as provided in the charter ordinance would be controlling, that is, he would be appointed by the council.

The third question reads:

"3. Did this ordinance become effective after its adoption?"

As above indicated, those portions which are in conflict with the statutes never became effective, but in so far it became effective at all, the third question is answered in the affirmative. It is to be noted that the ordinance specifically provided in section 3 that it should be in effect on its adoption. While the valid portions of the ordinance became effective on adoption, we do not mean to indicate that elective officers would be elected immediately by special election. That would be done at the following April election, as was indicated in the case of *State ex rel. Coyle v. Richter,* 203 Wis. 595. Hence, the reorganization of the city government would not take place at once, even though technically speaking, the ordinance became effective upon adoption. This point will be discussed further in the answer to the seventh question.

The fourth question reads:

"4. Can the government under the city manager plan fix salaries for the incoming mayor under the mayor-aldermen plan?"

The answer is, Yes. Sec. 62.09 (6) (b) provides:

"The council shall at its first regular meeting in February, fix the amount of salary of each officer entitled to a salary who may be elected or appointed during the ensuing year which shall not be increased or diminished during his term of office. In cities newly incorporated the compensation of the first officers may be fixed during their terms."

In the case of *Smith v. Phillips,* 174 Wis. 541, this section was held to be mandatory.

The fifth question reads:

"5. If the city government under the city manager plan cannot so fix the salary of the incoming mayor, how can it be fixed?"

The answer to the preceding question makes unnecessary any answer to this question.

The sixth question reads:

"6. Can the government under the city manager plan create new positions for the incoming government under the mayor-alderman plan that are not provided for in the adopted ordinance or chapter 62 of the statutes?"

The answer is, No, since there would be no reason why the incoming government under the mayor-alderman plan could not abolish such positions when it came into power.

The seventh question reads:

"7. Was the mayor-alderman form of government established on proof of adoption of the ordinance in question?"

It is not entirely clear as to just what is meant by this question. If the inquiry is directed to the proposition of whether the members of various boards and commissions and the various city officers under the city-manager plan of government become subject to immediate replacement, or whether they continue to hold office until the end of their respective terms, we would say that they continue to hold their appointments until the end of their respective terms.

In the absence of any provision regulating the matter, it would appear that the old officers would hold over on the transition from one form of city government to the other. 43 C. J. 648.

Hence the last question can perhaps best be answered by saying that while the mayor-alderman *form of* government was established on proof of adoption of the ordinance in question, it does not follow that the *personnel* of the city government changed as a matter of law immediately upon the adoption of the ordinance.

WHR

Taxation — Exemption — Income Taxes — Toll bridge owned and operated by city is not subject to local taxation although part thereof is located in adjoining town.

Income from such toll bridge received by city is not subject to income taxation.

February 20, 1937.

PUBLIC SERVICE COMMISSION.

You state that the city of Durand owns and operates a toll bridge on the Chippewa river; the westerly end of the bridge extends into the town of Waubeeka in Pepin county. You ask whether that portion of the bridge located in the town of Waubeeka is subject to local taxation and also whether said town is entitled to any portion of the tax that may be levied upon the income from said bridge.

Sec. 70.11, subsecs. (2) and (23), Stats., provides:

"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.

"* * *

"(23) All the property of every kind actually used in operating any plank or toll road."

Under the specific wording of the above provisions the bridge in question is not subject to local taxation. The fact that part of the bridge is located in the town of Waubeeka does not change the ruling. IV Op. Atty. Gen. 379, 426; XII Op. Atty. Gen. 231, 467; XIII Op. Atty. Gen. 563.

You are further advised that the income received from said toll bridge by the city of Durand is not subject to our income tax laws by the express terms of sec. 71.05 (1) (f), Stats.

LEI

Public Health — Pharmacy — Where second notice of expiration of pharmacist's registration under sec. 151.02, subsec. (3), Stats., is sent by registered mail with return receipt requested and notice is returned marked "unclaimed," such notice is ineffective to terminate right to be registered pharmacist.

February 20, 1937.

HENRY G. RUENZEL, *Secretary,*
Board of Pharmacy,
Milwaukee, Wisconsin.

You call our attention to sec. 151.02, subsec. (3), Stats., which provides in part:

"* * * Every registered pharmacist may continue to be such by annually, at such time as the board may determine renewing his certificate upon paying the fee of three dollars. Failure to obtain such renewal for sixty days after the secretary of such board shall have given a second notice of the expiration of his registration, shall terminate the right of any person to be a registered pharmacist within the meaning of this section, and such right can only be acquired by compliance with the provisions concerning original registration, again applying for and passing an examination satisfactory to the board."

You state that it has been the practice of your office to send the second notice by registered mail with a request for a return receipt. In one instance, such notice came back with the post-office mark "unclaimed." The pharmacist to whom this notice was sent had his license canceled for nonpayment of the annual registration fee, and has inquired about a renewal of his license. We are asked if this license may be reinstated without examination on the theory that the second notice was not received.

The statute makes the giving of a second notice mandatory and, inasmuch as it is evident that in the case mentioned no second notice was given, the right of such person to be a registered pharmacist was never terminated under the above statute. Hence it is somewhat inaccurate to speak about reinstating a license which has never been legally for-

feited. It is apparent from a reading of the above statute that the second notice must actually be given.

Notice is held to mean information by whatever means communicated. *Metcalf v. Mut. Fire Ins. Co.,* 132 Wis. 67, 71. It would follow that under the above statute you would be duty bound to see that the notice sent was received by the party addressed. *Watson v. Walker,* 23 N. H. 471.

You have inquired further whether it would be the licensee's responsibility, or whether the fact that the letter had not been delivered, would influence his case in any way.

In view of the foregoing discussion, we think it is clear that there is no responsibility on the person addressed to make any effort to insure receipt of the notice by him. In other words, under the wording of sec. 151.02, subsec. (3), your board is charged with the responsibility of making sure that the second notice is actually received by the licensee.

OSL
WHR

Athletic Commission — Boxing Matches — Payment for advertisements on program is not voluntary or solicited contribution paid towards matches or exhibitions conducted under sec. 169.01, subsec. (20), par. (b), Stats., prohibited by said section.

February 20, 1937.

ALEX L. SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

In your letter of January 19, 1937, you request an interpretation of sec. 169.01, subsec. (20), par. (b) of the statutes. The entire section 169.01 of the statutes provides for the regulation of boxing and other specified athletic activities by a state athletic commission. Sec. 169.01 (20) (b) exempts certain organizations from the regulations and pro-

visions of sec. 169.01, and specifically provides that no such boxing or sparing matches or exhibitions shall be conducted as a part of any program where an admission fee is charged.

It is apparent that in the event that an admission fee is charged, even though the exhibition be sponsored by any of the exempted organizations, still they must obtain the license provided for by sec. 169.01 and must follow the rules and regulations laid down by the commission. In the event no admission fee is charged, they are not subject to such provisions.

We assume that the charitable organization described in your letter is one specifically exempted by the terms of the statute. We also assume that this organization proposes to sell advertising space only on the program and that it does not propose to sell the program itself, so that the program might be used as a ticket to obtain admission to the exhibition.

It is our opinion that the mere selling of advertising and the placing of such advertising on the program is not in any sense a charge or a method of charging admission. It is a separate contract and the mere placing of the advertising does not in any way control the right of any person to be admitted to the boxing exhibition. It is therefore our opinion that under the facts stated it would be no violation of this statute.

LEV

Criminal Law — Worthless Checks — Sec. 343.401, Stats., is not violated by issuance of check in payment of past due account.

February 23, 1937.

F. W. HORNE,
District Attorney,
Crandon, Wisconsin.

In your letter of January 21, 1937, you submit the following facts:

"G received a check of fifty dollars ($50.00) from R for services rendered. The check was returned to G marked 'Insufficient Funds and Protested.' G called upon R several times for the money as did G's wife also. Finally, R paid G's wife ten dollars ($10.00) and took back the fifty dollar ($50.00) check and issued a new check for forty dollars ($40.00). The new check was sent to the bank and returned to G marked 'Not Sufficient Funds.' G asks for a criminal warrant against R for issuing worthless and fraudulent checks."

Under the facts above stated you desire to know whether or not R has violated sec. 343.401, Stats.

Sec. 343.401, subsec. (1), Stats., is as follows:

"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 despository, 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 * * *."

It is our opinion that the giving of the first check of fifty dollars by R to G did not violate the statute, inasmuch as the services for which this check was given had already been performed. The relationship of creditor and debtor existed. The giving of the check, even though it was worthless, did not in any way change his relationship or injure the recipient of the check. In other words, the element of intent to defraud is never present in the giving of a check in payment of a past due account, for the reason that no fraud can be perpetrated by the giving of such check when it is in payment of a past due account. The payment of the ten dollars later and the issuance of another check for forty dollars, which was also returned because of not sufficient funds, does not change the situation in any way whatsoever. When the forty-dollar check was given it was still an attempt to pay a past due account, and the element of fraud does not enter.

It is therefore our opinion that sec. 343.401, Stats., was not violated either by the issuance of the fifty-dollar check or the issuance of the forty-dollar check later.

LEV
JEM

Public Officers — County Board — Pension Department — Pension Director — Social Security Law — Old-age Assistance — Member of county board may not be appointed pension director during term for which he is elected even though he has resigned from county board.

State pension department may legally reimburse county for old-age assistance, aid to dependent children and blind pensions paid out by illegally appointed pension director.

February 23, 1937.

PENSION DEPARTMENT.

Attention George M. Keith, *Supervisor of Pensions.*

You state that in A county, pursuant to resolution of the county board, the county board pension advisory committee has power to select the pension director for said county. One X, chairman of the county board, resigned from the board, and was subsequently appointed pension director by said pension advisory committee. You ask whether X is eligible to hold this office.

The power to create a county pension department and to provide personnel therefor is given to the county board by sec. 49.51, subsec. (2), par. (b), Stats.

Sec. 66.11, subsec. (2), provides:

"No member of a * * * county board, * * * shall, *during the term for which he is elected,* be eligible for any office or position which during such term has been created by, *or the selection to which is vested in,* such board * * *."

Applying sec. 66.11 (2), this office has held that a member of the county board may not be appointed a member of the county pension department. XXIV Op. Atty. Gen. 698. The fact that X has resigned from the board does not during the term for which he was elected render the prohibition of sec. 66.11 (2) inapplicable. XXI Op. Atty. Gen. 209; XVII Op. Atty. Gen. 244; XII Op. Atty. Gen. 108. We advise that X is holding his office illegally.

You also ask, if it be held that X illegally holds his office, whether your department can legally reimburse the county

for payments of assistance that were made under the order of X.

Although the appointment of X was contrary to law, he is a *de facto* officer. *State ex rel. Schneider v. Darby,* 179 Wis. 147; *Ekern v. McGovern,* 154 Wis. 157, 46 L. R. A. (n. s.) 796; *State ex rel. Bloomer v. Canavan,* 155 Wis. 398. The right to collaterally attack the acts of a *de facto* officer was considered by this department in XXV Op. Atty. Gen. 750. We quote from that opinion, p. 751:

"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."

The above language is applicable to the present case, and we hold that the state pension department can legally reimburse the county for moneys paid out for old-age assistance, aid to dependent children, and blind pensions where such payments were made under the signature of X.

LEI

Peddlers — Public Health — Optometry — Peddler traveling from house to house selling glasses, even though they be simple lenses, violates sec. 153.01, Stats.

February 24, 1937.

C. J. CROOKS,
District Attorney,
Wausau, Wisconsin.

In your letter of January 19, 1937, you submit the following question:

"Can a man with peddler's license travel from house to house with kit of glasses, numbered on lens, and ask parties if they wish to try his glasses and sell them without his aiding in testing of eyes without violating chapter 153 of the Wisconsin statutes?"

Sec. 153.01 of the Wisconsin statutes provides, in part, as follows:

"* * * No person shall practice optometry without a certificate of registration properly filed. This shall not apply to physicians and surgeons nor to the sale of spectacles containing simple lenses of a plus power only at an established place of business and as incidental to other business conducted therein without attempting to test the eyes and without advertising other than price marking on the spectacles. The term 'simple lens' shall not include bifocals. * * *"

The above statute was construed by the supreme court in the case of *Price v. State,* 168 Wis. 603. This office, in the following official opinions, has also discussed this statute: VI Op. Atty. Gen. 370; XIV Op. Atty. Gen. 85; XX Op. Atty. Gen. 491 and 773. It appears from the question asked that this man travels from house to house selling glasses. He does not have an established place of business. Spectacles may, under the restrictions provided in sec. 153.01, be sold at an established place of business and as incidental to the other business conducted therein. However, as this man does not sell at an established place of business and

does not sell as an incident to any other business, he cannot be said to come within the classification of those exempt by this statute.

It is our opinion, therefore, that one traveling from house to house and selling glasses, even though they may be simple lenses, is not exempt from obtaining a certificate of registration and upon failing to do so violates sec. 153.01 of our statutes.

OSL
LEV
JEM

Public Officers — County Board — Malfeasance — Quarry Foreman — Unemployment Compensation — Where member of county board has been illegally employed as quarry foreman by county highway committee, he is not eligible for unemployment compensation.

February 25,1937.

GEORGE J. LARKIN,
District Attorney,
Dodgeville, Wisconsin.

You refer to our opinion in Vol. XXIV, p. 394, to the effect that a member of the county board is not eligible for the position of quarry foreman, this opinion having been rendered to Mr. Charles H. Gibbon, a former district attorney in your county.

You state that in spite of this opinion, and Mr. Gibbon's opinion to the same effect, the county highway committee nevertheless persisted in hiring A, the county board member, as quarry foreman. A has now filed claim for unemployment compensation based on such employment by the county contrary to law, and you inquire if he is eligible for such compensation.

Sec. 108.01, subsec. (1), Stats., evidences a legislative intent to place part of the burden of unemployment back upon

the employer, and payment of unemployment compensation is in effect based upon the original contract of employment.

Liability for unemployment compensation presupposes the existence of a lawful employment. In XXIV Op. Atty. Gen. 394, we pointed out that the employment in question was forbidden by both secs. 66.11 (2) and 348.28, Stats. Under the last sentence of this section it is provided:

"Any contract, to which the state or any county, city, village, town or school district is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the state, county, city, village, town or school district shall incur no liability whatever thereon."

This provision is very clear and express. Hence, if A cannot legally collect for the work performed by him, it follows that he cannot collect unemployment insurance.

OSL
WHR

Criminal Law — Railroads — Passes — Sec. 195.14, subsec. (2), and sec. 348.311, relating to giving and accepting of passes for free transportation, have not been affected by amendment to sec. 11, art. XIII, Wisconsin constitution.

February 25, 1937.

PUBLIC SERVICE COMMISSION.

You have asked for an opinion as to the effect of the amendment to sec. 11 of art. XIII of the Wisconsin constitution, as ratified by the people at the November 3, 1936 election.

Three questions are raised by your request:

"1. Does this amendment have the effect of creating any prohibition against the granting of passes of railroads for transportation in this state?"

The answer is, No.

Article XIII, sec. 11, in effect prohibits the giving of free passes to public officers. This constitutional provision was amended at the general election so as to exempt from its operation the following:

"* * * *Notaries public and regular employes of a railroad or other public utilities who are candidates for or hold public offices for which the annual compensation is not more than three hundred dollars to whom no passes or privileges are extended beyond those which are extended to other regular employes of such corporations are excepted from the provisions of this section.*"

The effect of the amendment is merely to permit the legislature to allow the use of free passes to certain public officers who are at the same time railroad employees.

In substance, the amendment created an exception to the prohibitions contained in art. XIII, sec. 11 of the constitution and constitutes a grant of power to the legislature rather than a limitation of power. The amendment does not, in any way, create additional prohibitions, but rather it eliminates some of the prohibitions heretofore existing under the constitution.

2. "Does the amendment in and of itself have the effect of permitting the granting of passes to regular railroad employees who are notaries public or candidates for or incumbents of public offices for which the annual compensation does not exceed $300, in view of the provisions of subsection (2) of section 195.14 and section 348.311?"

The answer is, No.

Secs. 195.14 (2), and 348.311, Stats., have not been changed, and still prohibit the giving or accepting of passes, just as before the amendment. Even though a particular act or practice is not prohibited by the constitution, it may, nevertheless, be a violation of the statutes and, in fact, practically all of our criminal law is statutory, and includes numerous offenses in no way mentioned in the constitution.

Consequently, both secs. 195.14 (2) and 348.311 should be amended if it is the desire of the legislature to carry out the will of the people expressed in the ratification of the amendment to art. XIII, sec. 11, at the last election.

3. "Does the amendment affect the right of a railroad to grant passes to a political committee or the members or employees thereof who may also be notaries public or candidates for or holding public offices for which the annual compensation is not more than $300?"

The answer is, No.

Sec. 348.311, subsec. (1), Stats., provides:

"No person, association, copartnership or corporation, shall offer, or give, for any purpose, to any political committee, or any member or employe thereof, to any candidate for, or incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication."

As above pointed out, it will be necessary to amend this section so as to incorporate the exception provided by the constitutional amendment. Otherwise, sec. 348.311 continues to be a part of the criminal law of the state in its present form without any exceptions.

WHR

Municipal Corporations — Public Officers — School Board — Neither school board nor city is liable for injuries to pupils or others arising out of negligence in operation of schools or conduct of athletic activities in connection therewith, except that neither may maintain public nuisance.

March 1, 1937.

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

You have inquired as to the liability of a city or board of education of a city for injuries:

(a) To students in the course of their regular class work;

(b) To students engaged in athletics;

(c) To spectators at athletic or kindred events.

The law is well settled in this state that unless liability is imposed by statute, a governmental agency is not liable for the negligence of its employees while engaged in the discharge of a governmental function. *Apfelbacher v. State,* 160 Wis. 565, *DeBaere v. Oconto,* 208 Wis. 377, and *Virovatz v. City of Cudahy,* 211 Wis. 357, XXIV Op. Atty. Gen. 246, XXIII Op. Atty. Gen. 570 and 760.

Just what constitutes a governmental function is a somewhat more difficult problem. However, the general rule in this country is that a school district, municipal corporation, or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation, or board, in maintaining schools, acts as an agent of the state and performs a purely governmental duty imposed upon it by law, for the benefit of the public, and for the performance of which it receives no profit or advantage. 9 A. L. R. 911.

This theory has been accepted in Wisconsin. *Folk v. City of Milwaukee,* 108 Wis. 359.

As to students engaged in athletics, we call your attention to the case of *Mokovich v. Independent School Dist.,* 177 Minn. 446, 225 N. W. 292.

In this case the plaintiff was a pupil in the defendant's high school and was injured at a football game conducted by the district as a part of its educational system. It was charged that the defendant's agents used unslaked lime to mark the lines on the football field and thereby created a nuisance. The plaintiff was thrown to the ground during the game, resulting in the lime coming into his eyes and destroying the sight of one eye and seriously impairing the sight of the other.

The court held that the district was not liable; that it made no difference whether the performance of the governmental function was mandatory or permissive, and the fact that an admission charge was made did not impose liability on the district.

The discussion up to this point applies alike to students engaged in regular class work or in athletics, and answers your first two questions, although we might say parenthetically, that this doctrine has not been adopted in all states. For instance, in New York, it has been held that a board of education is liable for injuries sustained by a manual training student who came in contact with an unguarded buzz saw during the course of his school work. *Herman v. Board of Education,* 234 N. Y. 196, 137 N. E. 24, 24 A. L. R. 1065. In Wisconsin in a similar case the court held that the school district was not liable. *Sullivan v. School Dist.,* 179 Wis. 502; and the same result was reached in *Conrad v. Board of Education,* 29 Ohio App., 317, 163 N. E. 567.

The same general doctrine of nonliability applies to injuries sustained by persons other than pupils for the same reason that in maintaining schools the board, district or municipal corporation is exercising a public function as an agent of the state, and that no benefit or profit is received. 40 A. L. R. 1091. This answers your third question concerning liability to spectators at athletic contests or kindred events.

Our attention is called to the fact that in connection with the third question, in one case the school football games are played in a park belonging to the city. We do not see that this alters the situation materially as regards the law in this state under the doctrine of nonliability heretofore dis-

cussed, since this applies alike to cities and school districts, with the exception that neither would be permitted to maintain what amounted to a public nuisance even where engaged in the performance of a governmental duty. See *Virovatz v. City of Cudahy, supra,* and other cases therein discussed.
WHR

Public Health — Basic Science Law — Massage — Sec. 147.185, Stats., is applicable to practice of massage for therapeutic purposes but does not extend to athletic rubs given by clubs in connection with athletics or physical exercise.

March 1, 1937.

DR. HENRY J. GRAMLING, *Secretary,*
Board of Medical Examiners,
Milwaukee, Wisconsin.

You inquire whether sec. 147.185, Stats., relating to the granting of licenses for the practice of massage or hydrotherapy, is applicable to the giving of athletic rubs in health clubs.

We are not entirely sure that we understand exactly what is meant by a "health club," and will answer your question by saying that if the purpose of such a club is the treatment of disease, sec. 147.185 is applicable. This section provides for the issuance of certificates of registration by the state board of medical examiners for the practice of massage or hydrotherapy. Applicants for such licenses must have certain professional qualifications, including courses in physiology, descriptive anatomy, pathology and hygiene, and are examined in these subjects by your board. Such applicants must be also examined in massage and hydro-

therapy under the supervision of the board by a registered practitioner in massage or hydrotherapy, selected by the board.

Sec. 147.185 is a part of ch. 147, which is entitled "Treating the sick" and should be construed as a part of that chapter.

This chapter, and particularly sec. 147.185, has never been construed to cover conditioning of athletes by trainers so far as we know. Prize fighters, baseball, basket-ball and football players and the like are frequently given athletic rubs by their trainers, the purpose of which is by no means the "treating of the sick." Neither would it appear that trainers connected with Y. M. C. A's or athletic clubs who give rubs for the purpose of preventing stiffness and soreness to members taking exercises or playing games should be considered as "treating the sick," or as holding themselves out as being engaged in the healing art. In other words, the applicability of sec. 147.185 would seem to depend upon whether the club is operated for therapeutic as distinguished from athletic purposes. The legislature has evidenced a clear intention that those engaged in treating the sick should be licensed, but rubdowns or massages given to healthy people in connection with physical exercise or athletics would not come within that classification.

WHR

Public Officers — City Supervisor — Resignation — Resignation of officer who serves until successor is elected and qualified takes effect upon qualification of his successor; he is entitled to compensation for serving in office until such successor has been appointed and qualifies.

March 1, 1937.

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

You state that the supervisor of the third ward of your city moved out of his ward on October 6, 1936, into another ward in your city, and that on November 7, 1936, he gave written notice to the mayor and common council of your city as follows:

Having moved from the ward limits of the third ward of the city of La Crosse, I hereby tender my resignation as supervisor of the third ward of the county board of supervisors, to which office I was elected in the spring of 1935 and which unexpired term will run until May, 1937.

You also state that this supervisor alleges that he informed the mayor at the time he filed the above notice of resignation that he did not want the resignation to take effect until the end of the November session of the county board; that the resignation, however, was voted upon and accepted by the common council on November 13, 1936, but notice thereof was not given to the county clerk until the close of the November session of the county board.

You advise that the common council has not as yet appointed a successor to this supervisor; that the county clerk is holding up payment of his per diem check for the November session; and you ask whether your county clerk is justified in allowing this supervisor his per diem for services at the November session of your county board.

Sec. 17.01, subsec. (13), Stats., provides when resignations shall take effect. In the case of an officer whose term

of office continues by law until his successor is chosen and qualifies, the resignation takes place upon the qualification of the successor. In the case of other officers, the resignation takes place at the time indicated in the written resignation.

It has been held in the case of *State ex rel. Kleinsteuber v. Kotecki,* 155 Wis. 66, at page 68, that a person may be a *de facto* officer even though he has submitted his resignation. In the case of *State ex rel. Elliott v. Kelly,* 154 Wis. 482, it has been held that a *de facto* officer is entitled to compensation where he performs the duties of the office when there is no *de jure* officer claiming it.

The supervisor in this case was a *de facto* officer. There was no *de jure* officer. The performance of the duties under these circumstances entitles the supervisor to the compensation and justifies payment to him by your county clerk.

OSL
JEM

Banks and Banking — Escheat of Bank Deposits — In construing sec. 220.25, Stats., bank deposits escheated to state can be deposited with state treasurer by secretary of state without legal proceedings required under said statute. Subsec. (3), par. (a), applies only to bank deposits known to have escheated to state where person dies intestate.

March 3, 1937.

THEODORE DAMMANN,
Secretary of State.

In construing sec. 220.25, Stats., you have asked us certain questions which are hereinafter stated, with the answer following each question.

1. What disposition shall be made of checks in payment of escheated dormant bank accounts sent to you by banks for the purpose of closing up the accounts without waiting for the legal proceedings outlined in sec. 220.25, subsecs. (4) and (5), Stats.?

It is our opinion that checks sent to you under sec. 220.25, Stats., by banks without waiting for legal proceedings under subsecs. (4) and (5) should be accepted and deposited with the state treasurer by your office.

2. Will the statutory receipt be required as provided in sec. 14.68, subsecs. (1) and (2), Stats., and would a specially printed form of receipt for escheated bank deposits appear desirable?

It is our opinion that the statutory receipt is required, and we suggest the use of a specially printed form of receipt, since there are a large number of dormant bank accounts reported.

3. Does subsec. (3), par. (a), sec. 220.25, Stats., which provides

"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"

apply to dormant bank accounts and property of persons who may die intestate without heirs some months prior to the next reporting date?

It is our opinion that only items actually known to have escheated to the state where persons die intestate need be reported in accordance with the provisions of subsec. (3) (a) of sec. 220.25, Stats.

LEV

Elections — Citizenship — Public Officers — Village Supervisor — Person not citizen of United States may be candidate for office of village supervisor, but before he can qualify to act as such supervisor he must have become citizen.

March 3, 1937.

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

In your letter you state that Mr. X has been a member of your county board for several years and also a member of the school board; that during the time he acted as such official he was under the impression that he was a citizen of the United States. He recently discovered he was not such citizen, and as a result thereof resigned his official position. He expects to be naturalized on April 19, 1937, and desires to be a candidate for the office of village supervisor at the election to be held on April 6, 1937.

You inquire whether X is eligible to be such candidate, on the supposition, of course, that he would not actually assume the duties of office until after he had been naturalized, that is, after April 19, 1937.

This question was determined by our supreme court in the case of *State ex rel. Barber v. Circuit Court,* 178 Wis. 468. That case holds, in effect, that any person may become a candidate for office, regardless of his qualifications. His right to hold office can be questioned only at the time he actually attempts to or assumes the duties of the office. It is our opinion that Mr. X may lawfully be a candidate for the office at the April election, but that he cannot qualify so as to entitle him to perform the duties of the office until such time as he becomes a citizen of the United States.
LEV

Education — School Administration — Teachers' Certificates — Application for unlimited state certificate should not be granted and is not authorized unless and until applicant has completed two years of successful teaching after graduation from state university, state normal school or Stout institute.

March 4, 1937.

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

In your letter of February 12, 1937, you request our opinion concerning the following facts:

One A., a teacher in Marquette county, Wisconsin, made application to the office of the state superintendent of schools in February of 1937 for an unlimited state certificate. A had taught school for about ten years on what is known as a first grade county certificate. A ceased teaching in June, 1936, and entered a state teachers college in Wisconsin, from which he graduated in January of 1937. A has never received a first year's license and has not taught since his graduation.

You inquire whether the state superintendent, upon application therefor, should grant to A, under the facts stated above, an unlimited state certificate. You inquire whether the two years' successful teaching must be performed before or after the graduation from the normal school in order to obtain the unlimited certificate.

Subsec. (2), sec. 39.29, Stats., provides in effect that the certificate of graduation shall entitle the holder to a license from the state superintendent to teach in any school the subject, grade or department covered by the course from which the holder of the certificate graduated. Subsec. (4) of this section provides:

"Every such license shall be good for one year from its date; and upon presentation to the state superintendent of satisfactory evidence of successful teaching for one year in the public schools of the state under such license, it shall be renewed for one year."

These sections authorize the issuance of a certificate by the state superintendent of schools which will entitle the holder thereof to teach for one year, and this certificate can be renewed for an additional year. Subsec. (5), sec. 39.29, Stats., provides, in effect, that the state superintendent shall, upon presentation to him of the certificate of the university of Wisconsin and a state normal school and satisfactory evidence of good moral character, and of two years' successful teaching in the public schools of this state, issue to the applicant an unlimited state certificate. It is apparent, from the analysis of the above cited statute, that the law contemplates that after graduation from a normal school or from the university of Wisconsin the holder of the graduation certificate shall teach two years before he shall be entitled to an unlimited certificate. The two years of teaching must necessarily be done after the graduation from the university or the normal school. It is not contemplated that any teaching done before graduation shall be considered as part of the two-year period provided by statute. Inasmuch as A has not taught for a period of two years after graduation, it is our opinion that you would not be authorized to issue to him an unlimited certificate as contemplated by subsec. (5) of sec. 39.29, Wis. Stats.

LEV

Taxation — Income Tax — Remuneration paid officers and employees by federal agency or instrumentality is immune from state income tax only if agency or instrumentality performs governmental sovereign function.

March 11, 1937.

TAX COMMISSION.

You have inquired whether the wages, salaries, fees and commissions paid by various federal agencies, associations and corporations to their officers, directors and employees are exempt from state income tax.

The problem submitted has never been presented to our supreme court for decision nor have we been able to find any cases in the United States supreme court that deal directly with the question in reference to the various agencies you have listed.

Since the case of *McCulloch v. Maryland,* 17 U. S. (4 Wheat.) 316, it has been an established rule of law that the officers, agents, and instrumentalities of either a state or the federal government are exempt from taxation by the other by virtue of the principle implied from the independence of the two respective governments within their spheres and the provisions of the constitution of the United States looking to the maintenance of the dual system of government.

This immunity from taxation, however, is limited to those agencies, means, and instrumentalities through which either government immediately and directly exercises its sovereign power. *Collector v. Day,* 78 U. S. (11 Wall.) 113, 20 L. ed. 122; *South Carolina v. United States,* 199 U. S. 437, 50 L. ed. 261; *Metcalf v. Mitchell,* 269 U. S. 514, 70 L. ed. 384; *Indian Motorcycle Co. v. United States,* 283 U. S. 570, 75 L. ed. 1277; *Ohio v. Helvering,* 292 U. S. 360, 78 L. ed. 1307; *Helvering v. Powers,* 293 U. S. 214, 79 L. ed. 291.

In the case of *Collector v. Day, supra,* it was held that the income of an individual derived from salary paid to him by an agency, means or instrumentality of the government in exercising its sovereign power was likewise within the immunity from taxation.

The determination of whether or not a particular agency or instrumentality falls within the classification of an exercise of a governmental sovereign power, so as to be within the immunity, is a difficult question and requires an analysis of the factual situation presented by each agency or instrumentality, having in mind the cases covering the subject. As was said in the case of *Metcalf v. Mitchell, supra,* p. 522:

"Just what instrumentalities of either a state or the Federal government are exempt from taxation by the other cannot be stated in terms of universal application."

In the cases holding that a particular agency or instrumentality was immune from taxation because utilized by the government in discharging a sovereign function various tests have been applied. In some it is stated that the immunity arises because each government must be left free to operate and function in its own sphere or domain without material interference from the other. *Collector v. Day, supra; National Bank v. Commonwealth,* 76 U. S. 353, 19 L. ed. 845; *Metcalf v. Mitchell, supra; Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U. S. 218, 72 L. ed. 857; *Wheeler Lumber, Bridge & Supply Co. v. United States,* 281 U. S. 572, 74 L. ed. 1047.

In other cases the test applied is whether the particular agency is performing a usual governmental function or is operating as a governmental endeavor by engaging in a business which is of a private nature and usually carried on for commercial purposes by private enterprise. *South Carolina v. United States, supra; Flint v. Stone Tracy Co.,* 220 U. S. 107, 55 L. ed. 389; *Indian Motorcycle Co. v. United States, supra; Ohio v. Helvering, supra.*

Another test which is sometimes applied is whether the particular agency or instrumentality is of a nature in itself that is usually within the taxing power of the government attempting to impose the tax. The limitation of the immunity from taxation has been stated to be that the

"State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity * * *. The necessary protection of the independence of the state government is not deemed to go so far." *Helvering v. Powers, supra,* p. 225.

In the last mentioned case the court said that the method which the particular government may adopt in organizing an activity cannot be regarded as determinative and that the nature of the enterprise, and not the particular incidents of its management, would control. Thus it seems that

a determination of whether or not the salary or other remuneration paid by a particular agency or instrumentality of a state or federal government to its officers or employees is immune from taxation by the other government depends principally upon the function and purpose being carried out by the agency or instrumentality for the government. If the purpose and function is one that by its nature is within the sovereign powers of the government the immunity applies, but if it is one that is of a commercial nature and usually carried on by private enterprise there is no immunity from taxation.

In the last case bearing upon the subject, *New York ex rel. Rogers v. Graves,* —— U. S. ——, 81 L. ed. 202, decided January 4, 1937, the court holds that in determining in which classification the particular agency or instrumentality falls the ultimate purpose for which it is used by the government is controlling. In other words, although the particular instrumentality or agency may be of a commercial nature and such as to be ordinarily carried on by private enterprise for a gain or profit, yet if it is used by the government for the ultimate purpose of carrying on and discharging a sovereign function the immunity from taxation exists.

An examination has been made in detail of the factual situation of each of the agencies and instrumentalities which you listed in your inquiry in order to determine the ultimate primary purpose of each.

AGRICULTURAL ADJUSTMENT ADMINISTRATION;

NATIONAL RECOVERY ADMINISTRATION.

The acts which these agencies administered have been declared invalid, because beyond the constitutional power of the United States to regulate commerce and agricultural production. Therefore, clearly the purpose of each of these agencies being to carry out a function beyond the constitutional power of the federal government, it cannot be said they would be discharging a governmental sovereign function. It is our opinion that the salaries or other remunera-

tion paid directly by these agencies to their officers or employees are not exempt from state income tax.

FARM CREDIT ADMINISTRATION.

In so far as this agency itself is concerned and the endeavors carried on by it directly, in our opinion it is an administrative agency of the government in the correlation and proper supervision of the various agencies which it controls. It is thus discharging a governmental sovereign function in the administrative or executive department of government. The salaries or other remuneration paid directly by it to its officers or employees, in our opinion, are exempt from state income tax.

NATIONAL EMERGENCY COUNCIL.

This agency is designed and functions as an administrative part of the government in the correlation of the various departments of government. It would clearly seem that it is exercising a sovereign function and, in our opinion, the salaries or other remuneration paid by it directly to its officers or employees are exempt from state income tax.

NATIONAL RE-EMPLOYMENT SERVICE.

This agency was created in establishing a national system of public employment and has for its purposes the establishment of state operated employment agencies in the various states and the allocation and distribution of federal funds to the various states for use in operation of these state employment agencies. This we deem to be the performance of an administrative function within the sovereign powers of government. In our opinion the salaries or other remuneration paid directly by this agency to its officers or employees are immune from state income tax.

NATIONAL YOUTH ADMINISTRATION.

While the purposes and endeavors of this agency are broad and numerous, it would seem that its major ultimate purpose is the providing of an employment as a relief measure. Thus, in our opinion, it is an administrative

agency of the government in the distribution of funds for relief purposes and so an exercise of sovereign power. Immunity from state income tax extends to the salaries or other remuneration paid directly by this agency to its officers or employees.

CIVILIAN CONSERVATION CORPS.

We deem that its purpose is primarily for the protection and restoration of natural resources and to provide relief for the unemployed, both of which are within the governmental sovereign powers of the United States. Therefore, the salaries or other remuneration paid directly by this agency to its officers or employees are not subject to state income tax.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS;
WORKS PROGRESS ADMINISTRATION;
PUBLIC WORKS ADMINISTRATION.

These agencies have for a purpose and function the allocation and distribution of moneys from the United States government to the various state governments to be used by the latter for public works. The officers and employees directly connected with these agencies are, therefore, in our opinion, discharging duties of an administrative nature within the sovereign powers of the federal government and the salaries or other remuneration received by them from the agencies directly are immune from state income tax.

FEDERAL EMERGENCY RELIEF ADMINISTRATION.

This agency likewise has for its purpose the granting of aid and the allocation of moneys from the United States to the various state governments to be used for relief purposes and is, therefore, in our opinion, performing an administrative duty within the sovereign function of the government. The salaries or other remuneration paid directly by this agency to its officers or employees are immune from state income tax in our opinion.

EMERGENCY CROP AND FEED LOAN OFFICE.

The purpose of this agency is to loan moneys to farmers to purchase seed and feed in emergencies created by drought or other similar situation. While that may be of a certain commercial nature, namely, that of loaning money with the obligation of repayment, it seems to us to be more in the nature of relief. We therefore deem it to be an administrative agency performing a sovereign function, so that the salaries or other remuneration paid directly by it are immune from state income tax.

RESETTLEMENT ADMINISTRATION.

This agency was authorized by the emergency relief act and has for its purpose the rehabilitation of rural areas. It is designed as a relief measure and such is its ultimate objective. For this reason we feel it comes within the classification of the exercise of a sovereign power of government by which the salaries or other remuneration paid directly by it are immune from state income tax.

FEDERAL FARM MORTGAGE CORPORATION;
FEDERAL HOME LOAN BANK;
FEDERAL INTERMEDIATE CREDIT BANK;
FEDERAL LAND BANK;
BANK FOR CO-OPERATIVES;
HOME OWNERS' LOAN CORPORATION;
PRODUCTION CREDIT CORPORATION;
RECONSTRUCTION FINANCE CORPORATION;
REGIONAL AGRICULTURAL CREDIT CORPORATION.

These various instrumentalities are all organized as corporations and in our opinion fall within the classification of banking institutions whose primary ultimate purpose is the loaning of money through various means and methods to private persons, corporations and other organizations with the expectation and obligation of repayment. Such is an endeavor of commercial nature and one that is ordinarily carried on by private enterprise for gain and profit. It is our conclusion that they are all instrumentalities of the government in its proprietary capacity. It is our opinion that all of the salaries or other remuneration paid directly

by these instrumentalities to their officers or employees are not immune from state income tax. See *Pomeroy v. State Board,* 99 Mont. 534, 45 Pac. (2d) 316.

COMMODITY CREDIT CORPORATION.

We take it that you refer to the National Agricultural Credit Corporations. They are organized pursuant to act of congress as private banking institutions and their purpose is to provide credit facilities for agricultural and live stock industries. They likewise perform an endeavor and are in a field that is usually carried on as a commercial venture by private enterprises. In so far as they are instrumentalities of the federal government we deem them to be the exercise of proprietary powers and not sovereign functions. It is to be noted that the act authorizing their creation expressly provides that they may be taxed in the same manner as national banks. It is our opinion that the salaries or other remuneration paid directly by this instrumentality are subject to state income tax.

RURAL ELECTRIFICATION ADMINISTRATION.

While this agency is not organized with a corporate structure, yet its primary purpose is the loaning of money to various persons, businesses, firms, corporations, associations, etc., in connection with rural electrification. These loans are made with the expectation and obligation of repayment in the same manner basicly as a private organization would make the loan. It therefore seems to us in fact to be discharging a function of the same character as a private banking institution and is, therefore, being utilized by the government in a proprietary capacity. It is our opinion that the salaries or other remuneration paid directly by this instrumentality to its officers or employees are subject to state income tax.

FEDERAL DEPOSIT INSURANCE CORPORATION;
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION;
FEDERAL HOUSING ADMINISTRATION.

These agencies or corporations are engaged in the business of insuring persons and financial institutions against loss. This is an endeavor that is commercial in nature and

customarily carried on by private enterprises. These, we believe, are not within the sovereign functions of government. The salaries or other remuneration paid directly by them are, therefore, in our opinion, subject to state income tax.

This opinion is limited solely to the salaries, wages, commissions, and fees paid directly by the mentioned agencies and instrumentalities to their officers, directors, and employees.

We have not overlooked the fact that in some of the acts of congress creating or authorizing the creation of the various agencies and instrumentalities mentioned herein there are express provisions that the debentures, bonds and other evidence of indebtedness issued by them, their properties (except real estate) and income are exempt from taxation by any state, municipality or local taxing authority. Such exemption from taxation directly has been held to be within the constitutional power of congress. *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. ed. 577. However, we deem that the situations governed thereby are entirely distinct and different from the precise question covered by this opinion.

OSL
HHP

Elections — Nominations — Public Officers — County Judge — Candidate for county judge who is not attorney as required in certain instances under sec. 253.02, subsec. (2), Stats., is nevertheless entitled to place upon ballot upon complying with sec. 5.17, subsec. (3), Stats.

March 12, 1937.

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

You have called to our attention the fact that one of the candidates for county judge in your county at the spring election is not an attorney of a court of record, as required by sec. 253.02, subsec. (2), Wis. Stats., with certain exceptions not applicable in your county, and you therefore inquire whether his name may properly be placed upon the ballot.

This inquiry is answered in the affirmative.

It was held in the case of *State ex rel. Barber v. Circuit Court,* 178 Wis. 468, 481, that the only requirement in the statute as a condition precedent to the right of a nominee to a place upon a ballot is that found in sec. 5.17 (3), Stats., that he shall file a declaration that if elected he will accept the office and qualify therefor, and that a condition that the nominee shall be eligible to the office will not be implied.

The question of whether or not such person is eligible to hold the office for which he is a candidate is not involved in the problem before us, and we express no opinion upon that subject.

WHR

Public Officers — County Board — County Drought Relief Committee — County board member may not be member of county drought relief committee appointed pursuant to sec. 15.89, subsec. (3), Stats., as created by ch. 25, Laws 1937.

March 15, 1937.

WISCONSIN HOME & FARM CREDIT ADMINISTRATION,
111 King Street,
Madison, Wisconsin.
Attention C. J. Schloemer, *Attorney.*

You state that sec. 15.89, subsec. (3), Stats., created by ch. 25, Laws 1937, provides for the equipment of a county drought relief committee by the various county boards. You then ask whether a member of the county board would be eligible for appointment to such committee.

Sec. 15.89 (3), created by ch. 25, Laws 1937, provides:

"Each county making application for such grant shall provide for the appointment of a county drought relief committee, which shall consist of three members, at least two of whom shall be persons actively engaged in farming. The county board shall determine the compensation of the members of the county drought relief committee, and such members shall be paid in the same manner as are county employees. * * *."

As the county board appoints and fixes the compensation of those serving on such committee, the provisions of sec. 66.11, subsec. (2), Stats., referred to in your letter, would apply. That section provides:

"No member of a * * * county board * * * shall, during the term for which he is elected, be eligible for any office * * * the selection to which is vested in such board * * *."

This department has held on numerous occasions that a county board member is not eligible to serve on any body whose members are selected and paid by the county board.

XVIII Op. Atty. Gen. 651; XXI Op. Atty. Gen. 235, and 400; XXIII Op. Atty. Gen. 655; and XXIV Op. Atty. Gen. 698.

In view of the express prohibition of sec. 66.11, subsec. (2), Stats., and the rule stated in the opinions cited above, we are of the opinion that a member of the county board may not serve as a member of a county drought relief committee created by ch. 25, Laws 1937.

LEV

Appropriations and Expenditures — Public Officers — County Highway Commissioner — County has power to purchase automobile to be used by highway commissioner in necessary performance of his duties.

March 16, 1937.

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

You inquire whether a county may purchase an automobile for the highway commissioner to use in the performance of his duties.

Sec. 59.07, subsec. (6), Stats., grants power to the county board as follows:

"Represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision is made."

Sec. 82.03, Stats., provides for the appointment of a highway commissioner and the payment of his salary and necessary traveling expenses. Sec. 82.04 prescribes the duties of the highway commissioner. Sec. 82.04 (2) makes it necessary that the highway commissioner shall travel in the performance of his duties. The use of an automobile is the natural mode of travel, and the purchase of an automobile

for the use of a highway commissioner must, therefore, have been contemplated by our statutes.

The purchase of an automobile for purposes of travel is a matter that is discretionary with the county board, and if they feel that the interests of the county will be best served by such purchase, it is our opinion that such purchase is proper and legal.

OSL
AGH

Taxation — Tax Collection — Where taxpayer in good faith applies to proper officer for purpose of paying his taxes and is prevented from making payment, in whole or in part, by mistake, wrong, or fault of such officer, taxpayer is not thereby relieved of his duty to pay that portion of his taxes remaining unpaid.

March 16, 1937.

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

You state that in 1933 the city of Washburn collected from a taxpayer $118.48 for taxes on his personal and real property, and issued to him a tax receipt therefor. As required by sec. 74.08, subsec. (1), Stats., the tax receipt which the taxpayer received contained in separate columns the several amounts paid for various taxes. The respective amounts were carried out as follows:

State tax	$ 0.25
County tax	27.42
City tax	90.62
School tax	47.87
Penalty	2.32

totaling, when correctly added $168.46. As totaled on the tax roll and in the tax receipt, the amount was $118.48. The tax payer paid that amount and received a receipt

therefor, which receipt stated that it was for payment in full. The taxpayer consequently paid fifty dollars less than he owed. The city treasurer duly settled with the county treasurer, but the error was not discovered until found this year by the auditor in auditing the county records.

You desire to know if the taxpayer is liable for the fifty dollars, or if the loss must be borne by the city officials.

In the following cases our court under similar circumstances inferentially held that a taxpayer was not relieved from paying a tax which was not paid because of the fault or mistake of the tax collector. *Gould v. Killen,* 152 Wis. 197, 204; *Bray & Choate L. Co. v. Newman,* 92 Wis. 271; *Nelson v. Churchill,* 117 Wis. 10; *Gould v. Sullivan,* 84 Wis. 659.

In those cases the taxpayer had been prevented by the mistake or fault of the tax collector from making payment of his taxes. Subsequently tax deeds had been issued on the basis of the taxes so remaining unpaid, from which deeds the taxpayers sought relief. In each instance the court granted relief on the condition that the taxpayer pay all taxes actually unpaid, together with interest and other proper charges.

Our court, in *Catlin v. Wheeler,* 49 Wis. 507, 523-524, said:

"* * * There is no such sacredness, or rather sacrilege, about a mere receipt, which is never to be held conclusive if there is any good legal reason that it be held otherwise, and which is always subject to explanation and construction, in view of the circumstances under which it is given. The law is, 'that the payment of a part of a debt, or of liquidated damages, is no satisfaction of the whole debt, even when the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand.' * * *."

Accordingly, the amount yet due from this taxpayer may be recovered from him.

WHR

Public Officers — Public Records — County Judge — County Pension Department — Upon creation of county pension department pursuant to sec. 49.51, subsec. (2), par. (b), Stats., such department succeeds to all records pertaining to assistance laws in possession of county judge.

March 16, 1937.

PENSION DEPARTMENT,
315 South Carroll Street,
Madison, Wisconsin.

Attention George M. Keith, *Supervisor of Pensions.*

In your communication you submit the following facts and inquiry for our opinion:

At the November 1936 meeting of the Dunn county board an ordinance was adopted pursuant to sec. 49.51, subsec. (2), par. (b), Stats., creating a county pension department to administer the assistance laws. The county judge who has been administering such laws questions his authority to turn over to such newly created department the records in his possession relating to the administration of the assistance laws. He points to the provisions of ch. 18, Wis. Stats., and to the fact that the legislature specifically provided that the pertinent records of the state board of control should be turned over to the state pension department (ch. 554, sec. 2a (1), Laws 1935), but remained silent as to the transfer of the records in the office of the county judge. Is the county judge required to turn over to the newly created department the records in question?

Under the provisions of secs. 47.08 (5), 48.33, 49.27 and 49.51 (1), Stats., the laws relating to blind pension, aid to dependent children, and old-age assistance shall be administered by the county judge. Sec. 49.51 (2) (b), Stats., provides in part:

"In counties containing a population of less than five hundred thousand, the county board may by ordinance provide for a county pension department with such personnel qualifications, duties and compensation as the county board may determine. Such pension department shall administer

within such county all laws of this state relating to old-age assistance, aid to dependent children and blind pensions, or any or all of such forms of public assistance. * * *."

We have heretofore held that the assistance laws shall be administered either by the county judge or by a county pension department. XXIV Op. Atty. Gen. 763. If such a department is created, it shall administer all laws of this state relating to such assistance. In other words, if such a department is created it succeeds to all the duties and powers of the county judge in the particular field in question.

It being clear that it was the intent of the statute to transfer all functions dealing with the administration of the assistance laws to the county pension department, it is logical to assume such transfer would include all records necessary to administer such laws. Certainly these records must be had by the new department in order to enable it to carry out its duties.

Sec. 18.01, subsec. (3), Stats., provides in effect that a county judge shall turn over to his successor in office all documents and records which have come into his possession by virtue of being such judge.

It is our opinion that under the facts stated the county pension department would constitute the successor of the county judge within the meaning of sec. 18.01 (3). The county judge could, therefore, legally transfer records in his office relating to the assistance laws to the newly created pension department.

You further ask what procedure should be taken in the event that the county judge desires a judicial determination as to his proper action in this matter.

We suggest that in such event proceedings be instituted pursuant to sec. 18.02, Stats.

OSL
LEI

Public Health — Cemeteries — Undertaker supplying as part of furnishings for funerals memorial markers not lettered in place of business of undertaker is not required to obtain license as dealer under sec. 157.15, Stats., but is required to have license as salesman.

March 18, 1937.

THEODORE DAMMANN,
Secretary of State.

You inquire whether an undertaker supplying bronze markers as a part of his regular furnishings for funerals is required to have a license as a dealer in cemetery memorials under sec. 157.15, Stats. 1935. You state some undertakers supply memorials of part bronze and part granite, that are furnished them by iron founders, while others supply markers of all bronze, and that the letters on each kind are cast by the iron foundries and attached when received by the undertaker. We take this to mean that the undertaker solicits the order for the memorial and then sends to the iron founder the particular lettering desired. Thereupon the iron foundry casts the plate or marker accordingly and ships it to the undertaker, who then merely places or erects the marker on the grave.

Sec. 157.15, subsec. (1), par. (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."

Under this definition a person is not a "dealer" in cemetery memorials unless he maintains a place of business in Wisconsin "in which cemetery memorials are lettered and displayed." Under the statement of facts submitted the lettering is not done at the place of business of the undertaker. Therefore, it is our opinion that he does not come within the statutory definition of a dealer.

However, in our opinion the undertaker is a salesman at retail of cemetery memorials within the provisions of the statute.

Sec. 157.15 (1) (c):

"'Salesman' means any person other than a dealer who sells or offers for sale at retail any cemetery memorial, but shall not include the three principal officers of a corporation or two designated members of a copartnership or association."

If the undertaker is an individual he must get a license as a salesman under the statute. If the undertaker is a corporation or copartnership the organization itself must obtain a license as a salesman under the statute.

HHP

Taxation — Forestation tax collected pursuant to sec. 70.58, subsec. (2), Stats., is state tax within meaning of sec. 74.57, subsec. (2), Stats.

March 19, 1937.

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

You state that certain property in the city of Milwaukee was conveyed to the state of Wisconsin for a national guard armory on October 24, 1932, at which time there were delinquent taxes against the property for 1930, 1931 and 1932.

The city of Milwaukee has now presented to the county clerk tax sale certificates representing the delinquent city taxes with the demand that the county clerk draw an order upon the county treasurer for the amount necessary to redeem said certificates pursuant to sec. 74.57, subsec. (2), Stats., which provides:

"No tax deed shall be issued upon any land the title of which shall have been acquired by the state after the same shall have been sold for taxes and a tax certificate issued

thereon. Upon the purchase by the state of any lands upon which there are tax certificates outstanding, the state department or agency making such purchase shall cause the amount of money required for the redemption thereof to be paid to the county treasurer. If such tax certificates shall not be so redeemed, the owner thereof may deposit the same with the county clerk who shall draw an order upon the county treasurer for an amount necessary to redeem the same and payable to the holder of the tax certificate. The amount of such order shall be paid by the county treasurer and deducted by him in his next settlement with the state treasurer for state taxes."

You state further that it is the intention of the county treasurer to honor such request and in his next settlement with the state treasurer to deduct the amount of the order, together with the amount of the delinquent county and state taxes on the property, offsetting these taxes against his remittance to the state treasurer for the state forestation tax collected under sec. 70.58 (2), which provides:

"There is levied an annual tax of one-tenth of one mill for each dollar of the assessed valuation of the property of the state as determined by the tax commission pursuant to section 70.57, for the purpose of acquiring, preserving, and developing the forests of the state, the proceeds of such tax to be paid into the conservation fund. But such mill tax shall not be levied in any year in which the legislature has provided funds for the purposes specified in this section, equal to or in excess of the amount which such mill tax would produce."

It is your view that the tax collected under sec. 70.58 (2) constitutes a state tax within the meaning of sec. 74.57, subsec. (2), and you request an official opinion as to whether the county treasurer may lawfully make the offset above indicated in his settlement with the state treasurer.

It is our opinion that your question should be answered in the affirmative, as we concur in your view that the forestation state tax constitutes a state tax within the purview of sec. 74.57 (2).

In the case of *State ex rel. Owen v. Donald,* 160 Wis. 21, it was held that the cost of reforestation so far as foresta-

tion is a legitimate exercise of the police power of the state, is a part of the "expenses of the state" within the meaning of sec. 5, art. VIII, Wis. Const., which provides:

"The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; * * *"

In this case it was further considered that forestation was a work of internal improvement within the prohibition of that portion of sec. 10, art. VIII, Wis. Const., which provides that the state shall never contract any debt for works of internal improvement. Consequently, prior to the enactment of sec. 70.58, subsec. (2), Stats., sec. 10 of art. VIII of the constitution was amended so as to authorize the appropriation of money for the purpose of acquiring, preserving and developing the forests of the state.

A tax which is imposed directly by the legislature upon all the taxable property of the state, the amount of which is declared by that body, and the uses to which it is to be devoted fixed by it, is a state tax, even though the municipal taxing machinery in cities and counties is used for its assessment and collection. *Society for Establishment of Useful Manufactures v. City of Paterson,* (1916) 89 N. J. L. 208, 98 Atl. 440, 442. In this case the tax in question was a school tax imposed by the legislature, "for the instruction of all the children in this state between the ages of five and eighteen years."

It was argued in the New Jersey case that such a tax was not "for the use of the state," that is to say, that although the tax was laid by the state, it was required to be used for local and not for state purposes. The court said at p. 442:

"As we have already pointed out, the people of this state by the amendment to the Constitution which we have cited, made the maintenance and support of free public schools a matter of state, instead of local, concern. The school tax is laid for the purpose of carrying out this state system of educating our children; it is used for that purpose; and such a use, in our opinion, is as much a state use as the appropriation of moneys to be expended in the support of our state government is an appropriation for a state use; the distribution by the state of the moneys so raised, in such a

way as, in the judgment of the Legislature, would best subserve the purpose of the constitutional mandate being a mere matter of administration."

In view of the foregoing, we are constrained to rule that the forestation tax provided for by sec. 70.58 (2) is a state tax within the meaning of sec. 74.57 (2), permitting state taxes to be offset by the county treasurer in settling with the state treasurer for state taxes where the county has paid to the holder of a tax certificate on state-owned lands, the amount required for redemption of the same.
WHR

Elections — Municipal Corporations — Taxation — Electors of town cannot, by referendum vote, authorize use of surplus funds derived from utility taxes, tavern and cigarette licenses for payment of county and state taxes.

March 22, 1937.

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

You ask in your letter of March 15 whether or not a town referendum could be held to authorize payment of county or state taxes out of surplus funds derived from the receipts of utility taxes, tavern licenses and cigarette licenses.

This office has ruled in a previous opinion (XXV Op. Atty. Gen. 737) that the town could not use such surplus funds for the payment of county and state taxes. In that opinion, however, the question of a referendum was not involved. It is the settled law that a town is a mere *quasi* corporation, possessing only such powers as are provided by statute. *Mulvaney v. Armstrong,* 168 Wis. 476.

Inasmuch as the town is not authorized to devote such funds to the paying of county and state taxes, we are of the

opinion that the holding of a referendum election would in no manner change the situation. In other words, if the town is not authorized by law to so expend its funds, such expenditure could not be made legal by the holding of a referendum election.

It is therefore our conclusion that the holding of the referendum would in no way authorize such expenditure.

LEV
AGH

Courts — Sentence given defendant found guilty of obtaining money under false pretenses in which imprisonment in state prison is fixed at "not less than one year nor more than three years the maximum sentence to be reduced by five months already served in the common jail" is construed as an indeterminate sentence of one year to two years and seven months.

March 23, 1937.

BOARD OF CONTROL.

You submit with your inquiry a letter from the warden of the state prison and a copy of a judgment, from which it appears that one, T. S., having entered a plea of guilty of the crime of obtaining money under false pretenses and further pleading guilty to being a repeater or habitual criminal, was given the following sentence:

"* * * it is hereby considered and adjudged by the court that the said defendant T. S. be punished by imprisonment in the state prison at Waupun at hard labor for and during the term of not less than one year nor more than three years the maximum sentence to be reduced by five months already served in the common jail for Juneau county."

You ask to be advised whether this is to be interpreted as a sentence of one to three years or of one to two years and seven months.

The penalty prescribed for obtaining money (not exceeding the sum of $100.00) under false pretenses is imprisonment in the discretion of the court in either the state prison or the county jail. If, however, the defendant is a repeater under sec. 359.13, Stats., he may be punished by imprisonment in the state prison by an indeterminate sentence in which the maximum is "not more than five years."

It thus appears that the trial court had the power to sentence this man to an indeterminate sentence of one year to two years and seven months. A judgment in a criminal case must be construed in its entirety. 16 C. J. 1313. The court evidently concluded that this man's sentence should be from one to three years but in view of the fact that he had already served five months in the county jail that the maximum sentence should be decreased accordingly. Applying the further principle that the interpretation of the law should be governed less by the form than by the substance of things, we are of the opinion that the court intended the sentence to be an indeterminate sentence of one year to two years and seven months and that you should consider it as such.

OSL
JEM

Banks and Banking — Public Deposits — State cannot pass legislation which will supersede as to public deposits provisions of federal reserve act and regulations of Federal Deposit Insurance Corporation affecting member banks. Such banks are obliged to follow federal statutes and regulations and will be unable to accept public deposits under provisions of sec. 34.03, Wis. Stats., to extent that such provisions are inconsistent with federal statutes and regulations.

March 23, 1937.

GERALD C. MALONEY, *Executive Secretary,*
Board of Deposits of Wisconsin,
Madison, Wisconsin.

You inquire:

(1) Whether paragraphs (12) and (13) of sec. 19 of the federal reserve act, supersede and nullify the provisions of par. (c), sec. 34.03, Wis. Stats., so as to prohibit Wisconsin banks from paying interest on demand on public deposits. The federal statute to which you refer reads in part:

"No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand: * * * *Provided further,* That until the expiration of two years after August 23, 1935 this paragraph shall not apply * * * to any deposit of public funds made by or on behalf of any State, county, school district, or other subdivision or municipality, or to any deposit of trust funds if the payment of interest with respect to such deposit of public funds or of trust funds is required by State law. * * *." Tit. 12, sec. 371a, U. S. C. A.

Par. (c) of sec. 34.03, Wis. Stats., authorizes the board of deposits of Wisconsin to fix the rates of interest to be paid by public depositories on active deposits and special deposits of the state treasurer. This has been fixed by the board of deposits at one-fourth of one per cent on the average daily balance in excess of twenty-five hundred dollars in the case of active public deposits.

It is apparent from the foregoing that after August 23, 1937, there will be a conflict as to the handling of public deposits by banks which are members of the federal reserve system, in view of the limitation imposed by the federal statute above quoted.

This is not a case of one statute superseding or nullifying the other, since the ruling of the board of deposits made under sec. 34.03 would continue to be controlling as to banks which are not members of the federal reserve system. In other words, our statute is fully operative and effective within its own scope, although

"By reason of the provision of the United States constitution that the constitution and laws passed in pursuance thereto shall be the supreme law of the land, when Congress passes a law in that field of legislation common to both federal and state governments, the act of Congress supersedes all inconsistent state legislation." 6 R. C. L. sec. 140, p. 139.

The state has both power and authority to prescribe the terms and conditions upon which public deposits may be accepted.

On the other hand, the federal government has both power and authority to prescribe the terms and conditions upon which any deposits may be accepted by banks which are members of the federal reserve system.

The results may be that a bank which is a member of the federal reserve system will find itself unable to pay interest on public deposits after August 23, 1937, because of the action of the state board of deposits taken under sec. 34.03, Stats., inasmuch as said action has imposed requirements which a bank belonging to the federal reserve system is unable to meet.

You also call attention to par (e), sec. 1, Regulation IV of the Federal Deposit Insurance Corporation, promulgated under authority of par. (8), subsection (v), of section 12B of the federal reserve act, which became effective February 1, 1936, and which defines savings deposits as follows:

"The term 'savings deposit' means a deposit evidenced by a pass book consisting of funds (i) deposited to the credit

of one or more individuals or of a corporation, association or other organization operated primarily for religious, philanthropic, charitable, educational, fraternal, or other similar purposes and not operated for profit, or (ii) in which the entire beneficial interest is held by one or more individuals or by such a corporation, association or other organization and in respect to which—

"* * *."

In construing this provision federal authorities take the position, unofficially, at least, that a savings account is essentially a thrift account, whereas, any corporation deposit, including deposits of municipal corporations, such as school boards, is clearly placed in a savings account for the purpose of profit. The effect of this interpretation is that all public depositors are prohibited from depositing public funds in savings accounts.

We are asked:

(2) "Does this interpretation supersede the provisions of the last sentence of par. (c), sec. 34.03, Wis. Stats. 1935?"

This portion of the Wisconsin statute reads:

"* * * Inactive deposits other than special deposits of the state treasurer shall bear the same rates of interest, as are paid by such public depository on time accounts."

Again we must answer this question along the same lines as are suggested in the answer to the first question.

While we might or might not agree with the interpretation placed by federal officials on Regulation IV, it is their interpretation which must be followed by member banks rather than any contrary ruling that might be made by this office. Federal agencies are not bound by any interpretation of federal statutes made by the attorney-general of any state.

You state that paragraph (c), subsec. (8), sec. 34.01, Wis. Stats., provides that special deposits of the state treasurer shall be payable on demand, and shall bear interest at the rate of 1½% per annum, until changed by the board of

deposits. The board of deposits has made no change in this rate and, therefore, the present rate is 1½% per annum.

In this connection you inquire:

(3) (a) "Do paragraphs (12) and (13) of section 19 of the federal reserve act supersede the above provisions of the Wisconsin statutes, thus prohibiting Wisconsin banks from paying interest on special deposits of the state treasurer after August 23, 1937?"

This question is answered in the negative as far as banks that are not members of the federal reserve system are concerned.

The federal government cannot dictate terms and conditions under which state banks are to operate, but if said banks desire membership in federal agencies, they will naturally have to comply with federal regulations. It is simply a matter which state banks must decide for themselves. If they want public deposits they must comply with the state public deposit law, and on the other hand, if they desire membership in the federal reserve system and the Federal Deposit Insurance Corporation, they must accept such memberships with the conditions attached thereto.

You next inquire:

"(b) Assuming that the legislature should amend the present law to provide that the state treasurer can make special deposits of funds not currently needed for the conduct of the daily business of the state in savings accounts, then would the federal reserve act and F. D. I. C. regulations prohibit banks from accepting such savings deposits?"

The answer is, No.

The prohibition of the federal statutes and regulations is not directed towards the acceptance of deposits but rather to the payment of interest, although the net result would be the same as though acceptance of such savings deposits were prohibited for the reason that no bank would knowingly accept deposits calling for interest under the state law if it were prohibited from paying interest under the federal law.

"(c) Is it possible for the Wisconsin legislature to enact any legislation which will supersede the provisions of the federal reserve act or regulations of the F. D. I. C. with respect to payments of interest on public deposits?"

The answer is, No.

Ours is a dual form of government,—"An indestructible Union, composed of indestructible states." Each is supreme within its own sphere and, consequently, the state is without power to enact any legislation which will supersede the provisions of the federal statutes or federal regulations lawfully made by the proper officers under federal law. Congress is the only body capable of giving relief from federal statutes validly enacted.

LEV
WHR

Taxation — Tax Sales — Assignee of one who purchases land on execution sale after homestead exemption has been selected can redeem lands so purchased from lien of tax certificate in manner provided by sec. 75.01, subsec. (1), Stats., but cannot secure assignment of part of tax certificate held by county.

March 24, 1937.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

You state that your county holds tax certificates on a farm of 162 acres, formerly owned by A. In December, 1936, part of the farm was sold at an execution sale to B, after A had selected his homestead. B then assigned his certificate of sale purchased by him at the execution sale to C. Three disinterested persons made affidavits setting forth that the part sold to B constituted 48½% of the assessed value and 51½% of the assessed value was represented by

the homestead retained by A. C seeks to purchase that portion of the tax certificates held by the county which represents the delinquent tax on the land so purchased by him. You ask whether the county treasurer can make a partial assignment of such certificates covering the property owned by B.

There appears to be no statute permitting the assignment of a part of a tax certificate held by the county. Sec. 75.35, Stats., prescribes the terms of sale for tax certificates and this statute must be considered as exclusive. Counties have only such powers as are expressly granted or necessarily implied from the statute. *Spaulding v. Wood County,* 218 Wis. 224.

However, sec. 75.01, subsec. (1), Stats., permits the owner, occupant or "other person" to redeem part or all of lands sold for taxes. The words "other person" mentioned in the statute are limited to one who has an interest in the land sought to be redeemed. *Rutledge v. Price County,* 66 Wis. 35, 39.

C, by virtue of the assignment of the sheriff's certificate of sale to him by B, has an interest in the property. 16 R. C. L. 129. Therefore, he may redeem that portion of the lands in which he is interested from the tax sale in the manner provided by sec. 75.01, subsec. (1), Stats.

OSL
WHR

Public Health — Pharmacy — Person who passes examination given by state board of pharmacy may become legally registered pharmacist even though one member of board is not registered pharmacist as required by sec. 151.01, subsec. (1), Stats.

March 25, 1937.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You state in your letter of March 13 that one of the members of the state board of health is not a registered pharmacist. We take it that you intended to mean that one of the members of the state board of pharmacy is not a registered pharmacist and, in dealing with the question you asked, we will so consider it.

You question whether or not those who pass the examination before this board are legally registered as pharmacists.

Assuming that a member of the state board of pharmacy is not a registered pharmacist and his appointment is illegal under the statute, such member would at least be a *de facto* officer. *State ex rel. Schneider v. Darby,* 179 Wis. 147; *Ekern v. McGovern,* 154 Wis. 157. The right to collaterally attack the acts of a *de facto* officer was considered by this department in XXV Op. Atty. Gen. 750.

It is our opinion that if the examination be given by a *de facto* officer, he who takes such examination and passes the same does not have his rights affected by the fact that the officer giving the examination is not a *de jure* officer.

It is our conclusion, therefore, that persons who pass an examination given by the state board of pharmacy become legally registered pharmacists, regardless of any irregularities in the board's membership.

LEV

Bonds — Loans from Trust Funds — Municipal bonds issued for purpose of refunding loan made for school purposes through commissioners of public lands require vote of electors under sec. 67.05, subsec. (5), par. (b), Stats.

March 25, 1937.

H. F. MCANDREWS,
City Attorney,
Kaukauna, Wisconsin.

You state that in 1934 the electors of the city of Kaukauna voted in favor of an addition to the local high school, which addition consisted of an auditorium and gymnasium, and that a loan for this purpose was secured from the commissioners of public lands in the sum of $90,000.00, which was supplemented by a later loan of $7,000.00.

It is now proposed to refund this indebtedness by a bond issue, and you inquire whether this may be done by the city council without a vote of the people. The maturity dates would be the same, and the interest rate would not be greater than four per cent, the rate on the present loan.

Your question is answered in the negative.

Sec. 67.05, subsec. (5), par. (b), Stats., provides, among other things, that no city shall issue any bonds for any purpose other than for certain specific purposes mentioned therein, until the proposition shall have been submitted to the electors of such city and adopted by a majority vote thereon. Among the purposes excepted from this requirement are bonds for school purposes or bonds for refunding any of the bonds issued for that purpose.

It is to be noted that your bonds will not be for school purposes, nor for the purpose of refunding bonds issued for school purposes. The bonds will be issued for the purpose of refunding a prior indebtedness, since the loan from the commissioners of public lands is not in the form of bonds, but is in the form of a note or notes.

The distinction between refunding bonds and refunding a prior indebtedness not in the form of bonds at first glance

seems like a tenuous and highly technical one, but it is a distinction which the legislature itself has clearly made in chapter 67.

Sec. 67.04, Stats., lists the purposes of municipal bond issues. Subsec. (2) (r) authorizes the issuance of bonds "To refund a prior indebtedness of any city in any case whether or not such indebtedness was created for a purpose for which general municipal bonds might have been issued in the original instance; * * *."

On the other hand, sec. 67.04, subsec. (11), authorizes municipal bond issues for the purpose of refunding bonds.

Sec. 67.05, subsec. (7) (b) provides that an initial bonding resolution need not be submitted to the electors in certain instances, but again, this section does not help in the present situation for the instances are limited to those listed in subsec. (5), which, as above pointed out, does not include bonds for refunding a prior indebtedness not in the form of bonds, even though the loan was for school purposes.

It is perhaps unfortunate that it is necessary to answer your question this way, since there is really no sound reason why there should have to be another election in the present instance as far as any public policy is concerned. The legislature might just as well have provided for this sort of situation in the same way as it has excepted certain other situations from referendum requirements. Its failure to do so, however, is clear, and we are not at liberty to read into the statute language which is absent, and we are confronted by the well known rule of statutory construction that the expression of the one results in the exclusion of the other *(expressio unius est exclusio alterius)*.

Ordinarily, the attorney general does not, and is not authorized by statute to render official opinions to city attorneys. However, your questions are entitled to our official consideration upon the theory that the proceedings preliminary to the proposed bond issue and the bonds may be formally submitted to this office for approval and certification under the provisions of sec. 67.02, subsec. (3). Consequently, we are treating this as an official opinion with the thought in mind that it may save time, expense and trouble

to other municipalities similarly situated, since we would feel obligated to disapprove proceedings and bonds submitted to us upon the incorrect assumption that no election was necessary in cases of this sort.

OSL
WHR

Courts — County board cannot by ordinance give exclusive jurisdiction of traffic law violations to county court.

March 25, 1937.

JOHN H. ROUSE,
District Attorney,
Baraboo, Wisconsin.

You state that the county board for Sauk county at their January meeting passed a traffic ordinance which embodies most of the traffic laws which are embodied in ch. 85 of the Wisconsin statutes. However, the ordinance provides that the county court for Sauk county shall have the sole jurisdiction in the handling of these cases. Penalties provided for in the ordinance are fines or imprisonment or both in the discretion of the court.

You ask, Can the county board by this ordinance give the county court for Sauk county exclusive jurisdiction of such matters?

The answer to your question is No.

Art. VII, sec. 8, Wisconsin constitution, provides in effect that the circuit courts shall have original jurisdiction in all matters, civil and criminal, not excepted in the constitution, and not prohibited by law. Therefore it would be impossible to grant exclusive jurisdiction to the county court and thus deny the circuit court original jurisdiction.

Art. VII, sec. 2 of the Wisconsin constitution provides in effect for the vesting of the judicial power in Wisconsin and says it shall be in the supreme court, circuit court, courts of probate and justices of the peace. However, it also grants

the legislature power to establish inferior courts with limited civil and criminal jurisdiction, and it is under this grant of power that the legislature in 1929, by ch. 108, Wisconsin Session Laws, extended the power of your county court, and established its jurisdiction. This section of the constitution clearly grants that power to the legislature and to no other body. Therefore, the question of the jurisdiction of the various courts of this state is purely a matter for the legislature to deal with and the county boards cannot, in any manner, enlarge, limit or change the jurisdiction of any of said courts.

OSL
AGH

School Districts — School director may be elected at adjourned meeting of electors of school district.

March 26, 1937.

SYLVAS C. JOHNSON,
District Attorney,
Spooner, Wisconsin.

This will acknowledge your recent letter, supplemented by our telephone conversation, wherein you ask the opinion of this office as to which of two persons is entitled to hold the office of school director in the village of Minong.

It appears that the school district, located in the village of Minong, Washburn county, Wisconsin, held its annual meeting and at this meeting elected officers for the ensuing year. One A was elected school director at this regular meeting. The meeting was then adjourned for a period of ten days. Before the time set for the adjourned meeting A, realizing that he could not act as a director due to the fact that he was a mail carrier, presented to the treasurer of the board a statement in writing to the effect that he could not act as such director and, therefore, resigned. No action was taken by the board concerning A's written declination to ac-

cept the office. Thereafter, at this same adjourned meeting one B was, by a majority of the votes of the electors present, elected as such school director in place of A. The other two members of the board, however, refused to recognize the election of B and appointed one C to such office on the board.

Sec. 40.04, Wis. Stats., provides:

"The annual common school district meeting shall have power:

"* * *

"(2) To adjourn, from time to time.

"(3) To choose a director, treasurer and clerk, by ballot, and a majority of the votes shall be necessary for a choice."

Sec. 40.07, Wis. Stats., provides:

"(1) 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 have been elected or appointed and qualified. * * * The officers elected shall be notified thereof by the clerk of the meeting, within five days thereafter, and unless a person elected and notified shall, within ten days after his election, file with the clerk his refusal in writing to accept the office, he shall be deemed to have accepted the same."

It is our opinion that at the first meeting of the electors A was properly elected to the office of director of the school board. We assume that he was notified of such election. He then had ten days in which to refuse to accept the office, and upon his failure to so refuse, he would be deemed to have accepted the same. However, at the adjourned meeting and within ten days it appears that A filed his refusal in writing to accept the office. Such refusal eliminated A as a member of the board. The situation, then, was the same as though no election had been held and the electors could then proceed to hold their adjourned meeting.

This office has held in XX Op. Atty Gen. 664 that officers of a school district may be legally elected at an adjourned annual meeting. The opinion further states, at p. 665, after quoting the provisions of sec. 40.04, subsecs. (2) and (3):

"Under the above provision it is apparent that the electors of a school district may transact any business at an adjourned annual meeting that can be transacted at any annual meeting, for the adjourned meeting is still the annual meeting."

In other words, the electors had the same power to elect board members at the adjourned meeting as they had at the original meeting. Inasmuch as A had declined to accept the office of school director, it was then within the power of the electors at this adjourned meeting to proceed to elect such director. As a result of such election B received a majority of the votes for such office. We assume that she had not declined to accept such office. Under these circumstances B is the duly elected and qualified director of this board. The appointment of C by the other two members of the board is an absolute nullity for the reason that after the election of B to the office of director of such board, there was no vacancy in existence, and the other members of the board had no power to appoint any one else to fill such office.

It is, therefore, our conclusion that B is the lawfully elected director of the school board and is entitled to act on said board, and that C has no right or title to said office.

LEV
JRW

Public Printing — Newspaper is "published," within meaning of sec. 331.20, Stats., within county even though physical work performed in printing thereof is performed in another county.

March 27, 1937.

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

You state that a certain weekly newspaper with a bona fide paid circulation to actual subscribers of more than 1,000 copies in the city and county of Sheboygan is entered

under the second class mailing privileges of the United States post office department at Sheboygan. This newspaper, with its principal place of business in Sheboygan, has been regularly and continuously published and circulated in the city of Sheboygan and Sheboygan county for at least two years. Although almost the entire circulation of this newspaper is in the city of Sheboygan, you advise that it is being printed in the city of Milwaukee.

You ask whether under such circumstances this newpaper is "published" in the city and county of Sheboygan within the meaning of sec. 331.20, Stats.

Sec. 331.20, Stats., provides as follows:

"No publisher of any newspaper in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, advertisement, or report * * * unless such newspaper has all the requirements enabling it to be entered by the United States postoffice department as entitled to second class mailing privileges and has a bona fide paid circulation to actual subscribers of not less than * * * one thousand copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously *published* in such city and county for at east two years immediately before the date of such notice, advertisement, or report, * * *."

This statute requires that the newspaper to be entitled to compensation shall be "published" in such city and county, which in this instance would be the city and county of Sheboygan. The statute does not say that it shall be "printed" in such city or county. Neither can the word "published" be said to include the idea that the printing should be done in such city or county. Webster's dictionary has defined the word "publish" to mean:

"To make public; to make known to people in general; to promulgate or proclaim, as a law or an edict; to make public in a newspaper, book, circular, or the like."

In the case of *Bayer v. Hoboken,* 44 N. J. L. 131, a newspaper was printed on presses in the city of New York. The

distribution or circulation of the paper was in Hoboken, New Jersey. The statute there required that the newspaper be "printed and published" within the limits of the municipality of that state. The court held that the newspaper was printed and published in Hoboken, New Jersey. It said:

"The paper * * * is, within the reason and spirit of the law, 'printed and published' in this state."

See also *In re McDonald,* 187 Cal. 158, 201 P. 110 and cases cited therein; XIX Op. Atty. Gen. 409 and 177, XXII Op. Atty. Gen. 207.

It seems quite clear to us that our statute, which does not use the words "printed and published," but uses only the word "published," was not intended to relate to the place of the actual printing of the newspaper and that it relates only to the place in which the paper is published. You are therefore advised that the newspaper referred to is published in the city of Sheboygan, Sheboygan county, within the meaning of sec. 331.20, Stats.

OSL
AGH

Mortgages, Deeds, etc. — Mortgage on exempt automobile without signature of mortgagor's wife is valid only for value in excess of four hundred dollars.

Trade in of exempt automobile worth less than statutory exemption limit upon which there is chattel mortgage not signed by wife of mortgagor is not violation of sec. 343.69, Stats.

March 27, 1937.

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

You state that A, a married man and living with his wife, owned a motor truck worth about $700.00 and mortgaged it to B, the wife of A not signing the chattel mortgage. Two

years later, A traded the truck in on another and was allowed about $275.00 for the old truck on the new one. At all times the truck was the only one A had and necessary in his business. The mortgagee was never notified of the trade-in sale and hence never consented to it.

You inquire:

1. Was the mortgage valid when made? If so, for what amount?

2. Was it valid for any amount when the truck was traded in?

3. Did the trade-in sale constitute a violation of sec. 343.69?

Sec. 241.08, Stats., provides:

"* * * Nor shall a chattel mortgage of personal property which is by law exempt from seizure and sale upon execution be valid unless the same be signed by the wife of the person making such chattel mortgage, if he be a married man and his wife at the time be a member of his family, and unless such signature of such wife be witnessed by two witnesses."

Sec. 272.18, subsec. (6), Stats., exempts from execution any automobile used or kept for the purpose of carrying on the debtor's trade or business, not exceeding $400.00 in value. As the automobile at the time of the giving of the mortgage was worth $700.00 but was exempt from execution only up to $400.00 in value, your first question is answered, Yes, to the extent that the truck exceeded the value of $400.00.

We assume that the trade-in allowance of $275.00 represented the value of the truck at the time of the trade in. Such being the situation at that time, the truck was worth less than the statutory exemption. Therefore, the mortgage was not then enforceable against the truck and your second question should be answered, No.

Sec. 343.69, Stats., provides:

"Any person having conveyed any personal property by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, remove or

carry or drive away said property or any part thereof, or cause the same to be done, without the consent of the mortgagee or his assigns and with the intent to defraud, shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars."

To constitute a violation of this section there is one prime essential, namely, the existence of an enforceable lien or title created by the mortgage. This statute is designed for and intended to protect the mortgagee. Just immediately prior to the trade in the mortgagee could not have asserted any claim or right to the truck while still in the possession of A, assuming that the truck did not exceed $400.00 in value, for the reason that the truck was exempt as within the statutory exemption limit of value. Therefore, at the time of the trade in there was no lien or title of the mortgagee to be protected by sec. 343.69. There was not then in existence any lien or title created by the mortgage within the meaning of sec. 343.69. For the above reasons it is our opinion that your third question should be answered in the negative.

OSL
JEM

Constitutional Law — Elections — Ballots — Public Printing — Statute permitting placing of union label on ballots by printer does not violate any provision of constitution.

March 30, 1937.

HOWARD F. OHM,
Legislative Reference Library.

You have requested an opinion as to the constitutionality of the proposed amended Bill No. 76, A., which if adopted would create a new section of the statutes reading as follows:

"6.265 Union label on official ballots: Whenever any official or sample ballot is printed in an establishment which is a member of a typographical union or of the allied printing trades' council there may appear on such ballot the union label."

It is our opinon that any contention that this bill as amended, if enacted, would be unconstitutional class legislation could not be supported and sustained. If the bill makes any classification it does so based upon reasonable grounds of distinction and additions to those included in such class are not precluded thereby. Further, the act applies equally to all within such class.

However, it is our opinion that the proposed bill as amended does not in fact make any classification, nor do we find any discrimination resulting from it. The union label is inherently distinct and in a class of its own by reason of its very nature and essence. It is novel and unique. It is unlike anything else and there is nothing analogous to it. Likewise, the persons or organizations entitled to use the union label stand apart from every one else and are in a class all by themselves. There is nothing in form, substance or effect which in any manner is similar to or approaches a union label in nature. There are no co-existent persons who use anything which in essence has any similarity to the union label. Thus there is no one to be discriminated against.

Neither is the proposed bill in our opinion invalid as granting special privileges to private persons. It gives the same rights to all because there is no one who is thereby eliminated or left out. Therefore, it is all inclusive. At most it is a grant of privilege to all persons who by virtue of their peculiar circumstances are in a distinctly unique situation, all of whom are dealt with in the same manner. There is nothing obligatory or exclusive in the bill. It is merely an all inclusive permission.

The placing of such union label on a ballot does not in any way influence the vote or interfere with the purposes for which a ballot is intended. Neither can the union label be said to be a mark by which a ballot can be identified con-

trary to the preservation of secrecy in voting. In the case of *In re Peters* (N. Y.), 112 N. Y. S. 339, 60 Misc. Rep. 420, where the statute prescribed the form of the ballot and provided that if a ballot did not conform thereto it should not be counted, it was held that ballots conforming to all of the express requirements of the statutes were not void because they bore on their face the imprint of the union label. The court held that the statute prescribing the forms of ballot was intended to preserve the secrecy of the vote and that the printing of a union label on the ballot in no way affected or defeated the intent of the statute.

The paper itself upon which the ballot is printed may bear a watermark containing the name or trade-mark of the manufacturer without affecting the validity of the ballot. The manufacturer of the papers puts on the watermark that thereby the manufacturer and the quality of the paper may be identified. The printing of the union label on a ballot would seem to carry out the same purpose. The printer through the label wants to be identified for the quality of the printing.

Inasmuch as no constitutional provision appears to be violated by the placing of the union label on the ballot it is our opinion that the amended bill, if enacted, would be constitutional.

OSL
HHP

Public Health — Basic Science Law — Successful passing of examination in basic sciences under sec. 147.06, Stats., does not entitle person to take examination to practice medicine and surgery under sec. 147.15, where state board of medical examiners has decided not to approve professional college of which such person is graduate prior to time of application to take examination to practice medicine and surgery.

April 2, 1937.

BOARD OF MEDICAL EXAMINERS,
Milwaukee, Wisconsin.
Attention Dr. Henry J. Gramling, *Secretary.*

You state that your board at its January meeting decided that it would no longer accept applications for licenses under sec. 147.15, Stats., in the case of graduates of foreign medical schools, excepting graduates of Canadian schools. Last December a foreign applicant wrote and passed the examination of the state board of examiners in the basic sciences given under sec. 147.06, Stats., and you state that he intends to write the examination given by your board this coming June.

We are asked whether your board is compelled to accept such applicant for examination because of the fact that he successfully wrote the basic science examination prior to the adoption of the above mentioned rule by your board.

The basic science examination is given by a board created pursuant to sec. 147.03, Stats., the functions of which are entirely separate and distinct from those of the state board of medical examiners created pursuant to sec. 147.13, Stats.

Many of those who take the basic science examinations have no intention of applying for licenses to practice medicine and surgery, or osteopathy and surgery, under sec. 147.15, and are not qualified to do so, but expect to engage in other branches of the healing art. The basic science examination is required of all persons who treat the sick, whereas the examinations given by your board are limited to those desiring to practice medicine and surgery, or osteopathy and surgery.

Consequently we are constrained to advise that the successful passing of the basic science examination does not qualify a candidate for admission to examination for a license to practice medicine and surgery, or osteopathy and surgery.

OSL
WHR

Education — Vocational Schools — Minors — School Districts — Where child over sixteen and under eighteen years of age is employed full time in home, it is necessary that he attend vocational school half time until attaining age of eighteen years.

April 2, 1937.

GEORGE P. HAMBRECHT, *Director,*
Board of Vocational Education.

You have submitted the following facts: The mother of a family of seven children is dead. The oldest child, a boy nineteen years of age, is working full time. The next oldest child is a girl just past sixteen years of age who is employed full time at home, attending to household duties and the care of five younger children.

It is assumed that said girl attained the age of sixteen years prior to the closing of the past school term, quarter, semester or other division of the school year.

You ask whether such child is to be classified as being regularly, lawfully and gainfully employed, or as employed at home under the provisions of sec. 40.70, subsec. (2), Wis. Stats.

Subsec. (2), sec. 40.70, Stats., reads as follows:

"Any person who is not indentured as an apprentice, who has not completed the equivalent of four years of high school work, who resides or is employed in a district which

maintains a vocational school, who is not physically incapacitated, and who is not required by subsection (1) to attend school full time, must attend in the daytime, for at least eight months in the year and for such additional months or parts thereof as the full time public schools in the district are in session in excess of eight months during the regular school year, some public, private, parochial or vocational school, half time from the end of the period of full time compulsory education to the end of the school term, quarter, semester or other division of the school year in which he is sixteen years of age, and after that for at least eight hours a week, if regularly, lawfully and gainfully employed, half time if employed at home, and full time if unemployed, until the end of the division of the school year in which he is eighteen years of age; and the parents of such minors shall compel such school attendance."

There are no cases or opinions in point.

However, it will be noted that the statute deals with both types of employment. It provides that if the child is regularly, lawfully and gainfully employed, he must attend school eight hours per week and then immediately thereafter provides that the child shall attend half time if employed at home. It is apparent that the legislators had in mind, at the time of passage of the statute, the present situation and that they clearly intended by the insertion of the words "half time if employed at home" to exclude the possibility of a contention that a child employed at home was regularly, lawfully and gainfully employed, and thus cause the other provision of the statute to apply, which would require attendance for only eight hours per week.

Therefore it must be concluded, considering the letter of the statute, that the child in question should be classified as being employed at home and must attend vocational school half time.

OSL
AGH

Fish and Game — Navigable Waters — Public has right to set traps under water along banks of navigable stream, including lands inundated by overflow of stream.

April 6, 1937.

PAUL E. ROMAN,
District Attorney,
Waupaca, Wisconsin.

You state that there are low marshy lands along the Wolf river at Fremont and that at divers times the river overflows, inundating portions of these lands to a depth of a foot or so. The owners of the land trap them for muskrat, mink, etc.

You inquire whether persons generally may paddle up and down a navigable stream and set traps under water along the bank without trespassing upon the rights of the riparian owner. You also inquire whether trappers have the right to paddle on to the inundated lands mentioned and set their traps on the same without committing trespass.

These questions have not been definitely considered by our supreme court. The only case that has been found dealing with them is *Johnson v. Burghorn,* 212 Mich. 19, 179 N. W. 225, 11 A. L. R. 234, holding that a riparian owner on a navigable stream has the exclusive right to anchor traps in the lands of a stream. This case is not controlling in Wisconsin, because in Michigan the public rights in a navigable stream are restricted solely to actual navigation, and hunting and trapping there are held not to be incidents of navigation.

In Wisconsin the riparian owner owns to the center of a navigable stream subject and subservient to the public use thereof for navigation and all of the incidents of navigation. *Franzini v. Layland,* 120 Wis. 72, 97 N. W. 499.

Our court has held that the right of navigation is extended to and includes the use of navigable waters for the purpose of travel, fishing, bathing, hunting and recreation, which are incidents of navigation. *Doemel v. Jantz,* 180 Wis. 225, 193 N. W. 393, 31 A. L. R. 969.

In the case of *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185, it was held that where the waters of a navigable stream were raised by a dam to such an extent as to increase the submerged area, the public had the right to navigate over the entire submerged area after increased in volume. To the same effect is *Haase v. Kingston Co-op. Creamery Assn.,* 212 Wis. 585.

The public would have the right to turn off from the regular course of the river and navigate the overflowed land. *McBride v. Williamette and Columbia River Towing Co.,* 132 Wash. 360, 232 Pac. 286.

In the case of *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273, the court held:

"Although the title to the bed of a navigable stream is in the riparian owners, yet the right to fish in such a stream is a right common to the public, and one who keeps within the limits of the stream may exercise such right without being guilty of trespass." (Syllabus.)

Any natural waters that are usable for rowing or canoeing are navigable and as such are open to the public for fishing or hunting. *Baker v. Voss,* 217 Wis. 415, 259 N. W. 413.

The rights of navigation by the public are co-extensive with navigable water. *Diana Shooting Club v. Husting,* 156 Wis. 261, 145 N. W. 816; *Doemel v. Jantz, supra; Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436.

Therefore, your first question is answered in the affirmative and, as it is our opinion that the public generally has the right to trap the inundated lands mentioned, your second question is also answered in the affirmative.

HHP

Counties — County Ordinances — Taxation — Tax Sales — County board ordinance which repeals ordinance authorizing sale of county-held tax certificates and tax deeds without payment of interest is valid. Sales made after passage of new ordinance are to be made upon payment of principal and interest from time of issuance of certificate.

April 7, 1937.

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

On March 16, 1926, your county board adopted a resolution authorizing the county treasurer to sell all tax certificates in his possession for their face value, without any additional charge for interest thereon.

On November 10, 1936, the board revoked said resolution and provided that within thirty days thereafter interest at the rate of eight per cent per annum should be charged on all tax certificates sold, and on all certificates redeemed. The county clerk was authorized to issue quitclaim deeds on lands owned by the county under tax titles, to the former owners of such lands upon payment of all delinquent taxes with interest at eight per cent per annum. This interest provision was to take effect thirty days thereafter.

On December 21, 1936, the offer to sell certificates at their face value without inclusion of interest was extended to February 10, 1937.

You ask whether interest can be charged on these tax certificates from the time of issuance to the time of redemption or only from the time the resolution was passed.

The first resolution, apparently adopted under authority of sec. 75.35, Stats., authorized the treasurer to sell the certificates at their face value without including interest charges. It did not prohibit the purchaser of the certificates from collecting interest from the date of his purchase. Therefore, the last two resolutions have no effect on certificates sold prior to February 10, 1937.

As to those certificates and county lands acquired by tax deed and which were not sold by the county prior to February 10, 1937, the situation is somewhat different. In effect the county, in order to relieve the taxpayer of onerous interest charges, and, perhaps, in order to facilitate collection of taxes, offered by resolution to waive interest charges. This office has held that such a resolution constitutes an offer to sell and continues until revoked. XIII Op. Atty. Gen. 274. Such offer, by the second resolution, was withdrawn, effective December 10, 1936. By the third resolution, the offer was extended to February 10, 1937. Therefore, any certificates held by the county after February 10, 1937, can only be sold in pursuance of the last resolution, i. e., interest is to be charged from the date the county acquired the certificate.

It is well settled that whatever is given by statute may be taken away by statute except vested and contract rights. *State ex rel. Voight v. Hoeflinger,* 31 Wis. 257, 263.

This rule in the absence of statutory restriction would apply equally to county board ordinances. No vested or contract right exists in any person under the facts stated, unless a valid contract to purchase was made prior to February 10, 1937.

WHR

Education — Vocational Schools — Tuition — Under sec. 41.19, Stats., vocational school offering university of Wisconsin extension division courses may charge nonresident tuition.

April 8, 1937.

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

You inquire as to the liability of a municipality which maintains no vocational school to pay for the tuition of one of its pupils who is attending a vocational school elsewhere

when the course of study being pursued by such pupil consists wholly or in part of instruction offered through such vocational school by the extension division of the university of Wisconsin.

It is our opinion that a vocational school giving instruction furnished by the extension division of the university of Wisconsin is entitled to charge nonresident tuition, as provided in sec. 41.19, Stats., which reads in part:

"The local board of vocational education is authorized to charge tuition for nonresident pupils not to exceed fifty cents for each day or evening of actual attendance. Before July in each year the secretary of the board shall send a sworn statement to the secretary of the local board of vocational education in the municipality in which such pupils reside in cities, towns or villages having local boards of vocational education. In case such nonresident pupils reside in a municipality in which no vocational school is maintained then such sworn statement shall be sent to the clerk of the municipality in which such pupils reside. * * *."

Sec. 41.15, subsec. (8) permits local vocational boards to contract with the extension division of the university of Wisconsin to give instruction in such branches as the department may offer.

There is no essential change in relationship between the vocational school and its pupils, merely because the vocational school has contracted with the extension division of the university for the services of certain teachers, instead of hiring these teachers directly. The sum and substance of the transaction, if we may borrow some phraseology from another field, is that the vocational school has hired a subcontractor to handle part of its teaching load, and that while the teachers are working for the subcontractor, they are, nevertheless, doing a part of the work which the principal contractor has undertaken to do, and for which the school is entitled to charge, as provided in sec. 41.19, Stats.

In order that there may be no misunderstanding of this language, we wish to point out that the tuition which can be charged back to the home district of a nonresident pupil is limited by sec. 41.19 to fifty cents for each day or evening of actual attendance, regardless of the cost of the university

extension instruction to the vocational school, and regardless of whether the nonresident pupil is taking university extension work or regular vocational school courses or some of each.

OSL
WHR

Legislature — Unemployment Compensation — Legislative employees of sergeant-at-arms are covered by unemployment compensation act.

April 8, 1937.

E. A. HARTMAN, *Sergeant-at-Arms,*
Senate.

You desire to know whether employees of the sergeant-at-arms come within the unemployment compensation act and whether you should make the required reports to the industrial commission.

Sec. 108.02 (e) 5, Stats., exempts from the act employment by a governmental unit (which includes the state), on an annual salary basis. The industrial commission, which administers the act, is empowered by sec. 108.14, subsec. (2), to adopt and enforce all rules and regulations which it finds necessary or suitable to carry out the provisions of the act. Rule 5 of the industrial commission interprets sec. 108.02 (e) 5, to mean that the exemption extends to permanent public employees regularly employed for at least ten months per year. The legislature meets only every other year, and the sessions do not last ten months. Hence the exemption should not apply.

You are, therefore, advised that these employees are covered by the act and that the required reports should be made.

OSL
WHR

Legislature — Wisconsin Statutes — Laws enacted by legislature providing that they take effect upon passage and publication take effect day after publication.

April 8, 1937.

E. A. HARTMAN, *Sergeant-at-Arms,*
Senate.

In your letter of April 2 you refer to ch. 36, Laws 1937, providing for an increase in legislative employees' salaries and inquire as to when the law goes into effect. You state that the law was published April 1, 1937.

Previous opinions of the attorney general have held that a law enacted by the legislature providing that it shall "take effect upon passage and publication" takes effect the day after the publication. X Op. Atty. Gen. 1099, XVIII Op. Atty. Gen. 615, 616, XXII Op. Atty. Gen. 571, 576. This has also been recognized as the law in *O'Connor v. City of Fond du Lac,* 109 Wis. 253, 261. Accordingly ch. 36, Laws 1937, takes effect on April 2, 1937.

OSL

Criminal Law — Gambling — So-called game of "Hollywood" appears to be in violation of sec. 348.07, Stats.

April 8, 1937.

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

You have inquired as to the legality of the game called "Hollywood."

As we understand it, the essential features of this game are substantially as follows:

Each patron upon entering a theatre or other place of assemblage is presented with a partially perforated card

bearing the names of three movie players. Upon each card is a five-, a six-, and a seven-letter name, three in all, no two cards being alike, there being one thousand possible combinations of names. Beneath each letter in a name is a perforation. A slide is projected on the theater screen, containing the alphabet, with an arrow centrally mounted. The arrow is electrically rotated and stops at random on one of the letters of the alphabet. The player of the game then punches out one corresponding letter on his card. When two of the three names appearing on the card are completely punched out, the player calls "Hollywood," and that completes the game. The pressing on the button to rotate the arrow is done either by the operator in the booth or by different members of the audience through an extension cord. The person first calling "Hollywood" receives a prize.

It is the contention of the promoters of this game that it is one of skill rather than one of chance in that the player, to be successful, must make a careful study of the card which is tendered to him. He determines the percentage of vowels to the number of consonants in each of the three names on his card, as the promoters contend, and figures the percentage of vowels to consonants in the alphabet as it is projected on the screen, and, when the arrow indicates a letter on the screen, it is with these percentages in mind that he must select the corresponding letters in the names which appear on his card. He must also bear in mind that every time he punches a letter from one of the names, the succeeding spin of the arrow presents a different problem, for the percentage of consonants to vowels in that particular name changes with the punching of each letter.

You disagree with the theory that the game is one of skill and we are inclined to concur in your opinion.

The theory that, to become skillful in playing the game, one must carefully study the card to determine the percentage of vowels to consonants in each of the three names on the card and correlate the same to the percentage of vowels to consonants in the alphabet as it is projected on the screen with appropriate revision of such percentages with each spinning of the arrow strikes us as being highly fantastic, particularly, since we understand that each patron is given a card containing different names. A large element

of chance must necessarily enter into the play between players of equal skill holding different cards.

Nor can we attach any real weight to the division of the alphabet into vowels and consonants. The chances that the arrow will stop on the letter Z are just as great as are the chances that it will stop on the letter A. It can make no difference whether we denominate the letter upon which the arrow stops as a vowel or as a consonant. There are twenty-six letters in the alphabet and they all stand on equal footing as far as the laws of chance are concerned.

The game in effect constitutes a device, scheme, or contrivance which patrons of the theater are induced, enticed or permitted to play for gain, and we are unable to escape the conclusion that the element of chance predominates over the element of skill. As was said in the case of *In re Lee Tong,* 18 Fed. 253, at 257:

"* * * In short, anything which is used as a means for playing for money or other thing of value, so that the result depends more largely on chance than skill, is so far a gambling device. Whart. Crim. Law, sec. 1465."

Sec. 348.07, Wis. Stats. provides:

"Any person who shall set up, keep, manage or use any table, wheel or other construction, or any cards, dice or other device, scheme, contrivance or thing of any name or description adapted, suitable, devised or designed, or which can or shall be used for gambling purposes and induce, entice or permit any person to gamble, bet or play for gain with, at, or upon, or by means of, such table, wheel or other construction, or such cards, dice or other device, scheme, contrivance or thing, or to bet or wager anything at or upon any game whatever played by such keeper, manager or any other person by means or use thereof, or who shall open, keep or manage any common gambling house shall be punished by imprisonment in the county jail not more than one year nor less than one month, or by fine not exceeding five hundred dollars nor less than one hundred dollars."

From the description you have furnished us and from our analysis of the mechanics of this so-called game of "Hollywood," it is our opinion that the playing of this game is in violation of sec. 348.07.

In your letter you refer to an unpublished opinion given to the district attorney of Milwaukee county under date of December 4, 1935, in which an apparently opposite conclusion to the one herein expressed was reached. We have considered this former opinion. However, we are not inclined to follow it.

LEV
WHR

Criminal Law — Gambling — Vending machine which is designed to be used for gambling purposes violates sec. 348.09, Stats.

April 8, 1937.

KENNETH E. PORT,
District Attorney,
Watertown, Wisconsin.

You have requested an opinion as to the legality of a certain type of alleged vending machine or amusement device which you describe as having the identical appearance of what is commonly known as a "slot machine." On the insertion of a token or a nickel and the pulling of a lever, the player receives a package of mints. The pulling of the lever throws into action three wheels, on which there is arranged a combination of cherries, plums, oranges, and pears. Each one of these emblems contains in fine print a supposedly humorous verse. Above each of the wheels is a button which, when pushed while the wheel is in action, will stop the particular wheel immediately. It is supposed that the player's skill in stopping the wheels will influence the number of tokens to be ejected by the machine when the wheels are set in motion by the pulling of the lever. The machine also contains what is commonly known as a "jack pot" and the number of tokens to be ejected is always indicated at a place above the wheels. These tokens are not ejected until another token or nickle is inserted.

On each of these machines there is a sticker reading as follows: "This machine is for amusement purposes only." On top of each machine and as a part thereof is a metal sign reading as follows:

"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 question of whether or not a machine of this type is a gambling device is fully discussed in the case of *Milwaukee v. Johnson,* 192 Wis. 585.

Sec. 348.07, Wis. Stats., provides:

"Any person who shall set up, keep, manage or use any table, wheel or other construction, or any cards, dice or other device, scheme, contrivance or thing of any name or description adapted, suitable, devised or designed, or which can or shall be used for gambling purposes and induce, entice or permit any person to gamble, bet or play for gain with, at, or upon, or by means of, such table, wheel or other construction, or such cards, dice or other device, scheme, contrivance or thing, or to bet or wager anything at or upon any game whatever played by such keeper, manager or any other person by means or use thereof, or who shall open, keep or manage any common gambling house shall be punished * * *."

It is to be noted that in order to constitute a violation of this section it is necessary that it be proved that the machine or device was actually used for gambling purposes. Usually it is very difficult to obtain proof of the actual use of a machine for gambling purposes. Evidently the legislature had this in mind when it enacted sec. 348.09, Stats., which prohibits the setting up or maintaining of a machine which is designed so that it will be capable of being used for gambling purposes.

Sec. 348.09, Wis. Stats., provides:

"Any person who shall knowingly suffer or permit any table, wheel or other construction, or any cards, dice or other device, scheme, contrivance or thing adapted, suitable, devised, designed or which can or shall be used for

gambling purposes to be set up, kept, managed or used, or any gambling or betting therewith, thereon or by means thereof in any house, building, shed, booth or on any lot or premises by him owned, occupied or controlled shall be punished * * *."

Under this statute a machine or device which by reason of its peculiar or particular construction is designed to be used for gambling purposes is a gambling device *per se* and illegal. It is not necessary to prove that it has actually been used for gambling purposes. The mere setting up, keeping, managing, or using of such a machine is a violation of this statute.

You state that on the insertion of either a token or a nickel the machine ejects mints. Thus the extra tokens received in playing the machine may be placed back into the machine with the result of getting more mints. These extra tokens are something of value, because they may be converted into mints. Therefore, this machine or device is inherently a gambling machine or device by reason of its peculiar design in emitting additional tokens which may be played into the machine.

Upon the facts which you state it is our opinion that the machine or device was designed for gambling purposes and is illegal. One would have to be exceedingly credulous and almost totally deficient in the knowledge of things as they exist to believe that any person or firm would build such an intricate machine for any other purpose and not to realize that the machine was made and is maintained purely for the purpose of appealing to the gambling instinct in human nature.

You refer to an opinion rendered December 21, 1936, reported in XXV Op. Atty. Gen. 731. It is to be noted that the machine which you describe ejects mints not only for nickels but also for tokens, whereas the machine described in the opinion in XXV Op. Atty. Gen. 731 emits mints only upon the insertion of nickels. The concluding sentence of that opinion is authority for holding the present device illegal. That sentence reads:

"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."

Where the reception of the additional or extra tokens of value is dependent upon the law of chance, then the machine is condemned by sec. 348.09, Stats. If, as it is contended, the additional tokens of value are received as the result of the skill of the player, then the machine is condemned as a gambling device by sec. 348.085, Stats.

It is our opinion that the machine which you describe is inherently a gambling device and that the possession thereof is illegal.

LEV

Courts — County judge in county having population under 14,000 inhabitants and in which county court has no civil or criminal jurisdiction, other than that which has been conferred upon all county courts throughout state by general statute, need not be attorney at law.

April 8, 1937.

WILLIAM E. THURSTON,
District Attorney,
Durand, Wisconsin.

You state that the question has been raised as to the necessary qualifications of a county judge in a county of less than 14,000 population, where there has been a special act of the legislature conferring civil or criminal jurisdiction upon that county court.

You call attention to that portion of sec. 253.02, Stats., pertinent to the question, reading as follows, to wit:

"* * * No person shall be eligible to the office of county judge who shall not, at the time of his election or appointment thereto, be an attorney of a court of record;

provided, that the foregoing provision as to the qualifications shall not apply to any county having a population of less than fourteen thousand inhabitants according to the last official census preceding such election, and in which the county court has no civil or criminal jurisdiction. Such provision shall not disqualify any person who held such office in this state on or before the first day of July, 1933."

Ch. 90, Laws 1933, amended sec. 253.02, Stats., to its present form by adding the following words, to wit: "in which the county court has no civil or criminal jurisdiction," to the then existing statute.

You call attention to the fact that secs. 351.30 and 351.31, Stats., which were in existence prior to the enactment of ch. 90, Laws 1933, grant to all the county courts in the state criminal jurisdiction in certain cases and that there are several other general statutes conferring upon all county courts jurisdiction in other specified cases concurrent with the circuit court.

You inquire whether or not the legislature in amending sec. 253.02, Stats., by ch. 90, Laws 1933, made it compulsory that any county judge in a county having less than 14,000 population, be an attorney at law, except one who was the incumbent of the office on or before July 1, 1933.

Prior to the enactment of ch. 90, Laws 1933, sec. 253.02, Stats., provided that all county judges must be attorneys at law with the exception of county judges in counties having a population of less than 14,000 inhabitants. At the time of the enactment of this amendment to the statute there were in effect at that time various general statutes conferring upon all the county courts in the state jurisdiction in certain specified cases concurrent with that of the circuit courts. However, at the same time it was true that by various special acts of the legislature limited civil and criminal jurisdiction concurrent with the circuit court had been conferred upon many of the county courts in the state, including a number of the county courts in counties having less than 14,000 population.

If the amendment made by the laws of 1933 is construed to include the civil or criminal jurisdiction which all county courts have by virtue of the general statutes, such as sec. 351.30 and other statutes of general application, then there

are no county courts in the state which do not have civil or criminal jurisdiction. Therefore, there would be no county courts which would come within the exception of the statute. If that were the intention of ch. 90 of the laws of 1933, the legislature, instead of adding the words it did by that chapter, should have struck out all of the words in the statute providing for any exception to the requirement that a county judge be an attorney. The effect of such construction would be that the amendment instead of extending or restricting the exception rather abrogated the exception in its entirety.

It is a well established rule that the statutes shall be construed in conformity with the intent of the legislature if such an intent is ascertainable. In *Nichols v. Halliday,* 27 Wis. 406, the court said that it is a cardinal rule for the construction of statutes to so interpret their language as to give them force and effect if possible. A construction of the words "no civil or criminal jurisdiction" in the strict sense would give to the amendment no force and effect as an addition to a statute but rather as a repealing of a portion thereof to which the enactment in fact expressly made an addition.

It is our opinion that the legislature in enacting ch. 90 of the laws of 1933 used the words "no civil or criminal jurisdiction" having in mind that limited general criminal or civil jurisdiction which had been conferred upon certain individual county courts by special acts of the legislature rather than the civil or criminal jurisdiction conferred on all county courts in specified instances by the general statutes.

Therefore the county judges in counties having less than 14,000 population and in which the court has no civil or criminal jurisdiction other than that which is conferred on all of the county courts in the state by the general statutes need not be attorneys at law. If, however, the county court, in addition to the civil or criminal jurisdiction in certain specified instances conferred upon all county courts by the general statutes, has had conferred upon it by special act of the legislature limited general jurisdiction in civil or criminal matters concurrent with the circuit court, then the county judge is required by the statute to be an attorney at

law except that the statute expressly provides that any person who held such office of county judge on or before July 1, 1933, is not disqualified by such requirement.
HHP
AGH

University — University extension division has duty to furnish correspondence courses without cost to veterans whose application therefor under sec. 37.32, Stats., is approved by department of public instruction.

April 9, 1937.

DEPARTMENT OF PUBLIC INSTRUCTION.

You have called to our attention sec. 37.32, Stats., providing for extension courses for World War veterans. Applications for such courses have been made to your office as required by law, but no veteran received the courses, as no appropriation has been made to take care of the necessary fees. You ask whether the extension division may give these courses without cost.

Sec. 37.32, Stats., provides:

"(1) Any person described in section 37.25 may take without cost correspondence courses from the extension division of the University of Wisconsin, but not more than one such course may be taken at any one time. Persons receiving the educational bonus under section 37.25 may not at the same time avail themselves of the benefits of this section but may do so during periods when not receiving benefits under section 37.25. Any person who has received a cash bonus under chapter 667, laws of 1919, may receive the benefits under this section.

"(2) The instructional courses provided for in this section may be secured upon application to the state superintendent of public instruction in such form as he may prescribe, and upon approval thereof by him."

Under this section any person described in sec. 37.25, Stats., may take, without cost, credit courses from the university extension division. Such courses may be secured upon application to the state superintendent of public instruction in such form as he may prescribe.

Extension courses at the university of Wisconsin are authorized by sec. 36.17, Stats., and appropriation for carrying out this work is made by sec. 20.41, subsec. (2) (a), Stats. The right of the university to exempt certain persons from payment of extension fees was considered by this department in XVI Op. Atty. Gen. 523. The board of regents there proposed to exempt students from the payment of extension fees by creating certain scholarships, and the opinion was expressed that this could not be done in the absence of statutory authority. It was said at p. 524:

"* * * I am of the opinion that the board of regents cannot make such exemption of incidental fees.
"* * *

"Under sec. 20.41, subsec. (2), which section deals with the appropriation for the university extension division, there is appropriated, 'all moneys received by each and every person for and in behalf of the board of regents of the university, as university extension fees, including fees for correspondence study.' Attention is called to this section of the statutes to show that the university budget and appropriation for the extension division is made in reliance on extension fees being charged. * * *."

This opinion is in accord with the general rule that the university has only such powers given or necessarily implied by statute. *State ex rel. Priest v. Regents,* 54 Wis. 159.

It is submitted that the legislature, by the enactment of sec. 37.32, Stats., intended to provide the necessary statutory authority to permit the exemption of veterans from payment of incidental fees. If any other construction were given this statute, it would clearly be a nullity and of no effect. It could not properly be said that the legislature intended to enact a law that would be of no force and effect. Obviously it intended to make available to veterans the educational facilities of the extension division of the university.

We are, therefore, of the opinion that the university of Wisconsin extension division has the duty to permit veterans to take correspondence work without payment of a fee where an application is approved by the superintendent of public instruction under sec. 37.32, Stats.
LEV

Appropriations and Expenditures — Public Officers — City Clerk — City Officials — School Districts — City school funds are to be disbursed by checks drawn on school fund and signed by city clerk pursuant to certified bill, voucher or schedule signed by president and secretary of school board, giving names of claimants and amount and nature of each claim.

When official is charged by law with duty of drawing and issuing checks, he may delegate to assistants ministerial work connected therewith if done under his direction.

April 10, 1937.

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

You refer to us a letter from the chairman of the finance committee of the board of education of the city of Beloit with your request for an opinion covering the problem stated in the letter. It appears from that letter that for some time the board of education, by it president and secretary, has prepared and forwarded to the city clerk a voucher giving the names of each creditor and the amount and nature of each debt due. The actual checks, drawn on the city treasurer, are prepared in the office of the school business manager, and are signed by the superintendent of schools and the secretary of the board of education. City officials charged with the duty of issuing and signing

checks have delegated some of such duties to the board of education and the superintendent. The nature of the duties delegated is not stated.

The questions presented are: (1) Must the checks originate in the city offices? (2) Must they be signed by the city manager and the city clerk?

The situation presented is governed by sec. 40.57, Stats., which provides as follows:

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

This statute requires the city clerk to issue the proper orders on the requisition of the board of education. In performing such duty, the city clerk, if he exercised his control over the work, could authorize the business manager to prepare the checks for signature or he could require that they be prepared in his office. This proposition is sustained under the principle that an officer may delegate the performance of mere ministerial or physical duties if the work is subject to his judgment or discretion. Mechem on Public Officers, sec. 568; IX Op. Atty. Gen. 82.

The second part of your question is answered by the opinion rendered your department January 26, 1928, XVIII Op. Atty. Gen. 13. In that opinion this department outlined the procedure to be followed in disbursing city school funds. It was there held that school funds were to be disbursed in the following manner: The school board first issues to the city clerk a certified bill, voucher or schedule, giving the name of each creditor and the amount and nature of each debt due, signed by the president and secretary of the board. Such bill, voucher or schedule is then filed with the city clerk. Thereupon it becomes the duty of the city clerk to "issue proper orders" upon such certification to the city treasurer. It was further held that the orders so drawn

need not be signed by the mayor (in the present instance the city manager), nor need they be countersigned by the comptroller.

Accordingly, it is our opinion that city school funds are to be disbursed by checks drawn on the school fund and signed by the city clerk pursuant to a certified bill, voucher or schedule signed by the president and secretary of the school board, giving the names of the claimants and the amount and nature of each claim.

LEV

National Guard — Trustees of military company must be members of said company in good standing.

April 10, 1937.

RALPH M. IMMELL,
Adjutant General.

We are in receipt of your inquiry requesting an interpretation of sec. 21.42, subsec. (2), Stats., which is as follows:

"The members of such military company in good standing and no others shall constitute the members of such corporation and shall elect three trustees who shall manage and administer the business of such corporation. The trustees shall elect one of their number president and one vice president and shall also elect a secretary."

You inquire whether the trustees who are elected under this section must be members of the present military company or whether they may be elected from outside the military organization.

It is our opinion that in view of the provisions of the statute, only members of the military company in good standing shall constitute the members of the corporation, and that the trustees to be elected must be members of the military company. In order to be trustees they certainly must be members of the corporation itself, and since there

is the requirement that members of the corporation must be members of the company, it follows that the trustees must be members of the present company.

Therefore no person outside of the military organization may be elected as a trustee of the corporation authorized under this statute.

OSL
LEV

Mothers' Pensions — Social Security Law — Term "dependent children" as used in sec. 48.33, subsec. (12), Stats., includes children under sixteen who attend boarding school while mother works and who return home only when school is not in session. This statute includes also children who are left with certain specified relatives while mother is at work.

April 10, 1937.

GEORGE M. KEITH,
Supervisor of Pensions.

You state that a certain mother has four children who attend a school conducted by a religious order. The school is fifteen or twenty miles from the home of the mother, and the children stay there almost continuously, coming home now and then during the school session, although they live at home during the summer. One of the reasons for keeping the children at such school is that the mother has full time employment and cannot care for the children at home.

You inquire whether aid may be granted these children as dependent children.

Sec. 48.33, subsec. (12), Stats., defines dependent children as follows:

"A 'dependent child' as this term is used in this section is a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of

a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in place of residence maintained by one or more such relatives as his or their own home."

It is a question of fact in each case as to whether a particular child, or children, comes within the provisions of the above statute.

In the first place a dependent child must be under sixteen years of age. You do not advise us as to the ages of the children, and consequently we are not in a position to know whether this requirement has been met.

Secondly, such children must have been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent.

It is possible that this requirement of the statute has been met in the case mentioned in that the mother's continued absence from home while engaged in full time employment has deprived such children of proper parental care. See IV Op. Atty. Gen. 1039, 1043, where it is said in quoting from a report of the state board of control:

"* * * After a day's work for wages, she [the mother] comes back tired to her home and children, and it cannot reasonably be expected that she can give them the attention she otherwise would, if she were not fatigued. Moreover, unless she leaves the children in the care of a reliable person, she cannot be sure that they have gone regularly to school, have had the proper food, have been warmly and cleanly clothed, and, further, she may be quite properly distressed over their unguarded and unprotected hours, which may lead them into ways of misfortune and delinquency, and which even her best efforts at support cannot prevent."

Lastly, a dependent child must be living "with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in place of residence maintained by one or more such relatives as his or their own home."

This raises a more difficult question in the present instance, but we are inclined to feel that giving the statute the liberal construction which it should receive, this last requirement has also been fulfilled. It has been held that the term "residence" signifies a person's permanent home to which whenever he is absent he has the intention of returning. *Jones v. Reser,* 61 Okla. 46, 160 Pac. 58, 59. It has also been defined as the place where one remains when not called elsewhere on business, pleasure, or for other temporary purposes. 54 C. J. 706.

We take it that it is the intention of the mother and children that they will return to their home when school is not in session and that their absence from their home, while in school, is for the purpose of obtaining an education and should be considered in much the same light as absence on business.

You also make reference to children who are left with relatives while the mother is employed as a housekeeper away from home, returning home once or twice a week, or possibly less frequently. We are asked whether or not this constitutes care of children in the home of the mother, who is receiving aid for their care.

While technically this may not constitute care of the children in the home of the mother, we do not believe that such children are thereby excluded from the classification of "dependent children" as defined in sec. 48.33, subsec. (12), since they may reside "with the father, mother, grandfather, grandmother brother, sister, stepfather, stepmother, stepbrother, step sister, uncle or aunt in place of residence maintained by one or more such relatives as his or their own home."

You do not mention what relatives the children are living with, and we are consequently unable to advise as to whether the situation falls within the purview of that portion of sec. 48.33, subsec. (12), above quoted.

WHR

Public Officers — County Pension Department — Town clerk is eligible to serve as member of county pension department.

April 10, 1937.

PENSION DEPARTMENT.

You ask whether one person may hold the offices of town clerk and member of the county pension department.

The test of compatibility was stated as follows by this department in XXIII Op. Atty. Gen. 605:

"* * * The test of incompatibility is whether the officer is placed in a position whereby his interest in one office is in opposition to his official position in the other. The inconsistency which makes the offices incompatible lies in conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. 46 C. J. 942."

See also XXIV Op. Atty. Gen. 344; XXV Op. Atty. Gen. 55, 698.

An examination of the duties of town clerk (sec. 60.45, Stats.) and the duties of a member of the county pension department, (secs. 49.20 to 49.30, Stats.) does not show that either position is in any way subordinate to the other or that either official has any authority to remove or audit the accounts of the other. Applying the test given above, the offices of town clerk and member of the county pension department are not incompatible.

Reference is made to sec. 60.60, especially that portion which provides:

"* * * No town officer shall be entitled to pay for acting in more than one official capacity or office at the same time."

In connection therewith you ask whether the fact that the town clerk receives an annual salary would disqualify him from acting as a member of a county pension department.

In considering sec. 60.60, Stats., it has been pointed out that a town clerk may receive additional compensation for acting as clerk of elections at the November election as he was not acting in another official capacity for the township. XIII Op. Atty. Gen. 647. Again in XVII Op. Atty. Gen. 291 it was suggested that the prohibition in sec. 60.60, quoted above, applied to an official capacity or office connected with town affairs. It is clear that the prohibition does not apply here, as the town clerk is not receiving compensation for acting in two official capacities or offices on behalf of the township.

LEV

Automobiles — Law of Road — Glass replacement company does not violate sec. 85.063, Stats., by replacing, at request of owner, ordinary glass and not safety glass.

April 10, 1937.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You state that you are in receipt of the following communication from T. C. Larson of the auto license department of the Milwaukee branch office of the motor vehicle division of the department of state:

"Section 85.063, Wisconsin statutes, states it is unlawful for any person to operate a motor vehicle manufactured after January 1, 1936, on Wisconsin highways unless same is equipped with safety glass.

"A certain glass replacement company in Milwaukee informs us that many of their customers insist on having the broken glass in their vehicles replaced with ordinary glass. This company has asked our department whether or not they are liable under the statutes if they accede to the de-

mands of their customers and replace the glass in vehicles manufactured after January 1, 1936, with glass which is not safety glass."

You inquire whether or not the company replacing the glass violates the statute above quoted in the event that such glass so replaced is not so-called safety glass, as defined in subsec. (2) of sec. 85.063, Stats.

The statute itself merely makes it unlawful for any person to operate an automobile on the public highways or streets unless it is equipped with safety glass. The statute applies, of course, only to automobiles manufactured after January 1, 1936.

The penalty of the statute is clearly directed to the operation of vehicles fitted with improper glass and is not directed to the person or corporation which installs improper glass. Furthermore, if the automobile was manufactured prior to January 1, 1936, there is no statutory requirement that such broken glass on an automobile be replaced with safety glass.

It is, therefore, our opinion that the company in question does not violate sec. 85.063, Stats. by replacing broken glass with ordinary glass rather than safety glass at the request of the owner of a vehicle manufactured after January 1, 1936.

LEV

Municipal Corporations — School District — Board of education in city operating under city school plan may use part of general school fund for construction purposes if such construction was approved by city council.

April 13, 1937.

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

You request our opinion concerning the following matter:

"Is it possible, in view of the statutes—particularly section 62.12 (6), to effect a transfer of a sum of money from a general school fund to a special school construction fund for the purpose of providing needed funds to assist in financing the construction of a school.

"The general school fund was raised pursuant to an itemized budget submitted for the current and ordinary expenses of the board of education for 1937, and which budget estimate did not include any item for construction costs.

"In connection with this, can such a transfer be made even where there has been no certain and definite provision made at the time of the transfer to reimburse the general school fund for the amount taken from it?"

Sec. 62.12, subsec. (6), Stats., to which you refer, provides:

"(a) City funds shall be drawn out only by authority of the council and upon order of the mayor and clerk, countersigned by the comptroller, if there be one. Each order shall specify the purpose for which it is drawn, and be negotiable.

"(b) The council shall not appropriate nor the treasurer pay out 1. Funds appropriated by law to a special purpose except for that purpose, 2. Funds for any purpose not authorized by the statutes, nor 3. From any fund in excess of the moneys therein.

"(c) No debt shall be contracted against the city nor evidence thereof given unless authorized by a majority vote of all the members of the council."

It appears from the statements made in your letter that the school board has been provided a definite fund for the operation of the school system. No part of this fund has

been particularly earmarked for any particular purpose. Under sec. 40.53 (11) a board of education in a city operating under the city school plan is given the power "to estimate the expenses of the city schools and prepare a budget, which shall be submitted to the common council for its approval."

Sec. 40.55, Stats., provides:

"The school board shall annually, before October, make an estimate of the expenses of the public schools for the ensuing year, and of the amount which it will be necessary to raise by city taxation, and certify the same to the city clerk who shall lay the same before the common council at its next meeting. It shall be the duty of the common council to consider such estimate, and by resolution determine and levy the amount to be raised by city taxation for school purposes for the ensuing year, which amount shall be included in the annual city budget and be called the 'City School Tax.' "

In the case of *State ex rel. Board of Education v. City of Racine,* 205 Wis. 389, it was held that the city council of a city operating under the city school plan is vested with discretion as to the imposition of school taxes in the exercise of which it may take into consideration the general financial condition of the city and other municipal necessities. The board of education may estimate its necessary disbursements and may submit to the city council for its approval a budget in which it has itemized amounts necessary for operation of the schools, and it is the duty of the city council to determine the amount to be levied.

After the city council has determined the amount to be raised and to be appropriated for school purposes, the matter of spending this money is entirely the function of the board of education. The city council has no control whatsoever of such expenditures after the money has been appropriated for school purposes. It is true that under sec. 40.57, Stats., "The city treasurer shall keep separate accounts of all moneys raised and apportioned for city school purposes." The city treasurer is the proper custodian of the funds appropriated for the use of the board of education (XXI Op. Atty. Gen. 712) but the moneys once raised under sec. 40.55

can be expended only by the board of education. XXII Op. Atty. Gen. 40; XXIV Op. Atty. Gen. 71.

It is our opinion that the school board may appropriate such money as is to its credit with the account of the city treasurer for such school purposes as it sees fit, and it may use such money for construction purposes. The statutes do not grant to the board of education the power to establish separate funds to which a trust attaches to the extent that the funds cannot be expended for another purpose. The board of education has power to use a part of the general school fund in financing the construction of the school if the city council has approved the construction of the school or an addition thereto.

Sec. 40.53 (11) provides in part:

"* * * 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 therefore follows that if the city council has approved the construction of this school building, the money allocated to the board of education for school purposes may be used for this new construction.

LEV
JRW

Commerce — Robinson-Patman Law — Trade Regulation — Commercial Fertilizers — University — Agricultural Experiment Stations — Provisions of Robinson-Patman law are not applicable to state in its purchases.

April 13, 1937.

UNIVERSITY OF WISCONSIN,
College of Agriculture,
Branch Experiment Stations,
201 City Center Building,
Green Bay, Wisconsin.
Attention Mr. E. J. Delwiche.

You have inquired whether the state of Wisconsin, in the purchase of commercial fertilizers for its agricultural experiment stations, is subject to the provisions of the Robinson-Patman law.

A discussion of the details of the Robinson-Patman price discrimination act, passed by congress June 19, 1936 (ch. 592, secs. 1-4, 49 Stats. at Large 1526, 15 U. S. C. A. 13, 13a, 13b, 21a), is unnecessary, except to point out that the purpose of the act is to prevent price discrimination, discrimination in rebates, discrimination in discounts or advertising service charges, etc., so far as interstate commerce is concerned. Persons violating the provisions of the act are subject to fines of not more than $5000.00, or imprisonment for not more than one year, or both.

In *Lowenstein v. Evans,* 69 Fed. 908, it was held that the Sherman antitrust law was not applicable to a state. The court said, at p. 911:

"* * * The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case,

as the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. * * *."

The situation here is analogous to that considered in the *Lowenstein* case, since as far as applicability to a state is concerned, there is no difference in principle between an antitrust law, such as was involved in the *Lowenstein case,* and an anti-price discrimination law, such as is involved in the Robinson-Patman act.

We are, therefore, of the opinion that the provisions of the Robinson-Patman act do not apply to the state.

OSL
WHR

Criminal Law — Gambling — Lotteries — Cards bearing numbers entitling holder to prize money if he also has purchased theater ticket are in violation of lottery and gambling laws.

April 14, 1937.

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

In your recent inquiry you state that you have the problem of bank night in your community. You state further:

"The scheme under which the bank night in this city is operated is that any person may register in the lobby of the theatre without buying a ticket and receive a number, and each Friday night these numbers are drawn from a hat and the one whose number is drawn receives a certain sum of money all the way from $50 up if that person happens to be in the theater or outside of the theater with a ticket entitling him to admission when the name is drawn. It seems to me that this would be a violation of the statute because the number which the individual receives is of no value unless he purchases a ticket to the theater."

You refer us to the opinion in XXIV Op. Atty. Gen. 663, in which it was held that free distribution of cards bearing numbers entitling the holder of a certain numbered card to prize money is not a lottery, a gambling device or a violation of the trading stamp act. In that opinion we cited XXI Op. Atty. Gen. 917, in which it was held that the scheme in question was "not a lottery or a gambling device, because the card is given way. 38 Cyc. 291, 27 Cyc. 979, 999 and IX Op. Atty. Gen. 9."

The difference between the facts stated in the opinion to which you refer and those here is that there no consideration whatever was given for a serial and lucky number, while under the facts stated by you the prize cannot be drawn unless the person has also in his possession a ticket to the theater at the time the name is drawn. Here it is necessary to purchase a ticket in order to be eligible for the prize. A consideration is therefore given for the chance. This is in violation of the laws under the authorities cited.

JEM

Courts — Garnishment — Quasi-garnishment — Legislature — Sec. 304.21, Stats., is applicable to salary of member of legislature for fifteen days next before commencement of session thereof, if such member will not be member of legislature at coming session.

April 20, 1937.

THEODORE DAMANN,
Secretary of State.

You ask whether or not the provisions of sec. 304.21, Stats., will apply to salary due to a member of the legislature for the fifteen days next before the commencement of a session thereof where said member, due to being defeated at the last election, will not be a member of said legislature at its next session.

Sec. 15, art. IV, Wisconsin constitution, provides as follows:

"Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest, nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session."

In a previous opinion of this department, it was held that sec. 304.21, Stats., known as the quasi-garnishment statute, is not applicable to members of the legislature during the session of the legislature in view of sec. 15, art. IV, Wisconsin constitution. XX Op. Atty. Gen. 29. In that opinion the present question was not raised. However, it was there reasoned that it was the purpose of the constitution to protect the legislator's salary for a period of fifteen days before the commencement of the next session, because to fail to do so might make it impossible for such legislator to attend the coming session and the rule therein was based squarely upon that reasoning.

In the present matter that rule will not apply because the facts are different. Here the legislator will not be a member at the coming session. Therefore, we advise that it was the intent of the framers of the constitution that such privilege is not to extend to a legislator who will not be a member of the legislature at the coming session and that sec. 304.21, Stats., will apply to his salary.

AGH

Public Officers — Register of deeds may accept and record instrument in foreign language but is not obliged to do so.

April 20, 1937.

MILTON L. MEISTER,
District Attorney,
West Bend, Wisconsin.

You inquire whether the register of deeds is required to accept and record an instrument in the German language, or whether he may appoint some one to translate the instrument and record the translated instrument of the English language.

It is our opinion that the register of deeds may accept and record such instrument, although he is not obliged to do so.

Sec. 59.57, subsec. (2), Stats., impliedly authorizes, but does not make mandatory, the recording of instruments in a foreign language. This subsection provides a fee of twenty cents per folio "For recording any instrument written in any other than the English language, * * *."

The duties of the register of deeds are created by statute and we know of no statute which imposes linguistic qualifications upon the register of deeds beyond familiarity with the English language. Clearly he is not required by statute to appoint some one to translate the instrument into English in order that the translated document may be recorded. Only the original instrument is entitled to record, and therefore a copy will not be admitted to record. 23 R. C. L. 174.

Many counties have photostatic recording machines which would make that part of the recording simple enough. The difficulty, however, arises in indexing such an instrument. Sec. 59.52 requires the register of deeds to make a general index which, among other things, must carry the name of the grantor in one column and the name of the grantee in another. Also the description of the land and the name of the instrument must be inserted in separate columns.

If the deed is written in German script and the register of deeds is unable to read the same, it would be practically impossible for him to pick out these matters for indexing. We do not believe, however, that he is precluded from recording and indexing such an instrument if he is able to do so because of the permission implied in sec. 59.57, subsec. (2), Stats.

Whether a recorded instrument in a foreign language constitutes constructive notice to subsequent purchasers is a question which we are not called upon to consider here, and we do not wish to be understood as expressing any opinion on that subject.

WHR

Public Health — Slaughterhouses — Under sec. 146.11, state board of health is not charged with jurisdiction over location of co-operative slaughterhouse in city having full-time health officer.

April 26, 1937.

BOARD OF HEALTH.

You have called our attention to sec. 146.11 of the statutes relating to slaughterhouses and state that you have assumed that the matter of location of these establishments in cities such as Milwaukee is primarily under the supervision of the municipal authorities, and that you have also adhered to this view where zoning laws are operative.

Consequently our opinion is asked as to whether local officials or the state board of health should pass upon the location of co-operative slaughterhouses in cities having a full-time health officer, and you state further that, in the particular situation where the question has arisen, the proposed slaughterhouse is not subject to federal inspection and supervision.

It is our opinion that co-operative slaughterhouses in cities having a full-time health officer are not subject to the jurisdiction of your department as to location.

Sec. 146.11, subsec. (2), provides that slaughterhouses not subject to federal inspection and supervision shall be supervised as to location and as to construction and operation by the state board of health.

Sec. 146.11, subsec. (1), among other things, provides:

"* * * The provisions of this section relative to location near a public highway, dwelling or business building shall not apply to central or co-operative slaughterhouses in cities having a full-time health officer. * * *"

There is some ambiguity in the applicability of the above worded exception, in that it appears in subsection (1), but not in subsection (2) of section 146.11, and because the word "location" is modified by the words immediately following which read "near a public highway, dwelling or business building."

However, the exception should be held to apply to the entire section 146.11 and not just to subsec. (1), for the reason that the legislature used the word "section" and not the word "subsection." If it had meant to limit the exception to subsection (1), it could easily have done so, and it would appear that the choice of the word "section" was deliberate rather than accidental.

The fact that the word "location" is modified by the words "near a public highway, dwelling or business building" is of no particular consequence here, and, as far as cities are concerned, would hardly confer jurisdiction upon your board in some instances and deny it in others, because any slaughterhouse within a city such as Milwaukee and located in an area such as is involved in the present instance would necessarily be "near a public highway, dwelling or business building," and hence would come within the wording of the exception.

Lastly we understand that it has never been the policy of your department to exercise jurisdiction in such instances

and this administrative construction of the statute by the department charged with its enforcement is entitled to great weight in interpreting the law. *State v. Johnson,* 186 Wis. 59.
WHR

Taxation — Under sec. 70.555, Stats., clerical error in tax assessment not affecting substantial justice of tax does not vitiate nor invalidate assessment, and county may proceed to assert its rights under tax certificates in same manner as if such clerical error were not present. Sec. 74.455 permits correction of tax certificates held by county.

April 26, 1937.

J. C. RAINERI, JR.,
District Attorney,
Hurley, Wisconsin.

You submit the following letter:

"In the early part of 1931 the West 36 ft. of Lot One Block Four of the original plat of Town A was sold to X by Y. When the taxes were assessed following the sale the West 36 ft. of Lot One Block Four as above described were assessed to X by the town assessor. The assessor at the same time assessed the whole of Lot One Block Four of the original plat of Town A to Y, both of the assessments being made for the tax of 1931. In going over the tax roll for the previous year (1930), that is, prior to the sale of the West 36 ft. to X I find that the total assessed valuation of Lot One Block Four was $1500. In going over the tax roll of 1931 after the sale of the West 36 ft. to X I find that the assessed valuation of the whole of Lot One Block Four is $1150 and the West 36 ft. of said Lot is assessed to X the assessed value being $350. Upon examining the tax roll for 1932 I find that in the assessment of Lot One Block Four the assessed value remains the same as in 1931 to wit: in the sum of $1150, but a notation as follows is contained:

'With the exception of the West 36 ft. of Lot One Block Four'. This assessment being made against Y. In the same roll (1932) the West 36 ft. appears assessed to X and the assessed valuation being in the sum of $350 the same as during the previous year.

"It appears therefore from the above facts that in the 1931 assessment a clerical error was made. The notation (except the West 36 ft. of Lot One Block Four) being omitted in assessing that part of Lot One Block Four still belonging to Y. * * *."

You inquire whether this constitutes a double assessment and whether the tax roll can now be amended to correct the error.

This does not appear to us to be a case of double assessment. Obviously the assessor has made a clerical mistake. The total assessment on the lot has remained the same since the sale of the west 36 feet to X. When assessed as a whole the valuation was $1500.00, and when subsequently assessed in two parcels of $1150.00 and $350.00, respectively, the total assessment remained at $1500.00. Y's property obviously is erroneously described because of the inadvertance and mistake on the part of the assessor in including the west 36 feet therein, in the 1931 assessment. X's property, on the other hand, is correctly described.

Sec. 70.73, subsec. (1), Stats., provides for a method of correcting errors in a tax roll before the taxes are returned as delinquent, and sec. 74.455 provides for a method of reforming incorrect real estate descriptions in tax certificates, but we find no statute authorizing correction of the tax roll after the taxes are returned as delinquent. You have questioned whether sec. 74.455 applies, since the tax certificate corresponds with the tax roll, and you have considered the problem as one of double assessment. We are inclined to believe, however, that sec. 74.455 does not apply, for the reason that there is an incorrect real estate description in the tax certificate to Y's land, although it is true that such tax certificate correctly corresponds with the tax roll. However, if the tax roll is incorrect as to the description, it necessarily follows that the tax certificate is also incorrect, and it would seem that it could be corrected under sec. 74.455 any time between the issuance thereof and the application for a tax deed.

It is our opinion that the clerical error has not affected the substantial justice of the tax, and that X and Y would be without any meritorious defense in case the county were to proceed with any of the usual methods of enforcing collection. Proceedings in the nature of a foreclosure action on the tax certificates are authorized by sec. 75.19, or you could follow the more usual practice of taking a tax deed or deeds, supplementing such procedure by an action to quiet title.

If a tax deed or deeds were obtained, and an action to quiet title were commenced under sec. 75.41, and if X and Y were to defend in such an action, sec. 75.42 would make necessary a deposit of the amount of the tax with the clerk of the court, together with interest at eight per cent from the date of the tax certificate or certificates.

Sec. 70.555, Stats., provides:

"The directions herein given for the assessing of lands and personal property and levying and collecting taxes shall be deemed directory only, and no error or informality in the proceedings of any of the officers intrusted with the same, not affecting the substantial justice of the tax, shall vitiate or in any wise affect the validity of such tax or assessment."

We also call your attention to the following cases denying relief to the taxpayer where the error complained of resulted in placing no greater burden on the taxpayer than he should have borne. *Dean v. Gleason,* 16 Wis. 1, 19; *Miltimore v. Supervisors of Rock Co.,* 15 Wis. 9, 10; *Wisconsin Central R. Co. v. Ashland Co.,* 81 Wis. 1, 9; *Hixon et al. v. Oneida Co. et al.,* 82 Wis. 515, 536; *Wisconsin Electric Power Co. v. Lake,* 186 Wis. 199, 209.

In view of the foregoing, we conclude that X and Y may not escape the payment of taxes which were justly due for the year 1931.

OSL
WHR

Constitutional Law — Public Officers — Tax commission is without power to pass upon constitutionality of tax exemption statute.

April 26, 1937.

TAX COMMISSION.

Our attention is called to ch. 15, Laws 1935. Sec. 2 of this chapter imposes an emergency tax on certain 1934 income, including dividends which would otherwise be deductible under sec. 71.04, subsec. (4), Stats. Sec. 6 of said chapter imposes an emergency tax on all dividends received in 1933. Subsequently, ch. 490, Laws 1935, was enacted. Sec. 4 thereof amends sec. 1 and sec. 6 of ch. 15, so as to exempt certain dividends from the emergency taxes imposed by said sections. This exemption provision reads as follows:

"Dividends received from a Wisconsin corporation, whose income has been taxed under chapter 71 and whose principal business consists of receiving and distributing to its stockholders dividends from a foreign corporation upon stock issued to such Wisconsin corporation in exchange for its assets pursuant to a tax-free reorganization shall not be taxable to such stockholders under this section or under section 6, and any tax paid shall be refunded upon application therefor filed under section 71.17. * * *"

You state that several taxpayers received dividends during 1933 and 1934 from a corporation conforming in all respects to the conditions set out in sec. 4 of ch. 490. When ch. 490 was enacted, a tax had already been paid on these dividends under ch. 15. Pursuant to the provisions of sec. 4, ch. 490, said taxpayers have filed claims for refund of taxes paid on these dividends. The assessor of incomes denied these claims for refund on the ground that the exemption provided for by sec. 4 of ch. 490 was discriminatory and unconstitutional, since to his knowledge, there is only one corporation in the state whose dividends meet the requirements of said exemption provision.

On appeal to the county board of review, the validity of this exemption provision was upheld, and the assessor of in-

comes has appealed to the Wisconsin tax commission. You inquire whether the tax commission has the power to pass upon the constitutionality of this exemption provision.

It is our opinion that the section in question is not open to construction by the tax commission as to constitutionality. The duty of interpreting the constitution and laws of the state rests with the courts and not upon any other officer or department of the state. *State ex rel. Carpenter v. Hastings, State Treasurer,* 10 Wis. 518, 522.

The tax commission is an administrative body, having, like any other administrative body, only the powers which the statute gives it. Nowhere do we find judicial powers, such as would be involved in holding a statute unconstitutional, conferred upon the tax commission. Indeed, any legislative attempt to confer such power on an administrative body would itself be unconstitutional, since the judicial power is vested in the courts under art. VII, Wis. Const. See *Klein v. Barry,* 182 Wis. 255, holding a statute unconstitutional which attempted to confer legislative and judicial power on the railroad commission in violation of the constitution.

In your communication to us you seem to be of the opinion that the provision of the law heretofore referred to is unconstitutional and that someone should, therefore, pass upon its constitutionality. In view of the foregoing opinion we can only suggest to you that in certifying these refunds for payment to the state treasurer you call to his attention the fact that there might be some question about the consitutionality of this law.

OSL
LEV
WHR

Appropriations and Expenditures — Industrial Commission — Unemployment Compensation — Travel expense of members of industrial commission in administering unemployment compensation law is chargeable to unemployment administration fund created by secs. 108.20 and 20.573, Stats.

April 27, 1937.

INDUSTRIAL COMMISSION.

You state that the legislature has provided a general budget for the maintenance of the general functions of the industrial commission, but that the entire expense of the administration of the unemployment compensation law is paid by allotment of federal funds by the social security board.

In the administration of this law members of the industrial commission are required occasionally to travel exclusively with respect to some phase of the administration of the law and you inquire whether such expense may be charged against the unemployment compensation administration fund rather than to the general administration fund of the commission.

We are of the opinion that such expense is properly chargeable to the unemployment compensation administration fund.

Sec. 108.14, subsec. (1), Stats., provides that the unemployment compensation law shall be administered by the industrial commission, and sec. 20.573 appropriates to the industrial commission all moneys paid to it pursuant to sec. 108.20 for the performance of the functions of the commission under ch. 108.

Sec. 108.20 sets up what is known as the "Unemployment administration fund" to finance the administration of the unemployment compensation law. This fund consists of all contributions paid to the industrial commission for the administration fund and of all moneys received for this fund by the state or the commission, including all federal moneys allotted or apportioned to the state or the commission for the administration of the unemployment compensation law.

It is apparent from the foregoing statutes that the expenses of administering the unemployment compensation law, including travel expense of commission members, are chargeable to the "unemployment administration fund."

Sec. 20.57, subsec. (1), Stats., on the other hand, provides an appropriation to the industrial commission for general administration. This is a general statute and, as far as administration of unemployment compensation is concerned, must be considered as superseded by the special provisions of secs. 20.573 and 108.20, which specifically relate to the administration of unemployment compensation. It is a well recognized rule of statutory construction that where there is a statute containing general provisions covering a subject as a whole, and another statute containing a special provision plainly covering some particular part within the scope of such general statute, the special provisions must prevail. *State ex rel. Donnelly v. Hobe,* 106 Wis. 411. See also, *Kollock v. Dodge,* 105 Wis. 187 and *Hite v. Keene* 137 Wis. 625.

We are therefore constrained to advise that, the legislature having set up a special fund for administration of unemployment compensation by the industrial commission, such fund must be used for that purpose rather than the general administration fund of the commission.

WHR

Prisons — Prisoners — Parole — One who was sentenced to life imprisonment and whose sentence has been commuted to twenty-five years must serve at least twelve and one-half years before becoming eligible for parole.

April 28, 1937.

BOARD OF CONTROL.

You state that one A was sentenced to the Wisconsin state prison for the crime of murder, being sentenced to life imprisonment. This woman was later transferred to the

Wisconsin prison for women at Taycheedah. On November 9, 1936 the sentence of this woman was commuted to a term of twenty-five years. You desire our opinion as to when this woman will be eligible to parole.

A person convicted of the crime of murder in the first degree cannot be sentenced for an indeterminate term. It is the duty of the court to adjudge the sentence as provided by statute and, inasmuch as there is only one penalty for murder in the first degree, the court had the power only to sentence the person convicted of such crime to the penitentiary during the term of her natural life.

Sec. 57.06, Stats., provides:

"(1) The board of control, with the approval of the governor, may * * * 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, * * * or who, if sentenced for life, shall have served thirty years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum for which he was sentenced * * * or who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, not deducting any allowance of time for good behavior."

In the instant case the offender was not sentenced under a statute which provided for or authorized an indeterminate sentence. The court, even though it wished, could not sentence one convicted of murder to an indeterminate term. Therefore, that part of the statute which authorizes parole to one who has served the minimum of the indeterminate term cannot be applied in this case.

That part of the statute which authorizes parole to a first offender who is sentenced under a statute imposing a minimum in excess of two years cannot be applied, for the reason that this person was not sentenced under a statute imposing a minimum in excess of two years. If there had been no commutation of sentence, there is no question that under the plain wording of the statute the offender would not be eligible for parole until she had served thirty years of the

sentence. The life sentence was commuted to twenty-five years. No person, as stated before, who has been convicted of murder can be sentenced for an indeterminate term, and the reduction of the sentence from life to twenty-five years did not in any sense change the statute under which sentence was imposed, or change the character of the sentence itself. We must consider the twenty-five year sentence as a definite term.

It follows, therefore, that under the provisions of the statute one who has been sentenced to a term of twenty-five years will become eligible for parole upon her having served at least one-half of the term, that is, one-half of the twenty-five years, not deducting any allowance of time for good behavior.

OSL
LEV

Dogs — Public Officers — Town Treasurer — It is duty of town treasurers to collect dog license fees provided by ch. 174, Stats.

April 30, 1937.

A. J. ASCHENBRENER,
District Attorney,
Stevens Point, Wisconsin.

You request an opinion as to whose duty it is to collect the dog tax and give a receipt therefor under the following conditions: Taxes for the year 1935, now delinquent, were turned over to the district attorney's office in 1937 for collection. The town treasurer refused to collect this tax and give a receipt therefor because the tax was delinquent. He claims it is the duty of the county treasurer to collect this tax. The latter maintains that according to sec. 174.05, Stats., it is the duty of the town treasurer to collect this tax.

You will note by reading sec. 174.05 that the tax referred to is a license fee, which license is to be given to owners of dogs, and it is made the duty of the town treasurer to grant the licenses and receive the necessary fees therefor.

A careful reading of said section and the section following makes it clear that it is the duty of the town treasurer to collect the license fee and issue the license therefor. We find no provision in the statute whereby these uncollected license fees can be turned over to the county treasurer as delinquent. Sec. 174.08, Stats., provides for the paying over of the license fees to the county treasurer monthly by the local treasurer.

It is therefore our opinion that it is the duty of the town treasurer to collect the license fees provided for by ch. 174, Wis. Stats.

OSL
JEM

Contracts — Counties — County Board — Taxation — County board resolution to sell to former owner, lands acquired by county on tax deeds for amount of taxes, interest and penalties, does not constitute valid communicated offer which ripens into binding contract upon tender of payment by former owner, and such resolution is contrary to public policy.

April 30, 1937.

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

You have called our attention to a county board resolution relating to the sale of lands acquired by the county on tax deeds. The resolution reads as follows:

"RESOLVED, By the county board of supervisors of Langlade county, Wisconsin, that any tax delinquent lands to which Langlade county may have acquired title or may hereafter acquire title, through the taking of tax deeds, be upon request and payment made as hereinafter provided by this resolution sold or conveyed to the party or parties who are shown to have been the record owner or owners when such lands first became deedable through tax delinquency, or to the executors, administrators, surviving spouse, heirs, or devisees of such record owner or owners; excepting, however, lands now or hereafter entered under the Wisconsin forest crop law, or lands that are or shall be hereafter contracted to be sold, conveyed or otherwise disposed of by the county. The purchase price to be paid in all cases covered by this resolution shall be as follows: The full amount of taxes on the parcels involved represented by the tax deed, together with interest and all legal charges plus the amount of all outstanding taxes and tax certificates against such parcels, with interest, penalties and charges, as provided by law, plus such sums as may be determined by the land committee to cover the approximate amount of taxes and interest that would have accrued against such parcels for any year or years during which they have been removed from the tax rolls."

You state that a certain parcel of land was acquired by the county on tax deed in 1933, and the county wishes to retain it for county park purposes. The former owner of this land desires to repurchase it in accordance with the foregoing resolution.

We are asked whether the resolution in question is binding upon the county.

It is our opinion that the resolution is not binding upon the county.

To establish liability on the part of the county in a contractual sense, it would be necessary to construe the resolution in question as an offer, communicated to the land owner in question who has accepted the same by his tender of the taxes, interest and penalties.

We do not believe that the resolution can be so construed. It expresses a willingness to sell, but is not made in the form of an offer nor was it communicated as such to the land owner.

"* * * One cannot accept an offer which has not been communicated to him; and, therefore, as a general rule, an uncommunicated offer, whether by words or acts, cannot result in a contract." 13 C. J. 271.

Mere information indirectly received by one party that another is willing to enter into a certain bargain, is not an offer by the latter. Restatement of the Law of Contracts, sec. 23.

Furthermore, and while not basing our opinion particularly on this proposition, we believe there is some question as to whether the resolution may not be void because contrary to public policy in that it tends to encourage tax delinquency and delay in collection of essential governmental revenues. The obvious purpose of the tax deed statutes is to prevent undue delay in tax payments by withdrawing the right of redemption after a certain time. To the extent that the resolution provides even a limited enlargement upon the statutory period of redemption, it would appear to be subversive of sound public policy if it is not actually beyond the powers of the county board, which has only such powers as the statute expressly or impliedly gives it. *Spaulding v. Wood County,* 218 Wis. 224.

WHR

Criminal Law — Marriage — Vacating of judgment or decree of divorce by proper court within one year from entry thereof returns husband and wife to full marital status. Any marriage entered into by either party in another state within said period of one year is null and void and of no effect civilly or criminally in event parties thereto did not at any time cohabit as man and wife in this state.

April 30, 1937.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire, Wisconsin.

You state that A and B were divorced by judgment of the circuit court of Eau Claire county, Wisconsin, on April 17, 1936; that later in the same month of the same year B married C in Waukegan, Illinois; that after the marriage of B and C they did not return to Wisconsin but moved to and resided in the state of Montana; that in November, 1936, B returned to Eau Claire county, Wisconsin, after separating from C; that thereafter the decree of divorce which was entered on the 17th day of April, 1936, was vacated upon proper application of A and B and that since the decree of divorce was so vacated A and B have been cohabiting as man and wife in Eau Claire county although the Waukegan marriage has never been annulled nor have the parties thereto been divorced.

You ask whether or not, considering sec. 351.02, Stats., in connection with secs. 245.03 and 245.04, Stats., B has committed a criminal offense in Eau Claire county.

In effect your problem is this: B has committed acts in the states of Illinois and Montana which, if committed within the boundaries of the state of Wisconsin, would have been in violation of our criminal statutes. Clearly B's act of marrying C, within the one year period, if committed in this state would have violated sec. 351.02, Stats., which deals with polygamy, as the mere act of entering into the ceremony constitutes the offense. Also the act of this man and his polygamous wife of cohabiting in this state would be in

violation of sec. 351.01, the Wisconsin statute dealing with adultery. However, in the present case neither of these acts was committed in the state of Wisconsin. Therefore, it being elemental that to violate a criminal statute of this state the act constituting the violation must be committed within the state, we advise that under the facts stated B is not criminally liable in Wisconsin for any of his acts committed with C.

There is now only one possible question left to answer. Is B in any way criminally liable for cohabitating with A as husband and wife at the present time?

Sec. 245.04, subsec. (1), Stats., in effect provides that marriages such as were entered into between B and C are null and void for all purposes. Therefore, the answer to this question must be "no." The marriage between B and C being null and void for all purposes, B is now in the same position as if he had never entered into the marriage in Illinois and, the decree of divorce between A and B having been legally vacated, A and B are now lawfully husband and wife and have the right to cohabit as such.

We therefore advise that B is in no way criminally liable in the state of Wisconsin under the facts stated.

AGH
JEM

Legislature — Public Officers — District Judge — Legislature does not have power to extend term of office for district judge beyond six-year period.

May 1, 1937.

HONORABLE PHILIP F. LA FOLLETTE,
Executive Chamber.

Ch. 218, Laws 1899, established the district court for Milwaukee county. Sec. 3 of ch. 218, Laws 1899, provides as follows:

"On the first Tuesday of April, 1901, and on the same day of the same month each six years thereafter, the qualified electors of said county of Milwaukee shall elect, in the same manner as is provided for the election of county officers for said county, a suitable person to the office of judge of said district court, to be called 'district judge,' who shall be a resident of said county and an attorney-at-law admitted to practice in the circuit court of Milwaukee county. Such district judge shall hold his office for the term of six years, from the first Monday of May next succeeding his election, and until his successor shall have been elected and qualified, and who may be removed from office for cause in the manner provided by law for the removal of justices of the peace. The resignation of the district judge shall be made to the governor of the state. Whenever a vacancy shall occur in the office of such judge, from any cause whatever, the governor shall appoint a district judge and the person so appointed shall hold for the residue of the term."

Pursuant to the authority contained in said chapter on the first Tuesday of April, 1931, there was elected in the county of Milwaukee a judge for the district court for a term of six years, commencing on the first Monday of May, 1937, and until his successor shall have been elected and qualified. During this term of office sec. 3 of ch. 218, Laws 1899, was amended by ch. 62, Laws 1933. Such amendment affects only the term of office and is as follows:

"Such district judge shall hold his office for the term of six years, from the first Monday of January next succeeding his election, and until his successor shall have been elected and qualified, * * *."

On the first Tuesday of April, 1937, an election was held in the county of Milwaukee and a new judge was elected for this district court, whose term is to commence on the first Monday in January of 1938.

You desire our opinion as to whether or not a vacancy occurs in the office of said district judge on the first Monday of May, 1937, so that it would require the appointment of a judge to preside as the judge of said court from the first Monday of May, 1937, to the first Monday of January, 1938.

Article VII, section 2, of the Wisconsin constitution provides:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. *The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.*"

The term of office for judges of circuit courts in the state of Wisconsin is six years and until their successors are elected and qualified. Under the plain interpretation of the last underlined sentence of the constitutional provision as indicated above, it is very apparent that the legislature does not have the power to prescribe the term of office for an inferior court of a period longer than six years. By the enactment of ch. 62, Laws 1933, the legislature has in effect extended the term of judge of district court elected in April of 1931 from the first Monday of May, 1937, to the first Monday of January, 1938, a period of eight months. In other words, the enactment of ch. 62, Laws 1933, in effect extended the term of the judge who was elected in 1931 for a period of

eight months longer than the term existing at the time of the election. Such extension of the term would, in effect, be giving to the district judge a term longer than that allowed to or provided for the circuit courts. It is our opinion that such extension of the term is a violation of the provisions of the constitution above quoted. We appreciate that the amendment itself does not in express terms extend the regular term of the district court, but the effect of the amendment does extend such term.

In the case of *O'Connor v. City of Fond du Lac,* 109 Wis. 253, at page 268, the court said:

"* * * the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election." Citing *State ex rel. Hamilton v. Krez,* 88 Wis. 135, and the case of *State ex rel. Dithmar v. Bunnell,* 131 Wis. 198.

It is the well settled law of this state that the legislature does not have the power to appoint judges. It is a prerogative of the people as voters to elect their judges and in the event of their failure or inability to elect said judge or in the event of a vacancy, the appointment shall be made by the governor. If the legislature can extend the term of the judge beyond that for which he was elected, the legislature will in effect be appointing the judge, at least for the extended term. It is our opinion, therefore, that the legislature does not have the power to extend the term. We therefore construe the amendment contained in ch. 62, Laws 1933, not merely a designation of the time when the next term shall commence, but actually an extension of the term from the first Monday of May, 1937, to the first Monday of January, 1938.

It is further our opinion that the term of the judge who was elected in April, 1931, terminates on the first Monday of May, 1937, and that inasmuch as the new judge cannot qualify on said date, a vacancy occurs.

We appreciate that by the wording of the statute the term of office of the judge elected in 1931 is for a term of

six years and *until his successor is elected and qualified.* It might be argued that inasmuch as his term is stated as being six years and until his successor is elected and qualified the underlined portion might mean that the judge elected in 1931 shall continue to hold office until January, 1938, at which time the newly elected judge can qualify.

It is our opinion, however, that such phrases cannot be given that interpretation for the reason that the legislature has created a situation, by the passage of ch. 62, Laws 1933, which makes it impossible for any person to qualify until January 1, 1938, even though such person were elected in April of 1937. It is true that if the judge elected on the first Tuesday of April, 1937, was able to qualify but neglected so to do the incumbent in the office would hold over until such time as the newly elected judge saw fit to qualify.

Where the term of office is set out by statute as being for a definite number of years and until a successor is elected and qualified, the person elected to that office takes office for the definite limited term provided by the statute. So long as such person elected to such office within the time limitation of the regular term does not resign or die or be removed from office, no other person is capable of being elected or appointed to the office. However, by virtue of the words "until a successor is elected and qualified," there arises in addition to the regular limited term an extended term which is sometimes known as a "defeasible term." During this time the incumbent holding over does not have the exclusive right to discharge the duties of the office. *State ex rel. Standish v. Boucher,* 56 N. W. 142, 3 N. D. 389.

At any time during this "defeasible term" some other person duly designated by election or appointment, as the case may be, to act as such officer may qualify for the office. By virtue of such possibility which exists at all times during the "defeasible term" the right of the incumbent holding over to discharge the duties of the office may be terminated at any time. However, under the situation presented, during this eight-month period there would be no person who could qualify for this office for the reason that no person was elected for the eight-month term.

It is therefore our opinion, first, that the legislature did not have the power to extend the term of this office and that such term is not extended and, second, that a vacancy exists in the office of the district judge of Milwaukee county on May 1 and that such vacancy may be filled by appointment of the governor.
LEV

Bridges and Highways — State Highways — County board is obliged to appropriate under sec. 83.14, Stats., minimum of two thousand dollars for improvement of prospective state highways only when petition of town is filed at regular meeting of county board next following voting by town of tax for such improvement and obligation of county to make such appropriation is limited to that amount. County is not obliged to appropriate any sum for such improvement where town raises money for such improvement by issuance of bonds.

May 3, 1937.

CHARLES P. CURRAN,
District Attorney,
Mauston, Wisconsin.

You state that a certain town by referendum voted to bond itself for forty thousand dollars to improve all of the highways in the town, of which ten thousand dollars was voted to improve a designated portion of a prospective state highway. Such town has now petitioned the county board under sec. 83.14, Stats., for five thousand dollars as the county's share of the proposed improvement.

Sec. 83.14, Stats., provides:

"(4) No county shall be required to appropriate in any year over two thousand dollars for work in any town or village."

You ask whether the county in acting upon such present petition may appropriate two thousand dollars as its share and thereby relieve itself of any obligation to appropriate

any further sum for the balance of the cost of the proposed improvement, or whether the town may each year hereafter petition the county for an appropriation of two thousand dollars which the county will be obliged to appropriate each year hereafter until the county has appropriated a total aggregate thereby equaling in amount that voted by the town.

Any idea that any money appropriated by the county under sec. 83.14, Stats., would be paid over to the town or be a reimbursement to the town of one-half the amount the town has voted to expend on this improvement, is erroneous. Any appropriation that the county makes under this section is added to the amount appropriated by the town and the total of both appropriations is available for the improvement. The town does not pay for the entire cost of the improvement and then petition the county to reimburse it and pay back to the town some part thereof.

Sec. 83.14, subsec. (2), Stats., provides as follows:

"When a tax has been voted under this section the town board or village board shall petition the county board at its next annual meeting to appropriate at least an equal amount as the county's share of the cost of the proposed improvement. The petition shall designate the highway to be improved and state the character of the improvement and the amount which has been voted therefor."

This subsection says expressly that when a tax has been voted by the town the petition shall be filed at the *next* annual meeting of the county board. This means the next annual meeting *after* the voting of the tax. If the tax was voted this year, then the petition must be filed at the next annual meeting of the county board occurring after the voting of the tax.

See XVIII Op. Atty. Gen. 604, holding that where the county board at the next annual meeting following the voting of a tax by a town, which tax was in excess of two thousand dollars, had a petition filed with it by the town under sec. 83.14, Stats., and the county board thereupon appropriated two thousand dollars for the improvement, it had done all that the statute requires. The opinion states

that such was a final disposition of the petition and the county board was not required at its annual meeting in the following year to appropriate an additional sum of money upon the same petition.

It follows that, a petition having been filed at the next annual meeting, no further petitions can be filed under the statute, because any subsequent annual meetings of the county board necessarily could not be the *next* annual meeting after the voting of the tax. Even if such new petition were filed by the town at a subsequent meeting of the county board no appropriation would be obligatory under sec. 83.14, subsec. (3), Stats., because the county board cannot be compelled to appropriate for a construction that has been completed. V Op. Atty. Gen. 844. You will note that by the express wording of sec. 83.14, subsec. (2), Stats., the petition may be made by the town board only when a tax has been voted and not when the town has voted to raise the money *by bonds*. While subsec. (7) of sec. 83.14, Stats., gives to towns the right to take the initiative in the improvement of prospective state highways by issuing bonds and says the funds produced thereby shall be handled and expended as though raised by taxation, it does not mean that a town may raise funds for such improvements by binding itself and thereby have a right to an obligatory appropriation by the county as provided by subsec. (3) of sec. 83.14, Stats. The reason for this is that subsec. (7) says that such bonds shall be issued subject to the conditions of sec. 67.16, Stats., which provides that such bonds shall not be issued or be valid until the county board at its option has determined to match the same with an equal amount.

As to the first part of your question you are advised that due to the fact that the money for the improvement has been raised by the bonding of the town the county is not obliged under sec. 83.14 to appropriate any money at all. In answer to the second part of your question it is our opinion that even if the money were raised by taxation and the petition filed at the next meeting of the county board, the county might then appropriate the sum of two thousand dollars for the improvement and thereby relieve itself of

any obligation to make any further appropriation and that the county would not be required to make any further appropriation in any subsequent years, either upon the original petition or upon new petitions of the town filed therefor. HHP

Constitutional Law — Works of Internal Improvement — What constitutes "works of internal improvement" as used in sec. 10, art. VIII, Wis. Const., is judicial question. Cases enumerated and classified.

Wisconsin development authority is not empowered by its articles of incorporation and Bill No. 608 A., to use state funds for "works of internal improvement."

Wisconsin development authority may use funds derived from sources other than state for "works of internal improvement" within public utility field.

May 6, 1937.

LESTER R. JOHNSON, *Chief Clerk,*
Assembly Chamber.

By Resolution No. 49, A., the assembly has requested an official opinion on the following questions:

"1. Enumerate the lines of businesses and activities that are embraced within the term 'works of internal improvement' as used in section 10, article VIII, Wisconsin constitution.

"2. Under Bill No. 608, A., and its articles of incorporation, is Wisconsin development authority authorized to engage in works of internal improvement and use state funds therefor?

"3. Under Bill No. 608, A., and its articles of incorporation, is Wisconsin development authority authorized to engage in works of internal improvement, using funds derived from sources other than the state?"

In answering question No. 1 consideration must be given to the term "works of internal improvement" as defined by

the courts in construing the provisions of sec. 10, art. VIII, Wisconsin constitution, and similar provisions in other state constitutions.

The pertinent provision of sec. 10, art. VIII of the Wisconsin constitution is:

"The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; * * *"

In *State ex rel. Jones v. Froehlich* (1902), 115 Wis. 32, at page 38, the court defined "internal improvement" as including "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential function of government. * * *"

Also in *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, at page 79, the court quotes with approval from *Rippe v. Becker,* 56 Minn. 100, as follows:

" 'Works of internal improvement,' as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental function, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government." (Syllabus.)

In the *Donald* case, *supra,* our court approved the following from the *Rippe* case:

"It excludes only such public works as are used by the state in carrying on the affairs of civil government * * *"

The determination of whether a particular activity is an "internal improvement" within such definition is a matter

of judicial decision. *State ex rel. Owen v. Donald* (1915), 160 Wis. 21. Consequently, each case must be determined separately. In view of the foregoing any enumeration of the lines of businesses and activities that are embraced within the term "works of internal improvement" is confined to those cases in which the courts have construed the question.

Our court has held that the following are included within the term "works of internal improvement" as used in the above constitutional provision:

Improvement of Fox River:

Sloan v. State, 51 Wis. 623.

Levees and Drains:

State ex rel. Douglas v. Hastings, 11 Wis. 448;
State ex rel. Jones v. Froehlich, 115 Wis. 32.

While not definitely controlling in Wisconsin, the courts in other states having a similar provision in their constitution, have held the following to be "works of internal improvement":

Bridges:

U. P. R. R. Co. v. Comms. of Colfax Co., 4 Neb. 450;
Freemont Bldg. Assn. v. Sherwin, 6 Neb. 48;
So. Platte Land Co. v. Buffalo Co., 7 Neb. 253;
State ex rel. Peterson v. Kieth Co., 16 Neb. 508;
State v. Babcock, 23 Neb. 179.
County Commrs. v. Chandler, 96 U. S. 205;
United States v. Dodge Co., 110 U. S. 156.

Ditches:

Wallace v. Skagit, 8 Wash. 457.

Grain Elevators:

Rippe v. Becker, 56 Minn. 100, 57 N. W. 331.

Grist Mills:

Blair v. Cuming County, 111 U. S. 363;
Guernsey v. Burlington Township, 4 Dillon (U. S. C. C.) 372;
Township of Burlington v. Beasley, 94 U. S. 310;
Traver v. Merrick Co., 14 Neb. 327, 45 Am. St. Rep. 111;
State ex rel. Perry v. Clay Co., 20 Neb. 452.

Improving the Channel of a River:
Wilcox v. Paddock, 65 Mich. 23, 31 N. W. 609;
Gibson v. Commr. of State Land Office, 121 Mich. 49, 79 N. W. 919;
Ryerson v. Utley, 16 Mich. 269.

Irrigation, Reservoirs and Canals:
In re Senate Resolution, 12 Colo. 285;
Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411;
Perkins County v. Graff, 114 Fed. 441;
City of Kearney v. Woodruff, 115 Fed. 90;
Kieth County v. Citizens' Savings & Loan Assn., 116 Fed. 13.

Levees:
Alcorn v. Hamer, 38 Miss. 652.

Lighting Plants, Water Works, Gas Works and the like:
Cass v. Dillon, 2 Ohio St. 607;
Pattison v. Supervisors, 13 Cal. 175;
Leavenworth Co. v. Miller, 7 Kans. 479, 12 Am. St. Rep. 429.

Macadamized Roads:
People v. Springwells Township, 25 Mich. 153.

Oil Refineries:
State v. Kelly, 71 Kans. 811, 81 Pac. 450.

Pipe Lines for Transportation of Petroleum:
W. Va. Transp. Co. v. Volcanic O. & C. Co., 5 W. Va. 382.

Railroads:
City of Savannah v. Kelly, 108 U. S. 184;
State v. County of Wapello, 13 Iowa 388.

Railroads, Highways, Bridges and Wharves:
Cass v. Dillon, 2 Ohio St. 607;
Pattison v. Supervisors, 13 Cal. 175.

Roads, Highways, Bridges, Ferries, Streets, Sidewalks, Pavements and Wharves, and the like:
Leavenworth Co. v. Miller, 7 Kans. 479.

Street Railways:
Attorney General v. Pingree, 120 Mich. 550, 79 N. W. 814;
Bird v. Detroit, 148 Mich. 71, 111 N. W. 860.

There may be, and in all probability are, other lines of activity within the term "works of internal improvement," but until the courts have so determined any attempt to enumerate them would be highly speculative and of no determinative effect.

The answer to Question No. 2 is that the Wisconsin development authority is authorized to engage in "works of internal improvement," within the public utility field, but that by the provisions of Bill No. 608, A., it is expressly prohibited from using state funds therefor. The authority to engage in such endeavors arises solely from its articles of incorporation and in no manner is derived from Bill No. 608, A.

Sec. 199.03, Stats., as created by sec. 1 of Bill No. 608, A., provides:

"* * * Wisconsin development authority shall use and expend the funds appropriated to it by section 20.514 *solely* for the execution of the following duties and functions * * *." (Italics ours.)

This section then goes on to set out in detail the specific purposes for which the appropriation may be used. This express language prohibits the corporation from expending the appropriation for any other purpose than specifically enumerated.

Sec. 199.02 as created by Bill No. 608, A., provides:

"Wisconsin development authority shall not use or expend any of the funds appropriated to it by the state for any activities or functions which would be repugnant to the constitution if carried on by the state, * * *"

Thus the corporation is prohibited from using state funds for any purpose that the state itself could not use them for. Inasmuch as the state by the constitution is prohibited from engaging in "works of internal improvement," therefore, by the language of the section, the corporation could not use any state funds for such purposes.

While the state may not engage in "works of internal improvement," yet the state may carry on educational or pro-

motional activities in relation to such "works of internal improvement" without violating the constitution. *State v. Raub* (1920), 106 Kan. 196.

Appropriations of state money to private corporations for the carrying on of work in which the public has an interest are common in Wisconsin, as the appropriations to the following illustrate: State historical society, Wisconsin agricultural experimental association, Wisconsin horticultural society, Wisconsin potato growers association, Wisconsin live stock breeders association, Wisconsin cheese makers association, and county agricultural societies.

This practice of appropriating public funds to private corporations for the carrying on of work in which the public has an interest has never been challenged in Wisconsin.

The third question is answered, Yes, but limited to activities in the public utility field by the articles of incorporation, which under sec. 180.07, subsec. (1), Stats., cannot be substantially changed. Opinion by Attorney General Walter Owen, VI Op. Atty. Gen. 819. See also *N. W. Nat. Ins. Co. v. Freedy* (1930), 201 Wis. 51. Sec. 199.02, created by Bill No. 608, A., in addition to the portion heretofore quoted, provides:

"* * * but nothing in this chapter shall be construed to prevent said corporation from using or expending funds which it may derive from other sources than the state to works of internal improvement or such other lawful purposes as it may deem proper."

As previously pointed out the power of the Wisconsin development authority to engage in works of internal improvement is derived solely from its articles of incorporation. The powers of the corporation are specifically enumerated in its articles of incorporation and there is nothing in such articles that prohibits it from using funds derived from sources other than the state in carrying on its functions.

OSL
WHR
HHP

Appropriations and Expenditures — Courts — Costs — Judgment for costs against members of state board of control cannot be paid by state unless such payment is specifically authorized by statute.

May 7, 1937.

THEODORE DAMMANN,
Secretary of State.

You enclose with your communication a certified copy of a judgment in the circuit court for Manitowoc county in the case of John J. Hannan and Mrs. Katherine Sullivan, acting as the state board of control of Wisconsin, plaintiff, against Edward S. Schmitz, acting as county court of Manitowoc county, defendant. You state this has been submitted by the clerk of the circuit court for payment of the amount of the judgment under secs. 285.04 and 20.07 (4), Stats. The judgment is for costs of $33.75.

You inquire whether this is a judgment against the state within the meaning of secs. 285.04 and 20.07 (4), Stats., and if not, whether it can legally be paid out of any other appropriation.

Sec. 285.04, Stats., deals only with the situation where a claim has been presented to the legislature, disallowed by that body, and thereafter, proper suit being brought, a judgment has been entered after trial. In the present matter no claim was filed with the legislature and no action was started against the state by serving a summons and complaint on the attorney general as required by sec. 285.01, Stats. Therefore, sec. 285.04, Stats., referred to in sec. 20.07, subsec. (4), Stats., can not apply.

Neither do the general provisions of the statutes in reference to the collection of judgments against individuals apply. General statutes do not affect the state if they in any way restrict its rights or interest. *Milwaukee v. McGregor,* 140 Wis. 35. It was also held in that case that the state may have full benefit of general laws, but it is not adversely affected by any unless it is so expressly provided. In *Sullivan v. School District,* 179 Wis. 502, the court said that

"general statutes are not to be construed to include, to its hurt, the sovereign." See also *State v. Milwaukee,* 145 Wis. 131.

The courts of this state have consistently held that no costs can be taxed against the state unless authorized by statute. *Baxter v. State,* 10 Wis. 454 at 457, which rule was reaffirmed in the later case of *Frederick v. State,* 198 Wis. 399.

Therefore, as secs. 285.04 and 20.07 (4), Stats. do not apply and as we find no other statute which does apply, we are constrained to advise that you are not authorized to pay this judgment as presented.

JEM
AGH

Counties — County Board — Real Estate — Real Estate Brokers — Taxation — Tax Sales — County board may not lawfully authorize exchange of county-owned lands for other lands to which county already holds title by tax deed.

County officials do not need real estate brokers' licenses in disposing of county-owned tax delinquent lands under sec. 75.35, Stats.

May 7, 1937.

ORVILLE A. DUBOIS,
District Attorney,
Rhinelander, Wisconsin.

You state that Oneida county has taken tax deeds to several thousand descriptions of tax delinquent lands and that the county board at its November meeting authorized the issuance of quitclaim deeds to the former owners of forty-seven descriptions of land and the assigning of tax certificates held by the county to such former owners. The consideration for these deeds consisted of quitclaim deeds to the county of ninety-seven descriptions to which the county

already held title by tax deeds. All of the lands involved in the trade were formerly owned by the grantees named in the deeds from the county.

It is your view that the county has in effect given away forty-seven descriptions of land, and you raise the further question of the necessity of county board members having real estate brokers' licenses. Our opinion on these matters is requested.

Answering the second part of your problem first, it is our opinion that real estate brokers' licenses are not required of county officials in the handling of county-owned lands, since sec. 136.01, subsec. (3), par. (b), Stats., specifically exempts public officers from the operation of the real estate brokers' law while performing their official duties.

The other part of your problem calls for more extended consideration. We do not understand the reason for the action of the county board in conveying the tax delinquent lands in return for quitclaim deeds to other tax delinquent lands to which the county's title has already attached by tax deeds, unless it may be that the county has failed to perfect its tax deeds in the manner provided by law, and that the county board has decided upon the exchange plan as a means of quieting title to certain lands by relinquishing titles to other lands. If such be the purpose of this action by the board we do not believe that this practice can be justified under the statutes.

A county has only such powers as are expressly given or necessarily implied from the statutes. *Spaulding v. Wood County*, 218 Wis. 224.

Sec. 75.35 of the statutes provides for the disposition of lands acquired by a county on tax deed. This section reads:

"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."

This section can hardly be considered broad enough to authorize the county to give quitclaim deeds to lands which it has acquired by tax deeds in return for quitclaim deeds to other lands which the county already owns. To state the matter more concretely, if the county has tax title to tracts which we will call 1 and 2, formerly owned by A, and A executes a quitclaim deed to the county conveying tract 1, in return for a quitclaim deed from the county to tract 2, the transaction amounts at least to remission of the taxes on tract 2 if not an out-and-out gift of such tract. The county has no power to remit valid taxes and it is equally without power to give away county property for private purposes.

In XXII Op. Atty. Gen. 484, in construing sec. 75.35, it was said, p. 487, that the words "to sell and convey" as used in that section contemplated "a present completed sale by receiving cash and delivering a deed which would constitute a muniment of title."

Obviously the transaction here considered falls short of such requirement, and we therefore advise that it may not lawfully be done.

OSL
WHR

Mothers' Pensions — Social Security Law — Under sec. 48.33, subsec. (5), par. (b), Stats., county agency administering aid to dependent children has discretion to determine whether child may receive aid when living in county other than county of legal settlement. Such determination is reviewable to limited extent by state pension department under sec. 49.50, subsec. (4), Stats.

May 7, 1937.

PENSION DEPARTMENT.

Attention George M. Keith, *Supervisor of Pensions.*

In your recent communication you call our attention to sec. 48.33, subsec. (5), par. (b), Stats., which provides in part:

"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. * * *."

You state that in many cases in which aid to dependent children is sought, a child is residing in a county other than that of legal settlement. You ask whether it is within the discretion of the county agency administering such aid to deny aid unless such child moves to and resides in the county of settlement. You also ask whether the state pension department, under the provisions of sec. 49.50, subsec. (4), Stats., has power to review such determination of the county agency.

We assume that the facts submitted relate to dependent children under sixteen years of age. The rights of minor children over sixteen years of age are treated in an opinion rendered by this department on August 14, 1936, and reported in XXV Op. Atty. Gen. 505.

Our laws relating to aid to dependent children are not designed merely to grant the barest necessities of life to dependent children, but are designed also for the purpose of insuring the less privileged children such an environment as will tend to promote healthy and useful future citizens.

XXIII Op. Atty. Gen. 796, 797. It has been a policy of this department to construe such laws liberally in order that the objects thereof may be accomplished. XI Op. Atty. Gen. 693, 694. Bearing these principles in mind, we proceed to analyze your question.

As stated, sec. 48.33 (5) (b) provides that a child may, with the approval of the court, reside and be cared for outside of the county of settlement while receiving aid. It is our opinion that the words "with the approval of the court," are equivalent to the words, "in the discretion of the court." When discretion is so given to an administrative body, it does not mean an absolute discretion. The law presumes that the agency will follow the dictates of deliberate judgment, based upon all the circumstances and the purpose of the law involved. It follows that the discretion to be exercised under said provision is not one based upon whim, fancy or caprice. Thus, the agency must consider the facts of each case. Such facts will necessarily include the home and living arrangements for the children in and out of the county of settlement, the difference in the amount of aid needed for the various living arrangements, and the people with whom the child will be living in each possible circumstance. The discretion of the agency is, therefore, very broad.

You also ask whether the state pension department may review the determination of such agency.

It is our opinion that sec. 49.50 (4), Stats., gives the board power of review. The nature of the board's reviewing power has been discussed in XXV Op. Atty. Gen. 202 and 505. We are of the opinion, however, that such power of review is very limited. If the testimony discloses facts and evidence which might reasonably lead a person of mature judgment to the determination rendered, the board should not alter such determination. If there is any evidence to sustain the findings made, the board should not disturb such findings. The board should act only if the determination made is based on no evidence whatsoever or is clearly the result of arbitrary and unreasonable action.
LEV

Counties — County Board — Taxation — Tax Sales — County board is not authorized to give land obtained by tax deed to state or any agency thereof for military purposes without compensation.

May 10, 1937.

RALPH M. IMMELL,
Adjutant General.

You state that the Wisconsin national guard wishes to procure certain described property which is held by Juneau county under tax deeds. In connection therewith you ask whether this land may be given to the state and the Wisconsin national guard for military purposes, and if not, how much must be paid for such land.

Sec. 75.36, Wis. Stats., provides that tax deeds to counties shall have the same force and effect as tax deeds to private individuals. XXIII Op. Atty. Gen. 269, 271. From this it might appear that the county would be able to give land secured by tax deed without charge to the state and Wisconsin national guard for military purposes. However, it must be remembered that counties have only such powers as are given or necessarily implied by statute and may do only those things authorized by law. *Frederick v. Douglas County,* 96 Wis. 411; *Spaulding v. Wood County,* 218 Wis. 224.

Nowhere in the statutes is a county board authorized to give land secured by tax deeds to the state or any agency thereof for military purposes. In the absence of such a statute, it is clear that Juneau county would have no authority to give land secured by tax deed to the Wisconsin national guard for military purposes.

In providing for the disposal of lands acquired by tax deeds, sec. 59.08, subsec. (19), Stats., provides that the county board may delegate the power to *sell* such lands to a particular committee. Again, it is provided by sec. 75.35, Stats., that county lands acquired by tax deeds may be *sold* by the county clerk or treasurer. A sale ordinarily implies that the property involved shall be transferred for a consideration—not given away.

Sec. 75.36, Stats., provides for the sale of county land acquired by tax deed. In construing this section this department held that the county board has broad discretion as to how much such lands shall be sold for. XIX Op. Atty. Gen. 550; XXII Op. Atty. Gen. 79; XXIV Op. Atty. Gen. 19, 21; *Spooner v. Washburn County*, 124 Wis. 24, 33. See also, XXII Op. Atty. Gen. 387. This office could not determine how much the Wisconsin national guard must pay for the land involved. That is a problem that must be worked out by that agency and Juneau county.
LEV

Criminal Law — Legislature — Lobbying — Sec. 346.20, Stats., relating to registration of lobbyists, applies only to persons employed to influence legislation and does not apply to chairman of legislative committee of non-commercial voluntary association of newspaper publishers where such chairman is not employed by such association and does not receive compensation from it. Neither does it apply to attorneys for such league who merely advise as to pending legislation and who do not attempt to influence legislature.

May 11, 1937.

THEODORE DAMMANN,
Secretary of State.

You have inquired whether registration under the lobby law is required where a non-commercial voluntary association of newspaper publishers elect a legislative committee to watch legislation. The chairman of the committee sends out bulletins to each member of the league, appears at committee hearings of the legislature, and sends messages and briefs to members of the league, although he is not an employee of the league and receives no compensation other than expenses.

It is our opinion that neither such an association nor the chairman of its legislative committee is subject to the lobby registration law. Sec. 346.20, Stats., requires registration by any person, corporation or association which employs any person to act as counsel or agent to promote or oppose legislation affecting the pecuniary interests of any individual, association or corporation as distinct from those of the whole people of the state. This section also makes it the duty of the person so employed to register as lobbyist.

The element of employment appears throughout this statute, and it is quite evident that in the absence of such relationship the statute does not apply.

You also inquire as to the attorneys for such league who appear at no committee hearings, attempt to influence no legislation, and who have been instructed to do no lobbying, although they have drafted legislation which has been introduced through other sources and have written opinions concerning the constitutionality of various bills introduced.

We are likewise of the opinion that the lobbying statutes do not apply to such attorneys, who apparently do not come in contact with the legislature and who do not seek to influence it in any way.

This department has heretofore ruled that the provisions of the lobbying law apply only to persons employed by special interests to influence legislation for a pecuniary consideration. I Op. Atty. Gen. 187.

WHR

Courts — Criminal Law — Sunday Law — Public Officers — Justice of the Peace — Police Officer — Under sec. 256.15, Stats., justice of peace may not set bail on Sunday or legal holiday set out in statute.

Police officer may not take from one who has been arrested cash bond to be forfeited for nonappearance at appointed time.

May 12, 1937.

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

You inquire whether a justice of the peace may set bail on Sunday or on holiday.

Sec. 256.15 Stats., provides:

"No court shall be opened or transact business on the first day of the week, the fourth day of July, Christmas or the day on which any general election shall be held unless it be for the purpose of instructing or discharging a jury or of receiving a verdict and rendering a judgment thereon; but this section shall not prevent the exercise of the jurisdiction of any magistrate when it shall be necessary, in criminal cases, to preserve the peace or arrest offenders. * * *"

Although the "Sunday blue laws" (secs. 351.46 to 351.49, Stats. 1931) were repealed by ch. 74, Laws 1933, such repeal did not destroy the effectiveness of sec. 256.15 Stats.

In our opinion a justice of the peace may not set bail on Sunday or a holiday mentioned in the above statute. See a former opinion, III Op. Atty. Gen. 797, which we approve.

You also ask if a police officer may personally on a Sunday, holiday, or any other day when a justice is not available take a cash bond from one who has been arrested, to be forfeited if the defendant does not appear at the appointed time.

The granting of bail and fixing of amount thereof is a judicial function. 6 C. J. 971, sec. 194; 982, sec. 209.

In 6 C. J., at page 979, sec. 205, the general rule is stated:

"A sheriff has no power to admit to bail, except in so far as he is authorized to do so by statutory enactment, and then only in the cases authorized in the statute, * * *."

Sec. 82.07, subsec. (1), Stats., providing for the appointment of special highway patrolmen, contains the following:

"* * * No such officer shall receive or accept from or for any person he has arrested, any money or other thing of value, as or in lieu of bail, or for the person's appearance before a court or magistrate, or to cover or be applied to the payment of fines or costs, or as a condition of such person's release."

In reference specifically to violations of ordinances, etc., of a village, sec. 61.62, subsec. (1), Stats., provides:

"In all villages having a police department when a person is arrested and the offense charged is for the violation of any ordinance, rule, regulation, resolution or by-law of any village, the chief of such police department may take from the person arrested a recognizance, with sufficient sureties or his own personal recognizance upon depositing with such officer the amount thereof in money, for his appearance at the court having cognizance of the offense."

See sec. 60.29, subsecs. (8) and (21), in reference to town officers.

We find no statute which authorizes an officer of any kind to set and take bail where the offense is the violation of a criminal statute, and therefore it is our opinion that a police officer may not personally take from one who has been arrested for criminal offense a cash bond to be forfeited if appearance is not made at an appointed time.

HHP
JEM

Public Health — Plumbing — All work dealing with providing of safe, pure water for human consumption and disposition of water so used must be performed by licensed plumber.

May 13, 1937.

BOARD OF HEALTH.

You have requested an opinion as to what constitutes plumbing work as it relates to water supply piping in connection with plumbing fixtures, appliances and appurtenances under ch. 145 of the Wisconsin statutes and the rules and regulations adopted by the Wisconsin state board of health pursuant thereto.

It appears from correspondence submitted to us in connection with your request that some division of opinion has arisen in Milwaukee between city officials, plumbers and steam fitters.

It is not the function of this department to settle jurisdictional disputes between plumbers on the one hand and steam fitters on the other hand, except in so far as we are asked by your department to construe the provisions of ch. 145.

Any interpretation of ch. 145 of the Wisconsin statutes and the question asked must be approached from the standpoint of the purpose or intent of the legislature in enacting this law. The chapter of the statutes dealing with the subject of plumbing represents an exercise of the police power of the state in the interest of public health. It indicates a desire or purpose on the part of the legislature to insure to the people of this state a safe water supply in so far as the proper regulation of plumbing can attain that end. The legislature realizes that it is not sufficient that an abundant supply of pure water be made available at its source or at the place where it is gathered for further distribution. The legislature recognizes that this water must be transported or lead to such places where it can be made of use to the consuming public. In the transportation of this water it is necessary that all contrivances used in such transportation be of such material and be so installed that the water can-

not become contaminated from any source whatsoever. Contamination in the process of distribution is just as harmful as the contamination of the water at its source. In modern practice it means that the water which has been purified or prepared in the main waterworks must be conducted along pipes into homes, buildings and eventually to the fixture or spigot which delivers the water for human consumption or use. During all this time the water must be kept free from any contaminating forces. In an attempt to insure this pure water supply at the place where it is needed for human use, the legislature enacted ch. 145 of the Wisconsin statutes. We are particularly interested in sec. 145.01 of the statutes, which purports to define the term "plumbing." Sec. 145.01, subsec. (1), Stats., provides:

"(1) In this chapter, 'plumbing' means and includes:

(a) All piping, fixtures, appliances and appurtenances in connection with the water supply and drainage systems within a building and to a point from three to five feet outside of the building.

"(b) The construction and connection of any drain or waste pipe carrying domestic sewage from a point within three to five feet outside of the foundation walls of any building with the sewer service lateral at the curb or other disposal terminal, including private domestic sewage treatment and disposal systems and the alteration of any such system, drain or waste pipe, except minor repairs to faucets, valves, pipes, appliances and removing of stoppages.

"(c) When so provided by local ordinance, the water service piping from a building to the mains in the street, alley or other terminal and the connecting of domestic hot water storage tanks, water softeners, water heaters with the water supply system.

"(d) The water supply piping and plumbing appliances including the water pressure system other than municipal systems as provided in chapter 144.

"(e) A plumbing and drainage system so designed and vent piping so installed as to keep the air within the system in free circulation and movement, and to prevent with a margin of safety unequal air pressures of such force as might blow, siphon or affect trap seals, or retard the discharge from plumbing fixtures, or permit sewer air to escape into the building."

The work of the plumber consists of installing all piping, fixtures, appliances and appurtenances in connection with the water supply and drainage systems within a building and to a point from three to five feet outside of the building. In other words, it is the plumber's work to bring safe pure water from its source, wherever that may be, to the particular fixture or spigot in the building which delivers it for use. After said water has become contaminated it is the work of the plumber to remove this water from the premises and to install such appliances and fixtures which will remove such used water from the premises in a sanitary manner and eventually deliver such used water to the sewage system. We must bear in mind that the plumber deals almost entirely with the ultimate delivery of water for human use and the disposal of that water after it has been so used. If we keep that fundamental idea in mind we should have no difficulty in determining just what detail work actually falls within the jurisdiction of the plumbers. It is the plumber's duty to so install the pipes and fixtures that it is impossible for any unsafe water to come in contact with the pure or safe water.

One who is not a licensed plumber is not authorized to install pipes or fixtures which are installed for the purpose of furnishing safe water for human consumption and removing the water so used. We do have in mind, however, that there is a slight exception contained in subsec. (b) of sec. 145.01 (1) which does permit the making of minor repairs to faucets, valves, pipes, appliances and removing of stoppages. Any connection made with the water system which contains the safe water for human consumption should be made by a licensed plumber. For the same reason any connection made with the sewage disposal pipes or system of water so used should be made by a licensed plumber. The term "plumbing" is defined in the plumbing code of the National Association of Master Plumbers as follows:

"Plumbing, in its broadest sense, is the science of creating and maintaining sanitary conditions in buildings where people live, work or assemble, by providing permanent means for a supply of safe, pure and wholesome water, ample in volume and of suitable temperatures for drinking,

cooking, bathing, washing and cleaning, and to cleanse all waste receptacles and like means for reception and speedy and complete removal from the premises of all fluid or semi-fluid organic wastes and other impurities incident to human life and occupation.

"Plumbing, in a mechanical sense, is the art of installing in a building the pipes to provide the water supply, apparatus for its control and handling, fixtures, and appliances to receive wastes or surplus water, the soil, waste, drain and sewer system for removing the waste or surplus water, traps to prevent sewer air from entering the occupied portion of the building, ventilating pipes to protect the trap seals and provide for a cleansing circulation of air throughout the plumbing system, leaders and roof, court and area rainwater drainage system. * * *."

There are many appliances, and pipes, fixtures, etc., connected and used therewith, which use water and which have been installed by persons other than plumbers for many years. The trade of the steam fitter, of those who install sprinkling systems, heating systems, air conditioning systems, and industrial piping, which use water, is well defined. This work can be installed by persons other than plumbers just so long as the water used in the systems is not for human use or consumption. Under these circumstances it is not necessary for a licensed plumber to install this work. It is our opinion, however, that whenever these systems and their appliances are connected with pipes containing the pure and safe water supply, the immediate connection to the pure or safe water shall be made by a licensed plumber, so as to make it impossible for any water which would be considered unsafe to come in contact with the safe water. As stated before it is the purpose of the statute to insure a safe water supply for human consumption, and anything that deals with the furnishing of such safe water supply must be performed by a licensed plumber, and all other work may be performed by others who may not necessarily be plumbers.

Except as above pointed out, this leaves free to steam fitters and others the field of piping water for industrial uses after it leaves the safe water supply and beyond the point where there is any possibility of such polluted water

getting back into the safe water lines by gravity, back siphonage or otherwise.
LEV

Dogs — Damage by Dogs — Claimant for damage done by dogs who has received his just proportionate share of any moneys in dog license fund for year in which loss was sustained, although such amount was less than full amount of his claim as allowed, cannot collect his unpaid balance from license moneys collected in ensuing year.

May 15, 1937.

WILLIAM K. MCDANIEL,
District Attorney,
Darlington, Wisconsin.

You submit a question concerning the interpretation and the rights of a person claiming damages under sec. 174.11, Wis. Stats. Mr. X obtained the allowance of a claim by the claims committee for damage done to his cattle by dogs. After the allowance of all claims there was not a sum sufficient in the fund, derived from the collection of dog taxes, to pay the claims in full. The claims were therefore prorated, and X received sixty-seven per cent of his full claim. X now desires to appeal from the decision of the claims committee to the circuit court. In the event he obtains a judgment, he will then cash his check for the sixty-seven per cent and collect the balance out of the dog license fund which will be created the following year.

Sec. 174.09, Wis. Stats., provides that the license fees shall be kept by the county treasurer in a separate fund and paid out for specific purposes. Included in these purposes is the paying of claims allowed by the county board to owners of live stock which have been injured by dogs. Subsec. (2) provides that any surplus in excess of one thousand dol-

lars which may remain from the license fees of any license year on March 1 of the succeeding year shall belong and be returned to the towns, cities and villages.

It is our opinion that the license money collected each year shall be used only for damages and claims allowed during that year; that the claims of one year or any part of them cannot be held over to the next year and paid out of the fund obtained during said succeeding year. Each year must be considered as a separate period, and in the event that the amount collected for fees is not sufficient to pay all of the claims for damages done, the amount awarded must be prorated and payments made in proportion to the amount of money in the fund. The claim of X is limited to the fund itself. There is no general liability against the county for damage done to cattle by dogs.

It is therefore our opinion that X could not collect a judgment against the county out of funds derived from dog taxes during years subsequent to the time the original damage was done and the claim allowed.

LEV
AGH

Fish and Game — Wholesale Fish Markets — Under facts stated party selling fish is not wholesaler within contemplation of sec. 29.135, Stats.

May 18, 1937.

LEWIS C. MAGNUSEN,
District Attorney,
Oshkosh, Wisconsin.

You advise that one A operates a retail fish market located in Neenah. He sells fish to the local hospital, the Valley Inn (a hotel), and to a few restaurants. In all these cases there are no standing orders. He is called whenever they are in need of fish. The order may vary from two to about twelve pounds. These customers are fairly regular,

and buy somewhat more than the regular run of trade, and are given a slight discount. He also sells to tavern keepers in larger quantities to supply "fish night" trade. These sales are also made with a discount.

You ask whether A is operating a wholesale fish market or fish house within the meaning of sec. 29.135, Stats., which requires that he obtain a license as a wholesaler from the conservation commission.

Sec. 29.135, Stats., provides:

"(1) Every person who deals in fish by operating a wholesale fish market or fish house shall secure a license from the state conservation commission, subject to the provisions of section 29.09. * * * *."

This statute gives no definition of wholesaler. This department has twice ruled upon this statute, but the question discussed in those opinions is not decisive of the question submitted by you. See XVII Op. Atty. Gen. 63; X Op. Atty. Gen. 787. It is, of course, understood that all words and phrases in the statute must be construed and understood according to the common and approved usage of the language, and the statute, being highly penal, is to be construed in favor of the citizen and against the sovereign.

In 8 Words & Phrases (1st series) p. 7450 a wholesale dealer is defined as follows:

"A wholesale dealer is one whose business is the selling of goods in gross to retail dealers, and not by the small quantity or parcel to consumers thereof. State v. Lowenhaught, 79 Tenn. (11 Lea) 13, 14; Webb v. State, 79 Tenn. (11 Lea) 662, 665."

In 7 Words & Phrases (3d series), p. 1002 is the following:

"A 'wholesaler' is one who buys in comparatively large quantities, and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a 'jobber,' a sort of middleman, or to a 'retailer,' who sells to the consumer. The quantities bought by the wholesaler may vary from a fraction of a car load to

many car loads; it being the character, not of his buying, but of his selling, that marks him as a wholesaler." Citing *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (C. C. A. N. Y.), 227 F. 46, 47.

Under the facts stated in this case, although A sells in larger quantities when selling to hospitals, hotels, taverns and restaurants than one selling to individuals, he is nevertheless selling only to consumers. In all these instances the sale is for consumption and not for resale at retail.

We are therefore of the opinion that A is not a wholesaler within the ordinary definition of that term and is not required to obtain a license under sec. 29.135, Stats.

OSL
JEM

Automobiles — Corporations — Motor Transportation — Operation of truck, under facts here presented, constitutes operation thereof as contract motor carrier.

May 19, 1937.

PUBLIC SERVICE COMMISSION.
Attention William M. Dinneen, *Secretary.*

You state that a prosecution upon your complaint has been commenced against one A in Milwaukee county for operating a motor vehicle as a contract motor carrier without authority therefor and in violation of ch. 194 of the statutes.

It appears from your statement that the said A has entered into an agreement with a certain coal company, which we will designate as B. A is designated in this agreement as the lessor, and B as the lessee. By the terms of this agreement the lessor agrees to lease to the lessee a certain truck, and the lessee agrees to rent the said truck for a period of one year upon terms to be agreed upon every three months. The lessor is to be employed by the lessee and is to

operate this truck, and is to receive as compensation a sum determined on a per ton basis in accordance with the agreement made every three months. The lessor shall be protected by the compensation policy of the lessee and the lessor shall maintain liability, fire and theft insurance on the said truck. The lessor is to operate this truck under the permit granted by the commission to the lessee, B.

It is your contention that A is in fact a contract carrier.

It is our opinion that the actual relationship between the parties is not that of a lessor and lessee or employer and employee, but that A is in fact a contract carrier. The court before whom this action is to be tried may very well find from the evidence that the so-called agreement is used merely as a subterfuge to avoid the necessity of A obtaining a contract carrier's license pursuant to the provisions of ch. 194, Stats.

If the court so finds that said purported agreement is merely a subterfuge, it would then necessarily follow that the lessor, A, has violated the provisions of ch. 194 in failing to have a license to operate as a contract motor carrier. This is a matter of fact, however, which must be determined by the court. The court is not bound to construe the so-called agreement literally, but may go behind this purported agreement and determine the real facts and particularly the intention of the parties.

It is, therefore, our suggestion that the matter be submitted to the court for final determination and that the state may very well take the position that this purported agreement is nothing but a subterfuge, and that A has violated such provisions of ch. 194 as are applicable.

LEV

Indigent, Insane, etc. — Poor Relief — Wisconsin Statutes — Procedural statute may be applied retroactively.

May 22, 1937.

CHARLES D. MADSEN,
District Attorney,
Luck, Wisconsin.

Subsec. (8a), par (a), sec. 49.03, Stats., provides for the collection of claims against counties for relief given to residents of said county or township by another county or township. You state that this section was part of ch. 453, Laws 1935, and that it expires July 1, 1937. Several actions have been started under this chapter against Polk county for claims prior to passage of this act.

You desire to know whether the procedure provided for by subsec. (8a) (a) of sec. 49.03 may be used in cases where the claim has accrued in its entirety prior to the passage of the act.

Ch. 453, Laws 1935, does not change the substantive law, that is, it does not in any manner alter or modify the liability of the governmental unit for the relief of its residents. It deals entirely with the procedure to be followed in order to determine the rights of the respective governmental units.

It is well settled that a law which merely changes the procedure and affects no substantive rights may be applied retroactively, *State ex rel. Sheldon v. Dahl,* 150 Wis. 73; *Read v. City of Madison,* 162 Wis. 94; *Stone v. Little Yellow Drainage District,* 118 Wis. 388.

It is therefore our opinion that the procedure provided by subsec. (8a) (a) of sec. 49.03 may be applied, even though the claims on which they are based may have accrued prior to the enactment of this section of our statutes.

OSL
LEV

Counties — County Board — County has no power to erect, supervise or maintain museum, even though funds therefor are supplied by gifts or donations. Such power may be granted by appropriate legislation.

May 24, 1937.

CHARLES K. BONG,
Assistant District Attorney,
Green Bay, Wisconsin.

You state that a museum is being promoted in your county and that it is contemplated that it is to be erected on property owned by Brown county. The cost of its erection is to be paid entirely by gifts or donations. You ask:

"1. Has the Brown county board of supervisors power, direct or implied, to construct such a museum on county property if sufficient funds are raised for such purpose?

"2. Has the Brown county board of supervisors power, direct or implied, to supervise such museum and pay for its upkeep out of county funds?

"3. If the board has such power in question, would it first be necessary to have sufficient funds raised for the supervision and upkeep of such museum?"

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. *Frederick v. Douglas County, et al.*, 96 Wis. 411; *Spaulding v. Wood County*, 218 Wis. 224; XXI Op. Atty. Gen. 531, XXV Op. Atty. Gen. 379, 532 and opinions therein cited. The general powers of the county board are outlined in sec. 59.07, Stats., and the special powers of the board are given in sec. 59.08, Stats.

An analysis of these two sections of the statutes does not disclose that the county board has the power, either express or implied, to construct, supervise or maintain a museum, even though the funds therefor are supplied by gifts or donations. We find no other statute which grants this power. Therefore it is our opinion that the Brown county board does not have the power, express or implied, to construct,

operate or maintain a museum and your first two questions are accordingly answered in the negative. We may add that such power however can be granted by appropriate legislation.

OSL
AGH

Intoxicating Liquors — Trust Funds — Common School Fund — Under sec. 176.62, subsec. (2), Stats., only net proceeds of confiscation of illicit liquor and personal property used in connection therewith are credited to common school fund.

May 26, 1937.

LAND DEPARTMENT.

You have called our attention to sec. 176.62, Stats., relating to confiscation of illicit liquor and personal property used in connection therewith, and you inquire whether the gross proceeds should be deposited in the school fund or whether the net proceeds after payment of liens on such confiscated property should be so deposited.

The statute clearly provides that the latter practice should be followed.

Sec. 176.62, subsec. (2), Stats., provides in part:

"* * * The state treasurer or such agent, after deducting the expense of keeping the property and the costs of the sale, shall pay all liens according to their priorities, which are established, by intervention or otherwise, in the proceedings for conviction as being bona fide and as having been created without the lienor having notice that such property was being used or was to be used in connection with such violation, *and shall pay the balance of the proceeds into the state treasury where said balance shall be credited to the common school fund.* * * *."

It is obvious from reading the foregoing statute that the words "balance of the proceeds" refer to the net proceeds remaining after deduction of the expenses of keeping the property, the costs of the sale, and the payment of liens.
OSL
WHR

Banks and Banking — Public Deposits — Unemployment Compensation — Industrial commission may pay public deposit insurance charges on funds included in "Unemployment Administration Fund" and in "Unemployment Trust Fund." Such charges should be taken from "Unemployment Administration Fund" created by sec. 108.20, Stats.

May 27, 1937.

BOARD OF DEPOSITS.

You have inquired whether the industrial commission may make payments to the state deposit fund on account of deposits made with the state treasurer or Wisconsin banks of funds coming to the industrial commission under the provisions of Wisconsin statutes relating to unemployment insurance.

Sec. 108.16, subsec. (10), Stats., provides, in part:

"All moneys held by and received in the fund shall promptly upon such receipt be deposited in (or invested in the obligations of) the 'Unemployment Trust Fund' of the United States, * * * While the state has an account in the 'Unemployment Trust Fund,' no part of the fund created by this section shall at any time be subject to any Wisconsin public deposit insurance charge, other statutory provisions to the contrary notwithstanding. During such time, moreover, the premiums on surety bonds required of the fund's treasurer under this section, and any other expense of administration otherwise payable from the fund's interest earnings, shall be paid from the administration fund."

While this section definitely provides that public deposit insurance charges may not be paid out of the Unemployment Trust Fund, it likewise provides that administration expenses shall be paid from the administration fund.

Sec. 108.16, subsec. (4), provides that the handling of moneys paid in under ch. 108 shall be under the direction of the administrative body designated by the legislature to administer this chapter. This section provides, in part:

"Consistently with subsection (10) of this section, all contributions payable to the unemployment reserve fund shall be paid to the industrial commission, and shall promptly be deposited by the commission to the credit of the unemployment reserve fund, with such custodians as the commission may from time to time select, who shall hold, release, and transfer the fund's cash in a manner approved by the commission. * * *."

Also sec. 108.20, subsec. (1), makes provision for an "Unemployment Administration Fund" with which to finance the administration of the unemployment compensation law and to carry out the provisions and purposes of ch. 108.

It would, therefore, follow that any expense incidental to the management of moneys paid in under ch. 108 may properly be classified as an administrative expense, payable in accordance with the provisions of sec. 108.16, subsec. (10), from the administrative fund set up by sec. 108.20, subsec. (1).

Furthermore, it was intended by the legislature that all public moneys coming into the hands of officials of the state and deposited by them in banks should receive the protection of the insurance on public deposits provided for in ch. 34.

"Ch. 34, Stats., was enacted to secure adequate protection by means of a system of state insurance of all public moneys coming into the hands of any official of this state or one of the subdivisions of the state and deposited by him in a bank." XXIII Op. Atty. Gen. 837, 838.

"It is apparent that the dominant purpose of the legislature was to include all public moneys within the provisions of chapter 34." XXI Op. Atty. Gen. 127, 130.

In addition to this general intent of the legislature that all public moneys paid into the state be afforded the protection of ch. 34, the legislature has indicated in sec. 108.16, subsec. (6), their expectation that moneys paid in under ch. 108 be given such protection.

Sec. 108.16, subsec. (6), Stats., provides in part:

"* * * Any public deposit insurance charges payable by the fund under chapter 34 shall be duly charged against interest earnings."

When sec. 108.16, subsec. (10), was amended to provide that public deposit insurance charges should not be paid out of the Unemployment Trust Fund, the legislature did not further provide that public deposit insurance charges should not be paid at all. Since the legislature did not show any indication that it had changed its intention that all public moneys should receive the protection given under ch. 34, that intention may be assumed. It would, therefore, follow that since public deposit insurance charges cannot be paid out of the "Unemployment Trust Fund," they may be paid, by implication, out of the "Unemployment Administration Fund."

Your inquiry is directed towards the problem as it existed prior to the enactment of ch. 95, Laws 1937, as well as to future payments, and the foregoing discussion relates to charges accruing prior to the passage of ch. 95. We might add that ch. 95, which was just recently enacted, will clarify the situation as to future protection of unemployment compensation funds and charges therefor by your board, since the last two sentences in sec. 108.16, subsec. (10), have been amended to read:

"While the state has an account in the 'Unemployment Trust Fund, '* * * public deposit insurance *charges on the fund's balances held in Wisconsin banks* * * *, the premiums on surety bonds required of the fund's treasurer under this section, and any other expense of administration otherwise payable from the fund's interest earnings, shall be paid from the administration fund."

OSL
WHR

Appropriations and Expenditures — Constitutional Law — Trust Funds — Common School Fund — Collection charges by banks on interest coupons belonging to state trust funds under sec. 2, art. X, Wis. Const., are chargeable to income rather than to principal.

Office expenses in administering such funds are not deductible from funds.

May 27, 1937.

LAND DEPARTMENT.

You advise that it is the practice of the state treasurer in the collection of interest coupons on bonds constituting a part of the common school fund to forward these coupons for collection to various banks which have state funds on deposit. These banks in turn forward the coupons to the debtor corporations for payment and receive the full amount of the interest due. Although the banks remit the full amount collected to the state treasurer, since March 1, 1937, they have been forwarding a bill covering their charges for these collection services.

You first inquire whether these collection charges rendered by the banks may be deducted by you out of the principal of the common school fund before remittance is made by you to that fund.

Sec. 2 of art. X of the Wisconsin constitution makes provision for a common school fund.

In the referee's report making an accounting as to trust funds and lands in the case of *State ex rel. Owen v. Donald*, 162 Wis. 609, it was said at p. 645:

"* * * Construing the constitution as I have, as requiring the state from its general funds to take care of and administer its constitutional trust funds, and not at the expense of the principal of the fund, I have not considered any disbursement made from the general or forest reserve fund in whole or in part for the protection and care of the constitutional trust fund lands as chargeable to such trust fund within the intent and meaning of the opinion of the court. * * *."

The report of the referee in this case, with certain exceptions not material here, was confirmed by the court, and clearly demonstrates that the expenses of administration of state trust funds are not chargeable to the principal of such funds.

It is our opinion that the coupon collection charges are chargeable to income rather than to principal, as no payment is made out of any funds under your control. The deduction is made before the net proceeds are accounted for by the banks and, presumably, the banks would not render the collection service without being paid. The only alternative would be to forward coupons directly to the debtor corporations and thus avoid the collection charges of the banks.

You have also inquired whether administrative office expenses incurred in administering the common school fund are deductible from the funds.

We believe this question is answered by the case of *State ex rel. Owen v. Donald, supra,* which holds that such expenses are not chargeable to such funds.

Furthermore, sec. 20.19 of the statutes makes an appropriation from the general fund to the commissioners of public lands for the execution of their functions. This appropriation must be considered as exclusive and may not be enlarged by intendment so as to permit the use of trust funds for the purposes covered by such appropriation. Appropriation statutes are strictly construed, and implied appropriations are not favored. II Op. Atty. Gen. 10, 12.

Sec. 2 of art. VIII of the Wisconsin constitution provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. Since there is no statute appropriating any of the trust funds to your department for administrative purposes it would be impossible to pay any money out of the trust fund account for such purposes, and even if there were such an appropriation it would be unconstitutional under the *Owen* case above discussed.

OSL
WHR

Elections — Public Officers — Caucus Committee — Counties with population of less than two hundred fifty thousand cannot use nonpartisan primary election for nomination of town officers.

Members of caucus committee are not entitled to compensation for their services.

May 27, 1937.

SCOTT LOWRY,
District Attorney,
Waukesha, Wisconsin.

You state that a town in Waukesha county desires to eliminate the caucus method of nominating candidates for elective offices as provided by sec. 5.27, subsecs. (1) and (2), Stats., and in place thereof to nominate candidates at a nonpartisan primary, as provided by sec. 5.27, subsecs. (3), (4) and (5), Stats. You inquire whether a town may nominate candidates at such primary.

Sec. 5.27, Stats., provides the method to be used in nominating candidates for office in towns and villages. Subsec. (1) thereof provides for the nomination of such officers by the caucus method. By virtue of that subsection the town electors at a town meeting nominate the candidates for office. The two receiving the highest number of votes for each office are placed upon the ballot. However, the vote of the second highest candidate must equal one-fifth of the vote cast for the highest, to have his name printed on the ballot, and only the name of the candidate receiving the highest number of votes shall appear thereon.

Subsec. (2) provides that candidates may be nominated by the signing of nomination papers by a number of the voters equal to ten per cent of the vote cast for governor at the last preceding election. This section provides an additional or alternative method that may be used.

You will notice that subsec. (3) and subsec. (4) of sec. 5.27 apply only to counties having a population of two hundred fifty thousand or more. The authority for a nonpartisan primary is contained in subsec. (4) of sec. 5.27, but this applies only, as stated before, to counties having a population of two hundred fifty thousand or more.

Since Waukesha county does not have a population of two hundred fifty thousand, the nonpartisan primary method of nominating town and village officers cannot be used. It is a well recognized maxim of statutory construction that "expressio unius est exclusio alterius," that is, the expression of one is the exclusion of others. *Chain Belt Co. v. Milwaukee,* 151 Wis. 188, 193; XX Op. Atty. Gen. 81, 83. Under this rule it is limited to the use of the method of nomination prescribed by subsec. (1) or (2), heretofore referred to.

It is therefore our opinion that towns in Waukesha county cannot nominate candidates for town offices pursuant to sec. 5.27, subsecs. (3), (4) and (5), Stats.

You also ask our opinion as to whether the members of a town caucus committee can be compensated.

It is well settled that a public officer takes his office *cum onere* and is entitled only to such compensation as is allowed by statute. *Henry v. Dolen,* 186 Wis. 622, 624; *Kewaunee Co. v. Knipfer,* 37 Wis. 496; XXIII Op. Atty. Gen. 770. The services performed by members of a caucus committee are for the most part of a voluntary nature and similar to those which anyone would perform as a public courtesy. Our legislature has apparently considered such services in this light.

We find no statute which authorizes the paying of any compensation to members of the caucus committee, and it is our opinion therefore that they are not entitled to any such compensation for such services.

OSL
LEV

Social Security Law — Reimbursement to county of state and federal aid past due must be turned over to beneficiaries. Counties are entitled to eighty per cent of what their expenditures for old-age assistance would have been had state and federal aid for preceding quarterly period been paid and had there been no reduction in counties' expenditures for that reason.

May 27, 1937.

PENSION DEPARTMENT.

You ask several questions involving the construction of secs. 49.38 and 49.51, Stats.

The first question which arises is as to the meaning of the words "full amount," used in the last sentence of sec. 49.51, subsec. (4). This section reads:

"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."

The words "full amount" as used in the above statute relate to the payment to the beneficiaries of the total amount of state and federal aid received by the county. Sec. 49.51, subsec. (4), provides that the county may reduce the amount allotted to the beneficiaries by the amount of aid which is unpaid, but that it shall remain a charge against the state and when the state reimburses the counties to this amount the counties in turn shall pay it over to the beneficiaries. This amount should equal the amount the old-age recipient's allowance has been reduced by reason of state and federal aid unpaid.

The next question which arises is:

When construed with sec. 49.51, subsec. (4), does sec. 49.38, subsec. (2), mean that the counties shall be reimbursed for eighty per cent of the amount of old-age assistance actually paid out by them, or eighty per cent of the amount they would have paid out had the state paid them a full eighty per cent of the amount they actually paid out during the preceding quarterly period? In other words, if the county reduces the amount of old-age assistance it pays out by the amount of state and federal aid unpaid by the state for the preceding quarter, is the county entitled only to eighty per cent reimbursement of this reduced amount?

The answer is that the county is entitled to an eighty per cent reimbursement of what its actual expenditures for old-age assistance would have been had there been no reduction by reason of state and federal aid unpaid. This is true because were the other suggested construction of the section adopted, the amount of an old-age assistance allowance would gradually dwindle to nothing, if there should be several successive quarterly periods during which the full amount of state and federal aid were unpaid.

This conclusion is reached after a consideration of the legislative purpose in enacting sec. 49.51, subsec. (4), since the dominant rule in the construction of statutes is to discover and give effect to the legislative purpose. *Julius v. Druckery,* 213 Wis. 643, 649, and cases cited.

Sec. 49.51, subsec. (4), was enacted by the legislature for the purpose of relieving "the counties which, in the absence of full aid may be short of funds." XXV Op. Atty. Gen. 441, 443. Sec. 49.51, subsec. (4), prevails over inconsistent provisions of sec. 49.38, subsec. (2). XXV Op. Atty. Gen. 441, 444. By this section the county was only relieved of paying the recipient the portion that the state was supposed to pay of the amount he had been found to be entitled to by the county administration.

OSL
WHR

Constitutional Law — Taxation — Refunds — In absence of statutory authority city may not refund valid assessments paid by property owners for installation of water mains laid in streets fronting upon their property.

May 28, 1937.

LESTER R. JOHNSON, *Chief Clerk, Assembly.*

By Resolution No. 51, A., the assembly has requested an official opinion as to whether a city without express statutory authority therefor may refund or provide for refunding to owners of property benefits and damages assessed against the same for water mains laid in streets fronting thereon where other water mains laid in streets of such city prior and subsequent thereto were required by the city to be paid by the municipal water utility.

The home rule amendment, sec. 3, art. XI, Wis. Const., provides:

"Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. * * *"

This amendment does not apply to "matters of state-wide concern" and the legislature's power relating to such matters was not impaired by the home rule amendment. *Van Gilder v. Madison* (1936), 222 Wis. 58, 267 N. W. 25.

A city has no power under this amendment to deal with matters of state-wide concern. *Logan v. City of Two Rivers* (1936), 222 Wis. 89, 267 N. W. 36.

By sec. 1, art. VIII of the Wisconsin constitution, it is provided that the rule of taxation shall be uniform.

Sec. 31, art. IV of the Wisconsin constitution, prohibits the legislature from enacting any special or private laws for assessment or collection of taxes or for the extending of the time for collection thereof, and then sec. 32, art. IV, Wis. Const., provides that the legislature may enact general

laws upon the subjects prohibited by sec. 31, but that such laws shall be uniform in their operation throughout the state. The constitution thus providing that all matters of taxation are to be uniform, has made all matters of taxation of state-wide concern.

The home rule amendment conferring powers upon cities to deal with local affairs is subject to the other provisions of the constitution. *Van Gilder v. Madison,* (1935) 222 Wis. 58, 267 N. W. 25. Therefore, the power granted to a municipality under the home rule amendment does not extend to matters of taxation, except as the legislature may provide, because the powers granted by the amendment are subject, first, to the limitation that the city may not act in reference to matters of state-wide concern which are purely within the province of the legislature, and secondly, to the constitutional provisions of uniformity in matters of taxation.

The statutes providing for the levy of special assessments for the payment of public work treat such assessments as taxes and provide that they shall be collected "as in the case of other taxes." In various places in the statutes such assessments are referred to as "special taxes." See secs. 62.20 and 62.21, Wis. Stats. By the enactment of secs. 62.19 to 62.21, in reference to special assessments, the legislature has thus acted upon a matter of taxation, which is within the sole province of the legislature.

The general rule is stated in 61 C. J. at 973 as follows:

"* * * Although there is contrary authority, counties, towns, and municipal corporations cannot compromise or release claims for taxes legally assessed, at least if the debtor is able to pay, unless they are authorized by the legislature to do so, * * *."

It is to be noted that sec. 74.135, Stats., provides as follows:

"After the tax roll shall have been thus delivered to the treasurer it shall not be lawful for the council to remit, annul or cancel any tax specified therein except in the following cases: [Then follow the exceptions none of which are pertinent here]."

In XXIV Op. Atty. Gen. 32, it was held that the county has no authority to waive penalties and interest on delinquent taxes. In an opinion in XXIV Op. Atty. Gen. 301 it was held that a statute authorizing a city, village or town to extend the time of payment of taxes did not authorize a county so to do because the county was not specifically mentioned therein.

Sec. 62.12, subsec. (6), par. (b), Stats., provides as follows:

"The council shall not appropriate nor the treasurer pay out * * * 2. Funds for any purpose not authorized by the statutes. * * *"

It is our opinion that in the absence of statutory authority a city may not refund valid assessments paid by property owners for the installation of water mains laid in streets fronting upon their property.

HHP

Public Lands — Sec. 1.055, Stats., supersedes sec. 24.09 to extent that it is inconsistent therewith and commissioners of public lands are authorized to sell public lands to federal government for national forests under sec. 1.055 without complying with provisions of sec. 24.09, relating to sale at public auction.

May 28, 1937.

LAND DEPARTMENT.

You request an opinion as to whether the land department can sell the trust fund lands, which are classified under sec. 24.01, as school lands, university lands, swamp lands, normal lands and agricultural college lands, direct to the federal government under sec. 1.055 of the Wisconsin statutes, or whether such lands can be sold only at a public auction under sec. 24.09.

Sec. 1.055, subsec. (1), referred to, provides as follows:

"Consent of the state of Wisconsin is hereby given to the acquisition by the United States by purchase, gift, lease or condemnation, with adequate compensation therefor, of such areas of land * * * as the United States may deem necessary for the establishment of national forests in the state, * * * and the commissioners of public lands are hereby authorized to sell and convey for a fair consideration to the United States any state lands included within such areas; * * *."

Sec. 24.09, subsec. (1), referred to, provides in part:

"All public lands that have been heretofore appraised or appraised pursuant to section 24.08, shall, from time to time in the discretion of said commissioners, be offered for sale at public auction. * * *"

We assume from your reference to sec. 1.055, subsec. (1), Stats., that the contemplated sale referred to by you is of lands for a national park, the only sale authorized by sec. 1.055.

The phrase "to sell and convey" as used in sec. 1.055, is interpreted in its usual sense and means an ordinary sale and conveyance without reference to a public auction.

The fact that sec. 24.09 was in existence at the time sec. 1.055 was passed by the legislature in 1925 is further indication that the legislature intended sec. 1.055 to be an exception to sec. 24.09. Unless the legislature contemplated a private sale to the federal government, no useful purpose would have been served by the statute authorizing the sale to the United States for a fair consideration.

It must be presumed that the legislature did not intend to legislate in vain, and that it had a specific purpose in mind. *Harris v. Halverson,* 192 Wis. 71.76, 211 N. W. 295. See also *Haas v. Welch,* 207 Wis. 84, 240, N. W. 789.

It is therefore our opinion that sec. 1.055 supersedes sec. 24.09 of the statutes, to the extent that the commissioners of public lands are authorized to sell public lands to the fed-

eral government for national forests at private sale for a fair consideration without submitting them to bids at a public auction.
OSL
WHR

Corporations — Securities Law — Words and Phrases — In Effect — Suspended permit to sell securities is not permit "in effect" within meaning of subsec. (3), sec. 4, ch. 158, Laws 1933.

May 29, 1937.

PUBLIC SERVICE COMMISSION.
Attention Wm. M. Dinneen, *Secretary.*

You request an opinion concerning the construction of section 4, subsec. (3), chapter 158, Laws 1933, which provides:

"* * * Any interested party may apply to the commission for registration of any security under this act for which permit is in effect under the provisions of the act hereby repealed without payment of any filing fees, but subject to the payment of the expense reasonably attributable to any examination or investigation which may be required to determine whether such securities comply with the standards of this act."

The public service commission has suspended permits issued under the former act, without prejudice, and it has been the policy of the commission to reinstate such permits on application and proper showing where no final order of revocation has been made.

You ask whether the public service commission, when application is made for registration of an issue of securities for which a permit issued under the former act has been suspended, may act under sec. 4, subsec. (3) of ch. 158,

Laws 1933, and charge merely investigation costs and not the filing fee provided for in sec. 189.21, subsec. (2) of the statutes.

Sec. 4, subsec. (3) of ch. 158 provides that only applicants for registration of securities for which there is a permit in effect under the provisions of the former act may apply for registration without payment of any filing fees.

The answer to the question thus turns upon the meaning of the phrase "in effect," and upon a decision as to whether a suspended permit is a permit "in effect" within the meaning of the section.

It is a fundamental rule of statutory construction that all words and phrases used in the statutes shall be construed and understood according to the common and approved usage of the language. Sec. 370.01, subsec. (1), Stats.

The ordinary meaning of the word "effect" is: "State or fact of being operative." Webster's New International Dictionary, 2d ed. "Active operation; force; execution; as, a law in full effect." Funk & Wagnalls New Standard Dictionary.

The word "suspend" appears to have a meaning almost directly opposite to that of the word "effect": "To cease from action or operation." Funk & Wagnalls New Standard Dictionary.

"The suspension of a statute for a limited time operates so as to prevent its operation for the time; but it has not the effect of a repeal. Brown v. Barry, 3 Dall. (U. S.) 365, 1 L. Ed. 638." Bouvier's Law Dictionary, Rawle's third revision, Vol. 2, 3213.

After a consideration of the above meanings of the word "effect" the conclusion is reached that the phrase "in effect" as used in sec. 4, subsec. (3) of ch. 158 means in active operation, as opposed to a state of suspension.

It therefore follows that the public service commission, when an application is made for registration of an issue for which a permit issued under the former act has been suspended, may not under this section charge the applicant merely for the expense reasonably attributable to an investigation but must charge the filing fee as provided in sec. 189.21, subsec. (2).

The same question is asked also in regard to a situation where, if the public service commission had known of the facts, it would have suspended the permit under the former act but actually did not do so. In such case the permit in the eyes of the law is "in effect" under the former act and hence, under the provisions of sec. 4, subsec. (3), applicants for registration of such securities need not pay the filing fees provided for in sec. 189.21, subsec. (2), but merely such expense as is reasonably attributable to any examination or investigation.

As far as this situation is concerned, the general statute on filing fees charged applicants for registration of securities must be regarded as superseded by the special provisions of sec. 4, subsection (3), ch. 158, Laws 1933.

It is a well recognized rule of statutory construction that, where there is a statute containing general provisions covering a subject as a whole and another statute containing a special provision plainly covering some particular part within the scope of such general statute, the special provision must prevail. *State ex rel. Donnelly v. Hobe,* 106 Wis. 411. See, also, *Kollock v. Dodge,* 105 Wis. 187, and *Hite v. Keene,* 137 Wis. 625.

To the same effect see: *Wis. Gas & Electric Co. v. City of Ft. Atkinson,* 193 Wis. 232, 213 N. W. 873; *Fox v. Milwaukee Mechanics' Ins. Co.,* 210 Wis. 213, 246 N. W. 511.

The opinion of the attorney general of February 5, 1934, XXIII Op. Atty. Gen. 76, referred to in the letter to this department, has no bearing on the question considered here. The attorney general there held that certain transactions did not constitute the issuance or sale of securities subject to regulation by the commission. The question here is not what constitutes the issuance or sale of securities, but rather: Is a suspended permit, a permit "in effect" within the meaning of sec. 4, subsec. (3), ch. 158, Laws 1933.

WHR

Courts — Justice Courts — Justice of the Peace — Police Justice — Where legislature has deprived justices of peace and police justices of city of right to exercise any criminal jurisdiction, such limitation of jurisdiction applies to all criminal matters arising anywhere within county.

June 2, 1937.

S. C. JOHNSON,
District Attorney,
Spooner, Wisconsin.

You state that sec. 7 of ch. 7, Laws 1927, reads as follows:

"No justice of the peace or police justice in the city of Spooner shall exercise any jurisdiction in any criminal cases but all such jurisdiction is vested in said municipal court and the judge thereof."

You ask: Does this take away the criminal jurisdiction from justices of the peace of the city of Spooner in criminal cases arising outside the city limits, or does it take away only the criminal jurisdiction of cases arising within said city?

It will be noted that ch. 7 of the laws of 1927 grants to the municipal court criminal jurisdiction throughout the county of all criminal cases, except those punishable by imprisonment in the state prison, and that such criminal jurisdiction so given is greater than the criminal jurisdiction of justices of the peace and police justices throughout the county.

It is well settled by our supreme court that the legislature in Wisconsin has the power to deprive justices of the peace and police justices of criminal jurisdiction. *Gilowsky v. Connolly,* (1882) 55 Wis. 445, 13 N. W. 444; *Shaffel v. State,* (1897) 97 Wis. 377, 72 N. W. 888; *Heller v. Clarke,* (1904) 121 Wis. 71, 98 N. W. 952.

The wording of sec. 7 of ch. 7, laws of 1927, is clear and unambiguous. It is capable of only one construction, which is that the legislature intended thereby to deprive justices

of the peace and police justices in the city of Spooner of all criminal jurisdiction.

Our opinion is that under sec. 7, ch. 7 of the laws of 1927, the justices of the peace and police justices in the city of Spooner have been deprived of all criminal jurisdiction, whether the action arises within or without the city of Spooner.

HHP
AGH

Insurance — Domestic mutual insurance companies may issue nonassessable policies only by complying with provisions of sec. 201.07, Stats.

June 3, 1937.

H. J. MORTENSEN,
Commissioner of Insurance.

You state that a question has arisen respecting the operation of certain mutual tornado insurance companies organized and operating under ch. 201 of the statutes. These companies write tornado insurance on farm property by charging a membership fee at the time the policy is written, and, annually, at the beginning of October, an assessment is levied to cover the losses and expenses incurred during the preceding year. At the same time some of such companies write tornado insurance on city and village property on which a specific advance premium is charged for the term of the policy at the time the policy is issued. When the annual assessments are levied each fall, such assessments are not applied to city and village policies.

You state further that the articles of incorporation of none of these companies make provision for setting up separate classes of risks, some classes of which are subject to assessment while other classes are not subject to assessment. The articles of incorporation of all of these companies do provide that all of the policyholders are members and are subject to their pro rata share of losses and ex-

penses. None of the articles of incorporation limit the liability of members in accordance with section 201.02, subsec. (5), par. (c), Stats., and none of the companies can qualify for the issuance of a nonassessable policy under sec. 201.07, Stats.

Consequently you inquire whether a mutual tornado insurance company can classify its risks so as to issue different types of policies to different classes of policy holders and then levy assessments which are applicable to only part of the policy holders.

The answer is, No.

The only statutory provisions for issuance of nonassessable policies by domestic mutual insurance companies are continued in sec. 201.07 of the statutes, under which you state these companies are unable to qualify.

This section reads:

"Any domestic mutual insurance company transacting the business of fire, marine, or casualty insurance, having accumulated a net surplus, exclusive of surplus notes, equal to the sum of fifty per cent of the capital and surplus required of a stock company to begin to transact the same kind of business and while such surplus is so maintained as a distinct guarantee fund and so shown in its annual statement may issue a nonassessable policy; provided, that such company shall cease the issue of such policies when such guarantee fund falls below such sum, and during such period of impairment shall cease to make apportionment and declare refunds of overpayments or savings resulting from premium contributions until such guarantee fund deficiency has been made good, except where the company at a regular or called meeting of its policyholders has voted to discontinue the issuance of nonassessable policies. The conditions of such nonassessability shall be plainly stated in the policies so issued. No company shall issue a nonassessable policy until its policy form is submitted to and approved by the commissioner of insurance."

The legislature having prescribed the terms and conditions under which nonassessable policies may be issued by mutuals, such terms and conditions are exclusive. The enumeration by the legislature of circumstances under which nonassessable policies may be issued by necessary implication excludes those not mentioned, because of the

well known rule of statutory construction,—*expressio unius est exclusio alterius. Chain Belt Co. v. City of Milwaukee,* 151 Wis. 188; *Owen v. Reisen,* 164 Wis. 123.
WHR

Social Security Law—Under sec. 49.50, subsec. (5), and sec. 49.38, subsec. (1), Stats., state pension department has authority to terminate and refuse approval of payments of state or federal aid on account of grant of old-age assistance improperly allowed, but said department may not offset aid improperly extended in past against future allotments.

June 3, 1937.

PENSION DEPARTMENT.

You advise that in P county the county judge, acting as administrator of old-age assistance, directed the discontinuance of a grant to one K who had been receiving aid for a number of months. Subsequent to receipt of notice of information that his grant had been discontinued because of the individual's inability to establish his eligibility for old-age assistance, your department made an adjustment in the next allotment of state and federal aid to P county by deducting from the eighty per cent which the county was entitled to receive on account of payments made to eligible individuals the eighty per cent allowed P county in prior reimbursements on account of payments made to K.

You ask whether it was proper for your department to withhold from the allotment to P county an amount equal to the state and federal aid allowed P county in prior reimbursements on account of payments made to K.

Sec. 49.50, subsec. (5), Wis. Stats., provides:

"The state pension department shall have authority at any time to terminate payment of any state or federal aid on account of any grant of old-age assistance, aid to dependent children, or blind pension which may have been im-

properly allowed or which is no longer warranted due to altered conditions. Such action shall be taken only after thorough investigation and after fair notice and hearing. Such notice shall be given to the recipient of the assistance, aid, or pension, the county clerk, and the county officer charged with the administration of such form of assistance, and their statements may be presented either orally or in writing, or by counsel. Any decision of the state pension department terminating the payment of state and federal aid shall be transmitted to the county treasurer, and after receipt of such notice the treasurer shall not include any payments made in such case in the certified statement of the expenditures of the county for which state or federal aid is claimed."

The state pension department is created within the industrial commission by sec. 49.50, subsec. (1) of the statutes, and it has only the powers given it by the legislature. It has been held that the powers of the industrial commission are derived exclusively from the statutes. *Kelley v. Tomahawk Motor Co.*, 206 Wis. 568, 572. And if it attempts to act in the absence of statutory authority or attempts to exceed the limits designated by the statutes, it has no jurisdiction and its orders are void. *Wisconsin Mut. L. Co. v. Industrial Comm.*, 190 Wis. 598.

We see no reason why the same rulings should not apply to the pension department, which is an arm or agency of the industrial commission. Neither sec. 49.50 (5), above quoted, nor any other provision of the statutes of which we are aware gives your department authority to offset aid improperly extended in the past against future allotments. In fact, sec. 49.38 (2) is quite to the contrary, and appears to be mandatory in the requirement for reimbursement of the eighty per cent paid as old-age assistance during the preceding quarter. So far as material that section is as follows:

"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; * * *."

We are not unmindful that your department does have the authority to refuse approval of current accounts submitted by counties to the state for reimbursement. This authority is provided in sec. 49.38 (1), which is as follows:

"On or before the fifteenth day of January, April, July and October, the county treasurer shall certify under oath, in duplicate to the secretary of state and the state pension department, the amount paid out by the county during the preceding quarterly period. *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.*"

This provision, however, falls short of granting the state pension department authority to withhold any portion of its reimbursement. It merely contemplates that if the certificate presented by the county treasurer is such that the state pension department is not satisfied that the amount claimed has actually been expended in accordance with the provisions of the statute, the state pension department may withhold its approval presumably until such time as the county treasurer shall present a correct certificate. See XXIV Op. Atty. Gen. 438 for discussion of an analogous situation arising prior to the creation of the state pension department and when the administration of old-age assistance was under the jurisdiction of the board of control.

In view of the fact that neither sec. 49.50 (5) nor sec. 49.38 (1), heretofore discussed, gives your department authority to offset aid improperly extended in the past against future allotments and there is no such authority specifically granted by statute, it is our opinion that your department cannot properly withhold or offset from the future allotment to P county aids improperly extended in the past.

It is a fact that sec. 49.50 (2) grants the pension department authority to adopt rules and regulations not in conflict with the express provisions of any law of this state, but our attention has not been called to any rules or regulations of your department purporting to authorize the practice here

in question, nor do we express any opinion as to the propriety of setting up any rule or regulation respecting such practice.
OSL
WHR

National Guard — Taxation — Gift Tax — Lands conveyed in trust for use of national guard company are not subject to Wisconsin gift tax statutes, ch. 15, Laws 1935, and ch. 363, Laws 1933.

June 4, 1937.

RALPH M. IMMELL,
Adjutant General.

You advise that on January 31, 1907, one Samuel A. Cook executed a trust agreement, conveying title to certain real estate to three trustees in trust for the use of Company I, Wisconsin National Guard. The trust agreement provided that if Company I, Wisconsin National Guard, should disband, go out of existence, or cease to be a part of the Wisconsin National Guard, the title and all right to the use and occupancy of the real estate should immediately and without notice cease and the title to and all rights in and to said real estate should revert to the settlor, Samuel A. Cook, his heirs, personal representatives and assigns.

The will of Samuel A. Cook directed that five thousand dollars be placed in the hands of the trustees for the care and keeping up of the armory building which is a part of the real estate.

Company I took possession of the real estate, but the trustees at no time received the five thousand dollars which the will directed be paid over to them.

During the World War Company I was mobilized into federal service and ceased to become a national guard unit. May 6, 1920, the regiment was reorganized as 24th Separate Company, Wisconsin National Guard. This company

resumed occupancy of the premises. The company has been redesignated several times and is now known as Company I, 127th Infantry, Wisconsin National Guard.

For the purpose of clearing title, it is proposed that all interested parties, such as the trustees under the trust indenture, the G. A. R. posts and auxiliaries, will quitclaim the real estate to the sole surviving heir of the settlor, Samuel A. Cook; that the G. A. R. posts, auxiliaries, etc., and the trustees will release the sole surviving heir individually and in her capacity as executor of the will of Samuel A. Cook from any liability in connection with the five thousand dollars which to date has not been paid over to the trustees as directed in the will; and that the sole surviving heir will immediately reconvey the premises to Company I, 127th Infantry, and its successors.

You inquire whether the transaction in question is subject to the Wisconsin gift tax statutes.

The gift tax law of Wisconsin, found in laws of Wisconsin 1933, ch. 363, sec. 4, and laws of Wisconsin 1935, ch. 15, sec. 7, provides:

"(1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom, in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1935, in the following cases, except as hereinafter provided:

"* * *

"(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

"* * *

"(5) The following transfers are exempt from the tax imposed by this chapter:

"(a) All property transferred to municipal corporations within the state for strictly county, town or municipal purposes, or to corporations of the state, organized under its law, solely for religious, humane, charitable or educational purposes, which shall use such property exclusively for the purposes of their organization within the state, and transfers to banks or trust companies as trustees in trust exclusively for public, religious, humane, charitable, educational or municipal purposes in this state shall be exempt."

Laws 1935, ch. 15, sec. 7, extended the tax to July 1, 1937.

It is our opinion that the contemplated transaction does not amount to a gift, but is merely a means of clearing title to the property. The gift was made at the time the trust indenture was executed. The trustees received title at that time, subject to being dispossessed upon breach of a condition subsequent.

In *Town of Wolf River v. Wisconsin Michigan Power Co.*, 217 Wis. 518, 259 N. W. 710, the court said at pp. 520-521, in speaking of a deed which provided that the title should revert to the grantor if the premises were used for other purposes than as a camp site for the Boy Scouts:

"* * * The deed, with the provisions set out in the statement of facts, does provide that the estate conveyed is to terminate if the premises are used for other purposes than as a camp site for Boy Scouts. This is not an unusual restriction. It results in the grantee holding title to the premises subject to being dispossessed upon breach of a condition subsequent. It in no way affects the title held by the grantee, but merely operates to destroy that title upon a breach of the condition. *Cobban v. Northern Wisconsin State Fair Asso.* 212 Wis. 235, 248 N. W. 463; *Polebitzke v. John Week L. Co.* 157 Wis. 377, 147 N. W. 703. The qualification annexed whereby the estate may be defeated upon breach of the condition leaves the title good in the grantee as long as he observes the condition. * * *."

We do not believe there has been a breach of any of the conditions set forth in the trust indenture. The indenture provides that title shall revert to the grantor or his heirs if Company I "shall disband, go out of existence, or cease to be a part of the Wisconsin National Guard."

The presumed intention of the creator of the trust should be effectuated if possible. *Will of Stack,* 217 Wis. 94; *Upham v. Plankinton,* 152 Wis. 275.

It appears to us that the settlor intended the condition subsequent to mean a complete and permanent extinction of Company I as part of the Wisconsin National Guard rather than the temporary absorption of Company I into the federal service for the period of the World War and the short interval of time elapsing after the discharge of the company from the federal service and its reorganization. It seems to us to be immaterial that the company has been reorganized and given a different name, as long as it is the successor to the original Company I, mentioned in the trust indenture.

The Wisconsin gift tax law above quoted exempts all property transferred to corporations organized under its law, solely for religious, humane, charitable or educational purposes, which shall use such property exclusively for the purposes of their organization within the state.

If there is a gift here it would appear to come within the exemption as a gift to a corporation organized for a charitable purpose. Under sec. 21.42, Stats., a company of the national guard constitutes a corporate body. In the law of trusts it is well recognized that a trust for patriotic purposes is charitable. Trusts and Trustees, 2 Bogert, p. 1203, and cases there cited. It therefore follows that Company I, 127th Infantry, is a corporation organized for a charitable purpose and within the exemptions to the Wisconsin gift tax law.

WHR

Appropriations and Expenditures — Legislature — Since committee created by one branch of legislature cannot lawfully function beyond adjournment of legislature, such committee is then without authority to legally employ stenographer reporter and such reporter cannot be validly paid for his services from legislative contingent fund created by sec. 20.01, subsec. (10), Stats. One senate cannot create charges against contingent fund of succeeding senate.

June 5, 1937.

JOINT COMMITTEE ON FINANCE,
Wisconsin Legislature.

You have called our attention to resolution No. 13, S., which is before the joint committee on finance for consideration, and you inquire as to its legality. The resolution in question provides for the payment of $536.30 from the senate contingent fund to Leo E. Packard, for reporting services rendered a senate committee which investigated alleged federal unemployment relief frauds and abuses, this senate committee having been created pursuant to senate resolution No. 62, S., of the 1935 legislature.

Sec. 20.01, subsec. (10), Stats., provides an appropriation for the contingent expenses of the senate and assembly, subject to certain conditions.

Par. (b) thereof, provides:

"Such expenditure shall not be made unless it is authorized by a yea and nay vote of such house, to be entered on its journal, *nor for any other purpose than to enable the house authorizing such expense to discharge its lawful functions.*"

In XXIV Op. Atty. Gen. 672 this department ruled that a committee created by one branch of the legislature cannot function beyond adjournment of the regular session of the legislature. That opinion was written with reference to the committee created pursuant to senate resolution No. 62, S., of the 1935 legislature, which had adjourned sine die prior to the rendering of such opinion, which was dated October 21, 1935.

Apparently the committee chose to disregard the opinion of the attorney general, as it appears from the reporter's transcript of the proceedings that all of the reporting services were rendered to the committee during the period of October 29, 1935, to December 2, 1935, inclusive. This was after the adjournment of the legislature and at a time when the committee had no lawful right to function according to the rule laid down in the above mentioned opinion.

As the committee in question had no right to function it could not legally hire a stenographic reporter. In addition it is clear that the requirement of a yea and nay vote contained in sec. 20.01 (10), (b) could not have been met, since the legislature had adjourned prior to the time that the services were rendered. As the bill could not have been lawfully paid from the senate contingent fund for the session of 1935, there is stronger reason why the bill cannot now be paid from the senate contingent fund for the 1937 session. The appropriation provided in sec. 20.01, subsec. (10), is available to the session of that biennium. Hence the present appropriation is available for the use of the session now in session rather than for the session which met two years ago.

If the senate which met in 1935 could deplete the $1,000.00 appropriation of the present senate by $536.30, it might have gone farther and created charges which would completely exhaust the appropriation intended for the use of the present senate. To state such a proposition is to demonstrate that it is something which the legislature never intended, and it is hardly necessary to cite authorities for the well known rule that a statute should not be so construed as to reach an absurd or unreasonable result if any other construction is permissible.

We are not unmindful of the fact that the reporter in this case has performed services for which he has not been paid. The advisability of payment outside of legal considerations is one within the province of the legislature and not one for consideration by this office. You have not asked and we do not pass upon the legality of payments which may be made through an appropriation from some other

fund, such as through a legislative enactment providing payment from the general fund.
OSL
WHR

Bonds — Public Officers — Public officer is insurer of public funds lawfully in his possession and is liable for losses which occur even without his fault.

June 8, 1937.

BOARD OF CONTROL.

You state that the steward of the Wisconsin Memorial Hospital and Mendota State Hospital has in effect a bond of ten thousand dollars in the regular statutory form with a corporate surety. We understand this steward had in his custody in cash certain funds which he was keeping for use of the institution and that apparently another employee in his office, upon leaving the institution, took in excess of nine hundred dollars of this cash from its place of safekeeping. You ask whether the bond of the steward covers such a loss.

By sec. 46.09, Stats., the steward of each institution is the local business manager thereof and has the immediate charge of all books, accounts, papers, and records relating to its financial management and is responsible for the safekeeping of all stores and supplies of the institution.

22 Ruling Case Law 468 states the rule of law thus:

"It is one of the duties of a public officer intrusted with public moneys to keep them safely, and this duty of safe custody must be performed at the peril of the officer. In effect, according to the weight of authority a public officer is an insurer of public funds lawfully in his possession, and therefore liable for losses which occur even without his fault. The liability is absolute, admitting of no excuse except perhaps the act of God or the public enemy. This standard of responsibility is based on public policy."

Our court in *Forest County v. Poppy* (1927), 193 Wis. 274, 213 N. W. 676, after quoting the above statement of law, said at page 277:

"We take this occasion to reaffirm the public policy so stated. The fact that hardship may result occasionally must not alter a public policy founded in public necessity."

See also, *School District v. Larson* (1928), 196 Wis. 211, 218 N. W. 847.

Therefore, it is our opinion that the loss thus arising is covered by the bond of such steward.

HHP

Public Printing — Newspapers — Printing of official proceedings and legal notices of city of second and third class provided for in sec. 62.10, Stats., in foreign language newspaper does not entitle publisher thereof to compensation under sec. 331.20, Stats.

June 8, 1937.

CHARLES L. LARSON,
District Attorney,
Port Washington, Wisconsin.

You inquire whether council proceedings and legal notices required by sec. 62.10, Stats., printed in the English language in a newspaper published in a foreign language entitle the publisher thereof to compensation under sec. 331.20, Stats.

Sec. 62.10, Stats., which provides for the publication of council proceedings and legal notices in cities of the second and third class, is as follows:

"In cities of the second and third class, the clerk shall, on or before the second Tuesday of April, advertise in the official city newspaper, or if there be none, in a newspaper published in the city, for separate proposals to publish in English (a) The council proceedings, and (b) the city ad-

vertising, respectively, for the ensuing year, inviting bids from all daily newspapers which have been published regularly in such city for the two years preceding, if there be more than one such paper, otherwise from all newspapers which have been published regularly at least once a week for such period, also stating the security required with each bid, which shall be previously fixed by the council, and requiring delivery of the bids in writing, sealed, at the clerk's office by twelve o'clock noon of the first Tuesday of May. * * *."

Sec. 331.20, Stats., relating to the requirements entitling a publisher to compensation, is as follows:

"No publisher of any newspaper in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, advertisement, or report of any kind or description required to be published by or in pursuance to any law or by order of any court unless such newspaper has all the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges and has a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, and one thousand copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously published in such city and county for at least two years immediately before the date of such notice, advertisement, or report, providing that the two years' requirement shall not apply to papers in existence at the time of the passage of this act. A newspaper in the contemplation of this section is a publication appearing at regular intervals, which shall be at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, and designed for the information of the general reader. * * *."

It is obvious from a reading of sec. 62.10, Stats., that it specifically provides the publication of council proceedings and legal notices must be in the English language. In addition to this, our court has definitely held that, even in the absence of an express provision of the statute, the English language must be used in all legal and official publications

unless there is a statute to the contrary. *Hyman v. Susemihl,* 137 Wis. 296, 118 N. W. 837; *State ex rel. Goebel v. Chamberlain,* 99 Wis. 503, 75 N. W. 62.

Although sec. 62.10, Stats., provides that the legal and official publications must be printed in the English language, neither sec. 62.10 nor sec. 331.20 contains a specific provision that such legal and official publications must be printed in an English language newspaper. Sec. 331.20, Stats., does, however, provide:

"* * * A newspaper in the contemplation of this section is a publication * * * containing reports of happenings of recent occurrence of a varied character * * * and designed for the information of the general reader."

It is obvious that a newspaper printed in a foreign language is designed for the information of a particular group, namely those reading the particular one of our many foreign languages. It cannot be said to be designed for the information of all the people referred to in sec. 331.20 as the general reader. This construction appears to be in line with the general rule in this country laid down in 20 R. C. L. 204, wherein it is stated:

"While a paper printed in a foreign language may be a newspaper, it may not be within the purview of a statute, requiring the publication of legal notices designed for the information of all the people, where the statute contains nothing to indicate an intention to include such a publication, *and it is well settled as a general proposition in this country that in the absence of a direction to the contrary the publication of a notice required by law to be made must be in the English language and in a newspaper printed in that language.* * * *." (Italics ours.)

While the Wisconsin cases heretofore cited are not directly in point to sustain the general rule laid down in 20 R. C. L. 204 and our court has not reviewed them to construe them to be in accord with such rule, courts in other jurisdictions have done so. In *Bennett v. Baltimore,* 106 Md. 484, 68 Atl. 14, the case of *State ex rel. Goebel v. Chamberlain,* 99 Wis. 503, 75 N. W. 62, was cited, among others, in connection with the following language, p. 15:

"* * * It is well settled as a general proposition in this country that, in the absence of a direction to the contrary, the publication of a notice required by law to be made must be in the English language and in a newspaper printed in that language. 21 A. & E. Encyc. Law 308. This proposition has been definitely announced or relied upon by the courts of last resort of many of the states, and no direct decision to the contrary has been cited to us or come to our knowledge. City of Chicago v. McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413; Goebel v. Chamberlain, 99 Wis. 503, 75 N. W. 62, 40 L. R. A. 843; * * *."

The latest case to review the Wisconsin decisions was that of *Reuter v. Dickinson Bldg. and Loan Association* (1933), 63 N. D. 673, 249 N. W. 778. In that case the respondent placed reliance on the language of the case of *Hyman v. Susemihl,* 137 Wis. 296, 118 N. W. 837. Concerning this case the North Dakota court said, p. 682:

"Obviously Hyman v. Susemihl * * *, supra, does not, nor do any of the Wisconsin decisions, sustain the contentions of the respondent here. Under the rule announced by those decisions the publication of the notice in question here was required to be made in a newspaper printed in the English language. This is also the rule established by the decisions in other jurisdictions. * * *."

We concur in the interpretation placed upon the Wisconsin decisions by the North Dakota court, and it is our opinion therefore that the printing of official proceedings and legal notices of a city of the second and third class, provided for in sec. 62.10 in the English language in a foreign language newspaper does not entitle the publisher thereof to compensation under sec. 331.20, Stats.

LEV
WHR

Bridges and Highways — Trunk Highways — Where state highway commission prior to passage of sec. 84.02, subsec. (2), Stats., apportioned state trunk highway on county line between two counties such apportionment was ratified and confirmed by sec. 84.02 (2) and cost of construction of bridge on portion apportioned to one county is properly chargeable to that county's allotment of state aid if bridge does not span stream forming part of boundary between two counties.

June 12, 1937.

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

You state that the state highway commission has ordered the construction of a new bridge on state trunk highway No. 79 between the city of Glenwood in St. Croix county and the village of Downing in Dunn county. The state highway commission proposes to charge the entire cost of construction of the new bridge to St. Croix county's allotment of state aid, and you inquire whether this may be done, or whether the cost should be divided between St. Croix county and Dunn county.

In order to answer your question it is necessary to make reference to a number of details not mentioned in your letter, and we have consequently referred to the files and records of the state highway commission in order to learn all of the material facts.

It appears that for about one-half a mile state trunk highway No. 79 runs in a northerly and southerly direction on the county line between St. Croix and Dunn counties. The stream over which the bridge is to be constructed runs in an easterly and westerly direction and crosses the highway and county line at right angles in the north quarter mile of the half mile stretch previously mentioned. The bridge will be on the line between the northeast quarter of the southeast quarter, section 25, St. Croix county, and the northwest quarter of the southwest quarter of section 30, Dunn county. The contract for the construction of a bridge

has been let by St. Croix county with the approval of the state highway commission under sec. 84.02, subsec. (1), Stats.

We understand further that the half mile stretch of state trunk highway 79 on the boundary line between St. Croix and Dunn counties had been for many years divided as to maintenance so that St. Croix county was responsible for the north half of this stretch, including the bridge, and Dunn county was responsible for the south half. This arrangement arose prior to 1923, when the obligation to maintain state trunk highways rested with the counties, sec. 1313 (5), Stats. 1921, having authorized the state highway commission to apportion county line highways between the counties.

Sec. 84.02, subsec. (2), by revision in 1923, superseded sec. 1313, subsec. (5), so that the statute now reads:

"The apportionment heretofore made by the highway commission of those portions of said trunk highway system that lie on county lines is hereby ratified and confirmed for all the purposes of this chapter. *The portion of such county-line highways assigned to any county shall be considered as lying fully within such county, and all the provisions for construction and maintenance shall apply to such highways just as though they lay wholly within the county to which assigned.* Each county shall pay one-half of the counties' share of the cost of constructing and maintaining bridges on the truck system which span streams where they form the boundary between two counties."

It is apparent from the italicized portion of the above quoted statute that the portion of state trunk highway No. 79 maintainable by St. Croix county, and which includes the proposed bridge, is to be considered for all practical purposes as lying fully within St. Croix county, and that the statutory provisions for construction and maintenance are to apply just as though the bridge were wholly situated in St. Croix county. The last sentence in sec. 84.02, subsec. (2), providing that each county shall pay one-half of the counties' share of the cost of constructing and maintaining bridges on the trunk system which span streams where they form the boundary between two counties, does not ap-

ply, for the reason that the proposed bridge does not span a stream which forms the boundary between two counties. This being true, the cost of the project is properly chargeable to St. Croix county's allotment of state aid under sec. 84.03, subsec. (3), Stats.

OSL
WHR

Bridges and Highways — Maintenance agreement made by two towns for town line road laid out pursuant to statute must be made in accordance with statutory requirements. In absence of valid agreement each town in which bridge on town line highway is located shall contribute to expense thereof in proportion to last assessment of taxable property within each town under sec. 80.11, subsec. (8), Stats.

Provisions of sec. 80.11 relating to county aid for construction or repair of town bridges apply to bridges jointly maintained by adjoining towns on town line highway.

June 12, 1937.

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

You state that a bridge will have to be replaced on a town road located on the county line between St. Croix and Pierce counties. The two towns in the adjoining counties have agreed by a verbal agreement not in compliance with statutory requirements to a division of the highway for maintenance purposes. The town in St. Croix county agreed to take over that half of the highway on which the bridge is located.

You inquire whether St. Croix county may legally pay one-half of the cost of this bridge.

It is not stated in your letter whether the highway in question was laid out pursuant to the statutes, but for the purpose of this opinion we will assume such to be the case.

Subsecs. (1), (2), and (3) of sec. 80.11 provide for joint action by the town boards in cases of town line roads legally laid out, and there is nothing in the statutes which limits this procedure to situations where the two towns lie within the same county.

Subsec. (3) provides that supervisors of the towns may decide what part of the road shall be made and kept in repair by each town, and where one town assumes the responsibility in respect to part of any highway it shall be the same as if the highway were situated wholly within such town.

Since the agreement in question between the two towns was only verbal and not in compliance with statutory requirements, the agreement was invalid. See *Town of Whitewater v. Richmond,* 204 Wis. 388, 392, XXV Op. Atty. Gen. 663.

However, subsec. (8) of sec. 80.11 provides that unless otherwise provided by statute or agreement every highway bridge on a town, city or village boundary shall be maintained by the municipalities within which it is located, each municipality contributing to the expense in proportion to the last assessment of taxable property therein. Hence, in the absence of a valid agreement between the adjoining towns, the provisions of this statute prevail as to maintenance of a town line road.

The question of county aid for such a bridge is covered by sec. 87.01. Subsec. (1) thereof outlines the procedure to be followed, which we will not take the space to repeat here. Suffice it to say that the statute makes no distinction as far as county aid is concerned between a bridge built jointly by two towns and a bridge built entirely by one town, and we therefore conclude that its provisions apply in this case. Therefore, it is not a case of St. Croix county paying one half of the cost of the bridge, but rather each of the adjoining towns is to follow the procedure outlined in sec. 87.01, and their respective counties are to contribute as therein indicated.

WHR

Public Health — Midwifery — Midwife licensed under sec. 150.04, Stats., may not give prenatal care.

June 14, 1937.

BOARD OF MEDICAL EXAMINERS.
Henry J. Gramling, M. D., *Secretary.*

You have inquired whether a midwife is permitted to give prenatal care, and you call our attention to sec. 150.04, subsec. (3), Stats., relating to the certificates issued by your board to applicants for licenses to practice midwifery. This statute reads:

"The certificate does not authorize the use of any instrument, except to sever the umbilical cord, assisting childbirth by artificial, forcible or mechanical means, performance of version, removal of adherent placenta, nor administering, prescribing, advising or employing drug, herb or medicine other than disinfectant and ergot after redelivery of the placenta, nor authorize a midwife to practice medicine, surgery or osteopathy, or assume any title or designation tending to show that she is a practitioner of medicine or by law so recognized or authorized to grant any medical or death certificate."

It is apparent from reading the foregoing section that the legislature intended to place certain definite restrictions upon the activities of licensed midwives. This section permits only a limited use of instruments, and such use is restricted to childbirth, and it prohibits administering, prescribing or advising, or employing drug, herb or medicine except disinfectant and ergot after redelivery of the placenta. Thus a midwife is in effect prohibited from using either instruments or medicine prior to childbirth.

In the absence of such specific limitations, a licensed midwife would be permitted to do the things ordinarily done by persons carrying on such profession. This makes necessary some consideration of the meaning of the term "midwife," since all words and phrases used in the statutes are to be construed and understood according to the common and approved usage of the language, although technical words and phrases and such others as may have acquired a peculiar

and appropriate meaning in the law are to be construed and understood according to such peculiar and appropriate meaning. Sec. 370.01 (1), Stats.

A midwife is most commonly defined as a woman who assists other women in childbirth. Webster's New International Dictionary (2nd ed.) Unabridged. Or, as stated in Funk & Wagnalls New Standard Dictionary of the English Language, a midwife is "a woman who makes a business of assisting at childbirth." Wharton's Law Lexicon (13 ed.) defines a midwife: "A person following the profession of delivering women of children." The term is defined in Gould's Medical Dictionary: "A female nurse, or other woman, who attends women in childbirth."

Similar definitions are to be found in the following books: English Law Dictionary, Rapalje and Lawrence's Law Dictionary and a New English Dictionary. However, a midwife is occasionally defined as a female obstetrician. See 40 C. J. 657; 3 Words & Phrases (2d series) page 382. "Obstetrics" is defined as the branch of medical science which has to do with the care of women during pregnancy and parturition. 46 C. J. 865. See also Gould's Medical Dictionary.

In view of the fact that the most common definitions refer to a midwife as one who assists at childbirth, we are disposed to give the term that meaning in the statutes relating to midwifery. As so construed and as considered in connection with the specific restrictions in sec. 150.04 (3), Stats., above quoted, we conclude that a midwife may not give prenatal care.

OSL
WHR

Public Officers — Garnishment — Quasi-garnishment — Justice of the Peace — Fees of justice of peace are "earnings" within meaning of subsec. (15), sec. 272.18, Stats., and if within limits of statute may be exempt.

June 14, 1937.

KENNETH E. PORT,
District Attorney,
Watertown, Wisconsin.

You advise that A is a justice of the peace in and for Dodge county and, by reason thereof, from time to time, in addition to fees in ordinary cases, receives fees from Dodge county. B, a judgment creditor of A, files a judgment with the county clerk and complies with the quasi-garnishment statute. You ask:

"Are the fees of a justice exempt from execution and quasi-garnishment and do they come within the purview of sec. 272.18 (15) ?"

Sec. 272.18, Stats., enumerates property exempt from execution. Subsec. (15) of this statute provides for an exemption of sixty per cent of the earnings of any person having a family dependent upon him for support at the time of the commencement of the proceedings for the collection of debt, including the earnings of any minor child or children whose earnings contribute to the support of such family, but not less than sixty nor more than one hundred dollars for the month preceding the issue of any writ or attachment, and not less than one hundred eighty nor more than three hundred dollars for the preceding three months. An additional amount of ten dollars is exempted for each child under the age of sixteen.

The word "earnings" as used in subsec. (15) of sec. 272.18 is broad enough to include fees earned by a justice of the peace.

"The word 'earnings' means the earnings or reward of labor; the price of services performed." 3 Words & Phrases (1st series) 2302.

The term includes personal services for works of skill and science as well as for mere physical toil. *Kuntz v. Kinney,* 33 Wis. 510, 513.

It is our opinion that the fees of a justice of the peace are earnings within the meaning of the statute and that, if such earnings (including that which is due from the county), do not exceed the amount of the exemptions as allowed by subsec. (15), sec. 272.18, Stats., then all such fees are exempt from execution and quasi-garnishment. They are, however, exempt only up to the amount allowed by statute, as heretofore set forth.

OSL
JEM

Indigent, Insane, etc. — Poor Relief — Public Health — Wisconsin General Hospital — Indigents are limited to hospitals designated by county judge, pursuant to ch. 142, Stats., with exception of emergency cases coming under sec. 49.18, subsec. (2), and cases treated at Wisconsin general hospital or Wisconsin orthopedic hospital for children pursuant to sec. 142.04.

June 19, 1937.

S. C. JOHNSON,
District Attorney,
Spooner, Wisconsin.

You have informed us that your county has an agreement with a certain hospital whereby the hospital takes care of the hospitalization of county indigent cases at certain rates. You have inquired whether indigents or their physicians are free to select hospitals of their own choosing instead of the hospital under contract, and then have these other hospitals bill Washburn county for the expense of hospitalizing such indigents.

The statutory provisions relating to hospitalization of indigents are to be found in sec. 49.18 and ch. 142, Stats.

Sec. 49.18 relates solely to temporary or emergency medical relief. Other cases are covered by ch. 142, Stats. Sec. 142.01, Stats., provides:

"A person having a legal settlement in any county in this state who is crippled or ailing and whose condition can probably be remedied or advantageously treated, if he or the person liable for his support is financially unable to provide proper treatment, may be treated at the Wisconsin general hospital or the Wisconsin orthopedic hospital for children at Madison or in such other hospital as the county judge shall direct, except that when the person to be treated, or his guardian if he be under guardianship, shall select that such treatment be at the said Wisconsin general hospital or the said Wisconsin orthopedic hospital, the hospital of his selection shall be the place of treatment; provided that the right of such selection shall not exist in counties having a population of five hundred thousand or more."

It is apparent from reading the foregoing section that the indigent is limited to treatment at such hospital as the county judge may direct, with the exception of those cases where a patient elects to be treated at the Wisconsin general hospital or the Wisconsin orthopedic hospital for children at Madison. This would mean that where the county judge is at liberty to select the hospital he might direct hospitalization at the contract hospital, and the patient would not be free to choose some other hospital and thereby incur liability upon the part of the county.

It is also equally clear that the county judge may not be deprived of his statutory power to designate the hospital under ch. 142, Stats., and that any attempt of a county board to limit the powers of a county judge under that statute would be invalid. See XXIII Op. Atty. Gen. 711, and XXIV Op. Atty. Gen. 155.

Sec. 49.18, subsec. (2), Stats., provides in part:

"Except in counties having a population of two hundred fifty thousand or more, the town, city, village or county, as the case may be, shall be liable for the hospitalization of a person entitled to relief under this chapter, without previously authorizing the same, when, in the reasonable opinion of a physician called to attend such person, immediate hospitalization is required, for indispensable emergency opera-

tion or treatment, and prior authorization for such hospitalization cannot be obtained without delay likely to be injurious to the patient. * * *."

In cases coming within the purview of the above section the county judge, of course, would have no opportunity to direct the place of hospitalization, and it is also possible that the emergency in some instances might be so great that hospitalization at some hospital nearer than the contract hospital would be advisable.
WHR

Bridges and Highways — State Highways — There is no statutory provision for apportionment of cost of county trunk highways located on county lines, but sec. 83.01 and sec. 83.03, subsec. (6), Stats., seem to contemplate that adjoining counties may make agreements with respect thereto.

June 22, 1937.

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

You inquire how the construction and maintenance of a county trunk highway is to be financed where such highway is a county trunk highway of St. Croix county, located on the county line between St. Croix and Pierce counties, such highway having previously been a town highway jointly maintained by the adjoining towns, pursuant to an agreement between them.

Sec. 83.01, subsec. (6), Stats., makes provision for the establishment of county trunk highways. County boards are required to select systems of county trunk highways which are to be marked and maintained by the counties. This section further provides that county boards or the county highway committees of adjoining counties shall by conference or otherwise cause their respective systems to join so as to make continuous lines of travel between the counties.

Sec. 83.03, subsec. (6), Stats., provides that the county board may construct or aid in constructing or improving any road or bridge in the county.

The statutes do not specifically provide for the apportionment and maintenance of county trunk highways located on county lines, but the two sections of the statutes above referred to seem to contemplate that counties may make agreements with respect thereto. Thus, either of the two counties would be authorized to contribute in excess of one-half of the cost of construction and maintenance of such a highway.

An agreement by the adjoining towns made prior to the time that the highway in question was adopted as a part of the county trunk system would have no effect now, since sec. 80.11, subsec. (4), Stats., expressly provides that in the event a portion of the town line highway is taken over by the county under a county highway system, the order previously made fixing the liabilities of such towns shall be deemed vacated.

OSL
WHR

Appropriations and Expenditures — Claims — Public Officers — County Board — County Officers — District Attorney — Under sec. 331.35, subsec. (1), Stats., members of county board, county clerk and county treasurer may be reimbursed by county for legal expenses incurred in successfully resisting proceedings to subject them to personal liability growing out of performance of their official duties. County board member may not be reimbursed by county for legal expenses incurred in successfully defending quo warranto action based on alleged ineligibility to hold such office.

District attorney may be reimbursed by county for legal expenses incurred in successfully defending ouster proceedings based on alleged misconduct in office.

June 23, 1937.

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

You state that several former and present officials of Dane county have petitioned the county, through its board of supervisors, for reimbursement of expenses incurred by them in personally defending actions commenced against them arising out of matters connected with the performance of their official duties. These claims have been filed pursuant to the provisions of sec. 331.35, subsec. (1), Wis. Stats., which provides in part:

"Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. * * *."

You have inquired whether these various claims may be properly paid by the county under the provisions of the above statute.

To answer this question it becomes necessary to consider the facts and offices involved in the different claims.

The first group of claims arises out of an action instituted by Dane county to recover damages from a depository bank for having cashed county checks bearing forged endorsements. The bank obtained an order to show cause why certain officials of Dane county should not be joined as defendants, claiming that their negligence had contributed to the loss which Dane county suffered. Two members of the county highway committee were named in the order to show cause upon the theory that it was their duty to pass upon and approve highway vouchers. The county clerk, county treasurer and chairman of the county board were also named by reason of the fact that they had signed the checks, and it was claimed by the bank that they should have discovered that the claims upon which the checks were issued were fictitious, the checks having been made payable to fictitious payees because of the fact that an employee of the highway department had turned in various pay rolls with the names of nonexistent employees. After the checks were ready, this employee took them to the bank, endorsed them with the names of the fictitious payees and cashed them, retaining the money for himself.

Upon the hearing of the order to show cause, the bank's motion to interplead these five county officials was denied, and as a result of having defended the proceeding these officials incurred expenses for attorneys' fees.

The first determination with reference to the county officers above named is whether the proceeding in question amounts to an action brought against them or subjects them to personal liability growing out of the performance of their official duties within the meaning of the statute.

A perusal of the pleadings in the proceeding indicates clearly that the object was to subject these officers to personal liability on account of alleged negligence in the performance of their official duties. It is true that no action was brought against them by the service of a summons,

but it is equally true that they would have been made parties without the service of a summons had the judge decided differently on the order to show cause. We do not consider that the words in sec. 331.35, subsec. (1) reading "or an action * * * to subject any such officer * * * to a personal liability" are restricted to actions commenced directly against officers, since an interpleaded defendant may be subject as fully to liability as one who is made an original party defendant. The word "action" is a generic term, having a broad and comprehensive application, meaning any legal proceeding in a court for the enforcement of a right or for the purpose of obtaining such a remedy as the law allows, or a judicial proceeding which, if conducted to a termination, will result in a judgment. 1 Words & Phrases (3d series) 187. It is defined in sec. 260.03, Wis. Stats., as follows:

"An action is an ordinary court proceeding 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. Every other remedy is a special proceeding."

Where the original party defendant attempts to bring in additional parties defendant, such procedure is considered to be an action. *Bell Lumber Co. v. Northern Nat. Bank,* 171 Wis. 374, 376.

Next it must be determined whether the officers in question are "being compensated on a salary basis" within the meaning of sec. 331.35, subsec. (1).

The county clerk and the county treasurer are compensated on an annual salary basis pursuant to the provisions of sec. 59.15, subsec. (1), which provides in part:

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

It appears that the word "salary" in the phrase "who is being compensated on a salary basis" as used in sec. 331.35, subsec. (1), refers to the compensation of an officer who is paid on a salary basis as distinguished from the compensation of one who is paid on a fee basis, since some officers are paid salaries, whereas others receive fees. "Salary," as relating to the compensation of public officers, is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered, the amount of the fee being fixed by law. *State v. Bland,* 91 Kan. 160, 136 Pac. 947. When fees are prescribed as his compensation the officer is not entitled to receive any other or additonal pay. 46 C. J. 1018.

The foregoing distinction between salaries and fees is recognized in our statutes in sec. 59.15, subsec. (5), which provides that the county board may at any time change the compensation of any county officer from the fees collected and retained by him to a salary.

The other county officers involved in the litigation against the bank are members of the county board, and their compensation is fixed by sec. 59.03, subsec. (2), par. (f), Stats., which provides in part:

"Each member of the county board, of each county to which this subsection is applicable, subject to the limitations herein provided, shall be allowed and paid by the county a compensation for his services and expenses in attending the meetings of the board at the rate of four dollars per day for the time he actually attends, excepting Sundays, and mileage for each mile traveled in going to and returning from the place of meetings by the most usual traveled route at the rate prescribed in paragraph (f) of subsection (6) of section 14.71; * * *."

When acting on committees, members of the county board receive such compensation as the county board shall allow, not exceeding the per diem and mileage allowed to members of the county board. Sec. 59.06, subsec. (2).

A "salary" has been defined to be "a fixed compensation, decreed by authority, and for permanence, and is paid at stated intervals, and depends upon time, and not the amount of services rendered." 46 C. J. 1017.

The per diem compensation of a county board member meets the description in the foregoing definition. Such compensation is fixed; it is decreed by authority of the statutes; it is permanent until changed by the legislature or by the county board itself within the limits fixed by the legislature. It is paid at stated intervals to the extent at least that the time of meetings for the county board is prescribed by sec. 59.04, subsec. (1), par. (a), Stats., and the compensation can be paid only on the order of the county board. Sec. 59.20, subsec. (2). It is also clear that such compensation depends upon time rather than the amount of services rendered.

Without passing upon the question specifically, the office has for many years referred to the compensation of county board members as "salary." See IV Op. Atty. Gen. 456, XVI Op. Atty. Gen. 145 and XX Op. Atty. Gen. 1004. In addition to this fact the term "per diem" has been held to be synonymous with "salary." *Peay v. Nolan* (Tenn.). 7 S. W. (2d) 815, 817.

We therefore conclude that, as the members of the county highway committee, the chairman of the county board, the county clerk and the county treasurer are officers compensated on a salary basis who have been subjected to an action to subject them to personal liability in their official capacity, they may be reimbursed by the county for all reasonable expenses incurred by them in resisting an order to show cause as heretofore referred to.

The next claim arises out of a *quo warranto* action commenced against a county board member under sec. 294.04, Stats., he being charged with usurping, intruding into and unlawfully holding such office because he had once been convicted of the crime of larceny and thus became ineligible for office by virtue of the provisions of art. XIII, sec. 3, Wisconsin constitution. Judgment resulted in favor of the defendant on the grounds that a subsequent pardon by the governor had removed the disability to hold such office. The defendant incurred expenses for counsel fees in defending the action for which he seeks reimbursement from the county under sec. 331.35 (1).

It is obvious that a *quo warranto* action brought under sec. 294.04, Wis. Stats., cannot be said to have been brought against the defendant in his official capacity, when the very purpose of the action is to deny such official capacity. Such actions are brought against the defendant as an individual and the complaint under sec. 294.04, subsec. (1), par. (a) must necessarily allege that the defendant has usurped, intruded into, or unlawfully held or exercised the public office in question. Thus it is also obvious that the action was not brought for any personal liability.

It is our opinion that this claim does not properly come within the purview of sec. 331.35 (1) for the reason that no charges of any kind or action of any sort were brought against such officer in his official capacity, or to subject him to a personal liability growing out of the performance of his official duties.

The last claim is for counsel fees paid by the district attorney in defending ouster proceedings brought under sec. 17.09, on charges of alleged inefficiency, neglect of duty, official misconduct and malfeasance.

The charges were brought against the district attorney in his official capacity, and they were dismissed. He is an officer "compensated on a salary basis" pursuant to the provisions of sec. 59.15 (1), above quoted, the same as the county clerk and county treasurer.

Hence, it is our opinion that under sec. 331.35 (1) the county may pay all reasonable expenses which the district attorney necessarily expended in defending such ouster proceeding.

The Wisconsin supreme court in the case of *Curry v. Portage*, 195 Wis. 35, construed sec. 62.09 (7) (f), relating to reimbursement of city officials where proceeded against in their official capacity or because of acts arising out of the performance of their official duties, which statute is in many respects similar to sec. 331.35 (1). In that case, proceedings were instituted against the chief of police of the city of Portage before the city fire and police commission, the situation as far as the principles here under discussion is concerned being analogous to proceedings before the governor to oust a district attorney. The court commented

upon the policy of the legislature in reimbursing state officers for expenses incurred where the litigation resulted from the faithful discharge of official duty, and Owen, J., speaking for the court said at page 40:

"* * * This is good public policy and encourages a faithful and courageous discharge of duty on the part of public officers. This practice on the part of the legislature has obtained for so many years that it is now an intrenched public policy, * * *"

We deem this language particularly appropriate and apply it by analogy to proceedings instituted to oust district attorneys. The office of district attorney is a most important one in the administration of justice and the courage with which the duties of such office ought to be discharged should not be dampened by fear of incurring personal expenses in defending baseless ouster proceedings. Without the assurance afforded by the wise provisions of sec. 331.35, subsec. (1), Wis. Stats., a district attorney might well hesitate to investigate or prosecute powerful interests who could always embarrass him with the expense of defending ouster proceedings however unjustified.

In concluding that the first and third mentioned claims may properly be paid by Dane county under sec. 331.35 (1) we call your attention to the fact that such payment is discretionary with the county board, the words "may pay" being permissive under the rule laid down in *Curry v. Portage,* 195 Wis. 35, 37.

OSL
WHR

Automobiles — Law of Road — Recommended procedure to effect suspension of revocation of driver's license after conviction of traffic offense under municipal ordinance is through issuance of state warrant for same offense.

Conviction for violation of county ordinance does not bar prosecution under state law upon same facts.

June 23, 1937.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You state that Richland county has a county traffic ordinance and refer us to an opinion of this office in XX Op. Atty. Gen. 931, where it was held that a driver's license cannot be suspended upon a conviction of a traffic offense prosecuted under a municipal ordinance. Our advice is requested as to what procedure should be followed in suspending drivers' licenses following conviction under a municipal ordinance.

You have suggested that after conviction of a traffic offense under municipal ordinance a warrant be issued under the state traffic code for the same violation and that the driver's license be suspended upon conviction thereunder. Sec. 85.08, subsec. (13), Stats., provides that a driver's license may be revoked or suspended after a hearing upon written complaint filed in a court of record, notice of such hearing having been given at least three days before the date thereof by personal service or by registered mail.

In view of the fact that sec. 85.08, subsec. (13) is not expressly definite as to the reasons for which a license may be revoked by the procedure therein outlined, it is our opinion that the procedure suggested by you of issuing a state warrant and suspension of the driver's license by a conviction thereunder is the proper and more advisable manner of procedure.

In the event the procedure thus recommended is followed you raise the question whether under such procedure the defendant may successfully claim that he has been placed in

jeopardy twice for the same offense contrary to art. I, sec. 8, of the Wisconsin constitution. A prosecution under a county ordinance is a civil action, while a prosecution under the state law is a criminal action. In *Guinther v. Milwaukee* (1935), 217 Wis. 334, 258 N. W. 865, our court recently held that where acts may be prosecuted under a state statute and also under a municipal ordinance, a conviction upon either does not bar a prosecution under the other. In 8 R. C. L. 150, the general rule is stated to the same effect. The reason for the rule is there stated:

"* * * The courts proceed on the theory that while the same act may be the basis of each prosecution, yet the offenses are distinct and committed against two different laws. * * *"

It is our opinion, therefore, that one who violates the traffic laws may be prosecuted under a county ordinance and also under the state traffic statutes without violating the constitutional prohibition against double jeopardy.

OSL
JEM

Education — Teachers' Retirement Act — Bill No. 758, A., extending to former teachers of cities of first class who retired prior to June 24, 1931, same annuities as are payable to teachers retiring subsequent to that date amounts to grant of extra compensation after services have been rendered, in violation of art. IV, sec. 26, Wis. Const.

June 23, 1937.

LESTER R. JOHNSON, *Chief Clerk.*
Assembly.

You have forwarded to this office a copy of Resolution No. 62, A, requesting an opinion from the attorney general as to the validity of the provisions of Bill No. 758, A.

This bill creates par. (k) of subsec. (12) of sec. 42.55 of the statutes, relating to teachers' retirement funds in cities of the first class. The material portions of this bill read as follows:

"SECTION 1. A new paragraph is added to subsection (12) of section 42.55 of the statutes to read: (42.55) (12) (k) From and after July 1, 1937, a teacher who shall have become retired and entitled to an annuity under the provisions of this section prior to June 24, 1931, upon written application to the board of trustees therefor and in lieu of the annuity previously fixed, shall receive an annuity in such sum as such retired teacher shall be entitled to and as shall be determined by the board of trustees in accordance with the provisions of this subsection when applied in the same manner and on the same basis as annuities are computed for teachers who shall have become retired and entitled to an annuity under this section after June 23, 1931. * * *"

In order to pass upon the validity of this bill, it is necessary to make some preliminary statements concerning the history and scope of sec. 42.55, Stats., which sets up a retirement system for teachers in cities of the first class. This law had its origin in ch. 453, Laws 1907, and it has been amended at various times since then. The retirement fund provided by the law is administered by a board of trustees as provided by sec. 42.55, subsec. (2), Stats., consisting of the president of the managing body of the schools and four teachers. Payments to the fund are deducted from the monthly salaries of teachers in accordance with the schedules provided in sec. 42.55, subsec. (11). The fund is otherwise built up in accordance with the provisions of subsec. (20) of sec. 42.55, which provides for contribution from the general fund of the city to make up any shortage between teachers' contributions and withdrawals from the fund. This statute also provides that the city shall annually pay into the fund a sum not less than that paid in by teachers the preceding year. However, par. (b), subsec. (20), sec. 42.55 relieves the city from contributions in any year during which the amount received by the city from the teach-

ers' surtax on incomes under sec. 71.25, Stats., equals or exceeds the amount which the city otherwise would be required to contribute.

Thus it will be seen that in addition to the contributions of the teachers the fund is augmented by aid from the state, or by aid from both the state and the city if the city's portion of said surtax on incomes is insufficient, when added to the current payments from teachers, to equal the current demands on the fund.

Under par. (b), subsec. (12), sec. 42.55, Stats., retired teachers are entitled to an annuity of six hundred dollars and par. (c) of said subsec. (12) further provides:

"For every additional year of service over twenty-five, a teacher, entitled to an annuity under the provisions of this section, shall be paid an additional sum of *forty dollars* a year; but every such additional year of service shall have been rendered in the public schools in such city of the first class, and in no case shall any pension or annuity exceed the sum of *twelve hundred dollars a year.*"

Prior to June 24, 1931, when ch. 299, Laws 1931, became effective, par. (c) read:

"For every additional year of service over twenty-five, a teacher, entitled to an annuity under the provisions of this section, shall be paid an additional sum of *twenty dollars* a year; but every such additional year of service shall have been rendered in the public schools in such city of the first class, and in no case shall any pension or annuity exceed the sum of *nine hundred dollars* a year."

Thus it will be seen that teachers having more than twenty-five years of service who retired subsequent to June 24, 1931, have been, and now are, receiving larger annuities than those of the same number of years of experience who retired prior to that date.

It is the avowed purpose of Bill No. 758, A., to place the teachers who retired prior to June 24, 1931, on the same basis as those who retired after that date as far as the annuities provided by sec. 42.55, subsec. (12), par. (c) are concerned.

The first constitutional question that suggests itself in connection with the provisions of Bill No. 758, A., is whether it amounts to a grant of extra compensation after services have been rendered in violation of art. IV, sec. 26, Wisconsin constitution, which provides:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

In considering the constitutionality of the state teachers' retirement act, ch. 459, Laws 1921, our court in the case of *State ex rel. Dudgeon v. Levitan,* 181 Wis. 326, held that such act did not constitute a grant of extra compensation for services already rendered by the teachers contrary to sec. 26, art. IV, Wisconsin constitution, but was intended to induce experienced teachers to remain in the service, and therefore is compensation for the services to be rendered in the future, even though, in cases of teachers longest in service, such additional compensation would be disproportionate to the services thereafter rendered. Hence, it would appear that except for the reason that the teachers' retirement act was intended to induce experienced teachers to continue teaching the court would have held it unconstitutional under sec. 26, art. IV, above quoted.

This reasoning, with which the court met the constitutional objection raised in the *Dudgeon* case, would not apply to the present act, which is designed to benefit teachers who retired prior to 1931. They are no longer in the service, and the benefits to be received by them, under the proposed act, can in no sense be considered as compensation for services to be rendered in the future or as an inducement to them to remain in service.

It is well established that an attempt to grant benefits of pension laws to those who have retired from service before the enactment of such pension laws is unconstitutional as a grant of extra compensation within the meaning of constitutional provisions similar to art. IV, sec. 26, Wisconsin constitution.

Judge Dillon, in his work on Municipal Corporations (5th ed.), sec. 430, page 754, says:

"But to be valid under constitutional requirements, the pensions must be conferred upon *persons who at the time* of receiving the right to them are officers or employees of the municipality. They cannot be conferred upon persons who had, previously to the grant, retired from the service of the city. A pension to such persons is an appropriation of public funds for the benefit of individuals, and a gift or gratuity."

The same idea is well expressed in the opinion of the court in the case of *Mahon v. Board of Education,* 171 N. Y. 263, 63 N. E. 1107. The New York legislature, in 1894, enacted a teachers' pension law. The plaintiff had been a teacher in the public schools and had retired in 1892. In 1900 the legislature enacted the statute directing the board of education to place the plaintiff and others on the pension rolls as retired teachers. The New York constitution provided that the legislature should not grant any extra compensation to any public officer, servant, agent or contractor. The court said at page 267:

"* * * The legislature might well think that in a large city where teaching is adopted as a calling to be pursued for years, and often for life, it would be wise to provide a system of pensions as an inducement both to service at low wages and also to good conduct in service. But these considerations have no application to the case of officers or employees who are not in service at the time the pension system is established or in force. As to such persons the grant of a pension is a mere gratuity."

The language of the New York court applies here, as we can see no distinction in principle between granting benefits of pension laws to those who retired prior to the enactment of the pension law and granting increased pensions to those who retired before the increases went into effect.

The case of *Porter v. Loehr,* 332 Ill. 353, 163 N. E. 689, is directly in point. There the court held that statutes amending the pension law so as to increase pensions of policemen theretofore retired, in cities having a population

exceeding two hundred thousand inhabitants, violated art. IV, sec. 19 of the Illinois constitution, which provides, among other things, that "the General Assembly shall never grant or authorize compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made." The court said at page 361:

"The amendatory acts increasing the pensions of retired policemen do not contemplate the rendition of additional services by the pensioners. They were paid when they performed their services and the amounts of their pensions were fixed by law when they retired. The increases are not granted for services to be performed by the pensioners, but have as their sole basis or justification the services which they rendered prior to their retirement. The obligations which the performance of those services imposed upon the public have been fully discharged. No obligation, either legal or moral, to pay more than the stipulated compensation arises where no additional services have been or will be rendered. Extra compensation is a payment or allowance in excess of that which was fixed by law or contract when the services were rendered. Since the increases in the pensions of retired policemen sought to be effected by the amendatory acts in question are based solely on the services rendered by them prior to their retirement, these increases necessarily constitute an extra allowance for past services. Such an allowance section 19 of article 4 of the constitution expressly forbids, and the amendments to sections 3 and 4 of the act of June 29, 1915, and to section 50 of the act of June 29, 1921, increasing the pensions paid to retired policemen, are therefore void."

We are unable to improve upon this statement of the constitutional principle here under discussion, and we adopt the reasoning of the Illinois court in rendering this opinion.

It may further be argued that the proposed legislation impairs contractual rights existing between teachers entitled to participation in the retirement fund and the state of Wisconsin, in violation of art. I, sec. 12, Wisconsin constitution, and art. I, sec. 10, United States constitution.

However, to analyze the problem on that ground would only prolong this opinion without in any way changing the

result. Consequently, our conclusion that the provisions of Bill No. 758, A., are unconstitutional is based upon the reasons heretofore stated.
WHR
JRW

Minors — Child Protection — Adoption — Child over eighteen and less than twenty-one years of age who has been abondoned by its parents may be adopted and parental rights may be terminated under sec. 322.04, subsec. (7), Stats., without necessity of committing such child to welfare bureau or state board of control.

June 24, 1937.

BOARD OF CONTROL.

You state to us the following facts:

"B was born on July 7, 1918 and has been in the home of Mr. and Mrs. X since she was four years old. Her mother is dead and her father, Mr. A, deserted her fourteen years ago and has not supported her during that time. His whereabouts are unknown. Mr. and Mrs. X have cared for B since her father's desertion and now want to adopt her. Before adoption proceedings are instituted, it is necessary to terminate the parental rights of the father of this child, under Section 322.04 (7)."

You ask our opinion as to whom the child should be committed.

We call your attention to the fact that in our opinion it is not necessary to terminate the parental rights of the father of his child before institution of the adoption proceedings, and that the parental rights may be terminated in the adoption proceeding itself. We find nothing in ch. 322, Stats., that requires the consent to adoption to be made before institution of the proceeding. In fact, sec. 322.04, subsec. (6), provides that in the case of a minor parent whose consent is required a guardian ad litem shall be appointed whose con-

curring consent shall be necessary. This necessarily means that the consent of the guardian ad litem would be given after the filing of the petition for adoption.

In the adoption proceedings pursuant to ch. 322, Stats., the rights of the parents with reference to the child may be terminated. Sec. 322.04 (7) provides as follows:

"If the parents of a child to be adopted who is eighteen but less than twenty-one years of age shall have abandoned such child the court wherein the adoption proceedings are pending may terminate all rights of the parents with reference to such child, after notice and a hearing as provided in paragraph (a) of subsection (7) of section 48.07 for the termination of parental rights in the juvenile court."

By the provisions of this statute it will be necessary in the adoption proceeding to terminate the parental rights of the father by giving notice in the adoption proceeding in the manner provided for in par. (a), subsec. (7), sec. 48.07. The provisions of sec. 322.04 (7) quoted are merely to define the method of procedure to be followed in the adoption proceedings in county court. It does not follow that by reason thereof all of the other provisions of sec. 48.07 are applicable in the adoption proceeding and must be complied with. Sec. 48.07, as a part of ch. 48, properly applies only to delinquent, neglected, or dependent children as defined in sec. 48.01, Stats. The subject of your inquiry is not "a neglected, dependent or delinquent child" within the meaning of ch. 48, because she is over eighteen years of age. See pars. (a), (b), and (c) of subsec. (1), sec. 48.01.

The questions of who shall maintain and support the child and who shall have the control and custody of her are ones of vital importance and necessarily involved in the adoption itself. They would be disposed of by the county court of necessity in granting the adoption.

In our opinion, therefore, there is no necessity in such adoption proceedings for the commitment of the subject of your inquiry to a welfare bureau or the state board of control.

OSL
LEV

Prisons — Prisoners — Under sec. 14.30, subsec. (16) Stats., enacted by ch. 119, Laws 1937, one charged with escape may be held for safekeeping pending trial in institution from which he escaped instead of in county jail.

By sec. 53.01, subsec. (2), Stats., as amended by ch. 119, Laws 1937, one who escapes from prison farm, whether located within or without Dodge county, may be prosecuted in courts of Dodge county.

June 24, 1937.

BOARD OF CONTROL.

You have submitted a copy of a letter from Mr. Oscar Lee, warden of the state prison, relative to the interpretation of ch. 119, Laws 1937 and request an answer to several questions. The first question is whether you should swear out a warrant for escaped prisoners as you have done in the past, deliver it to the sheriff for service at the time the prisoner's sentence in your institution expires, and then have the prisoner taken into court by the sheriff, and if the circuit court is not in session before what court is the man to be taken.

One who escapes from the state prison commits a crime which is classed as a felony. The officer who recaptures the escaped convict may, without any further proceedings in court, bring him back to the state prison to serve out the balance of his term. The original commitment papers are sufficient to hold the convict. However, if it is desired to prosecute the prisoner for the crime of escape, then the regular criminal procedure must be followed in the same manner as the prosecution of any other person who has committed a felony. The complaint must be sworn to before a magistrate in the county where the crime was committed and such magistrate issues a warrant for the arrest of the accused prisoner. Upon being arrested on such warrant the accused is brought before the magistrate, where he is entitled to a preliminary hearing. The accused is entitled to his liberty upon furnishing bail but, if he does not furnish the required bail pending the preliminary hearing or pend-

ing trial in the event of waiver of preliminary hearing, he will be committed by the court to the institution from which he escaped until discharged according to law.

Your second question is whether, where an escaped prisoner has been taken before some court and remanded back to the institution for safekeeping pending trial, he is to enter the prison as a regular prisoner, to be dressed in prison uniform and to comply with all the other rules regarding men committed to prison.

Under the provisions of ch. 119, Laws 1937, if the escape was from the state prison, such commitment will be to the state prison. The incarceration under such commitment is not the same as though the accused had been convicted of a crime. He is committed purely for the purpose of safekeeping and not for punishment and should not be returned as a convicted criminal. The accused should simply be held for trial by the state prison authority under such rules and regulations for the protection and good of the institution as the state board of control shall prescribe in the same manner as he would be held had he been committed to the county jail pending trial. The right to hold such escaped prisoner as the accused in such proceedings is based upon the commitment from the magistrate or court authorized to commit him to prison pending disposition of his case under authority of ch. 119, Laws 1937. Prior to the passage of this law one charged with the crime of escape, pending final disposition of his case, was committed to the county jail in the county where the crime was committed.

The question is also asked whether it is only those who escape from camps situated in some county other than Dodge county that fall within the meaning of the amendment by ch. 119, Laws 1937 to sec. 53.01, subsec. (2).

Under sec. 53.01, subsec. (2), Stats., as it heretofore existed, the state prison and all precincts thereof are deemed to be within and a part of Dodge county for the purpose of all judicial proceedings and the courts of Dodge county have jurisdiction of all crimes and offenses committed within the prison and its precincts. In the event of the escape of a prisoner from the state prison or any outlying camp in Dodge county under the jurisdiction of the state prison the

charge of escape would be prosecuted in that county. Under the provisions of sec. 53.01, subsec. (2) as amended by sec. 2, ch. 119, Laws 1937, any farming, forestry, quarrying or other activity conducted under the jurisdiction of and by said prison, no matter where located, shall be deemed and is made a precinct of said prison. Therefore, any violation of law occurring in any of the camps under the jurisdiction of the state prison, whether such camps are within or outside of Dodge county, shall be deemed to have occurred within Dodge county and the courts of that county have jurisdiction to punish the same.

OSL
LEV
JEM

Corporations — Co-operatives — Insurance — Co-operative insurance agency organized and operating under co-operative statutes, ch. 185, Stats., does not thereby violate anti-rebating provisions of sec. 201.53, Stats.

June 24, 1937.

H. J. MORTENSEN,
Commissioner of Insurance.

You have called our attention to the corporate articles of a co-operative insurance agency in which it is provided:

"The property rights of members of this association shall be unequal and shall be in proportion to the net earnings of the business done by the association with the member."

The "net earnings" of the corporation will be comprised of the commissions received from insurance companies on insurance placed by the persons employed to act as agents less costs of operation. The question is raised as to whether the corporation may calculate property rights "in proportion to the net earnings of the business done by the association with the member" because of sec. 201.53, subsec. (2), Stats., which provides:

"No insurance company, nor any officer, agent or employe thereof, shall pay, allow or give or offer to pay, allow or give, nor shall any person receive, any rebate of premium, or any special favor or advantage whatever in the dividends or other benefits to accrue, or any valuable consideration or inducement whatever not specified in the policy."

In connection with the restrictions mentioned in sec. 201.53, (2), Stats., above quoted, there must also be considered the restrictions contained in sec. 201.53 (4), which provides in part:

"It is not unlawful to pay the whole or any part of any commission to a domestic corporation, of which the agent writing the insurance shall be an officer or salaried employe, *but no commission shall be so paid where any officer or stockholder of such corporation shall be interested in the property or risk insured,* otherwise than as an agent authorized under section 209.04, * * *."

The italicized portions of sec. 201.53 (4), above quoted, were obviously designed to strengthen the anti-rebating provisions of subsec. (2) by making it impossible to avoid its provisions through the formation of corporate insurance agencies for the purpose of saving the commissions on insurance written on property of its stockholders. In the absence of restrictions such as those contained in subsec. (4), there would be a strong temptation for insurants paying heavy insurance premiums to form corporate insurance agencies, not for the purpose of selling insurance to the general public, but for the sole purpose of securing their own insurance at a substantial saving by eliminating the middleman or insurance agent.

This, of course, is the avowed purpose of a co-operative insurance agency, and hence such an agency violates sec. 201.53 unless it can be established that the law respecting co-operative organizations supersedes the anti-rebating law to the extent that it is inconsistent therewith. Therefore, it becomes necessary to make some analysis of the history and scope of the law relating to the organization and operation of co-operatives.

Co-operative corporations are organized under ch. 185, Stats., and they may incorporate for any of the purposes for which incorporation is authorized by sec. 180.01, Stats. See sec. 185.02, subsec. (2). Incorporation is authorized under sec. 180.01 for any lawful business or purpose whatever, except banking, insurance, and building or operating public railroads. Thus, it is clear that a co-operative association may be formed for the purpose of selling insurance or conducting an insurance agency, as distinguished from the business of insuring risks which, of course, it cannot do because of the restrictions in sec. 180.01, Stats. In other words, as far as authority to do business is concerned, a co-operative insurance agency stands on the same footing as any other domestic corporation formed for insurance agency purposes.

In a general way the theory underlying co-operative associations is that the net profits are to be distributed among the members in proportion to the volume of business conducted by such members. If this cannot be done by a co-operative association in connection with the writing of insurance without violating the anti-rebating law, then the result is that a co-operative association is impliedly precluded from entering the insurance selling field.

In passing upon the problem here presented, attention is first called to the proposition that co-operative associations are favored by the laws of Wisconsin. *No. Wisconsin Co-op. Tobacco Pool v. Bekkedal,* 182 Wis. 571, 582. No extended consideration of this proposition is necessary, as one or two illustrations will suffice. For instance, sec. 94.15, Stats., makes it the declared policy of the state to assist in the organization and development of co-operative marketing associations, and sec. 185.08, subsec. (10), Stats., provides that whenever any corporation shall discriminate against any co-operative association transacting business in this state, its charter may be vacated or its existence annulled, if it is a domestic corporation; or, if it is a foreign corporation, its license to transact business in Wisconsin may be revoked. These provisions speak for themselves and can leave no doubt as to the favored position occupied by co-operatives under Wisconsin law.

The holding of the *Bekkedal* case was followed in these subsequent cases: *Watertown M. P. Co-op. Asso. v. Van Camp P. Co.,* 199 Wis. 379; *Spencer Co-op. Live Stock S. Asso. v. Schultz,* 209 Wis. 344; *State v. Dairy Distributors, Inc.,* 217 Wis. 167. In *State ex rel. Saylesville C. Mfg. Co. v. Zimmerman,* 220 Wis. 682, it was held that contracts between co-operative associations and their members are of a nature which entitles them to a peculiar status in the law, and such contracts may be afforded a protection in the law denied to the contracts of other persons, natural or corporate. These holdings are not confined to Wisconsin. See also: *Liberty Warehouse Co. v. B. Tobacco Growers' Co-op. Marketing Asso.,* 276 U. S. 71, and *Frost v. Corp. Commission of Oklahoma,* 26 Fed. (2d) 508, wherein it was held that a statute authorizing the corporation commission to issue licenses for cotton gins on petition by one hundred citizens for establishment of a gin to be run co-operatively, did not violate Amendment Fourteen of the United States constitution, guaranteeing equal protection of the law, since a gin to be run co-operatively is different from an ordinary commercial gin, for which an adjudication of necessity is required under the statutes.

Another consideration, and one which we believe to be controlling here, is that the co-operative law, being enacted later than the general anti-rebating insurance law, must be considered as modifying the latter law and as legalizing the method of profit distribution authorized in the case of co-operatives.

The anti-rebating law was formerly embodied in sec. 207.01, Stats., which was renumbered by ch. 487, Laws 1933. It had its origin in ch. 267, Laws 1891, whereas the co-operative law was first enacted by ch. 126, Laws 1887. In line with the proposition here discussed we call attention to the fact that the court in the *Bekkedal case* held that the provisions of the general antitrust statutes were superseded by the later conflicting provisions of the co-operative law.

Thus we conclude and it is our opinion that, having in mind the purpose of co-operatives and their extremely fa-

vored positions under the Wisconsin law, they are exempt from the prohibitions contained in sec. 201.53, Stats., known as the insurance anti-rebating law.
OSL
WHR

Minors — Child Protection — Adoption — Minor mother of child born out of wedlock may, with consent of her guardian ad litem, waive her parental rights to child.

June 25, 1937.

BOARD OF CONTROL.

You have submitted and asked our opinion upon the following question:

"Is it proper and legal for a minor mother of a child born out of wedlock to waive her parental rights personally and through her guardian ad litem, or is this right that exists in the mother to the child a personal right that cannot be waived?"

In a juvenile court proceeding under ch. 48, the provisions of sec. 48.07, subsec. (7), Stats., expressly provide that the rights of the parents with reference to a child may be terminated upon a hearing before the court after notice thereof has been served on the parents personally or by publication. The last sentence of par. (a) of this subsection provides as follows:

"* * * In case of any minor parent the court shall appoint a guardian ad litem therefor in the manner provided for appointment of guardians ad litem in the county court."

In such a proceeding no consent of the parent is required. If the court finds that it is necessary to transfer the care, custody, and control of the child it may terminate the par-

ental rights, whether the parents consent or not. All that is required is that notice of the hearing be given to the parents.

It is only in an adoption proceeding under ch. 322, Stats., that consent of the parent is required. Of necessity the very essence of an adoption proceeding terminates the parental rights.

Subsec. (1), sec. 322.04 provides as follows:

"Except as otherwise specified in this section, no adoption shall be permitted except with the written consent of the living parents of a child. * * *"

Then subsec. (4), sec. 322.04, provides as follows:

"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."

In a case falling within this last quoted provision of the statutes the consent of only one parent, to wit, the mother, is required, but her consent is necessary even though the consent of the licensed child welfare agency or the state board of control must also be secured in such adoption proceedings.

Subsec. (6), sec. 322.04 provides:

"In a case where the consent of a minor parent is required a guardian ad litem therefor shall be appointed and the consent of such minor parent shall be effective only if concurred in by the guardian ad litem."

It is therefore our opinion that a minor mother of a child born out of wedlock, by consenting to the termination of her parental rights in which the duly appointed guardian ad litem joins, properly and legally waives her parental rights to such child.

OSL
LEV

Municipal Corporations — Commission Cities — Public Officers — City Utility Commission — Metropolitan Sewerage District Commission — City of third class operating on commission plan may govern its utility by nonpartisan commission pursuant to sec. 66.06, subsec. (10), Stats.

Offices of municipal utility commissioner and metropolitan sewerage district commissioner are compatible.

Commission city of third class may by charter ordinance provide for method of selection of members of utility commission.

July 1, 1937.

PUBLIC SERVICE COMMISSION.
Attention Mr. William M. Dineen, *Secretary.*

You have requested our opinion as to whether a city of the third class organized under ch. 63, Stats., may provide for the management of its municipally owned water utility by a nonpartisan commission as provided in sec. 66.06, subsec. (10), Stats.

Ch. 63, Stats., provides for the organization of cities under the commission plan of government. Sec. 66.06 Stats., relates to public utilities and is a part of ch. 66, Stats., entitled "General Municipal Law."

Sec. 63.06, subsec. (1) provides:

"The council may create any general department of city affairs, such as (a) public finance and accounts; (b) public health, safety and sanitation; (c) streets and public improvements; (d) public property; (e) public charities and corrections; and designate one of its members as the head thereof; but such head may be changed whenever it appears that the public service would be benefited thereby."

Sec. 63.08 provides:

"The council shall have power from time to time to create and fill offices and fix the term of service and salaries other than those described in the preceding section and to discontinue any office so created or any office included within section 63.06 according to their judgment of the needs of the city."

The provisions of sec. 66.06 (10) which are pertinent to your question are as follows:

"(a) In cities owning a public utility, the council shall and in towns and villages owning a public utility the board may provide for a nonpartisan management thereof, and create for each or all such utilities, a board of three or five or seven commissioners, to take entire charge and management of such utility, to appoint a manager and fix his compensation, and to supervise the operation of the utility under the general control and supervision of the board or council.

"(b) The commissioners shall be elected by the board or council for a term, beginning on the first day of October, of as many years as there are commissioners, except that the terms of the commissioners first elected shall expire successively one each year on each succeeding first day of October.

"* * *

"(g) In cities of the third or fourth class the council may provide for the operation of a public utility or utilities by the board of public works, in lieu of the commission above provided for."

The provisions of sec. 63.06, subsec. (1), and sec. 63.08 grant to the council of a commission city, except in so far as other statutes may prohibit, ample power to create such municipal offices and departments for the operation of the city's affairs as the council shall find advisable. In the absence of such contrary statute it seems clear that under ch. 63, Stats., a city organized thereunder could, if it so desired, provide for a nonpartisan commission to manage its utility.

However, in a previous opinion, XIX Op. Atty. Gen. 499, it was held that the above quoted portions of sec. 66.06 (10) apply to a city operating upon the commission plan under ch. 63 and are mandatory. Sec. 66.06 (10) is special legislation in reference to the management of municipally owned utilities. The provisions of ch. 63, Stats., are general laws pertaining to the operation of cities under the commission plan of organization.

In so far as there is a conflict between the two, the provisions of sec. 66.06, subsec. (10) must control in conformity to the rule that special legislation takes precedence over general laws. However, in so far as your question is con-

cerned, no conflict appears, because such a city has the necessary authority under both provisions. The power granted under secs. 63.06 (1) and 63.08 is certainly general enough to authorize a nonpartisan commission management of a utility. Sec. 66.06 (10) specifically provides therefor. The general grant of power must include the specific grant.

Therefore it is our opinion that sec. 66.06 (10) applies the same to a city of the third class operating upon the commission plan as it does to other cities of the same class.

You have also asked whether a member or employee of a metropolitan sewage district, formed under sec. 66.20, Stats., comprising a city of the third class operating under the commission plan, would be eligible to be a member of the utility commission of such city.

The offices of town chairman and commissioner of a drainage district are compatible. XIV Op. Atty. Gen. 136. The court appoints the commissioner of the drainage district and maintains supervisory powers thereof. No jurisdiction over the commissioners is possessed by the town chairman. Thus, the powers of the two officers being separate and distinct and no conflict existing, the offices are compatible.

In an opinion XVII Op. Atty. Gen. 498 it was held that the offices of city supervisor and member of the city water and light commission are compatible, except where the city water and light commission furnishes service to the county.

Under sec. 66.20, Stats., the commissioners of the metropolitan sewage district are appointed by the court and are under its supervision. The members of the city utility commission are selected by the city. Neither of the two offices has any jurisdiction or power over the other. There is thus compatibility between the offices, except where by reason of transactions between the two bodies or other similar situations, such as the furnishing of service by one to the other, conflicting interests arise, whereupon the offices become incompatible by virtue of the particular existing circumstances. See 46 C. J. 942. If the present circumstances are such that there exist situations in which the interests of the two bodies are in conflict then the offices are now incompatible. Until such incompatibility is shown to exist in

fact, it is our opinion that a member of the metropolitan sewerage commission may also be a member of the municipal utility commission. If a member of the sewerage commission is eligible for the office then surely an employee thereof is likewise eligible in so far as incompatibility of offices is concerned.

In addition you have asked whether such a commission city of the third class may provide for the selection of the members of said utility commission by appointment of the mayor with the consent of the council through the adoption, pursuant to sec. 66.01, Stats., of a charter ordinance, notwithstanding the provisions of sec. 66.06 (10) (b).

Whether or not the provisions of sec. 66.06 (10) in providing for the management of municipally owned utilities, being applicable to all cities, is of state-wide concern so as not to be within the prohibition of the home rule amendment (art. XI, sec. 3, Wis. Const.) is an extremely difficult problem, but not necessary to be solved in order to answer your last question. In a former opinion of this department, XXI Op. Atty. Gen. 1, it was held that even though state legislation in regard to health and sanitation is a matter of state-wide concern, nevertheless, the method of selection of a local health officer is a local affair within the provisions of the home rule amendment and sec. 66.01 (4). It is, therefore, our opinion that such a city, if it desires to effect its own method of selection of its utility commission, may do so through a charter ordinance electing not to be governed by such of the provisions of sec. 66.06 (10) (b) as relate to the method of selection.

HHP

Taxation — Exemption — Owner of land abutting highway or street has title to center of highway or street adjacent to his property subject to easement acquired by public for purposes of travel, and portion over which state purchases such right-of-way does not thereby become tax exempt.

July 2, 1937.

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

You state that certain lands in Dane county were acquired by the state for highway purposes in July, 1936. Some time subsequent to the first Monday in August, 1936, the former property owner removed a frame building from the portion of the lot acquired by the state for right-of-way purposes and refuses to pay taxes on such portion of the lot, contending that this property, having been acquired by the state prior to the first Monday in August, 1936, is exempt from taxation for 1936 and subsequent years. Our advice on the matter is requested.

It is our opinion that the property owner's contention is based upon a misapprehension of the nature of a conveyance for highway purposes.

The owner of land abutting a highway or street has title to the center of the highway or street adjacent to his property, subject only to the easements acquired by the public for purposes of travel. *Spence v. Frantz,* 195 Wis. 69.

Hence the property in question continues to be taxable as before the conveyance of an easement thereon for right-of-way purposes, although it may well be that the easement acquired by the public will materially diminish the valuation of the property for future assessment purposes. The fact that the owner may have removed or razed a building on the property subsequently to the first Monday in August of 1936 can in no way change the tax situation for that year. If the right-of-way conveyance and the removal of the building so diminished the value of the lot that the owner does not feel justified in paying taxes upon it, it will simply

have to go the way of all tax delinquent lands, and the remedies to be pursued in collecting the taxes against this property are, of course, no different than in any other case of tax delinquency.
WHR

Courts — Guardian ad Litem — Minors — Child Protection — Adoption — Guardian ad litem required by sec. 48.07, subsec. (7), Stats., must be attorney if proceedings are before county judge, but not if before circuit judge.

Guardian ad litem provided for by sec. 322.04, subsec. (6), State., must be attorney.

July 2, 1937.

BOARD OF CONTROL.

You ask our opinion as to whether the guardian ad litem provided for by sec. 48.07, subsec. (7), Stats., must be an attorney.

The proceedings to terminate the parental rights of a parent under sec. 48.07 (7) are brought in juvenile court.

Sec. 48.01, subsec. (2), Stats., is as follows:

"All courts of record in this state shall have original jurisdiction of all cases of neglected, dependent and delinquent children. The judges of the several courts of record in each county of this state shall at intervals of not less than one year designate one or more of their number whose duty it shall be to hear at such places and times as he or they may set apart for such purposes all such cases; and in case of the absence, sickness or other disability of such judge, he shall designate a judge of any court of record whose duty it shall be to act temporarily in his place. Such court shall be known as the juvenile court. * * *."

By virtue of the provisions of the above quoted statute, the juvenile judge may be a county judge, a circuit judge or a judge of some other court of record. Thus whether such

guardian ad litem must be an attorney depends upon the rules of procedure governing the court which performs the functions of the juvenile court.

If the proceedings are before a county judge then by reason of sec. 324.29, subsec. (1), Stats., which provides

"* * * Every person under disability shall appear and conduct or defend by his guardian ad litem, who shall be an attorney, or by his general guardian who may appear by attorney. * * *"

the guardian ad litem must be an attorney. VIII Op. Atty. Gen. 480.

Sec. 260.23 governs the appointment of a guardian ad litem in circuit court. There is no requirement therein that the guardian ad litem shall be an attorney. Therefore should the proceedings be before a circuit judge it would not be necessary for the guardian ad litem to be an attorney.

You also ask whether the guardian ad litem provided for in sec. 322.04 must be an attorney.

Sec. 322.04 (6) provides:

"In a case where the consent of a minor parent is required a guardian ad litem therefor shall be appointed and the consent of such minor parent shall be effective only if concurred in by the guardian ad litem."

Adoption proceedings provided for in ch. 322 are in county court. By virtue of sec. 324.29 (1), previously quoted, the guardian ad litem appointed pursuant to sec. 322.04 (6) must be an attorney at law.

OSL
LEV

Constitutional Law — Taxation — Extension of Time for Payment of Taxes — Amount county treasurers should retain out of taxes paid them before July 1, 1937, for which affidavits for extension have been filed under sec. 74.037, Stats., enacted by ch. 10, Laws 1937, is determined by computation made on percentage that total county tax of city, town or village bears to total city, town or village tax roll.

Subsec. (1), sec. 74.037, Stats., is not unconstitutional as class legislation or in violation of constitutional rule of uniformity in taxation.

July 2, 1937.

WALTER T. NORLIN,
District Attorney,
Washburn, Wisconsin.

An opinion has been requested on several questions relating to sec. 74.037, Stats., created by ch. 10, Laws 1937.

Your first question concerns the construction of subsec. (2), sec. 74.037, Stats., in which you ask whether, where a town has paid a part of its county tax, the amount to be retained by the county treasurer out of each individual payment of taxes from that town, made before July 1, 1937, and for which an affidavit of extension of the time of payment has been filed, should be computed on the total amount due the county as county taxes or on the balance still due the county from the town.

Subsec. (2), sec. 74.037, Stats., provides in part:

"* * * such computation for each parcel of property shall be made on the percentage basis that the total county tax for such town, city, or village shall bear to the total tax roll of such town, city, or village. * * *"

It is a well recognized rule of statutory construction that where the language of a statute is plain and unambiguous it is not subject to construction and must be enforced and applied in accordance with its terms. *State v. Chicago & N. W. Ry. Co.*, (1931) 205 Wis. 252, 237 N. W. 132, and cases there cited.

The statute thus very specifically states that the computation shall be on the basis of the total county tax.

In your second question you inquire as to the constitutionality of the provision in subsec. (1), sec. 74.037, which permits a taxpayer who, by filing an affidavit pursuant to proper authorization, has obtained an extension of the payment of his taxes to July 1, but has failed to pay said taxes by that date, to pay interest thereafter only from July 1, whereas a taxpayer who has not filed an affidavit must pay interest for the entire time his taxes are delinquent.

Art. IV, sec. 31, Wis. Const., provides:

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

Art. IV, sec. 32, Wis. Const., provides:

"The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state."

Our court has frequently set forth the elements of the requirement of art. IV, sec. 32, Const.:

"Where legislation upon a given subject is required to be by general law, such requirement is complied with by proper classification and the law relating to the subject being made applicable to all within the class created." *Hjelming v. La Crosse County,* (1926) 188 Wis. 581, 584, 206 N. W. 885; *Adams v. Beloit,* (1900) 105 Wis. 363, 81 N. W. 869; *State ex rel. Risch v. Trustees,* (1904) 121 Wis. 44, 98 N. W. 954.

See also XXII Op. Atty. Gen. 571.

The enactment of ch. 10, Laws 1937, is thus within the power of the legislature as granted to it by the constitution.

While it is true the act does not directly specify those to whom municipalities may grant extension, yet there is set

out the requirement that those desiring to take advantage of the extension must file an affidavit showing need. In addition, the title of ch. 10, Laws 1937, states that it relates to the authority of municipalities to extend the time of payment of taxes on real estate to persons *who are unable to pay* such taxes.

It is an established rule in Wisconsin that in the construction of legislative acts, where there is a doubt, resort may be made to the title thereof in order to determine the true meaning of the act. *State ex rel. McManman v. Thomas,* (1912) 150 Wis. 190, 136 N. W. 623; *Federal Rubber Co. v. Industrial Comm.,* (1924) 185 Wis. 299, 201 N. W. 261. Where the construction of the legislative enactment is doubtful the title of the act may be resorted to in order to ascertain the purpose and intended scope of the act. *State ex rel. Pumplin v. Hohle,* (1931) 203 Wis. 626, 234 N. W. 735. By reading the whole statute and the title of the act together it is very clear that the power of the municipalities to extend the time of payment of taxes is limited to the granting of an extension to those persons who by reason of need are unable to pay their taxes. In our opinion ch. 10, Laws 1937, is therefore not unconstitutional as an unlawful delegation of legislative power.

Legislation which discriminates and is limited to a particular class is prohibited by art. I, sec. 1 of the Wisconsin constitution unless there exists a reasonable ground for such classification. When based upon reasonable distinctions such classification for the purposes of taxation is not prohibited by such constitutional prohibition.

"Both plaintiff and defendant concede that while the legislature may classify persons for purposes of taxation, the classification must be based on reasonable differences or distinctions which distinguish the members of a class from those of another in respects germane to some general and public purpose or object of the particular legislation. *Louisville Gas & Electric Co. v. Coleman,* 277 U. S. 32, 48 S. Ct. 433, 72 L. Ed. 770. This rule is well settled and calls for no further exposition here." *Welch v. Henry,* (1937) 223 Wis. 319, 271 N. W. 68, 70.

In deciding the chain store tax case, *State Board of Tax Commrs. of Indiana v. Jackson,* 283 U. S. 527, 537, 51 Sup. Ct. 540, 75 L. ed. 1248, 73 A. L. R. 1464, Justice Roberts said:

"* * * The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction, * * * or if any state of facts reasonably can be conceived to sustain it. * * *."

Any classification arising out of the extension of the time of payment of taxes to persons unable to pay by reason of need is based upon an existing distinction. There is a reasonable basis for distinguishing between taxpayers who by reason of need are unable to pay their taxes and those who are not. Any taxpayer unable to pay his taxes by reason of need could bring himself within the class by filing the required affidavit. This, in our opinion, is a reasonable classification and as it operates uniformly upon all persons in like circumstances, is not prohibited by the constitution.

The Wisconsin constitution also prescribes:

"The rules of taxation shall be uniform, * * *" Art. VIII, sec. 1.

It has been stated by various text-writers that the rule as to uniformity is not applicable to the procedure of enforcing or collecting taxes. Cooley, The Law of Taxation, p. 643, sec. 308; 26 R. C. L. 246, sec. 218.

In Cooley, The Law of Taxation, 4th ed., vol. 1, sec. 35, the rule is stated:

"While taxes include a penalty for nonpayment which by force of the statute becomes part of the tax, yet ordinarily the imposition of a penalty is not a tax, within the strict legal definition of the term."

Again in sec. 309 of the same text, it is said:

"The uniformity rule is not violated by imposing penalties for failure to pay taxes or for failure to return property for assessment. However, all penalties for nonpayment

of taxes must be equally and uniformly imposed upon persons similarly situated and belonging to the same class; * * *"

In 61 C. J. at page 124, it is stated:

"* * * and statutes permitting counties to waive or reduce penalties on delinquent taxes, or remitting penalties on taxes levied for certain years if paid prior to a specified date, are not violative of the requirement of equality and uniformity; and it has been held that the constitutional requirement of equality and uniformity does not control the nature and character of the penalty that may be assessed by the legislature for failure to pay taxes when due. * * *"

Perhaps it should be pointed out that our court in *Westby v. Bekkedal,* (1920) 172 Wis. 114, 178 N. W. 451, has said, pp. 122-123:

"* * * The penalty prescribed by the statute (sec. 1090) in the event that the tax is not paid within the time prescribed becomes a part of the tax and payable with it. *State ex rel. Portage Co. D. Dist. v. Newby,* 169 Wis. 208, 171 N. W. 953."

This case, however, cannot be said to be to the contrary to the previous citation. The court there was merely determining to whom the penalty belonged. For that purpose it held the penalty to be a part of the tax and to be collected by the same methods of procedure and with the same force as the tax itself. It did not consider the question of whether or not the penalty provided upon failure to pay a tax is a part of the tax within the rule of uniformity.

In XXII Op. Atty. Gen. 571, it was held that ch. 288, Laws 1933, providing that the governing body of any county or city of the first class might waive any or all of the interest and penalties on delinquent real estate taxes for the years 1931 and 1932 for which the county or city holds the tax certificates, was constitutional as it did not violate the constitutional requirement of uniformity of taxation and was a reasonable classification.

It is our opinion that ch. 10, Laws 1937, sets up a reasonable classification and does not violate the constitutional requirement of uniformity in matters of taxation.
HHP
WHR

Banks and Banking — Savings bank having definite and fixed place of business, as provided by sec. 222.01, subsec. (2), Stats., may not sell securities in form of deposit contracts with annuity features by means of salesmen throughout state.

July 6, 1937.

BANKING DEPARTMENT.
Attention H. F. Ibach, *Commissioner.*

You have called our attention to the activities of a certain mutual savings bank organized under ch. 222, Wis. Stats. The charter of this bank states its place of business to be at a particular location in a certain city. However, it does not conduct an ordinary banking business at such location of the type carried on by other mutual savings banks. Its business, as we understand it, consists, to a large extent at least, of the sale of deposit contracts with annuity features. These contracts are sold by security salesmen at various places in the state, and the contracts have been held to be "securities" by the security department of the Wisconsin public service commission under the provisions of sec. 189.02, subsec. (7), Stats.

Numerous complaints have been made to your department by other banks in the state who take the position that this bank is, in effect, engaging in branch banking in the communities where these contracts are sold, and you inquire if this bank may lawfully conduct business along the lines above indicated.

Sec. 222.01, Stats., makes provision for the incorporation of savings banks. Subsec. (2) thereof provides that the organization agreement shall state the place where the business is to be transacted.

With reference to transacting business at any other location or locations, sec. 221.255, subsec. (1), provides:

"Any bank may establish and maintain a receiving and paying station in the manner provided in this section, in any community not having adequate banking facilities, anywhere within the county in which the home office of the bank is located or anywhere in any adjoining county having a population of less than sixteen thousand, or in any other county if within the trade area of the home office of the bank and not more than twenty-five miles from such home office, but no bank shall be permitted to establish, maintain or operate more than four such receiving and paying stations nor any such station within four miles of any other existing bank or an authorized receiving and paying station of any other bank; however, any such station in operation at the time of the passage of this act shall not be subject to the four-mile limit."

Subsec. (2), sec. 221.255, Stats., makes provision for application to the banking commission by a bank desiring to avail itself of the privileges provided by subsec. (1). Subsec. (3) provides for investigation of the application by the banking commission, and subsec. (4) provides that the commission shall make a written report to the banking review board of its investigation and recommendation. This board may either approve or disapprove the plan and its decision is final.

These provisions merely authorize the establishment of paying and receiving stations within a certain area and restrict the number of such stations which any bank may have to four. This statute does not authorize the establishment of paying and receiving stations generally, nor the solicitation of deposits by salesmen.

There may be some doubt as to whether the provisions of sec. 221.255 apply to savings banks organized under ch. 222. However, without expressly considering or passing

upon that question, we will, for the purposes of this opinion, resolve such doubt in favor of the bank in question, since it will in no way affect the conclusion here reached.

It is elementary that banks, like other corporations, have only such powers and authority as are expressly granted to them or necessarily implied by the statutes under which they are created.

"The range of a banking corporation's powers is generally stated in the statutes, and is limited by fairly well-defined principles. It cannot exercise powers prohibited by statute, but only those that are expressly conferred upon it or which may be reasonably implied from, or are incidental to, such express powers and are necessary to carry on the business of banking." 6 Fletcher, Cyclopedia Corporations, p. 275, sec. 2538.

Furthermore, it is well recognized that among the banking activities which can be properly performed only at the office of the bank are the accepting and repaying of deposits. Morse on Banks and Banking (6th ed.) p. 144, sec. 46, and p. 465, sec. 168.

It is our opinion that the provisions of sec. 222.01, subsec. (2), Stats., respecting the designation in the organization agreement of the places where the business is to be transacted, together with the limited provisions relating to the transaction of banking business elsewhere, found in sec. 221.255 (assuming that the provisions of that section apply) impliedly exclude the right to transact business except at the place designated in the organization agreement or at such other place or places as have been designated under sec. 221.255. This is in line with the well known rule of statutory construction that the expression of one results in the exclusion of others, *"expressio unius est exclusio alterius."*

We are, therefore, disposed to advise that the practice in question is without lawful authority.

WHR

Civil Service — Taxation — Beer Tax — Bureau of personnel should proceed forthwith to classify and hold examinations under civil service law in order to have eligible list for appointment of employees for beverage tax division ready at expiration of sixty days from June 22, 1937, being effective date of ch. 254, Laws 1937.

July 6, 1937.

BUREAU OF PERSONNEL.

You have asked our opinion as to whether under ch. 254, Laws 1937, published June 22, 1937, you are expected to have the classifications and examinations for employees in the beverage tax division completed before the sixty-day period therein provided, thus making it possible for the state treasurer to make appointments from eligible lists at the close of the sixty days.

Sec. 139.03, subsec. (11), Stats., as amended by sec. 1, ch. 254, Laws 1937, provides:

"The state treasurer shall enforce and administer the provisions of this chapter and shall have authority to employ such personnel, subject to the provisions of chapter 16, as shall be necessary for the performance of his duties hereunder, and such positions shall be so filled only from lists certified by the bureau of personnel and after open and competitive examinations held by said bureau for that purpose and no one shall be eligible who has not taken such examination. * * *"

This subsection is a grant of authority to the state treasurer to employ in the beverage tax division only such persons as have become eligible thereto under the civil service law. The word "employ" as used therein is taken to mean "make use of the service of" such persons and not to mean the act of hiring. Therefore it was intended that the state treasurer would have in his employ in the beverage tax division only those persons who have civil service status. The language cannot be interpreted to refer solely to any future hiring, such as replacement or additions to the present

force, and that persons employed prior to the passage of this act, even though not eligible to appointment under the civil service law, could retain their employment.

In the progress of this act through the legislature there were various rejected amendments expressly excepting the present employees from the necessity of civil service status or granting such to them without examination. Such was the subject of considerable controversy and debate in the legislature. It is quite apparent from the history of this enactment that it was the intent of the legislature to require all employees of the beverage tax division after the effective date of the law to have civil service status and to have been appointed pursuant to the civil service law.

Sec. 2, ch. 254, Laws 1937, provides as follows:

"This act shall affect all employes in the beverage tax division of the state treasurer's office, appointed pursuant to the provisions of subsection (11) of section 139.03 of the statutes, and who, up to the time of the effective date of this act were employed therein and not, at such time, subject to chapter 16 of the statutes, except that such employes may take, upon proper application, the examination provided for by this act."

By the language of this last quoted section the legislature has clearly said that the requirement of civil service status for all employees of the beverage tax division under sec. 139.03 (11) as amended by sec. 1 of the act, should apply to all employees of the division after the effective date of the act. The act is to take effect sixty days after passage and publication. After due consideration to all of the legislative history of the act we conclude that this sixty-day period was provided for the purpose of allowing a reasonable length of time for the bureau of personnel to make the classifications and conduct the examination. Thus it was intended that at the end of the sixty-day period the state treasurer could make appointments from the eligible list in order that all of his employees thereafter in this division would be such as he was authorized to employ under sec. 139.03, subsec. (11), Stats., as amended.

Our view of the legislative intention is re-enforced by the fact that Joint Resolution No. 37 was adopted by the assem-

bly on March 4, 1937, and concurred in by the senate on March 10, 1937. This was after the introduction of Bill No. 330, A. (which with amendments later became ch. 274, Laws 1937), and prior to any action being taken thereon either by the assembly or the senate. This resolution instructed the bureau of personnel to make arrangements to be prepared to hold an examination promptly upon the passage of legislation. It therefore must be taken as an expression of legislative intention in reference to this matter of placing the employees of the beverage tax division under civil service. It thereby gave the bureau of personnel notice sufficiently in advance that it might have time to establish the classifications and make arrangement for conducting the examination so that immediately upon the law taking effect, at whatever date the legislature might determine, it would be ready to present an eligible list to the state treasurer. This would be necessary only to a desire for a continuity of the activities of the division. Otherwise there would be a period during which the previous employees, being without civil service status, could not discharge their duties, and no new appointments could be made because of the time involved in making classifications, conducting examinations, and getting eligible lists ready for certification.

It is, therefore, our opinion that the bureau of personnel, as soon as possible, should classify the positions in the beverage tax division of the treasury department and proceed to conduct open competitive examinations for all positions therein in order that its work may be completed within sixty days after June 22, and that the state treasurer, at the close of such sixty-day period, may make appointments from eligible lists.

OSL
HHP

Trade Regulation — Trade-mark cannot be used to advertise or designate particular type of business.

July 6, 1937.

THEODORE DAMMANN,
Secretary of State.

You have forwarded to this office an application for registration of a trade-mark "Buck-Nite," together with a sample ticket. The application states that the class of merchandise to which the same is intended to be appropriated is theater advertising matter. The particular description of the goods referred to in the application is "theatre tickets and tickets to places of amusement, motion picture films and trailers, also advertising matter; also used in connection with the Dramatic Composition 'Buck-Nite.'"

You ask whether it is the duty of your office to register such as a trade-mark.

The registration of trade-marks is authorized and governed by sec. 132.01, Stats. The purpose of this section of the statutes is to enable the public to distinguish between various goods, products or commodities and to enable the purchasers thereof to be certain that they are purchasing a product which has been made, manufactured, produced, prepared, packed or put on sale by a particular person, firm, copartnership, corporation, association or union of working men, or by a member or members thereof.

We can see no way in which this trade-mark, if registered, could be used to designate, make known or distinguish any goods, wares, merchandise or other product of labor or manufacture from other similar products. It is rather a form of advertising or a method of doing business which is not registerable as a trade-mark. See Op. Atty. Gen. for 1906, 756, VII Op. Atty. Gen. 141. The tickets are not a commodity which are purchased by the public but are merely evidence of what is purchased, to wit, the right to attend a place of amusement and participate in a drawing or lottery.

It is therefore our opinion that the trade-mark should not be registered.

OSL
AGH

Military Service — Soldiers' Bonus — Informal request of veterans for benefits of ch. 161, Laws 1937, may be considered as sufficient application if filed with adjutant general prior to April 15, 1937.

July 7, 1937.

RALPH M. IMMELL,
Adjutant General.

You refer to ch. 161, Laws 1937, which extended the benefits of the Wisconsin cash bonus law for veterans, ch. 667, Laws 1919, so as to cover applications filed with the adjutant general prior to April 15, 1937, the portion of ch. 161 material for present purposes, reading:

"* * * to such eligible persons who have filed their application with the adjutant general prior to April 15, 1937."

You inquire whether an informal application in the form of a communication received by the adjutant general prior to April 15, 1937, may be considered as a valid application. In this connection you have referred to us for examination several correspondence files. In all of these instances the inquiries and correspondence extend back long prior to April 15, 1937, although this date had passed before the applications in final form were filled out and filed with the adjutant general.

It is to be noted that the legislature has not prescribed the form of the application, and we therefore consider that it was the legislative intent to leave such matters as form and details of the application to the adjutant general.

The word "application" has been liberally construed from time to time by the courts. There are many cases illustrative of such liberal constructions.

In *Zilch v. Bomgardner,* 110 N. E. 459, 460, 91 Ohio St. 205, the court held that where a blank filled out and signed by an injured employee read

"I hereby make application * * * for the payment of money out of the state insurance fund on account of the injury * * *"

and contained a request that all necessary blanks be furnished, it constituted not merely a notice but an "application" within the meaning of the statute.

In *Newhall Land & Farming Co. v. Industrial Accident Comm.*, 206 Pac. 769, 771, 57 Calif. App. 115, an injured employee's letter to the industrial accident commission stating that a case of hernia developing from injury required an operation, and asking the commission to inquire into the matter of his injury, was held to be an "application" within the meaning of the workmen's compensation act. Similar rulings from other jurisdictions might be cited.

This office has ruled in construing the soldiers' educational bonus law, sec. 37.25, that it should receive a liberal construction so as to accomplish the object of the statute, and that informal requests for its benefits might be considered as valid, if the requests were definite and to the point. See, XXII Op. Atty. Gen. 657.

Obviously, the legislature intended to extend the time during which veterans might apply for the benefits of the cash bonus law. To say that a valid claim for a bonus should be denied merely because the request or application was informally made, although within the time limit set by the law, would result in defeating the intention of the legislature contrary to well established rules of statutory construction.

OSL
WHR

Taxation — Inheritance Tax — Taxes collected pursuant to provisions of sec. 11, ch. 490, Laws 1935, shall be paid into general fund for emergency relief purposes, and no part shall be retained by county collecting said taxes.

July 7, 1937.

SOLOMON LEVITAN,
State Treasurer.

You ask our opinion as to whether or not counties are entitled to retain seven and one-half per cent of the emergency relief tax imposed upon transfers of property under the provisions of section 11, ch. 490, Laws 1935.

Ch. 72, Wis. Stats., provides for the levying, collection and distribution of inheritance taxes. Sec. 72.20, Stats., provides:

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

By virtue of the provisions of the above statute the county treasurer retains seven and one-half per cent of the taxes collected. The amount retained is deducted from the amount of the tax paid pursuant to the provisions of ch. 72, Stats.

Subsec. (1), section 11, ch. 490, Laws 1935, imposes an emergency tax for relief purposes upon all transfers of property which are taxable under the provisions of ch. 72, Stats. Subsec. (2) of sec. 11 provides for the administration, assessment and collection of said taxes, and specifically provides as follows:

"* * * The entire proceeds of said tax shall be paid into the general fund for emergency relief purposes."

Inasmuch as this is a special emergency tax and there is no provision in the law authorizing the county to retain any part of the tax so collected, it is our opinion that the entire proceeds shall be paid into the general fund for emergency

relief purposes. The county collecting the tax shall retain no part whatsoever of this tax, but by virtue of the plain provision of the law cited above the entire amount shall be paid to the general fund.
LEV

Mothers' Pensions — To qualify for aid for dependent children under sec. 48.33, subsec. (5), par. (d), Stats., it is not necessary that mother's husband be totally incapacitated, but it is sufficient if his incapacity affects his ability properly to support child.

Child living with collateral female relative is qualified to receive aid regardless of whether such relative meets requirements of sec. 48.33 (5) (d); and child living with collateral male relative is qualified to receive aid regardless of whether such relative is incapacitated.

July 8, 1937.

GEORGE M. KEITH, *Supervisor of Pensions, Pension Department.*

You request our advice as to the correct interpretation to be placed upon sec. 48.33, subsec. (5), par. (d), Stats., which provides as follows:

"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 * * * 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, * * *."

In your first question you ask:

"1. Must incapacitation be complete to the extent of being physical or mental helplessness or at least inability to do any type of gainful work whatever, or may it be incapacitation such as the loss of an arm or a leg making it im-

possible for the husband to earn his living in his accustomed manner although he may be able to earn a little at such types of work as his incapacitation will permit?"

In arriving at an answer to your question, it must be borne in mind that the purpose of this law granting aid for dependent children is to care for the children and not for the parents. To authorize the granting of aid, the officer making such determination must take into consideration the dependent condition of the child or children. The statute itself should not be strictly construed, but such construction should be placed upon it as will effectuate its general purpose. If it were to be interpreted so as to require entire incapacitation, situations would be likely to arise which would make it impossible to carry out the purposes of the statute. The question of incapacitation of the parent should be left to the sound discretion of the officer who has the power of granting the aid. It is not necessary that the parent be completely incapacitated, but it is sufficient if such incapacitation results in inability of the parent properly to support the child.

In your second question you ask:

"2. * * * To permit the granting of aid where a child is to live with a female relative who herself is not legally responsible for the support of the child and whose husband, if living, is not responsible for the child's support, must the child run the gauntlet twice, of having established his dependence upon the public for proper support, by first, having it established that the woman is a relative of the degree of kinship specified in subsection (12) and second, by having it established that the husband of such woman is incapacitated to an extent equal to that degree of incapacitation required in case the father is caring for the child instead of the mother? In the case of male relatives with whom the child may live, such as grandfather, uncle or brother, who are under no statutory compulsion to support, must such male relative be incapacitated to an extent equal to that of the father before the aid may be granted? Or, considering the broad general language of the definition of subsection (12) which appears late in the law and was added in 1935, can it be contended that the language of subsection (7) with respect to the incapacitation of the male relative may properly be construed as being repealed by implication?"

It must be borne in mind that the aid to dependent children is granted because of inability of the parents to support said children. (Stats., sec. 48.33 (12).) In other words, if the father is incapacitated under the conditions discussed in the answer to your previous question, aid may be granted. However, it is limited to the parent and the incapacity of any other relatives mentioned in the section is not a reason for the granting of aid to the dependent child.

Subsec. (12) of sec. 48.33 defines the term "dependent child" as follows:

"A 'dependent child' as this term is used in this section is a child under the age of sixteen *who has been deprived of parental support or care* by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in place of residence maintained by one or more such relatives as his or their own home."

This definition is identical with that found in Title IV, sec. 406 (a) of the federal social security act (49 Stats. 629, 42 U. S. C. A. sec. 606 (a), August 14, 1935), and is a necessary provision to qualify for federal aid under that act. It is apparent that under this section the incapacitation must be that of a parent and not of a collateral relative. Section 48.33 (7), Stats., should not be construed as requiring in addition that collateral female relatives must meet the same requirements as the mother or stepmother under subsec. (5) (a), or that collateral male relatives must be incapacitated, since such a construction might disqualify the state from participation in the federal grant, contrary to the intent of the legislature. If this appears to conflict with the express provisions of subsec. (7), it should be remembered that:

"* * * the very letter of an enactment may be violated to carry out a manifest legislative purpose, so long as the reasonable meaning be not overstepped." *State ex rel. Husting v. Board of State Canvassers,* (1914) 159 Wis. 216, 228.

Subsec. (7) must therefore be taken to mean that the child may live with a male relative even though he be incapacitated for gainful employment, provided he is capable of taking care of the child, rather than that aid may not be given to a child living with a male relative unless the latter be incapacitated.
LEV

Prisons — Prisoners — Parole — Time prisoner is out under parole later declared invalid because of technical procedural defects is counted toward service of his sentence when such absence from prison was not due to fault or crime of prisoner.

July 13, 1937.

BOARD OF CONTROL.

You state that an inmate of the Wisconsin state prison was released on parole on May 31, 1935. The supreme court of Wisconsin on October 8, 1935, held that the parole granted to said inmate was invalid. He was then returned to the state prison. You ask whether the time spent away from the prison under said invalid parole should be counted as time served by him under his sentence.

The parole was declared invalid because the board of control failed to give ten days' written notice to the district attorney who participated in the trial of the prisoner, as required by subsec. (1), sec. 57.06, Stats. The notice was given to the district attorney who was in office at the time of the commencement of the proceedings. He initiated the proceedings but was not the district attorney in office during the trial so as to be the district attorney who participated in the trial upon whom notice must be given as required by the statute.

In an opinion by a former attorney general, Hon. Walter C. Owen, VI Op. Atty. Gen. 238, it was held that when a prisoner is released on a conditional pardon or parole the

running of his sentence is not thereby suspended. The same principle has been adhered to by this office in the following more recent opinions: XXI Op. Atty. Gen. 806, XXII 13, XXV 154. See also *West's Case,* 111 Mass. 443; *In re Prout,* 12 Idaho 494; *Woodward v. Murdock,* 124 Ind. 439; *Scott v. Chichester,* 107 Va. 933; *Crooks v. Sanders,* 123 S. Car. 28, 115 S. E. 760.

The reason for this rule is that the prisoner released on parole is by no means a free man; he is still a prisoner, although permitted under certain conditions to serve his sentence outside the prison walls. By subsec. (3), sec. 57.06, Stats., such parole prisoner remains in the legal custody of the state board of control and may at any time be returned to the prison on the order of the board.

So in the present case the parole (which was later declared invalid for failure to comply with technical requirements in its granting) expressly provided that it was granted subject to certain definite conditions, among which were the following: That the prisoner remain at the employment stated therein until discharged from custody or until authorized by the board of control to change his employment; that he report on the first of each month as to whether he had continuously worked, the amount of money earned and the money spent; that with such report he enclose all money paid to him in excess of that actually used by him for the maintenance of himself and those dependent upon him; "that he shall not marry during the term of his parole"; that while on parole he remain in the legal custody of the board of control; that "he shall hold himself ready to return to the institution from which he was paroled for any reason satisfactory to the State Board of Control," and that he was to be guided by the instructions of the supervising parole officer.

While outside of the walls of the state prison pursuant to this parole, the prisoner in question, in all respects, was subject to the same restraints, conditions and terms as though he had been validly paroled. Had the parole been valid then the time spent out of prison thereunder would be counted as time served under his sentence. It would seem that it is not the regularity of the parole that should be con-

trolling as to whether or not he was actually serving his sentence, but rather whether he was enjoying such liberty and freedom from his imprisonment that he cannot be said to have been actually in custody in the service of his sentence. The restraints that the prisoner was subject to under this invalid parole were exactly the same physically as he would have been subject to had there been a compliance with the technical requirements in the granting of the parole. Where the prisoner is out on a parole which is later declared invalid, a subsequent declaration of invalidity in no manner affects or changes the physical character of the restraints that he was under while out on the parole.

As before stated, sec. 57.06 (3) expressly says that even in the case of a valid parole the prisoner would still be in legal custody. Then by the same token if he were outside the prison walls upon an invalid parole he would still be in legal custody. The subsequent declaration of invalidity does not change the fact that he was in legal custody. Actual physical presence within the stone walls of the prison is not necessary in order that a prisoner may be discharging his sentence. He is serving his sentence when he is in legal custody and he is in legal custody whenever he is subject to the restraint, directions and orders of the parole authority.

Even if the parole were validly granted the board of control is vested with the power to terminate and end it at any time and order the prisoner back into prison. Had this parole been validly granted and then had the board of control terminated it and ordered the prisoner back into the prison, the time he was out under the parole prior to its being revoked would be counted as a part of the serving of his sentence. This would be true even if the parole were revoked for some infraction or misconduct upon the part of the prisoner himself.

So here, while the subsequent declaration of the supreme court invalidated the parole from its origin, yet until declared invalid by the supreme court such parole had all the effectiveness of a valid parole. Whether the prisoner be outside of the prison by reason of a validly granted parole which is later revoked by the parole authority or whether he is out on parole which is later declared by the court to be

invalid because of technical defects in granting it does not change the physical facts. The prisoner is subject to the same physical restraints in either case. He is in effect a trusty who has been allowed a certain measure of freedom or a freedom from a portion of the restraints of his sentence, upon good behavior. The manner by which he is granted relief from portions of physical restraint does not, in the absence of a situation that may be considered an escape, change the character and effectiveness of his enjoyment of freedom from those restraints from which he is relieved, nor of the remaining restraints.

While sec. 359.07, Stats., provides in part

"* * * All sentences shall commence at twelve o'clock, noon, on the day of such sentence, but any time which may elapse after such sentence, while such convict is confined in the county jail or is at large on bail, or while his case is pending in the supreme court upon writ of error or otherwise, shall not be computed as any part of the term of such sentence; * * * and provided further that when any convict confined in said prison shall escape therefrom, the time during which he unlawfully remains absent from the prison after such escape shall not be computed as any part of the term for which such prisoner was sentenced to be confined in the prison,"

there is no provision in the statutes covering the question here involved.

The sentence of a prisoner starts to run from the day of sentence and runs whether the prisoner is actually incarcerated or not. *In re Crow,* 60 Wis. 349, 369. Our court in the case of *In re Webb,* 89 Wis. 354, at pages 357-358, said:

"* * * When the sentence was pronounced the defendant was in custody; and it became *eo instanti* his duty to pay his fine, and, for failure to do so, the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he has been committed and is now held in confinement. * * * "* * *

"We think, therefore, that the circuit court had no authority to make the order of October 12, 1894. As already observed, the period of imprisonment, in contemplation of law, commenced March 16, 1894, when the defendant was in

custody and failed to pay the fine imposed against him, and he could not be lawfully imprisoned after it had expired. * * *"

In XVIII Op. Atty. Gen. 572, this office held that the time a prisoner is out of prison under the provision of sec. 57.115, Stats., is counted in determining the time served. The time spent out of a prison on conditional pardon is likewise deducted from the term of the sentence upon the revocation of the conditional pardon. XXIII Op. Atty. Gen. 172.

In the case of *White v. Pearlman,* 42 Fed. (2d) 788, it was held that the release of a prisoner without his fault prior to the expiration of his term does not suspend the running of a sentence. There the prisoner was actually sentenced to a term of five years but by reason of a mistake in the warden's office the term was set out in the prison records as three years. Relying upon the prison records that the sentence was for three years, the prisoner was discharged from custody, although he had not served the time required for the five year sentence. It was later shown that the warden's records were erroneous and that the term was actually five years. Upon the rearrest of the prisoner at a time when the five year sentence would have been served had he remained in custody instead of being discharged as above, the court held that his sentence ran while he was out of prison and said, at page 789:

"* * * We have here a case where the prisoner was released without fault on his part; he cannot fairly be considered as an escape or a parole violator. Furthermore, he called attention to the mistake being made and was brushed aside. He was, in substance, ejected from the penitentiary.

"A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. * * * *It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty."* (Italics ours.)

See, also, *In re Jennings,* 118 Fed. 479.

In *White v. Pearlman, supra,* the warden had no right to discharge the prisoner from custody because the term had not been served. Here the board of control had no right to grant a parole because they did not serve the notice of hearing thereof on the district attorney who participated in the trial. The acts in both cases by which the prisoner found himself beyond the prison walls were invalid and without legal authority. However, in *White v. Pearlman, supra,* the prisoner had his complete liberty but in the present case the prisoner remained in legal custody and was subject to considerable physical restraint. The reasoning and rule of *White v. Pearlman, supra,* would, therefore, seem to apply with as much force to the present case.

It seems, then, that the running of the prisoner's sentence is not interrupted when he is out of prison through no fault of his own. Unless the failure to notify the proper district attorney of the hearing on the parole can be said to be the fault of the prisoner in this case the above mentioned rules seem applicable. As before stated, the reason that the parole in question was declared invalid was because the board of control did not give the notice to the proper district attorney as required by sec. 57.06 (1). Instead it gave notice to the district attorney who commenced the prosecution but whose term had expired at the time of the trial of the prisoner. It is to be noted that as to parole hearings, the board of control under sec. 57.06 (1), Stats., gives the notices, whereas in pardon matters the notices of hearing under sec. 57.09, Stats., are given by the prisoner or someone in his behalf.

Among the records in your office of this case there are several matters which are pertinent. The admission record of the Wisconsin state prison made October 21, 1933 by Mr. Krause of the record department of the prison, at the time of the prisoner's entrance into the institution, gives the name of the district attorney who started the proceedings. This record is a printed form with blank spaces for the insertion in designated places of information or answers as to name of prisoner, date of admission, date of arrest, date of commitment, court, etc. In the blank space for the insertion of the district attorney the name of George A. Bowman is written in typewriting.

We find then that in the parole application of this prisoner, made on a printed form, there was inserted in the blank space of the printed statement, "I was prosecuted by ——— district attorney," the name of George A. Bowman. The printed form of the application for parole does not provide for a statement as to the name of the district attorney "who participated in the trial" to whom notice must be given under sec. 57.06 (1), Stats. Upon the basis of the name of George A. Bowman being so given the board of control gave notice of the parole hearing to him. Such notice was by the supreme court declared to be invalid as said George A. Bowman was not the district attorney who "participated in the trial of the prisoner." The records in your office show by whose fault this error occurred. We quote thus from a letter of June 8, 1935 by Oscar Lee, warden of the Wisconsin state prison addressed to your office as follows:

"* * *

"He was * * * received at the institution on October 20, 1933; that he was examined by our Record Department, Mr. * * * Krause, on October 21, 1933, and that he entered at that time the name of Mr. George A. Bowman as District Attorney in the case.

"Mr. Krause does not remember exactly why the name of Mr. George W. Bowman was entered as District Attorney, because it is perfectly plain that Mr. William F. Zabel was the District Attorney.

"Mr. Krause believes, however, to the best of his memory that this name, George A. Bowman, was entered because the proceedings against [name of prisoner] were started during the term of Mr. Bowman.

"When the parole applications are made out all preliminary information is taken directly from the information given on the inmate's entrance examination sheet.

"In view of the fact that Mr. Bowman's name was entered on this examination sheet as District Attorney, it was very naturally copied onto the parole application blank.

"This accounts for Mr. Bowman's name appearing on your records as District Attorney.

"We feel very sorry that this error has occurred. We know it is due entirely to a lack of thorough investigation and carefulness on our part.

"* * *"

Further, we quote from a letter under date of September 11, 1935 by said Oscar Lee, warden, to the senate investigating committee, as follows:

"* * *

"I want to add that the failure to notify Mr. Zabel of [name of prisoner] request for a parole was in no way the fault of the state board of control. The fault, or rather error, rests in this office and nowhere else. When [prisoner's name] was received at this institution, our Assistant Record Clerk entered the name of Mr. Bowman as District Attorney (you recall that the action against [name of prisoner] was started by Mr. Bowman). Mr. Bowman was therefore entered on many of our records, but the error was almost immediately discovered, and corrected we believed. It so happened that on one blank, which goes into the files of the resident parole officer, the correction was not made. Inasmuch as the parole applications are made up from the files of the parole officer, the name of Mr. Bowman was sent to the State Board of Control as the district attorney."

In making up the application for parole to be signed by the prisoner the prison authorities used their erroneous records made at the time of his admission. The error as to the name of the proper district attorney was corrected in most of the prison records but through inadvertence was not corrected in the records which were kept by the parole officer. These records kept by him, it is shown, are used as the basis of furnishing the information from which to make out the parole application for the signature of the prisoner.

Such making of incorrect records at the prison, the subsequent use of such erroneous records and the procedure resulting from such use occurred through the fault of the prison authorities. It thus appears quite conclusively that the error in giving the name of the proper district attorney as required by the statute and the consequent failure of the board of control to give the notice to the proper district attorney, all of which resulted in the parole later being declared invalid, was the fault of the prison authorities. Obviously such errors upon the part of the prison authorities and the inadvertence of the board of control in acting upon the information furnished from the prison records does not

constitute such fault on the part of the prisoner as to render inapplicable the rule relating to the running of sentences while a prisoner is on parole.

Therefore, it is our opinion that the period between May 31, 1935 and October 8, 1935, being the time during which the inmate in question was outside of the prison under a parole which was later declared to be invalid through the failure of the board of control to comply with all the technicalities of the statute, must be counted toward the serving of the sentence the same as if the inmate had spent such time within the confines of the prison walls.

LEV
HHP
AGH

Public Health — Funeral Directors and Embalmers — Secs. 156.04, 156.05 and 156.12, Stats., relating to funeral directors and embalmers, do not preclude such persons from arranging with co-operative burial associations to furnish services to members of such associations, nor are such associations conducting undertaking businesses without licenses.

July 15, 1937.

BOARD OF HEALTH.

Our attention is called to sec. 156.12, subsec. (3), Stats., which provides:

"No licensed funeral director or licensed embalmer, shall directly or indirectly, pay or cause to be paid any sum of money or other valuable consideration for the securing of business or of obtaining authority to dispose of dead human bodies."

In this connection you state that a co-operative burial association has been proposed which will furnish complete funeral or burial services on the co-operative plan, the association employing licensed embalmers and funeral directors for such purpose.

You inquire, first, whether a licensed embalmer or funeral director, by contracting to perform services for the association, thereby violates sec. 156.12, subsec. (3), above quoted.

It is our opinion that a licensed embalmer or funeral director does not necessarily violate the provisions of sec. 156.12 (3), although the contract or working arrangement may be such as to fall within the prohibition of that statute.

We believe it is safe to assume that it is not contemplated as a part of the plan that the embalmer or director will pay or cause to be paid any money or other consideration to the association for the work which such embalmer or director obtains through the association. Such an association is not formed for the purpose of profit and it amounts merely to a modified system of collective bargaining whereby the members of the association bargain through the association for undertaking services in advance of the time when such services will be needed. Of course, if the embalmer or director were to pay the association for securing such business, the statute would be violated.

The theory upon which the co-operative association expects to secure burial services at substantially reduced prices without varying the quality is that after its organization there will average a certain number of deaths among its members each year and the embalmer or director, having an agreement with the association, can reasonably expect to secure such business, although members are free to seek such services elsewhere.

Co-operative associations are strongly favored by the laws of Wisconsin. See *Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal,* 182 Wis. 571, 582, and discussion of this principle in an opinion from this department to the commissioner of insurance under date of June 24, 1937, in which it was held that co-operative insurance agencies do not violate anti-rebating provisions of the insurance law.

Also, it must be remembered that the provisions of ch. 156, Stats., are penal in their nature, penalties for violations being provided for in sec. 156.15, Stats. It has been held that a penal statute, which is open to construction, is

to be limited rather than extended thereby in favor of the person sought to be penalized, so that in case of fair doubt as to which of two reasonable meanings readable out of the law was intended, that one should be adopted which is most favorable to such person. *Miller v. Chicago & N. W. R. Co.*, 133 Wis. 183.

Having in mind the penal character of the statute involved and the favored positions of the co-operative associations under Wisconsin law, we are inclined to believe the statute in question to be of doubtful applicability. To apply the statute would be to say, in effect, that co-operative burial associations may not be formed in Wisconsin. This is true even though the penalty would not be applied to the co-operative association directly but to the licensed embalmer or director through whom the burial services must necessarily be supplied by the association.

This brings us to the second and perhaps more difficult question of whether solicitors for membership in the association or the association itself holds out or represents to the public that it is a licensed funeral director or embalmer.

Sec. 156.04, subsec. (2), Stats., provides that no person shall engage in the business of a funeral director or hold himself out as engaged in such business unless first licensed, and sec. 156.05, subsec. (1), Stats., makes similar provision in the case of embalmers.

Obviously a corporation, whether co-operative or otherwise, could not be examined and licensed as an embalmer or funeral director. This is recognized in the corporate articles of the proposed corporation which provide in part:

"The purposes of this association shall be to furnish complete funeral or burial services on the co-operative plan. It shall have the power and authority to own, operate, manage and control a funeral home or homes, a mortuary or mortuaries, a hearse or hearses, automobile or automobiles, *to employ a licensed funeral director or directors, and a licensed embalmer or embalmers,* for the purpose of furnishing said funeral services; * * *."

Thus, it is plain that the co-operative must employ licensed persons to perform those services for which licenses are required under the law. However, there is no reason why

solicitors should not explain this situation fully to proposed members, and if the association did hold itself out or permit its solicitors to represent that the association is licensed as an embalmer or director, the law would be violated. In other words, the arrangement does not constitute an inherent violation of sec. 156.04 and 156.05, Stats., although it might become such through improper operation.

It is generally held that neither a corporation nor any other unlicensed person or entity may engage in the practice of learned professions such as law, medicine, dentistry, and the like, through licensed employees. See 103 A. L. R. 1240 and 73 A. L. R. 1327. However, we do not find that this doctrine extends to the undertaking profession, if undertaking may properly be called a profession.

It would seem that the licensing provisions of the Wisconsin statutes relating to undertaking were enacted for the purpose of promoting and preserving public health and to protect the public against imposition. It does not appear that such purposes are in any way defeated by the co-operative burial plan.

As we understand the plan, the association does not employ the undertaker. The services are rendered directly to members, and the association does not insist that members employ embalmers or funeral directors designated by it. The substance of the arrangement is that members will have bargained in advance for services through the association at more or less definite and fixed prices.

The result is that under the co-operative plan the sales and bargaining features are eliminated from a distressing situation, the circumstances usually being such that the bereaved family of the deceased is in no mood for bargaining or exercising sales resistance. Frequently this situation lends itself to imposition and exploitation, although we do not wish to be understood as criticising the great majority of high minded and ethical funeral directors because of the misdeeds of an unscrupulous minority who have abused the opportunities arising out of the misfortunes of others.

We therefore conclude that neither co-operative burial associations nor licensed embalmers and funeral directors dealing with such associations violate the provisions of ch.

156, above referred to, in the absence of specific acts definitely coming within the prohibition of these statutory provisions.
WHR

Mothers' Pensions — Mothers' pension is for aid of children and not for relatives described in sec. 48.33, subsec. (12), Stats., and if child is living with any of such relatives and meets all other conditions, such pension may be granted.

July 15, 1937.

PENSION DEPARTMENT.

You advise that there seems to be a general tendency for unmarried mothers to leave children born out of wedlock in the care and custody of the child's maternal grandparents, or with other relatives who come within the class named in sec. 48.33, subsec. (12), Stats. At times the mother loses all contact with the child, sometimes leaving the state and establishing an independent residence. You request an interpretation of sec. 48.33, subsec. (12), so far as it relates to such circumstances.

In determining whether or not a pension should be awarded in such cases, we must bear in mind that the pension for dependent children is not designed for the aid of the parents, grandparents, or other relatives. It is purely one for the aid of the child in affording the child an opportunity of living as a part of a family under family living conditions. The statute clearly indicates under what conditions such aid may be given, and if the child is one who comes under the classification as indicated by the statute itself, there is no reason why the pension may not be granted.

This department has held in XV Op. Atty. Gen. 497 that "All conditions in law for mother's pension apply as well when grandparent has custody of child as when mother has." We also call your attention to the opinion in XVI Op. Atty. Gen. 234.

It is our opinion that the statute means exactly what it says and that is that such child, when in the custody of relatives mentioned in sec. 48.33, subsec. (12), Stats., is entitled to a pension if all other conditions provided for by statute exist.

In your second question you state that it sometimes occurs that where a widow with children remarries, the stepfather is unable or unwilling to support the children, and the stepchildren are given into the care and custody of relatives who come within the classification of sec. 48.33, subsec. (12), Stats.

If the children are living with the mother and stepfather, such children are not eligible for aid because the mother has a husband. If a child, however, is living with the grandparents or with any person mentioned in sec. 48.33 (12), such child is entitled to aid, providing that all other conditions are met. The answer to the second question is the same as the answer to the first question for the reason that the marital status of the mother or her residence is not involved if the child is living with one of the relatives mentioned in the statute.

LEV

Social Security Law — Old-age Assistance — Sec. 49.21, Stats., provides that old-age assistance shall be fixed with due regard to conditions in each case within maximum allowance of one dollar a day, and it contemplates that such maximum allowance shall be made when condition of applicant warrants it.

Pensioner may receive, in addition to maximum old-age assistance allowance, medical and surgical care through regular relief channels.

July 16, 1937.

PENSION DEPARTMENT.

You call our attention to sec. 49.31, subsec. (1), Stats., which 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."

In this connection you state that one, A, has been granted old-age assistance by X county in the amount of twenty dollars per month. Subsequent to the grant of assistance he became ill and required hospitalization costing fifty dollars. He has no source of income other than his old-age assistance.

You inquire first, whether the statute permits X county to increase A's old-age assistance to thirty dollars per month for five months with the understanding that the ten dollars per month increase be applied on the hospital bill.

Sec. 49.21, Stats., provides:

"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."

It seems to us that the provisions of sec. 49.21 above quoted justify the proposed procedure. As was said in XXV Op. Atty. Gen. 205 at 207-208:

"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 such cases.' (Sec. 49.21.) The administrative agency is required to investigate 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."

It appears to be the purpose of sec. 49.21 to vest considerable discretion in the agency administering old-age assistance within the maximum limits of one dollar a day. See XXIV Op. Atty. Gen. 280, 282. The statute not only vests considerable discretion in such agency but specifically commends that such discretion be exercised, since the amount of the assistance "shall be fixed with due regard to the conditions in each case."

As further indicating that the legislature intended to make the administration of old-age assistance as flexible as possible within the maximum limits fixed by sec. 49.21, we call attention to sec. 49.29 (2), which provides in part:

"* * * If it appears at any time that the applicant's circumstances have changed, the county judge may revoke or modify any certificate issued. * * *"

In view of the foregoing, we see no good reason why it would not be possible to temporarily increase old-age assistance in a given case from twenty dollars to thirty dollars per month so as to take care of the condition which resulted in extra expense.

Secondly, you inquire whether or not it is the responsibility of the authorities administering outdoor relief to provide medical care in addition to the regular old-age assistance allowance.

The reasoning set forth in the answer to the first question is likewise applicable in answering your second question. If the physical condition of the applicant is such as to call for medical care, such condition should be given due regard under sec. 49.21 and sec. 49.29, subsec. (2), Stats., in fixing the amount of the old-age assistance within the maximum limits of one dollar a day. To ignore such condition would be to disregard the plain command of sec. 49.21, Stats.

One of the primary purposes of the old-age assistance law is to keep aged, dependent persons off the regular poor relief rolls as much as possible. Otherwise there would be little point in having old-age assistance, since such people could be taken care of through the regular poor relief channels. This view is supported also by the express intent of the old-age assistance law to provide for "the more humane care of aged, dependent persons" (sec. 49.20). Apparently the legislature used the word "more" in its comparative sense, and hence the implication is that the old-age assistance law was intended to provide a more humane care for aged dependent persons than could be provided through regular relief channels.

To be sure, there may be many cases where the condition of the pensioner is such that the maximum allowance of one dollar a day under sec. 49.29 is insufficient to provide necessary medical and surgical care. In such a case if the persons is without other resources it would, of course, be proper to supplement the maximum old-age assistance allowance with medical and surgical care through regular relief channels. This is clearly implied by the provisions of sec. 49.31 (1), heretofore quoted, and it is our opinion that the authorities administering outdoor relief may provide medical and surgical assistance in addition to old-age assistance.

OSL
WHR

Appropriations and Expenditures — Counties — County board has no power to appropriate money to Wisconsin Dairymen's Association for purpose of inducing association to hold its convention in county whose board appropriates such money.

July 16, 1937.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire, Wisconsin.

You state that the Wisconsin Dairymen's Association has as one of its purposes the aiding in control of animal diseases, such as Bang's disease. In an effort to bring the association's meeting to the county of Eau Claire, the county board of supervisors desires to appropriate two hundred fifty dollars to aid in paying the expenses of the meeting. You submit the question whether or not, in view of the provisions of sec. 59.07, subsec. (17), Stats., or any other provision of the statutes, the county board of supervisors may by proper resolution appropriate money to aid in defraying the expenses of the Wisconsin Dairymen's Association annual meeting, provided, of course, that the meeting is held in Eau Claire county.

Sec. 59.07, subsec. (17), Stats., gives as one of the powers of the county board:

"To appropriate money for the control of insect pests, weeds, or plant or animal diseases within the county. * * *."

Sec. 20.61, subsec. (5), Stats., provides:

"STATE DAIRYMEN'S ASSOCIATION. Annually, beginning July 1, 1937, five thousand one hundred dollars to the Wisconsin state dairymen's association for printing and otherwise carrying on its work as provided in section 94.80."

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 statutes. *Spaulding*

v. Wood County, 218 Wis. 224; XXV Op. Atty. Gen. 92, 316, 379. See also XXIV Op. Atty. Gen. 424, 429; XXII 997.

There is no specific provision in the statute giving power to the county board to appropriate money in a general way to hold a convention of the Wisconsin Dairymen's Association.

The only power granted by statute to the county board is to appropriate money for the control of animal diseases within the county. The state may make, and has in fact made, an appropriation to the association to enable it to carry on its work, but no authority has been granted to permit the county to make an appropriation to the association.

The mere fact that the Wisconsin Dairymen's Association may have as one of its objects the control of animal diseases does not in itself authorize the county board to appropriate money to such association for its convention. It cannot be claimed that, in order to successfully combat animal diseases, it is necessary for the association to hold its meeting in Eau Claire county or any other particular county, because there can be no relationship between the control of animal diseases and the location of the annual convention.

It is therefore our opinion that the county board is not authorized to appropriate money to aid in defraying the expenses of the annual meeting of the Wisconsin Dairymen's Association.

OSL
LEV
JEM

Appropriations and Expenditures — Board of Examiners in Watchmaking — Trade Regulation — Watchmaking — Sec. 20.475, Stats., created by sec. 2, ch. 91, Laws 1937, appropriates to Wisconsin board of examiners in watchmaking fees received by it during fiscal year for which appropriation is made.

No compensation may be paid to members of Wisconsin board of examiners in watchmaking for services rendered prior to July 1, 1937, no money having been appropriated to board prior to that date.

July 17, 1937.

B. W. HEALD, *Secretary,*
Board of Examiners in Watchmaking.

You request an opinion construing sec. 20.475, Stats., enacted by Laws 1937, ch. 91, sec. 2. This section is in part as follows:

"BOARD OF EXAMINERS IN WATCHMAKING. There is appropriated from the general fund annually, beginning July 1, 1937, the fees received pursuant to the provisions of Chapter 125 to the board of examiners in watchmaking but any unused balance at the end of the fiscal year shall revert to the general fund. * * *"

You inquire whether under this section the fees are to be accumulated during each fiscal year and the amount thereof appropriated for the following year, or whether the fees are appropriated for the fiscal year in which they are received. You point out that under the provisions of ch. 125, Stats. 1937, created by Laws 1937, ch. 91, sec. 1, whereby the board of examiners in watchmaking is created, most of the fees charged by the board will necessarily be received in January, since that is when certificates of registration must be renewed. You then say:

"* * * From then until the following January, there would be very little money collected and if the bulk of the fees revert to the general fund on June 30th, there would be nothing on which to operate from July 1st to January 1st

of each year. The board could operate only the first six months of each year and it could not properly function as intended by the provisions of Chapter 125."

You suggest that if the first construction mentioned above is correct, this difficulty will be obviated and the board will have operating funds throughout the year.

Ch. 91, Laws 1937, contemplates that the board will begin functioning immediately. Sec. 20.475 must be construed as nearly as possible to give effect to that intent. If it were construed as appropriating an amount equal to the fees received in the previous fiscal year, then nothing might be appropriated for the fiscal year beginning July 1, 1937, since no fees were required by the act to be paid before that date. This is contrary to the plain intent of the legislature as well as to the letter of sec. 20.475, which begins: "There is appropriated from the general fund annually, *beginning July 1, 1937,*" etc.

The correct construction is that the fees received during the fiscal year are appropriated for that fiscal year. If this construction renders the amount appropriated indefinite, that does not affect the validity of the appropriation. *State ex rel. Board of Regents v. Zimmerman,* (1924) 183 Wis. 132, 139. Furthermore, the amount will become certain before the end of the fiscal year.

It is the manifest intention of the legislature that the board function throughout the year. In order that there be funds available for this purpose, it is necessary that sec. 125.06 (4), Stats. 1937, be amended to provide that certificates of registration shall expire on the 30th day of June, instead of the 31st day of December, in each year.

You also inquire whether members of the board are entitled to compensation for services performed before July 1, 1937.

Sec. 20.75, Stats., which prohibits forestalling appropriations, provides in part as follows:

"It shall be unlawful for any state officer, department, board, commission, committee, institution or other body, or any officer or employe thereof, to contract or create, either directly or indirectly, any debt or liability against the state or for or on account of any state officer, department, board,

commission, committee, institution or other body, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same."

Under the above statute, no compensation may be paid for services rendered prior to July 1, 1937, the date of the first appropriation.

LEV
ML

Public Officers — Engineer of Courthouse — County Pension Commissioner — County pension commissioner and engineer are subject to removal at any time by present or any future county board, even though county board has passed resolution that their terms shall be for definite period of time.

July 17, 1937.

ALEX L. SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

You state that the county board has passed a resolution increasing the term of the pension commissioner and the engineer of the courthouse from a one-year term to a two-year term.

You inquire whether the members of the county board, holding office for only one year, have authority to elect county employees for a period longer than their own term of office.

There are two sections of the statutes which are pertinent in answering your question.

Sec. 49.51, subsec. (2), par. (b), Stats., which provides for the appointment of a pension commissioner, in part reads as follows:

"* * * The creation of such county pension department by said ordinance shall not prevent the discontinuance thereof by subsequent adoption of an ordinance reinstati-

the method of administering such performance of public assistance existing just prior to the effective date of this subsection."

Sec. 59.08 (8) reads as follows:

"The county board, at any annual meeting, may abolish, create or re-establish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provisions of the statutes and the salary or compensation for which is paid in whole or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion thereof, not withstanding the provisions of any special or general law to the contrary."

The supreme court has, in dealing with the powers of the county board, in effect said that the county board is a continuing body with perpetual succession, thus, it is the same board that continues from year to year despite periodic changes in the membership. *Perry v. State,* 9 Wis. 19. (See also III Op. Atty. Gen. 731, XXI Op. Atty. Gen. 378.) While the board is a continuing body, one board cannot act in such a way as to tie the hands of a future board. *State ex rel. Graef v. Forest County,* 74 Wis. 610; *Forest County v. Langlade County,* 76 Wis. 605; *Baines v. City of Janesville,* 100 Wis. 369.

The court said in a later case:

"It is a well-nigh universal rule that where no definite term of office is fixed by law the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary. * * *" *State ex rel. Wagner v. Dahl,* 140 Wis. 301, 303.

See also 15 C. J. 494.

In a still later case the court said that a future board is at liberty to vary the salaries of these officials. It may increase or decrease such salaries as it choses. Neither the appointment of the officials or the fixing of their term of office creates a contractual relationship between the county and the officials; it is merely an indefinite hiring. *Dandoy v. County of Milwaukee,* 214 Wis. 586.

Therefore, in view of the above quoted statutes and the language used by the court, it is our opinion that although there is nothing illegal in the action the board has taken, nevertheless the pension commissioner and engineer hired in your county will be subject to discharge at any time by the present or any future county board.
AGH

Taxation — Ch. 294, Laws 1937, applies only to taxes for year 1936 and subsequent years paid or sold after its publication.

July 19, 1937.

TAX COMMISSION.

You have requested an opinion as to the effect of ch. 294, Laws 1937, which was passed by the legislature late in June, published June 26, 1937, and provides as follows:

"In order to simplify the administration of the collection of delinquent taxes both before and after tax sale, both for the convenience and information of the taxpayer and the several collecting treasurers, the two per cent penalty, advertising fee, selling fee, redemption fee and the interest charge of eight per cent per annum now in force are abolished. In lieu thereof a flat interest charge of eight-tenths of one per cent per month or fraction thereof on the principal sum of the tax from the first day of January succeeding the year of the tax levy shall be charged. All laws or parts of laws inconsistent herewith are repealed and the revisor of statutes is directed to amend the applicable sections of the statutes in accordance with this act."

The first question is whether ch. 294 repeals all or any part of ch. 10, Laws 1937, which authorized cities, villages and towns to extend the time of payment of the 1936 real estate taxes to July 1, 1937, on the filing of affidavits showing need. By ch. 10 the interest and penalties on the 1936 taxes so extended would be the same as on other delinquent

taxes, except that interest would run only from July 1, 1937. This chapter then also provided for certain tax sale and tax settlement adjustments as to the 1936 taxes, which were made necessary by reason of such extensions.

We find that both of these laws were passed unanimously by both houses of the legislature. Ch. 10 is special legislation because it relates to the 1936 taxes only and therefore, as to 1936 taxes, supersedes the general provisions of law. It is special both as to the year to which it applies and as to the subject which it covers. It pertains primarily to the extension of time of payment of 1936 taxes and as to when they became delinquent. The matters of the adjustment in tax sales and settlements arising from such extension are incidental to the main subject of the act.

Similar laws have been in effect since 1931, namely ch. 5, Laws 1931; ch. 21, Laws Spec. Sess. 1931; ch. 16, Laws 1933; ch. 81, Laws 1933; ch. 288, Laws 1933; ch. 8, Laws Spec. Sess. 1934; and chs. 7 and 209, Laws 1935. Each of these laws dealt only with the taxes in specific years and did not attempt to modify or change the statutory provisions relating to such matters.

Ch. 294, Laws 1937 is general legislation providing for the simplification in the computation of the penalty incurred for delinquency in tax payment and substitutes a single flat interest charge of eight-tenths of one per cent per month instead of the previous composite penalty composed of the total of the two per cent penalty, advertising fee, selling fee, redemption fee and interest previously provided for by the general statute. While this act is general legislation because it applies to taxes generally and not to any particular year, yet all it does is to change the rate or method of computation of penalty for delinquency and is operative only on a tax after it has become delinquent. In this last respect it is special legislation. It is a rule of construction of statutes that if possible statutes should be read together and construed so as to harmonize. If statutes, however, cannot be made to harmonize and are in conflict then in so far as there is a conflict the special legislation takes precedence over the general legislation.

In our opinion these two statutes must be read together, each controlling in its separate field. The two may be properly read together without conflict. However, if they should be deemed to be in conflict, then ch. 294 should be controlling, in so far as the rate of penalty or method of computation thereof is concerned, but leaving ch. 10 in full effect and force in all other respects. In the event of such conflict this construction would be in conformity with the principle that a later act must control over a previous. By reason of unanimity of passage of both bills it would seem that it was not the intention of the legislature in passing ch. 294 to disturb any of the special provisions of ch. 10, but that each of said acts should control in its special field over the other.

It is therefore our opinion that ch. 294 does not repeal ch. 10 but merely provides that on and after the effective date of ch. 294 the penalties to be collected on and after that date upon all taxes, including the 1936 taxes, thereafter paid or sold, shall be upon the rate and method as provided in ch. 294.

Your next question is whether ch. 294 affects the interest and charges on 1936 taxes collected and sold subsequent to its enactment. It is to be noted that ch. 294 expressly states that it shall take effect upon passage and publication. Upon the reasoning, heretofore set out in answering the first question, it is our opinion that ch. 294 is not to be regarded as prospective legislation affecting only taxes of years subsequent to 1936, but is to be given immediate effect, so that from and after the effective date of ch. 294 all taxes paid which have not theretofore gone to tax sale and all sales thereafter shall carry the charges of eight-tenths of one per per cent per month from January 1, 1937, if no affidavit of extension was filed, and from and after July 1, 1937 if such extension affidavit was filed.

You then ask whether ch. 294 is retroactive so as to apply to taxes prior to the year 1936. It is our opinion based upon the reasoning above that ch. 294 was not so intended and that ch. 294 applies only to 1936 taxes collected or sold subsequent to its enactment and to taxes of the following years. As to taxes which have been paid or sold prior to the

effective date of ch. 294 the penalties are computable and payable as the statutes existed prior to the effectiveness of ch. 294.
HHP

Loans from Trust Funds — Under sec. 206.34, subsec. (1), par. (c), Stats., state annuity and investment board may make loan secured by mortgage on real property to Wisconsin industrial corporation even though such corporation has defaulted on bond payments within past five years. Such loan is not prohibited by sec. 206.34 (1) (ee).

July 19, 1937.

ALBERT TRATHEN, *Director of Investments, Annuity & Investment Board.*

You advise that the state annuity and investment board proposes to make a loan to a Wisconsin corporation secured by a first mortgage on real estate, but within the past five years the corporation has been delinquent in payments on its bonds. You inquire whether you, the board, may make a loan to this corporation and take a first mortgage on its real estate to secure the loan, although you would not be authorized to buy bonds of this corporation.

Sec. 42.32, Stats., provides:

"The annuity and investment board shall receive, hold, invest and pay out according to law, all deposits by the members and by the state and all accretions thereto and other moneys belonging to the several funds. The funds shall be invested in securities in which domestic life insurance companies are authorized to invest their assets, but not less than seventy per cent of all moneys hereinafter invested or reinvested by such board shall be invested in Wisconsin. In making loans, preference shall be given to applications in the following order:

"* * *

"(4) For all other types of loans authorized by section 206.34.

"* * *."

Sec. 206.34, subsec. (1), pars. (c) and (ee), Stats., provides:

"(1) Every life insurance company organized under the laws of this state may invest its assets as follows:
"* * *

"(c) In loans secured by mortgages upon unincumbered and wholly or partly improved real property in any state of the United States, or in the District of Columbia; provided * * * that no such loan shall exceed fifty per cent of the then fair market value, including buildings, if any, mortgaged to secure the same; * * *."

"(ee) In bonds or other evidences of indebtedness of any solvent company organized under the laws of the United States or the laws of any state (in addition to those mentioned in subsections (d) and (e) and other than bonds of corporations organized for the sole purpose of holding stock in other corporations) which bonds or other evidences of indebtedness are adequately secured by mortgage on, or pledge of, the owned and used or useful property of the company issuing them, or held in trust for its use and benefit, or by adequate collateral so secured, and the issue of which has been approved by the proper public authority, if such approval was required by law at the time of issue; provided that no insurance company shall invest in any one such issue of bonds or other evidences of indebtedness in excess of two per cent of the admitted assets of the insurance company; provided further that the company issuing such bonds or other evidences of indebtedness has not defaulted in the payment of principal or interest upon any of its bonds or other evidences of indebtedness at any time during five years prior to the date of investment therein, or since issuance, if issued less than five years prior to the date of investment therein."

Unless sec. 206.34 (1) (ee) applies to this situation, the proposed loan would clearly be authorized by secs. 42.32 and 206.34 (1) (c). However, if sec. 203.34 (1) (ee) is applicable then, by reason of the fact that the corporation has defaulted on its bonds within the past five years, the proposed loan could not be made. Sec. 206.34 (1) (ee) is applicable if the mortgage note is included in the words "other evidences of indebtedness" as used therein.

Par. (c), subsec. (1), sec. 206.34 has been in the statutes in substantially its present form for a number of years, but par. (ee) is more recent, having been created by ch. 260, Laws 1935. Although the same legislative act did slightly amend par. (c), it was not thereby so amended as to provide that first mortgage loans could not be made to corporations which had defaulted on bonds within the past five years. This new paragraph was not intended as a restriction upon investments of the types already authorized but rather as an enlargement of the field of investments. If sec. 206.34 (1) (ee) were interpreted as preventing the proposed loan, it would operate as an implied partial repeal of sec. 206.34 (1) (c), which authorizes such loan. Repeals by implication are not favored. *Pabst Corporation v. City of Milwaukee,* 190 Wis. 349, 208 N. W. 493; *Milwaukee County v. Milwaukee Western Fuel Co.,* 204 Wis. 107, 235 N. W. 545.

An earlier act will be considered to remain in force unless it is so manifestly inconsistent with, and repugnant to, a later act, alleged to repeal it by implication, that they cannot reasonably stand together. *Milwaukee County v. Milwaukee Western Fuel Co., supra.*

This rule against implied repeal should be particularly applicable in the present instance, where the legislature, by the same act which created sec. 206.34 (1) (ee), had before it and amended sec. 206.34 (1) (c).

A number of cases have been found in which the courts have defined "evidence of indebtedness." These cases, however, relate to the use of the term in statutes and constitutional provisions not in any wise analogous to sec. 206.34 (1) (ee) and therefore are of no assistance in determining the meaning of this term in that section. They do serve, however, to indicate that the term "evidence of indebtedness" has no settled meaning in the law. The term is a general one and, following the word "bonds" in sec. 206.34 (1) (ee), would probably be held to include other evidences of indebtedness in the nature of bonds.

Under the doctrine of *noscitur a sociis,* general words in a statute which follow words relating to a particular class or specific subject should be restricted to persons or subjects of

the same genus, or family to which the particular person or subject belongs. *Chicago & N. W. R. Co. v. Railroad Comm.*, 162 Wis. 91, 155 N. W. 941.

From an investment standpoint the loaning of money upon a note secured by a real estate mortgage and the buying of one or more bonds of an issue are two distinct types of investment. In the first the investor is primarily concerned with the security and its value. He owns the whole loan and security. In case of default his rights to the security can be asserted immediately by him alone in a comparatively simple and direct manner. However, as the owner of one or more bonds the investor has only an undivided interest in the security along with other bondholders, and does not have independent separate rights. The rights of a bondholder are usually asserted through proceedings by a trustee, who is a third person, and acts in behalf of all bond holders. Such proceedings, being comparatively involved, take time and are subject to the control of the majority of the bondholders. So, in making investment in bonds, while the security is important the major consideration is the borrower's history as to earnings and credit, which has a direct bearing upon the marketable value of the bonds.

Sec. 206.34 (1) (ee) was intended to prevent improvident investment in the bond type of loan upon the assumption that the default of a corporation within the past five years in the payment of its bonds would be indicative of the unsoundness of its securities. However, under sec. 206.34 (1) (c) presumably the real estate mortgaged is in itself sufficient security apart from the use of the property as a going concern, because the loan is limited to fifty per cent of the market value.

Par. (c), subsec. (1), sec. 206.34 is controlling as to the real estate mortgage type of investment, whereas paragraph (ee) of the same subsection governs the bond type of investment, which latter includes bonds and other similar securities of the same nature as bonds.

It is our opinion that the mortgage notes by which the proposed loan will be evidenced would not be an evidence of indebtedness within the provision of sec. 206.34 (1) (ee), and that your board may make a loan under sec. 206.34 (1)

(c) to a corporation secured by a first mortgage on its real estate, even though the corporation has been in default on its bonds within the past five years.
HHP
JRW

Social Security Law — Old-age Assistance — Money recovered from estate of one who received old-age pension before and after approval of Wisconsin law by social security board shall be divided as follows: (a) Retain sufficient funds to reimburse state and county in full for payments made before approval of Wisconsin law; (b) pay fifty per cent of balance, if any, to United States; (c) add remainder to first amount and divide total between state and counties in proportion in which they respectively contributed over whole period.

July 23, 1937.

PENSION DEPARTMENT.

You ask for an interpretation of sec. 49.25, Wis. Stats. which provides as follows:

"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."

You state a hypothetical case of a person who received old-age assistance from 1933 to his death on January 1, 1937. You point out that certain counties in this state have

paid old-age assistance for a number of years prior to the federal social security act. For the year 1933 the state reimbursed the counties 19% of their expenditures for old-age assistance. For the year 1934 it amounted to 16%. For the first nine months of 1935 there was no state reimbursement, but since October, 1935, the counties have been reimbursed 80%. Since February 1, 1936, the federal government has contributed 50% of the amount paid to old-age beneficiaries pursuant to the federal social security act. You assume that a part only of this can be recovered from his estate. You then ask the following question:

"1. Is there any priority on account of the payment for the first month of 1933 over the second month and any month thereafter, or, since there is a partial collection from the estate shall consideration be given to the amounts contributed by each of the units of government, namely the county, the state and the federal governments."

Prior to the enactment of ch. 554, Laws 1935, sec. 49.25 read as follows:

"* * * The amount so recovered shall be paid into the treasuries of the state, county, town, village or city in the proportion in which they respectively contributed toward the total old-age assistance received by the deceased or by the married couple of which the deceased was the survivor."

Section 4, ch. 554, Laws 1935, aforesaid, amended sec. 49.25. In so doing it substituted the last two sentences of the present statute (heretofore set forth in full) in place of the sentence last hereinabove quoted. The federal social security act was enacted August 14, 1935, and the change made by ch. 554 aforesaid became effective October 9, 1935.

It is quite apparent that this amendment to sec. 49.25 was enacted for the specific purpose of qualifying our law so as to comply with and meet the requirements of Title I, sec. 2 (a) of the federal social security act, which provides in part as follows:

"(a) A State plan for old-age assistance must * * * (7) provide that, if the State or any of its political subdivisions collects from the estate of any recipient of old-age assistance any amount with respect to old-age assistance furnished him *under the plan*, one-half of the net amount so collected shall be promptly paid to the United States. * * *." (49 Stat. 620, 42 U. S. C. A. sec. 302, Aug. 14, 1935.) (Italics ours.)

The payment required to be made to the United States is one-half of the amount collected by reason of payments *made under an approved plan.* Wisconsin had no such approved plan until December 23, 1933. It would be unreasonable to impute to the legislature an intent to pay to the United States any sums in excess of those required by the social security act, and therefore the amendment of sec. 49.25, Stats., is not to be construed as applying retroactively to amounts recovered from estates by reason of payments made prior to approval of the Wisconsin plan by the social security board.

Both subdivision (7) of Title I, sec. 2 (a) of the federal social security act and sec. 4 of ch. 554 aforesaid were evidently designed to provide for reimbursement of federal funds advanced under a plan to be later approved. Reimbursement is refunding, repaying, restoring or paying back an equivalent. Certainly it was not contemplated that there should be reimbursement for funds paid at a time when nothing had been paid by the federal government. If this were so, then the reimbursement in many cases would be an overpayment instead of a repayment. Thus it is apparent that sec. 49.25 should be given a prospective and not a retrospective effect.

It has been held that the intention that a statute should act retrospectively is not to be assumed from the mere fact that general language is used, which might include past transactions as well as future. (See cases—Callaghan's Wisconsin Digest, Statutes, sec. 138.)

The social security board has made the following rule:

"Where a State law has been in operation prior to approval by the Social Security Board and such law at such prior date provided for collection from the estate of any re-

cipient of old-age assistance of any amount with respect to old-age assistance furnished him under the law, the State shall recover all money granted by it before approval of the plan. The State and Federal Government shall divide equally any amount remaining thereafter."

The board has authority to make and publish rules and regulations not inconsistent with the social security act, for the efficient administration of the act. (Social security act, Title X, sec. 1102, 49 Stats. 647, 42 U. S. C. A., sec. 1302.) The above rule is not inconsistent with sec. 2 (a) (7) of Title I, but is a construction thereof to the effect that it does not affect rights of states which were vested before the approval of their plans by the board. This agrees with the above construction of Wisconsin statutes 1935, sec. 49.25, and may be followed.

There is no provision in Wisconsin statutes 1933, sec. 49.25, giving priority to claims based upon earlier payments over claims based upon later payments. It provides that "amounts recovered" are to be divided between the state and the counties "in the proportion in which they respectively contributed." This language is clear and unambiguous, leaving no room for construction, and must be carried out in accordance with its plain wording. *State ex rel. Weller v. Hinkel,* (1908) 136 Wis. 66; *Nordean v. Minneapolis, St. P. & S. S. M. R. Co.,* (1912) 148 Wis. 627. The same is true of Wisconsin statutes 1935, sec. 49.25.

It follows that in the case of a partial recovery the money is to be divided as follows: (a) Set aside sufficient funds to reimburse the state and the counties in full for payments made before the effective date of the approval of December 23, 1935; (b) Pay 50 per cent of the balance to the United States; (c) Add what is left to the first amount, and divide the total between the state and the counties in the proportion in which each contributed over the whole period.

Your second question is as follows:

"2. What is the relative rank of the contributions made by two counties if the beneficiary receives assistance from one county for a few years and then goes into another

county which continues payment until his decease? Would the claim of the county making the first payments have to be satisfied in full together with the contributions of the state and federal governments for that period before the second county would have any claim or, since the recovery of the estate is insufficient to reimburse all units of government to the full extent of their claims, would the two counties participate and also the state and the federal government participate in proportion to their individual contributions?"

Applying the reasoning in the discussion of the first question, the first and second counties would each participate on a pro rata basis, neither having priority.

OSL
ML

Marriage — Single certificate may be used if it contains information required in subsecs. (1) and (5), sec. 245.10, Stats. 1937, and if examinations are made by same person.

Term "Wasserman test" as used in ch. 311, Laws 1937, must be considered generic term and construed to mean any accredited and approved blood test for syphilis.

July 28, 1937.

BOARD OF HEALTH.

You request an interpretation of certain provisions of ch. 311, Laws 1937. For many years sec. 245.10, Stats., has been in force and requires the male applicant for a marriage license to furnish a certificate of freedom from venereal disease prior to his obtaining a license to marry. Ch. 311, Laws 1937, now provides that in addition to the examination described in sec. 245.10, subsec. (1), Stats., a Wassermann test is required of the male as well as of the female. Sec. 245.10 (1) prescribes the certificate to be issued by the examining physician. Subsec. (5) of sec. 245.10,

which is provided for by ch. 311, Laws 1937, prescribes a form of certificate to be issued to the male as well as to the female upon giving the Wassermann test.

Your first question is: Are two certificates from the examining physician to be delivered to the male upon examination, or can the provisions of the law be legally met by incorporating the provisions of both certificates in one?

The examination to determine the existence of venereal disease is made by the physician. The Wassermann test will, in the majority of cases, be made by an accredited laboratory. In the event that the examination required by sec. 245.10 (1), Stats., is made by a physician, and the Wassermann test, as required by sec. 245.10, subsec. (5), is made by some accredited laboratory, it is apparent that both certificates cannot be joined, for the reason that the certificates will necessarily have to be made by separate examining agencies. Under these circumstances separate certificates must necessarily be made. However, in the event that the physician who makes the examination for the purpose of determining the presence of venereal disease is the same physician who makes the Wassermann test, then under such circumstances there seems to be no reason why both certificates cannot be incorporated in one paper. The certificates, when combined, however, should be complete and should certify that which is required by statute, although both may be printed on the same piece of paper.

Your second question relates to an interpretation of the term "Wassermann test" as contained in ch. 311, Laws 1937.

One Wassermann was the first to work out a blood test to determine whether an individual was afflicted with syphilis. That test was devised many years ago. Since the original test was worked out there have been improvements made by other scientists and now equally reliable and possibly more efficient tests than the original test are classified under other names. The question arises whether or not it is the intent of the legislature to interpret the term "Wassermann test" as a general term, indicating an accredited blood test for syphilis, although such test may be a modification of the Wassermann test and carrying a different name.

The purpose of enacting ch. 311, Laws 1937, was to prevent the marriage of persons afflicted with syphilis. This object could be attained only by requiring tests to determine whether or not syphilis was present, the tests to be used being such as are recognized by scientists as efficient in determining the presence of the disease. The term "Wassermann test" is a term used by laymen generally to designate an efficient blood test for discovering the presence of syphilis. It does not mean the designation of any particular technique in obtaining this test. It simply means an accredited scientific test for syphilis. The term "Wassermann test" should be considered as a generic term and should be interpreted to mean any approved test for effectively discovering the existence or freedom from syphilis in any individual. In construing the statutes the intent of the legislature is controlling. All words and phrases used in the statutes should be used and understood according to the common and approved usage of the language.

It is therefore our opinion that the term "Wassermann test," as used in ch. 311, Laws 1937, means an accredited blood test used by the medical profession for determining the presence of syphilis.

OSL
LEV

Bonds — Public Officers — State Employee — Cashier of institution, having given official bond, is insurer of public funds lawfully in his possession and liability for losses occurring even without his fault is covered by such bond.

July 29, 1937.

BOARD OF CONTROL.

You inquire whether the bond in the usual standard form given by the cashier of an institution protects the state in the event the cashier is held up and robbed while taking money from the institution to a local bank.

In a recent opinion to your department under date of June 8, 1937,* it was stated that a public officer is an insurer of public funds lawfully in his possession and liable for losses which occur even without his fault, citing 22 R. C. L. 468 and *Forest County v. Poppy,* (1927) 193 Wis. 274, 213 N. W. 676. This rule of law is stated in 46 C. J. 1039 as follows:

"According to the more general rule the liability of a public officer for such funds and property in his custody is that of an insurer rather than that of an ordinary bailee, and he is liable for loss resulting from theft, robbery, fire, or the failure of the depositary."

By sec. 46.05, subsec. (2), Stats. any officer or person having the possession or custody of any money belonging to the state or any institution shall be required by the board of control to give an official bond. The form of bond is set out by sec. 19.01 (2).

"The question whether a given employment constitutes the one selected for its discharge an officer or a mere employee is often a difficult one. The line between the two is frequently shadowy and difficult to trace." *Sieb v. Racine,* (1922) 176 Wis. 617, 624, 187 N. W. 989.

In *Dade Co. v. State,* (1928) 95 Fla. 465, 116 So. 72, it was held that persons entrusted by legal authority with the receipt of public monies, or through whose hands such money may pass are public officers.

The cashier of an institution seems to us to have such characteristics of a public officer as to be within the above rule of liability.

Irrespective of whether in a strict sense the cashier of an institution is a public officer, it is our opinion that by the filing of the bond he has entered into a contractual relationship whereby he has assumed the same liabilities and responsibilities with respect to public funds as are imposed by the above rule of law upon a public officer.

The supreme court of the United States has said as follows:

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"Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. *He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception.* * * *" (Italics ours.) *Boyden v. U. S.*, 20 L. ed. 527, 529, 80 U. S. (13 Wall.) 17, 21-22.

It is therefore our conclusion that the cashier of a state institution who has filed an official bond is an insurer of public funds in his possession and that losses which occur even without his fault are covered by such bond.
HHP

Public Officers — Town Clerk — Public Records — Town clerk is not authorized by statute to keep records of town outside of his office in town.

July 30, 1937.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You state that your county board has made arrangements for space in the county courthouse for the storing of town records in order to keep them safe and fireproof. You request our opinion as to whether there is any statutory authority which will permit the storing of town records in this manner.

There is no statute which would permit the permanent storing of town records in the county courthouse as provided by the recent action of your county board.

Sec. 60.45, subsec. (9), Stats., provides that the town clerk shall have custody of and safely keep all town records. It also provides that the town clerk shall keep the records in a safe, if the town has furnished him with one for that purpose, and that he shall permit any person to examine records belonging to the town in such office.

The language of this statute is sufficiently clear to indicate that it was the intent of the legislature that the town clerk shall keep all records belonging to the town in his office within the town. However, this section of the statute would not prohibit the town clerk, pursuant to a proper order from the town board, from placing the town records in the hands of his agent or agents for the purpose of having them indexed and catalogued, even though he or his agent should temporarily remove the records from the clerk's office. It would require further action by the legislature to permit the permanent storing of such records in a place other than the office of the town clerk, as now provided for by the statute.

Therefore, it is our opinion that the town clerk would not be authorized to permanently place any town records in the county courthouse, since it is not properly his office.

OSL

Civil Service — Public Officers — State Employees — Sick Leave — Ch. 153, Laws 1937, is not retroactive, and does not accumulate unused sick leave prior to its effective date.

Sick leave may be allowed by bureau of personnel even though employee has not accumulated unused time, but not to exceed sixty days in year.

July 31, 1937.

BUREAU OF PERSONNEL.

You request an interpretation of certain provisions of ch. 153, Laws 1937, and particularly section 2 of said chapter, which provides:

"Leave of absence with pay owing to sickness and leave of absence without pay, other than vacation, shall be regulated by rules of the bureau, except that unused sick leave shall accumulate from year to year not to exceed sixty days."

Your first question is:

"Is the above chapter retroactive, that is, does it become the duty of the bureau to check through the records and credit to each regular permanent employee any accrual of unused sick leave up to sixty days as a result of prior service?"

Ch. 153, Laws 1937, became effective on May 20, 1937. In the case of *Vanderpool v. La Crosse and Milwaukee R. R. Co.*, 44 Wis. 652, the court in discussing whether or not a law was retroactive, said, p. 663:

"The rule applicable to the construction of statutes, as laid down by the authorities, is, that statutes are never to be construed to act retrospectively unless the intention that they should so operate is unmistakable. * * * 'The principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the leg-

islature meant it to operate retrospectively;' * * * 'This principle may have been lost sight of in some cases, but has on the whole been steadily adhered to.' * * *."

This rule has been consistently followed by our supreme court. *Chicago Title & Trust Co. v. Bashford,* 120 Wis. 281; *Winneconne v. Winneconne,* 122 Wis. 348; *In re Dancy Drainage District,* 199 Wis. 85. Applying this test to ch. 153, Laws 1937, it is clear that this law should be given only prospective operation inasmuch as the legislature has not indicated by express language that it shall operate retroactively.

Your second question is as follows:

"Do the provisions of this chapter preclude the personnel board from granting sick leave in excess of twelve days for any calendar year if there is no accrual accredited to the employee's record?"

By virtue of sec. 16.275, subsec. (2), Stats., the bureau of personnel has authority to adopt rules and regulations providing for the granting of sick leave. Rule No. 12 adopted by the board provides that each employee may be granted twelve days' sick leave for each year, and in special cases the board may grant more than this number. Ch. 153, Laws 1937, does not attempt to deprive the bureau of personnel of this power, but in fact reaffirms that power by incorporating the words "leave of absence with pay owing to sickness * * * shall be regulated by rules of the bureau * * *." The limitation as amended would not take this power from the bureau. It is therefore our opinion that the bureau of personnel does have the power to grant sick leave in excess of twelve days in any calendar year even though the employee may not have accumulated additional time.

Your third question is as follows:

"Do the provisions of this chapter preclude the personnel board from granting any regular employee sick leave in excess of sixty days during any calendar year?"

Inasmuch as the statute limits the accumulation of sick leave time to sixty days in express terms, it is our opinion that the bureau is without power to enlarge such time.

LEV
HHP

Courts — Juvenile Court — Criminal Law — Post-mortem Examination — Juvenile court has power to order post mortem in interest of justice on application of defendant's attorney even though district attorney and coroner refuse to order such post mortem.

August 3, 1937.

JAMES P. CULLEN,
District Attorney,
Prairie du Chien, Wisconsin.

You advise that one X has been brought before the juvenile court of your county and is charged with being a delinquent minor. You further advise that he and his young sister were living at the home of an uncle and aunt; that while this uncle and aunt were absent, he and his sister were alone in the home. Upon the return of the uncle and aunt it was discovered that the minor sister had been killed by a rifle shot; that X later confessed that he fired the shot which killed his sister. Later he repudiated his confession and now denies the killing. A short time after the death of this girl the uncle died. Counsel for the defendant, X, has requested you to order an autopsy on the body of the uncle, with the thought in mind that such autopsy might determine that the uncle died as the result of metallic poisoning, which might indicate whether it was suicide or murder and might indicate that X is not the one who killed his sister. You have been requested to order this autopsy. Counsel for the defendant has now requested the juvenile judge, by whom X is to be tried, to order such autopsy.

You desire to know whether or not the juvenile judge has the power to order that the body of the uncle be exhumed and that a post-mortem examination be held.

It is our opinion that the court before whom this minor is to be tried, that is, the juvenile court, has inherent power to order the body of the uncle exhumed and a post-mortem examination held. If the court is of the opinion that such procedure would be of some help in determining the issue of the guilt or innocence of the minor, then certainly the court has the power to order the examination.

This department has held in XIX Op. Atty. Gen. 386 that a coroner may, independently of direction from the district attorney, order an inquest upon the death of a person in his county where he has reason to suspect foul play. Certainly the court, where there is sufficient reason given why a post mortem should be had in the interest of justice and the rights of the defendant, does have the power to order the examination.

We know of no rule or law which would prevent a court of competent jurisdiction in a criminal case from ordering such examination. The question of whether an examination should or should not be held, however, is within the sound discretion of the judge. It is therefore our opinion that under the facts stated the juvenile court does have the power to order the post-mortem examination requested by counsel for the defense.

LEV

School Districts — Power of state superintendent of public instruction under sec. 40.62, subsec. (1), Stats., as amended by ch. 116, Laws 1937, extends to all school districts maintaining junior high schools.

August 13, 1937.

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

You call to our attention sec. 40.62, subsec. (1), Stats. as amended by ch. 116, Laws 1937, and ask:

"Does section 1, chapter 116, laws of 1937, limit the jurisdiction of the state superintendent to those districts which irrespective of valuation have junior high schools?"

Sec. 40.62, subsec. (1), Stats., as amended by ch. 116, Laws 1937, reads:

"Any common school district having an assessed valuation of one million two hundred fifty thousand dollars or more may establish a high school, *except that if such district irrespective of valuation has a junior high school, the state superintendent may, after an investigation, permit the establishment of a high school, if he is satisfied that the district, together with the aid provided by law, and prospective tuition, can maintain such high school without exacting an undue hardship upon the taxpayers of the district.*" (The portion in italics was added by the amendment.)

Prior to this amendment, sec. 40.62 (1) was a grant of power to a school district to establish a high school provided the district had an assessed valuation of $1,250,000.00 or more. The amendment added by ch. 116, Laws 1937, starts out with the word "except" and by the use thereof is a restriction on the previous grant of power. Thus by the express wording of this statute as amended the state superintendent is designated as the one by whom this restrictive power shall be exercised. Such power also is clearly limited to those districts which have a junior high school.

If the district has a valuation greater than $1,250,000.00 and has a junior high school, then it may establish a high school in the district only with the permission of the state superintendent. Likewise, if the assessed valuation of the district is below $1,250,000.00 and it has a junior high school then the state superintendent likewise may give his permission to the establishment of a high school in such district.

It is therefore our opinion that the power and authority of the state superintendent of public instruction is limited by the provisions of sec. 40.62, subsec. (1) Stats. 1937, to those school districts which have a junior high school therein and that, irrespective of valuation, a school district in which a junior high school is established may establish a high school only after securing the permission of the state superintendent of public instruction.

HHP

Corporations — Requirements of sec. 180.06, subsec. (4), Stats., relating to paid in and subscribed capital stock are initial requirements only and constitute conditions precedent to commencement of business by corporation.

Treasury stock purchased by corporation may be used in computing subscribed or paid in stock under sec. 180.10, where corporation is not prohibited by its charter from purchasing its own stock and where such purchase is made in good faith without intent to injure creditors or stockholders.

August 14, 1937.

PUBLIC SERVICE COMMISSION.

You have called our attention to a certain corporation which, before it commenced to transact business, met the statutory requirements imposed by sec. 180.06, Stats., in that one-half of its capital stock had been subscribed and one-fifth of its authorized capital actually paid in. Subsequently, however, through purchase of its own stock, less than fifty per cent of the authorized capital stock was outstanding in the hands of the public, and you inquire as to the applicability of sec. 180.06, subsec. (4), Stats., to the corporation in its present situation.

Sec. 180.06, subsec. (4), Stats., provides:

"The corporation shall not transact business with any others than its members until one-half of its capital stock shall have been subscribed and one-fifth of its authorized capital actually paid in. If the articles authorize only stock without par value, the corporation shall not transact business with any others than its members until at least one-half of the number of authorized shares shall have been subscribed and one-fifth of the number of authorized shares actually paid in. If the articles authorized both par value and nonpar value stock, the corporation shall not transact business with others than its members until at least one-half of the authorized par value of the par value stock and one-half of the authorized number of shares of nonpar value stock shall have been subscribed and one-fifth of the authorized par value of the par value stock and one-fifth of the authorized number of shares of nonpar value stock shall have actually been paid in. If any obligation shall be con-

tracted in violation hereof, the corporation offending shall have no right of action thereon; but the signer or signers of the articles and the subscriber or subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same.

It is a rule of statutory construction that the ordinary approved meaning of words is to be regarded as the one intended by the legislature unless inconsistent with the manifest legislative purpose. *Wadhams Oil Co. v. State,* 210 Wis. 448, 245 N. W. 646.

It does not appear here that there is any manifest purpose to give to the word "subscribed" any meaning other than its ordinary and usual one.

The word "subscribed" as used in this connection refers to an agreement to purchase stock from the corporation on the original issue of such stock. Cook, Corporations, 8th ed., Vol. 1, p. 51.

Since subscriptions may be made only for an original issue of stock, an agreement to purchase treasury stock cannot constitute a stock subscription. Cook, Corporations, 8th ed., vol. 1, p. 51; Fletcher Corporations, vol. 4, secs. 1372, 1373.

Also an agreement to purchase stock from a stockholder cannot be a subscription, as a subscription can be made only with the corporation. Furthermore, a subscription is only an agreement to purchase and is not a purchase itself. This being true, it would be absurd to require one-half of a corporation's stock to be subscribed at all times. After the stock has been issued and paid for, it is no longer subject to subscription, and undoubtedly the great majority of established corporations would be prevented from doing business if it were held that one-half of the stock must be subscribed at all times. It is well established that a statute should not be so construed as to lead to an absurd result. *Guse v. Industrial Comm.,* 189 Wis. 471, 205 N. W. 428.

The language of the statute itself indicates that the legislature intended the word "subscribed" to be interpreted in its literal sense.

The amount of stock purchased and in the hands of the public is shown by the amount of capital paid in. It is therefore significant that the section requires a different proportion of stock to be subscribed than it does capital to be paid in. Had the legislature intended the word "subscribed" to mean stock outstanding in the hands of the public, there would have been no object in requiring the different proportions set up in the statute for subscribed stock and paid in stock. If the word "subscribed" be construed as meaning stock outstanding in the hands of the public, the statute is ambiguous and contains two inharmonious provisions. Such construction should not be adopted if any other construction will save the statute from ambiguity.

In construing sec. 180.06 (4), Stats., our court has said:

"* * * The object of the statute seems to be to prevent fictitious and fraudulent corporations from extorting money from confiding stockholders, and obtaining credit when they have no real basis of capital to do business upon and no resources to meet their liabilities." *Anvil Mining Company v. Sherman,* 74 Wis. 226, 233, 42 N. W. 226.

See also *Goetz v. Williams,* 206 Wis. 561, 240 N. W. 181.

It therefore seems apparent that the provisions of sec. 180.06 (4) were designed for the purpose of setting up an express rule relating to the proportion of stock to be subscribed, and the proportion to be paid in before a corporation shall be permitted to transact business, thus protecting the stockholders and creditors during the period preceding the acquiring of assets by the corporation.

For these reasons, we are of the opinion that a corporation need not at all times have fifty per cent of its authorized capital stock subscribed. Neither is there any statutory provision requiring it to have fifty per cent of its authorized capital stock outstanding at all times.

You have also called our attention to a second corporation, which we will refer to as the "X" corporation. This company previously had an authorized capital stock of 100,000 shares of common stock plus certain preferred stock not material to the problem discussed here. At various

times the X Company purchased shares of its own common stock and on March 24, 1937, the company held 25,539 shares of such stock.

At a stockholders' meeting held March 24, 1937, a resolution was adopted to amend the articles of incorporation, including the amendment to Article Fourth, to read as follows:

"Fourth: The capital stock of this Corporation shall consist of Five Hundred Thousand (500,000) shares of the par value of One Dollar ($1.00) per share."

The certification attached to the amendment contains the following statement:

"We do further certify that the outstanding stock of said Corporation on said date was and is 74,461 shares of common stock and that there were present in person and by proxy at said meeting the owners of 56,498 shares * * *."

Each holder of common stock was to receive three shares of the new common stock, so that 223,383 shares will be outstanding in the hands of the public without any additional subscriptions taking place. This is less than half of the authorized capital stock, and the corporation can only comply with requirements of sec. 180.10, Stats., if its 25,539 shares of treasury stock may be counted in the three for one stock split up so that it will receive 76,617 shares which, when added to the 223,383, will make a total of 300,000 shares subscribed or paid in.

You inquire whether the X corporation will have fifty per cent of its authorized capital stock outstanding upon completion of the exchange of the old common stock for the new common stock, assuming no additional shares are issued.

Sec. 180.10, Stats., provides:

"No amendment to the articles of any corporation, increasing the capital stock, shall be filed unless accompanied by the affidavit of the president and secretary that one-half of the capital stock, including the proposed increase, has been duly subscribed and one-fifth of the authorized capital

actually paid in. In the case of corporations having stock without par value the percentage of stock subscribed for and paid in shall be determined as provided in subsection (3) of section 180.06."

To determine the problem here presented it becomes necessary to consider the Wisconsin cases relating to the purchase of its own stock by a corporation and the status of such stock after the purchase.

In the case of *Pabst v. Goodrich,* 133 Wis. 43, it was held that a corporation, being solvent, has the right to purchase and hold its own stock, keep it alive and treat it as assets, and such purchase does not amount to a cancellation of the stock purchased. Here the lower court found that it was the intention of the corporation to hold the exchanged stock as assets, and the supreme court considered that whether it was so held or not was largely a question of intent.

In the *Pabst* case a testator, by his will, provided that one beneficiary should receive shares in a corporation sufficient to make $1,000,000.00 book value. It appeared, among other things, that the corporation, to the knowledge of the testator, who was its principal stockholder, had purchased its own stock which it held alive and treated as assets, designating it as "treasury stock." After the testator's death the directors of the corporation distributed this "treasury stock" as a stock dividend, and the court held that the so-called "treasury stock" was a part of the principal or assets of the corporation and not income, and that it passed to the different legatees as corpus of the estate.

It would seem to be consistent that the treasury stock, if held to be outstanding and an asset of the corporation for one purpose would have to be so considered for all purposes. Hence, we conclude that such treasury stock may be counted as outstanding and fully paid for within the meaning of sec. 180.10.

Of course, the situation would be quite different where the corporation has retired and canceled the stock which it purchased. Such stock is no longer considered to be outstanding. *Dunn v. Acme A. & G. Co.,* 168 Wis. 128.

The doctrine of the *Pabst* case has been followed in these later Wisconsin cases, among others: *Gilchrist v. Highfield,*

140 Wis. 476; *Atlanta & Walworth B. & C. Asso. v. Smith,* 141 Wis. 377; *Rasmussen v. Schweizer,* 194 Wis. 362; *Federal Mortgage Co. v. Simes,* 210 Wis. 139.

These cases are in accord with the principle as stated in 25 L. R. A. (n. s.) 51 note:

"In the United States it is held by the weight of authority that a corporation may purchase its own shares of stock unless restrained by its charter or by statute, provided the purchase is made in good faith, without intent to injure creditors or stockholders."

We might add that what we have heretofore said with respect to both sec. 180.06 (4) and 180.10, is predicated upon the assumption that the transactions involved are not prohibited by the corporate charter and are made in good faith without intent to injure creditors or stockholders.

In view of our conclusion that the X Company will have fifty per cent of its authorized capital stock outstanding upon completion of the exchange of the old common stock for the new common stock, it becomes unnecessary to consider other questions you have asked relating to the personal liability of the stockholders and the payment of dividends.

WHR

Bridges and Highways — Farm Drainage — Sec. 88.41, Stats., does not apply to watercourse which drains surface waters only, notwithstanding it formerly drained spring water, such watercourse not being "natural watercourse" in meaning of statute.

County may enter upon lands adjoining highway and restore original watercourse grades, blocking up of which causes periodic flooding of highway, but landowner is entitled to damages in such case.

Where landowner prevents discharge upon his land of surface waters and thus causes them to accumulate upon lands of adjoining owners, such adjoining owners have no remedy in absence of malice, such accumulation constituting in law *damnum absque injuria.*

August 16, 1937.

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

You have requested an opinion based upon the following facts:

"A and B are adjoining land owners, said lands being separated by a state trunk highway. A natural watercourse draining A's land, passes under the road through a bridge and crosses the lands owned by B. Evidence would show that this watercourse originally carried the run-off from springs located on A's property years back, but that subsequent clearing of the lands caused the springs to dry, and that thereafter the course carried water only when rains or melting snows produced the surface flow.

"B, in cultivating his lands, caused a filling in of the watercourse on his property over a period of years, and at the present time the blockage amounts to roughly 18 inches. This, which in effect causes a stoppage of flow, results in the accumulation of stagnant water approximately one foot in depth on A's lands and on a portion of the highway right-of-way as well."

Your first question is:

"Does section 88.41 of the Wisconsin statutes apply to this case?"

That section, which was enacted by the laws of 1935, ch. 188, is as follows:

"Whenever any natural watercourse becomes obstructed so that the natural flow of water along the same is retarded by the negligent action of the owner, occupant or person in charge of the land wherever such obstruction is located, the owner or occupant of any lands affected and damaged by such obstruction may request the removal thereof by giving notice in writing to such owner, occupant or person in charge of the land wherever such obstruction is located. If such removal is not made within six days after receipt of said notice, the owner or occupant of the lands so affected may make complaint to the supervisors of the town, filing at the same time a copy of said written notice, and such supervisors, upon being satisfied that the complaint is just after viewing the watercourse, shall make recommendations in writing to the owner or occupant of the lands where the obstruction is, for the removal of such obstruction and if such recommendations are not followed within a reasonable time, shall order the obstruction removed. The cost of view and of removal shall be charged and assessed against the lands from which the obstruction was removed and collected as other special assesments are collected."

It must be presumed that the legislature used the term "natural watercourse" in its common law sense. It is well settled that a depression or gully through which water does not usually flow, but which carries off surface waters only, is not a natural watercourse. *Hoyt and another v. The City of Hudson,* (1871) 27 Wis. 656; *Fryer and wife v. Warne,* (1872) 29 Wis. 511; *Eulrich v. Richter,* (1875) 37 Wis. 226; *Waters v. The Village of Bay View,* (1884) 61 Wis. 642, 20 N. W. 654; *Lessard v. Stram and others,* (1885) 62 Wis. 112, 22 N. W. 284; *Blohowak v. Grochoski,* (1903) 119 Wis. 189, 96 N. W. 551; *Williams v. Bass,* (1923) 179 Wis. 364, 191 N. W. 499.

It is apparent, therefore, that the "watercourse" referred to in your letter is not at present a "natural watercourse" in the meaning of sec. 88.41, Stats.

The fact that it formerly drained spring water does not affect its present status, even though at that time it may have been a natural watercourse. Natural conditions do not remain fixed forever, and when the condition of a stream becomes altered either by natural causes or by the hand of man, with the lapse of years the new condition is regarded as the natural condition and the rights of landowners are altered accordingly. *Smith and others v. Youmans and others,* (1897) 96 Wis. 103, 70 N. W. 1115; *Village of Pewaukee v. Savoy and another,* (1899) 103 Wis. 271, 79 N. W. 436; *Castle v. Madison,* (1902) 113 Wis. 346, 89 N. W. 156; *Diana Shooting Club v. Lamoreux,* (1902) 114 Wis. 44, 89 N. W. 880; *Minehan v. Murphy,* (1912) 149 Wis. 14, 134 N. W. 1130.

It follows that sec. 88.41, Stats, is not applicable.

Your second question is:

"Can the county or state enter the lands of B and restore the original watercourse grades by removing the blockage without liability for their acts?"

Sec. 81.06, Stats., provides as follows:

"The superintendent of highways may enter upon any lands near any highway in his town and there construct such drains or ditches or embankments as may be necessary for the improvement or protection of such highway; and may enter upon any unimproved lands near any highway in his town and take stone, gravel, sand, clay, earth or trees for the purposes of improving any highway, but he shall carefully avoid doing any unnecessary injury to the premises; and he may take any stone, gravel or other suitable materials within the highway of his town to improve any highway therein. No such material shall be removed from any town without the consent of the town board unless the highway on which the same are found is maintained by the county in which case the county may use the same for any highway purpose. Whenever any highway shall be con-

structed or maintained by a county the county highway commissioner shall possess all the powers conferred in this section upon town superintendent of highways."

The highway in question being a state trunk highway, the duty to maintain it rests upon the county under sec. 83.06 (1), and the county highway commissioner possesses the powers conferred upon town superintendents of highways under sec. 81.06. He may therefore enter upon the lands of B and make such changes as may be necessary to prevent flooding of the highway. But under sec. 81.07 B is entitled to the payment of any damages he may suffer thereby.

The answer to your second question is, therefore, that the county may enter but not without liability.

Your third question is:

"What remedy is available to A in the event that the county either fails to clear the watercourse or is restrained from so doing due to liability being attached to its acts?"

The rule of the civil law is that a landowner has a natural easement for the discharge of surface water upon his neighbor's land in the direction of its natural flow, and a landowner who obstructs such flow is liable for damages or may be enjoined. *Herman v. Drew,* (1933) 216 Iowa 315, 249 N. W. 277.

See *Hoyt and another v. The City of Hudson,* (1871) 27 Wis. 656, 659.

The rule of the common law is contrary, to the effect that a person in improving his land may cause the surface water to pass off in a different direction or in larger quantities than formerly, and any damage caused thereby is *damnum absque injuria. Gannon v. Hargadon,* (1865) 92 Mass. 106.

The Wisconsin supreme court has taken a middle ground, holding that a landowner may obstruct or divert the flow of surface water upon his land, but if he wishes to carry it off from his own land he must do so without material injury or detriment to the lands of his neighbors.

Pettigrew v. The Village of Evansville and another, (1870) 25 Wis. 223; *Hutchinson v. The Chicago & Northwestern Railway Company,* (1875) 37 Wis. 582; *Waters v. The Village of Bay View,* (1884) 61 Wis. 642, 20 N. W. 654; *Lessard v. Stram and others,* (1885) 62 Wis. 112, 22 N. W. 284; *Johnson v. The Chicago, St. Paul, Minneapolis & Omaha R. Co.,* (1891) 80 Wis. 641, 50 N. W. 771; *Borchsenius v. Chicago, St. Paul, Minneapolis & Omaha R. Co.,* (1897) 96 Wis. 448, 71 N. W. 809; *Shaw v. Ward,* (1907) 131 Wis. 646, 111 N. W. 237; *Adlington v. Viroqua,* (1914) 155 Wis. 472, 144 N. W. 1100; *Harvie v. Caledonia,* (1915) 161 Wis. 314, 154 N. W. 383.

In the case of *Hoyt and another v. The City of Hudson,* (1871) 27 Wis. 656, 664, the court pointed out in a *dictum* that the right to obstruct or divert the flow of surface water is limited to what may be necessary in the reasonable use and improvement of the land, and may not be done wantonly or unnecessarily, or from motives of malice. However, no case seems to have arisen in which that limitation was applied.

In the facts which you submit nothing indicates that B has acted wantonly, unnecessarily or maliciously. A has suffered no legal injury, therefore, and consequently has no remedy.

ML

Public Officers — County Board — County Highway Committee — Highway Patrolman — County board member, whether elected or appointed, is not eligible after resignation to appointment by county highway committee as special highway patrolman under sec. 82.07, subsec. (1), Stats.

County highway committee appointed under sec. 82.05, subsec. (1), Stats., is committee of county board.

August 17, 1937.

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

You state that in May, 1937, the supervisor of a certain village resigned and thereupon A was appointed supervisor. On July 1, 1937, A resigned as supervisor and the village board accepted his resignation. The following day, July 2, the county board adopted a resolution authorizing the county highway committee to appoint a special highway patrolman pursuant to the provisions of sec. 82.07, subsec. (1), Stats.

You inquire whether, under the circumstances, A is eligible for the position of special highway patrolman.

Sec. 82.05, subsec. (1), Stats., provides in part:

"Each county board at the annual meeting shall by ballot elect a committee of not less than three or more than five persons, to serve for one year, beginning either as soon as elected or on the first day of January following their election, as may be designated by the county board, and until their successors are elected. Any vacancy occurring in the committee may be filled until next meeting of the county board by appointment made by chairman of said board. Such committee shall be known as the 'County Highway Committee,' and shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining any roads or bridges within the county. The members of such committee shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties, and shall be paid the same per diem for time

actually and necessarily spent in the performance of their duties as is paid to members of other county board committees. * * *."

Sec. 82.07, subsec. (1), provides in part:

"The county highway committee shall have authority to appoint special highway patrolmen * * * The commission of any such special highway patrolmen may be revoked at any time by the county highway committee * * *."

Sec. 66.11 (2), provides in part:

"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."

In previous opinions of this office it has been held that a member of the county board may not be appointed county patrolman during the term for which he has been elected. See X Op. Atty. Gen. 416; XII Op. Atty. Gen. 353; XIII Op. Atty. Gen. 164.

In XXII Op. Atty. Gen. 308 it was said in effect that the county highway committee appointed pursuant to sec. 82.05, subsec. (1), Stats., is not a committee of the county board and that the power of such committee to appoint a special highway patrolman is given to it by statute, sec. 82.07, and not by a delegation of power by the county board. In so far as such opinion holds that the highway committee is not a committee of and acting for the county board in highway matters, we feel it is erroneous because in defining the powers and duties of the county highway committee, sec. 82.06, Stats., in several of the subsections, requires action of the county board before the power may be exercised, and in subsec. (6) expressly says the committee shall have the power to perform such other duties as may be delegated to

it by the county board. If it is not a committee of the county board then the county board has no authority to delegate to it any powers or to exercise any control over it.

In X Op. Atty. Gen. 1115 it was said that the county road and bridge committee is the county board's executive highway committee. We believe the same to be true of the county highway committee because it is an agency of the county, the appointment of which is made mandatory by statute in performing a governmental function of the county. Furthermore, sec. 82.05 (1) expressly says that such committee "shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining any roads or bridges within the county." The county highway committee thus acts for and in the place of the county board in reference to certain matters. The county board elects the members of the county highway committee. It seems quite clear then that the county highway committee is a representative and agent of the county board.

In XXI Op. Atty. Gen. 209, it was held that a member of the county board, although he has resigned and a successor has been selected and qualified, may not be appointed county highway patrolman during the term for which he was elected.

It has been held that a member of the legislature cannot escape the application of a constitutional prohibition against holding an office which was created during the term for which he was elected to the legislature, by resigning before the appointment is made. *Brady v. West,* 50 Miss. 68.

In *People v. Pearson,* 200 N. Y. S. 60, 121 Misc. Rep. 26, (affd. Mem. 201 N. Y. S. 936, 207 App. Div. 888) at page 62, the court made the following statement:

"* * * The defendant, as public official, could not vote to appoint himself to public office, if such vote were necessary to constitute the majority required to fill the vacancy. It would be contrary to public policy and public decency to permit him to do so. * * * What the defendant could not do directly, he will not be permitted to effect by subterfuge and strategem. * * * The law will look

beneath the forms employed, to learn the purpose to be accomplished. * * * The law will not suffer any such scheme to defeat its ends. * * *"

Any interpretation of the term "county board" as used in sec. 66.11, subsec. (2), as excluding county board committees and limiting the term to the county board itself would be in contravention of the spirit of the statute and would lead to the very result which it was intended the statute should guard against in the interests of public welfare. The prohibitions of this section are not founded upon the method by which the person gets into office but upon sound public policy in the interest of upright government. In our opinion the prohibition of sec. 66.11, subsec. (2) applies equally to one who has been appointed to a vacancy upon the county board and to one elected to the office.

It is therefore our opinion that a member of the county board, whether he be an elective or appointive member, even though he has resigned and his successor has been appointed and qualified, is not eligible during the term of office to appointment by the county highway committee as special highway patrolman.

HHP

Taxation — Exemption — Trade Regulation — Warehouses — Tax exemption provided by sec. 70.11, subsec. (37), Stats., of merchandise in storage in original package in commercial storage warehouse does not include goods on municipal dock.

August 17, 1937.

TAX COMMISSION.

You have inquired whether goods stored on a municipal dock are tax exempt under the provisions of sec. 70.11, subsec. (37), Stats., which provides:

"Merchandise placed in storage in the original package in a commercial storage warehouse shall while so in storage be considered in transit and not subject to taxation."

Perhaps, before entering upon a discussion of this question, it would be well to state at the outset that the state cannot tax the subjects of interstate commerce while still in transit in the course of such commerce, as such a tax would impose a burden on interstate commerce amounting to a regulation thereof contrary to the federal constitution. *Nash Sales, Inc., v. Milwaukee,* 198 Wis. 281, 286. Our consideration of the problem in so far as goods in interstate commerce is concerned is therefore limited to such goods as are no longer in transit.

As to such goods the problem resolves itself into the question of whether or not a municipal dock may be considered "a commercial storage warehouse" within the meaning of sec. 70.11, subsec. (37), Stats., above quoted.

A warehouseman is one lawfully engaged in the business of storing goods for profit within the purview of the uniform warehouse receipts act. See sec. 119.62, subsec. (1), par. (m), Stats., and *State ex rel. Bloch Bros. Co. v. Tiesberg,* 196 Wis. 419. A warehouseman is defined in 67 C. J. 441 as one engaged in the business of receiving and storing the goods of others for compensation or profit. Also in 67 C. J. 442 a warehouse is defined as a place where goods are received in store for profit.

In the case of *Love v. Export Storage Co.,* 143 Fed. 1, a lumber yard comprising four acres of land with a small frame building in the center enclosed by a fence on three sides was held to be a warehouse, but in *Carwile v. Bryson,* (Tex.) 251 S. W. 522, the court held that an open yard used for the storage of cotton could not be considered a warehouse.

We understand that the municipal dock in question consists of a pier and the fenced-in area adjoining the pier, although none of the area is under cover. Under some of the broader definitions above given, it would seem that a municipal dock of the type here under consideration might properly be termed a warehouse as far as physical characteristics are concerned. However, we believe that the answer to the present question depends not so much upon the physical factors involved as upon the use to which the premises are put and the manner and usage of conducting the business.

We assume that the municipal dock in question is used primarily in connection with the reloading of goods brought in on boats to trains for reshipment to other points and for the reloading of goods brought in on trains to boats for similar reshipments. In other words, such storage as takes place is incidental to the shipping. It is further assumed that the facilities of the dock are not offered to the public for general storage purposes, but only for purposes of reloading from boat to train or from train to boat. In this connection it has been held that under the law of Wisconsin (with a statutory exception with respect to grain), the owner of property can obtain a negotiable warehouse receipt therefor only when it is stored in a public warehouse openly held out as such and subject to use by all persons on equal terms. *Security Warehousing Co. v. Hand,* (C. C. A.) 143 Fed. 32 (affirmed 206 U. S. 415). The fact that some interval of time may elapse between the unloading and reloading does not in our opinion change the primary character from shipping to storage, unless the proprietors of the dock are openly engaged in the latter business and in the usual course of trade.

A "dock" is defined as the slip or waterway extending between two piers or projecting wharves or cut into the land for the reception of ships, sometimes including the piers themselves. Websters's New International Dictionary. We find nothing in this common definition of the word "dock" to suggest that such term is synonymous with "commercial storage warehouse." In construing statutes all words and phrases are to be construed and understood according to the common and approved usage of the language. Sec. 370.01, subsec. (1), Stats. Applying this rule we conclude that a municipal dock is not a commercial storage warehouse within the meaning of sec. 70.11, subsec. (37), Stats.

The conclusion here reached that the words "commercial storage warehouse" should not be so broadened as to include a municipal dock is further supported by the general principle of statutory construction applicable to tax exemption statutes, which is to the effect that such statutes are to be strictly construed and all doubts in respect to a specified

piece of property, or ownership, are to be resolved in favor of the taxability of the property. *Katzer v. City of Milwaukee,* 104 Wis. 16, 80 N. W. 41.
WHR

Mortgages, Deeds, etc. — Taxation — Forest Crop Lands — Chapter 327, Laws 1933, amending sec. 77.02 Stats., applies only to mortgages or other indentures executed subsequently to its enactment.

August 18, 1937.

H. W. MACKENZIE, *Conservation Director,*
Conservation Department.

You have called our attention to sec. 77.02 (1), Stats., which, prior to 1933, read as follows:

"The owner of any tract of land of not less than forty acres may file with the conservation commission a petition stating that he believes the lands therein described are more useful for growing timber and other forest crops than for any other purpose, that he intends to practice forestry thereon, that all persons holding incumbrances thereon have joined in the petition and requesting that such lands be approved as 'Forest Crop Lands' under this chapter."

In *Wabeno v. State Conservation Comm.,* 220 Wis. 502, the Wisconsin supreme court held that sec. 77.02 (1), above set forth, did not authorize a trustee to join in a petition without the consent of the bondholders.

In 1933, by ch. 327, Laws 1933, the legislature amended sec. 77.02 (1), by adding:

"Whenever any such land is incumbered by a mortgage or other indenture securing any issue of bonds or notes, the trustee or trustees named in such mortgage or indenture or

any amendment thereto may join in such petition, and such action shall for the purpose of this section be deemed the action of all holders of such bonds or notes."

You request an opinion as to whether this amendment applies to mortgages and other indentures executed prior to the enactment of the amendment or only to such instruments as have been subsequently executed.

It is our opinion that this amendment may be applied only to trust deeds made subsequent to its enactment. The powers of a trustee under a deed of trust depend entirely upon the terms of the deed and are a matter of contract between the parties. *Wabeno v. State Conservation Comm.*, 220 Wis. 502.

Before sec. 77.02, Stats., was amended, the trustee was without power to join in a petition to the state conservation commission to have lands approved as forest crop lands without the consent of the bondholders. *Wabeno v. State Conservation Comm., supra.*

Consequently if the amendment to sec. 77.02, be applied to trust deeds created previous to its enactment, such application will constitute a direct change in the terms of the contract between the parties. This construction would render the statute invalid as impairing the obligations of contracts contrary to the provisions of sec. 10, art. I, U. S. constitution.

As was said by the court in *Von Hoffman v. City of Quincy*, 71 U. S. (4 Wall.) 535, 550, 552, 18 L. ed. 403:

"* * * the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

In *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N. W. 611, the court held that where there was a provision in an automobile liability policy that no action should be brought upon it until after the liability of the insured had been determined by judgment after trial, or by agreement with the written consent of the insurer, it constituted an impairment of the obligation of contract to apply to such insurance pol-

icy a subsequently enacted statute making the insurer a proper party defendant in an action against the insured. On pages 192-193 the court said:

"It is true as a general rule that statutes that are remedial only are retroactive, and it is also true that prior enactments similar to the one in suit have been stated in opinions of this court to be remedial. But statutes are not to be given retroactive effect if so doing will deprive the parties to the contract of a valuable right. The decisions of the United States supreme court upon questions arising under the contract clause of the United States constitution are of course conclusive upon this court. That court long ago held that any statute, whether remedial or not, that operated to deprive a party to a contract antedating the enactment of the statute of any valuable right secured to him by that contract is void as to that contract. *Edwards v. Kearzey,* 96 U. S. 595. If a statute substantially lessens the value of a pre-existing contract the constitutional provision bars application of it to the contract. Many decisions of the supreme court of the United States have so held."

The right we are here concerned with of the bondholders to have their consent obtained to the petition to the state conservation commission must have been considered a valuable and substantial right by the Wisconsin court or it would not have held in the *Wabeno* case, *supra,* that it was necessary that their consent be obtained.

What is the obligation that would be impaired in the present instance? The answer is that it is the obligation of the trustee under the trust deed to limit his activities in so far as the rights of the bondholders are concerned to the authority vested in him by the terms of the trust deed. If the amendment in question absolves the trustee from such obligation, then clearly the contract rights set up in the trust deed have been impaired, since the trustee may now do something which cannot be said to have been within the contemplation of the parties when the contract was made.

There are numerous cases involving a change in procedure or in the remedy of a previously created contract, where it has been held that the obligation of the contract is not impaired. These cases are not in point, however, for

the reason that we are not here concerned with a remedy or procedure used in enforcing it, but rather with a substantive right of the bondholders. *Van Baumbach v. Bade,* 9 Wis. 559.

There are also numerous cases holding that impairment of the obligation of a contract does not result where a statute is passed which merely affects the contract incidentally. These cases are not in point because the amendment here deals directly with the rights of the parties under the trust deed, and it cannot be said that such amendment has an incidental affect upon the obligation of the contract. We also deem it significant that the court in the *Wabeno* case said that ch. 327, Laws 1933, can have no retroactive effect (page 506). It is true that the trustee there had attempted to give consent on behalf of the bondholders prior to the 1933 amendment, but the reasoning of the court in considering such consent to be invalid appears to be based upon the fact that no such power was given the trustee in the trust deed rather than upon the grounds that the trustee had no statutory authority to consent on behalf of the bondholders. WHR

Courts — Clerk of Circuit Court— Taxation — Income Tax — Clerk of circuit court of Milwaukee county is not entitled under sec. 2, ch. 311, Private and Local Laws 1862, as amended, to charge fee of two dollars for each income tax warrant filed in his office under sec. 71.36, subsec. (2), Stats.

August 19, 1937.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

Attention Mr. Oliver L. O'Boyle, *Corporation Counsel.*

You have requested an opinion as to whether the clerk of the circuit court for Milwaukee county may charge the Wisconsin tax commission a fee of two dollars for filing each

income tax warrant filed in that office against delinquent taxpayers pursuant to sec. 71.36, subsec. (2), Stats.

In Milwaukee county the fees of the clerk of circuit court are governed by special act, ch. 311, Private and Local Laws 1862, as amended. Sec. 2 of said ch. 311 provides as follows:

"There shall be paid to said clerk at the time of commencement of each action or proceeding * * * the sum of two dollars, * * *"

This quoted section corresponds to the provisions of sec. 59.42 (40) Stats., which is the general statute relating to the fees of all circuit courts not governed by special act and which provides as follows:

"Clerk of court: fees. Except as otherwise provided by law, the clerk of the circuit court shall collect the following fees:

"* * *

"(40) At the time of the commencement of every action or special proceeding * * * the sum of two dollars * * *"

In an opinion, XXV Op. Atty. Gen. 246, it was held that the filing of delinquent income tax warrants with the clerk of the circuit court pursuant to sec. 71.36 (2), Stats., did not come within the meaning of the words "actions" or "proceedings" as used in sec. 59.42 (40), and that therefore the clerks of the various circuit courts were not entitled to a fee of two dollars for each tax warrant so filed.

The provisions of the special law governing the fees of the clerk of the circuit court for Milwaukee county being substantially the same as the provisions of the general statute, sec. 59.42 (40), we follow the above former opinion of this office.

It is our conclusion, therefore, that the clerk of the circuit court of Milwaukee county is not entitled to charge a fee of two dollars as provided in sec. 2, of ch. 311, Private and Local Laws 1862, as amended, for each delinquent income tax warrant filed in his office.

HHP

Bonds — Public Officers — State Employee — Under sec. 46.05, subsec. (2), Stats., board of control may from time to time change requirements as to amount of surety bond required of particular employee or officer whose bond is not otherwise fixed by law.

August 20, 1937.

BOARD OF CONTROL.

You have called our attention to the surety bond of the superintendent and steward of one of the state institutions under the jurisdiction of the board of control. This individual, who was also formerly the superintendent of a second institution, no longer has anything to do with the second institution, and the board now proposes to decrease the amount of his surety bond from $25,000 to $10,000.

The surety company is willing that this be done provided it can be done legally, and you ask for our opinion on the matter.

We understand that the bond in question was given pursuant to sec. 46.05, subsec. (2), Stats., which provides in part:

"* * * The steward of each institution shall execute and file an official bond in such sum and with such sureties as said board may prescribe. Said board shall also require any other officer or other person having the possession or custody of any money or property belonging to the state or any institution under its control or supervision to give an official bond, and from time to time to renew the same."

This statute gives the board of control broad powers with reference to fixing the amount of surety bonds of its employees and, if the circumstances have so changed that less coverage is needed in the case of a particular individual, we see no reason why the contract with the surety company should not be so amended with its consent as to result in smaller premiums. No useful purpose would be served by paying premiums on a $25,000 bond when a $10,000 bond would be adequate.

There are two ways in which the amount of the bond may be reduced: The bonding company may attach a rider to the present bond reducing the coverage for defaults occurring thereafter from $25,000 to $10,000; or a new bond for $10,000 may be issued and the $25,000 bond canceled for defaults occurring thereafter.

The bonding company in its correspondence refers to Bill No. 423, S., which became ch. 429, Laws 1937, as having some possible bearing on the question. The bond cancellation provisions contained in this chapter relate solely to employees of cities, villages and counties, and do not apply to state employees under the jurisdiction of the state board of control. The bonds of these state employees are covered by the provisions of sec. 46.05, subsec. (2), above quoted, and the provisions of that section were neither expressly nor impiedly repealed or amended by ch. 429.

ML
WHR

Intoxicating Liquors — Municipal Corporations — Malt Beverage Licenses — Provisions of sec. 176.17 and sec. 66.05, subsec. (10), par. (c), subd. 1, Stats., do not prohibit granting of wholesale liquor permit to corporation where one of its stockholders holds Class "B" retail license.

August 20, 1937.

SOLOMON LEVITAN,
State Treasurer.

Attention Beverage Tax Division.

You call our attention to sec. 176.17 and sec. 66.05, subsec. (10), par. (c), subd. 1., Stats., which are too lengthy to quote here, and inquire whether these provisions prevent the granting of a wholesale liquor permit to the Y corporation where X, a stockholder in such corporation, is also the holder of a Class "B" retail license.

Sec. 176.17, Stats., contains various restrictions in substance prohibiting manufacturers, rectifiers and wholesalers of intoxicating liquors from acquiring interests in retail licenses and from lending money, equipment, fixtures, supplies and signs costing over a certain amount to retailers, and from holding any interest in the premises where such liquors are sold at retail.

Sec. 66.05, subsec. (10), par. (c) 1, Stats., provides somewhat similar restrictions for brewers, bottlers and wholesalers of fermented malt beverages.

These restrictions do not expressly nor impliedly include stockholders in corporations engaged in manufacturing, rectifying or wholesaling intoxicating liquor or engaged in the brewing, bottling or wholesaling of fermented malt beverages.

Neither do we believe that the statutes should be widened by construction so as to include cases of the sort here under consideration. To do so would lead to illogical and absurd results in addition to doing violence to the plain wording of the statutes.

In the first place such interpretation would place a wellnigh impossible administrative burden on your department, as it would require that you examine the stock books of all corporations applying for wholesale permits, so as to determine that none of the stock is in the hands of retail licensees.

Secondly, the penalty for violation is revocation of the wholesale license. This would result in depriving the wholesaler of a very valuable right because of the action of one of its stockholders over whom it has no control. Assume for the moment that the Y corporation has one million shares worth one dollar each and that X has succeeded in acquiring one of these shares on the market. If Y's license can thereby be revoked, the door is open to almost limitless abuse by designing competitors and others, and at the same time the Y corporation through no fault of its own would be helpless to defend any proceedings to revoke its license.

We therefore conclude that a corporation is not to be denied a wholesale liquor permit merely because one of its stockholders happens to hold a Class "B" retail license, al-

though you are not precluded from disregarding a corporate arrangement deliberately devised for the purpose of evading the above mentioned statutes.
WHR

Banks and Banking — Sec. 220.08, subsec. (19), Stats. 1935, applies to all segregated trusts, including those created previously to its enactment, and trustees thereof are liable for expenses of banking commission in examining and supervising trust.

August 21, 1937,

BANKING COMMISSION.

You state that a segregated trust of a state banking corporation was created in August, 1932, the administration of which the banking commission has supervised pursuant to sec. 220.08, subsec. (19) Stats. 1935, but that the trustees contend that the banking commission has no jurisdiction over this particular segregated trust and therefore refuse to pay your statement for expenses. You request an opinion as to whether said trustees are liable for the expenses incurred by the banking commission in examining and supervising this trust.

State banking corporations come into being pursuant to statutory authority and are subject to the regulatory provisions of the statutes. Moreover, the entire institution of banking itself is subject to regulation by the state under the police power, as was recognized in *Wausau M. P. Co. v. Citizens State Bank,* (1934) 214 Wis. 654, 254 N. W. 379, where the court at page 658, said:

"* * * The character of banking as an institution peculiarly calling for regulation and for the exercise of the police power in order to give adequate protection to the public is too well established to call for extended comment."

Prior to the enactment of sec. 220.07 (16) (a), Stats. 1933, by ch. 15, Laws of the Special Session of 1931-1932, providing for the entering into stabilization and readjustment agreements, with the approval of the commissioner of banking, between a bank and eighty per cent of its depositors and creditors, there existed no statutory authority therefor. Thus the whole plan of stabilizing banks with the attendant rights and privileges of setting up agreements and trusts came into being by a statutory enactment designed to meet a most acute economic emergency. Although there was no statutory provision governing the situation the banking commission, working jointly with the circuit courts along the line of procedure similar to that used in liquidation of closed banks, supervised the administration of the stabilization trusts thus authorized.

Sec. 220.07 (21), Stats. 1933, was created by ch. 484, Laws 1933, and provided as follows:

"Whenever any bank is operating under a stabilization and readjustment agreement and the banking commission orders the segregation of the assets of such bank, the trustees appointed pursuant to any trust agreement shall be confirmed by the circuit court of the county wherein such bank is located, such trustees shall at all times serve under the supervision of said court, and the assets of said bank covered by such trust agreement shall be administered under the supervision of said court."

In the administration of the segregated trusts which were created by virtue of the stabilization agreements the various circuit courts and the banking commission interpreted the provisions of sec. 220.07, (21), Stats. 1933, to mean that the banking commission had joint supervision with the courts over such trusts. The courts were not adequately equipped or possessed of the necessary technical knowledge and experience in reference to banking matters in order to actively supervise these trusts and therefore the duty of looking after the best interests of all parties fell largely upon the banking commission. Not only did the best interests of the depositors and creditors demand that the trust funds be looked after by some disinterested conversant

agency which could assist the court in intelligently and economically administering the trusts, but the institution of banking and the economic situation were such that the interests of the public demanded it in order that general confidence might be restored and retained.

In order to clarify its intent and to make the statute expressly conform to the interpretation being given to sec. 220.07, (21), the legislature by ch. 245, Laws 1935, repealed sec. 220.07 (21) and in its place enacted sec. 220.08, (19), Stats. 1935, which provides as follows:

"Segregated trusts heretofore or hereafter created in connection with the stabilization and readjustment or reorganization of a bank shall be administered and liquidated under the supervision of the banking commission and the circuit court of the county in which the bank is located.
"* * *"

Sec. 220.08 (19) Stats. 1935, having used the language "segregated trusts *heretofore* or hereafter created * * * shall be administered and liquidated under the supervision of the banking commission," it cannot be doubted that the legislature thereby intended to confer upon the banking commission jurisdiction over all segregated trusts whether created after the passage of ch. 245, Laws 1935, or, as the one in question, created prior thereto. Had the legislature not intended the provisions of this section to apply to trusts created prior to its enactment there can be nothing to which the word "heretofore" applies.

The statute first authorizing stabilization agreements, under which the segregated trusts came into being, departed from the previous statutory provisions in reference to banks by providing that the action of eighty per cent of the depositors and creditors of a bank would bind all the depositors and creditors. In *Wausau M. & P. Co. v. Citizens State Bank,* (1934) 214 Wis. 654, 254 N. W. 379, this statutory provision for stabilization agreements was held to be within the proper functioning of the state police power.

If the state by providing for liquidation and stabilization of banks may vary the rights theretofore existing, it cannot be doubted that in the exercise of its police power the state

may also place subsequent regulations upon said stabilization arrangements and the trust *res* set aside for the benefit of depositors and creditors who by the stabilization agreement entered into an arrangement in reference to their lawful demands against the bank, such as providing for the supervision and examination by the banking department of the funds so set apart. The state by statute created the rights and privileges of entering into the stabilization arrangements and by the same token may thereafter reasonably regulate the rights and privileges so created.

When the state is properly acting within its police power a property interest or contract right existing prior to the enactment of the regulatory statute may, if the legislature so intended, be subject to the provisions of the act. In *Andrews v. La Crosse Refrigerator Corp.*, (1928) 196 Wis. 622, 222 N. W. 807, where the legislature had passed a statute providing that no person should receive any fees or compensation for acting as a private detective without first having obtained a license and filing bond, a firm of private detectives who had been employed prior to the passage of the act was held not entitled to recover for services rendered subsequently to the passage of the act because they had not complied with the requirements of the statute. The court at page 624 said:

"* * * It was argued and held in the court below that ch. 289 was invalid because it impaired plaintiffs' contract. Assuming that the plaintiffs had a contract for a term of service (a matter very much in doubt), nevertheless the provisions of ch. 289 did not impair it. The plaintiffs might have complied with the law and continued the performance of their contract. If the argument of the plaintiffs is sound, the operation of laws enacted in the exercise of the police power might be indefinitely suspended by the terms of contracts of private parties. The law seems well established and clearly applicable to the facts of this case. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118; *Jacob Huppert, Inc. v. Caffey,* 251 U. S. 264, 40 Sup. Ct. 141."

Par. (c), subsec. (19), sec. 220.08, Stats., provides that the cost of such examination and supervision rendered by the banking commission shall be a charge against the trust and be paid as an expense of administration thereof.

It is therefore our opinion that under sec. 220.08 (19) all segregated trusts created in connection with the stabilization and readjustment or reorganization of a bank, whether created before or after the enactment of such statute, are subject to the joint supervision of the circuit courts and the banking commission and that the trustees of such trust in their official capacity are liable for the cost of examination and supervision of the trust by the banking commission.
HHP

Courts — Estates — Wisconsin Statutes — Ch. 224, Laws 1937, increasing fees for executors and administrators, applies to accounts allowed and settled subsequently to effective date of that act, even though services may have been rendered prior thereto.

August 21, 1937.

TAX COMMISSION.

You have called our attention to ch. 224, Laws 1937, which amends sec. 317.08, Stats., by increasing the amount of fees alllowable to executors and administrators. The act provides that it shall take effect upon passage and publication, and you inquire whether the increase of fees provided by this chapter applies to those estates which were in the process of administration at the time of the enactment of said chapter, or whether the increase applies only to the estates of those who may die subsequently to the effective date of the act.

Without attempting to go into a detailed history of the Wisconsin statutes providing for compensation of executors and administrators, it appears that such statutes had their

origin in earlier New York statutes, and that the New York courts have held for over a century that the statutes in force at the time the fees are passed upon are applicable. *Dakin v. Demming,* (1836) 6 Paige 95; *Savage v. Sherman,* (1882) 87 N. Y. 277; *Naylor et al. v. Gale,* (1893) 25 N. Y. Supp. 934.

In the case of *In re Naylor's Estate,* (1917) 164 N. Y. Supp. 462, 463, the court said:

"* * * The amount of commissions allowed to testamentary trustees is governed by the law in force at the time of the settlement of their accounts. Whitehead v. Draper, 132 App. Div. 799, 117 N. Y. Supp. 539; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938."

The principle is well stated in the case of *In re Daly's Estate,* 165 N. Y. Supp. 792, 796, as follows:

"The well-settled rule, that the statute existing at the time of the passage of the accounts is the one which governs the allowance of compensation to an executor, is based upon the ground that an executor is not entitled to any compensation until the final execution of the duties imposed upon him. Naylor v. Gale, 73 Hun. 55, 25 N. Y. Supp. 934. The executor acquires no accrued right to compensation until his accounts are being settled and his acts and conduct passed upon by the court, as it is only at that time that his services can be examined and his compensation fixed. It would seem, therefore, that in applying the law in force at the time the right to compensation accrues, whether the compensation be for services purely executorial or of the nature of extra services, such as legal services, or, in other words, whether the compensation sought be for services that either may or may not be remunerated under the law in force when the services were performed, the rule of applying the statute in force at the time of the judicial accounting does not give said statute so much a retroactive effect, as it applies to a new statute to an existing condition of things. In such a case the statute applied is the statute in force when the right to compensation has accrued. Laird v. Carton, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. (N. S.) 189."

See also *Matter of Barker,* 230 N. Y. 364, 130 N. E. 579 (1921).

Since the foregoing rule was first announced by the New York courts in 1836, prior to the adoption of the Wisconsin statutes relating to the subject, it follows that the same construction should apply in this state.

"* * * It is elementary that where a statute is adopted from another state, which statute has been construed by the courts of that state prior to its adoption, it should be given the same construction here. In other words, the statute as construed is adopted. *Draper v. Emerson,* 22 Wis. 147; *Dutcher v. Dutcher,* 39 Wis. 651; *Westcott v. Miller,* 42 Wis. 454; *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430; *Estate of Bullen, supra; Ditsch v. Finn,* 214 Wis. 305, 252 N. W. 562. * * *" *Estate of Hamilton,* 217 Wis. 491, 496.

It is interesting to note that in 24 C. J. 974 it is said to be the general rule that compensation in such cases is governed by the law operative at the time of the rendition of services, although it is also stated that there are authorities to the contrary. However, a careful reading of the first mentioned cases cited in Corpus Juris reveals that some of them at least do not sustain the rule as stated there. There is a note in 91 A. L. R. 1421 on the subject, and while it is pointed out that there is a conflict of authority on the question, the majority of the cases there cited are to the effect that the right to compensation is governed by the statute in force at the time of the allowance for services or settlement of accounts, although not in force at the time of the testator's death. Thus, it would appear that the conclusion which we have reached here is in line with the weight of authority on the subject.

It is therefore our opinion that, since an executor or guardian has no contract or vested right to fees, such compensation is governed by the law in force at the time his accounts are allowed and settled, and that the increase in fees provided in ch. 224, Laws 1937, applies to estates in the process of administration at the time of the enactment of the law.

OSL
WHR

Contracts — Corporations — Securities Law — Contract whereby peanut vending machine is sold and seller agrees to lease machine, operate it and pay purchaser percentage of gross intake as rent, constitutes security within Wisconsin securities law, sec. 189.02, subsec. (7), Stats.

August 25, 1937.

PUBLIC SERVICE COMMISSION.

Our attention is called to the following state of facts:

A corporation is engaged in taking orders from individuals for peanut vending machines. At the time the order is taken payment is made and the following agreement is entered into by the two parties:

"This is your authority to deliver to me a bill of sale covering ———— Premium Vending Machines, also lease covering said machines. This is also your authority to locate and service said machines for me.

"Attached is payment for above machines at the rate of $——— per machine, plus 3 per cent Illinois State Tax for each machine purchased.

"* * *

"This purchase is made by me with the understanding that you will lease from me the above machines for a period of ——— years. This lease will give you authority to operate, service, keep in repair, collect monies, and in all other necessary ways care for the up-keep and operation of these machines for the above period of years.

"I agree to sign the lease, delegating you to the duties above stated for which I am to receive 20% *(Twenty Per Cent)* of the gross intake from the machines as a rental for the term so stated in your lease. It requires from 30 days to 45 days to place these machines in proper locations.

"It is also agreed that your lease will show the serial number of machines purchased by me and that you will furnish me with a list of their respective locations within a period of sixty days upon request.

"This contract covers the entire agreement—No verbal representations to the contrary will be recognized."

Thereafter, in accordance with the agreement, a bill of sale is delivered and a lease executed. The machines are not

delivered to the purchaser, but as provided in the lease, are placed by the corporation in various locations. The corporation keeps the machines filled with peanuts, services it, and makes collections, remitting to the owner twenty per cent of the gross intake from the machines.

You inquire whether the agreement whereby this undertaking is entered into constitutes a security under the Wisconsin securities law.

Subsec. (7), sec. 189.02, Stats., defines a security as follows:

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

A consideration of the authorities reveals that in determining whether a transaction comes within a securities law, courts look to substance rather than form.

"In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share." *Domestic & Foreign Petroleum Co. v. Long,* 51 P. (2d) 73, 76 (Cal. 1935), and cases there cited.

Thus, in *State v. Robbins,* (1932) 240 N. W. 456, 185 Minn. 202, it was held that where by one contract several muskrats were purchased and by another contract executed simultaneously the buyer agreed to leave the animals on the breeding ground of the seller and assented to the seller's re-

ceiving one-half of the cash proceeds from the sale of pelts and live animals, the two contracts considered together constituted a sale of an interest in a profit-sharing scheme or venture and were a security.

In *Stevens v. Liberty Packing Corporation,* (1932) 161 A. 193, 111 N. J. Eq. 61, a company "offered an absentee ownership agreement, called a lease, whereby, for $175, four female rabbits were sold to the absentee, who in turn leased them to the company for ten years, the company to breed them, to divide the offspring, and to buy the absentee's share at $1 apiece when the offspring are 8 weeks old." The court held that the absentee ownership agreement and the lease back to the company constituted a security.

See XIX Op. Atty. Gen. 173, XVIII Op. Atty. Gen. 438, XVII Op. Atty. Gen. 343 and 427, to the same effect.

Similarly, where land is sold with an agreement whereby the seller is to cultivate the land and divide the profits with the buyer, the courts have held the transaction to constitute the sale of a security.

In *Prohaska v. Hemmer-Miller Development Co.,* (1930) 256 Ill. App. 331, where a contract was made for the sale of land whereby the purchaser was to pay one-third of the purchase price in cash, the balance being payable from crops to be planted and harvested by the vendor, the court held the contract to constitute a security.

In *Kerst v. Nelson,* 171 Minn. 191, 213 N. W. 904, land was sold to be used as a vineyard, accompanied by an agreement on the part of the seller to cultivate, harvest, and market crops, and divide the proceeds with the buyer. It was held that this constituted a contract for investment in a profit-sharing scheme and was a security.

In *State v. Agey,* 171 N. C. 831, 88 S. E. 726, it was held that a company engaged in the business of selling small portions of land with payments extending over a term of years with obligation on the part of the company to plant and cultivate fruit trees thereon was an investment company.

In *People v. McCalla,* 63 Cal. App. 783, 220 Pac. 436, where a corporation conveyed a small parcel of land constituting a part of a large tract subject to an oil lease and the right on the part of the corporation to receive and disburse

all income received from such land to the proper parties and to make any new agreements necessary for increasing or protecting such income and, contemporaneously with the execution of the deed, issued to the grantee a certificate entitling the grantee to a proportionate part of the net income received from the land, it was held that the transaction constituted a security.

See notes in 87 A. L. R. 42, and 54 A. L. R. 498 on the general subject.

The Wisconsin court appears to be in accord with these authorities. In *Brownie Oil Co. v. Railroad Comm.*, 207 Wis. 88, 240 N. W. 827, an oil company issued good-will contracts to customers purchasing coupon books for thirty-five dollars. By the good-will contract the customer agreed to purchase oil, gasoline, kerosene and grease from the company's stations whenever convenient and to recommend the company's merchandise to his friends and neighbors. In consideration of this, the company agreed to deposit a specified amount per unit measure of products sold, in trust, to be shared at the end of approximately a ten-year period by the owners of the good-will contracts. The court held that the good-will contract construed with the coupon book constituted a security and could not be sold without a permit. On pages 93 and 94 the court said:

"* * * The question therefore arises whether this failure definitely to bring the certificates within the category of stock, on the one hand, or bonds, on the other, prevents this from being a security. We think it does not. This is a device for financing a corporation. The inducement to secure this financing is the promised creation of a fund which will later be distributed to the person making the investment or furnishing the financing. This person waives his right to any interest or dividends as such, but he does invest with the hope or expectation that the money invested will be returned to him together with some payment for its use. He acquires the right to have the fund accumulated and to receive his distributive share when it is accumulated. He accepts the risk that the enterprise will be unable to get into operation and that the period of its operation will be neither sufficiently long nor successful to bring him the expected returns. In *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937, the court said:

" 'The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an "investment" as that word is commonly used and understood.'

"We think the contract which evidences the investor's right to this return should be treated as a security unless it is without the definition of 'security' contained in sub. (7), sec. 189.02. Since the contract under examination here evidences a right to have accumulated the fund heretofore referred to, it is 'evidence of . . . interest in . . . property . . . of a company.' It therefore seems to us to fall within the letter and spirit of the securities law.

"In *Creasy Corp. v. Enz Bros. Co.* 177 Wis. 49, 187 N. W. 666, it was said, referring to the act:

" 'Its purpose was to protect the residents from the purchase of worthless obligations for the payment of money in whatever form such obligations took.' "

The contract in question has many of the characteristics of a security. It is a device for financing a corporation which lacks funds to acquire the necessary machines for itself, as appears from the testimony in a hearing conducted by Mr. Harriman on August 27, 1936. It was also brought out at this hearing that delivery of the machine to the owner is not contemplated and that it would be impractical for the owner to operate the machine himself. It appears further in the testimony that the whole enterprise is speculative in character in that the owner has the risk of receiving little or no return as rentals, depending upon the amount of gross intake. The purchaser of the machine is desirous of an income and enters into the contract for investment purposes. In other words, he is seeking an "interest in the profits of a venture" within the statutory definition of a security given in sec. 189.02, subsec. (7), Stats.

The sale, lease and contract of service are entered into in a single contract and, considered together in the light of the foregoing authorities and discussion, constitute a security within the Wisconsin securities law.

In reaching the conclusion that the contract in question constitutes a security within the Wisconsin securities law and is subject to regulation under chapter 189, we are not

unmindful of a contrary view expressed in an opinion by a former attorney general on December 15, 1936. That opinion, reported in XXV Op. Atty. Gen. 723, is expressly overruled in so far as it is inconsistent with this opinion.
OSL
WHR

Constitutional Law — Courts — Public Officers — Governor — Municipal Judge — Provision of ch. 264, Laws 1937, for appointment of judge by governor is contrary to art. VII, sec. 2, Wis. Const., as attempt to delegate to governor power to elect judge.

August 26, 1937.

HONORABLE PHILIP F. LA FOLLETTE,
Governor.

Attention Gordon Sinykin, *Executive Counsel.*

Ch. 264, Laws 1937, creating a municipal court for Burnett county, provides for the first election of the judge on the first Tuesday in April, 1938, to take office on the first Monday in May, 1938, and authorizes the governor to appoint a judge for this court to act and hold office until the first Monday in May, 1938. You inquire whether the governor has power to appoint a judge to act and hold office until the first Monday in May, 1938.

Art. VII, sec. 2, Wis. Const., provides as follows:

"* * * Provided * * * that the legislature shall provide as well for the election of judges of the municipal courts as of judges of inferior courts, by the qualified electors of the respective jurisdictions. * * *"

Art. XIII, sec. 10, Wis. Const. provides as follows:

"The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution."

The constitution by art. VII, sec. 2 has thus clearly provided that such office shall be filled by the qualified electors, except in case of a vacancy. Sec. 17.03, Wis. Stats., is the action of the legislature in declaring pursuant to art. XIII, sec. 10, Const., when an office shall be deemed vacant.

In *State ex rel. Reynolds v. Sande,* (1931) 205 Wis. 495, 238 N. W. 504, where a municipal court for Neenah-Menasha was created by legislative act providing that the common councils of Neenah and Menasha were to elect a judge to serve pending the regular election, the court held that the legislature had no authority to provide for the selection of a judge in this manner. At pages 499-500 the court said:

"Sec. 10, art. XIII, of the constitution refers to other offices than that of circuit judge and reads:

" 'The legislature may declare cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution.'

"The action of the legislature with relation to vacancies mentioned in the section just quoted appears in sec. 17.03, Stats., and is confined to death of incumbent, resignation, removal, ceasing to be an inhabitant of the state or district, conviction and sentence for certain offenses, when the position is declared vacant by reason of void election, insanity of the incumbent, neglect or refusal to file official oath, or on the happening of any event which is declared by law to create a vacancy. Mr. Chief Justice Dixon in *State ex rel. Attorney General v. Messmore, supra.* [14 Wis. 163], writing for the court, said:

" 'The clause which gives the legislature power to declare the cases in which any office shall be deemed vacant * * * clearly confers no authority by direct act to declare a particular office vacant. The legislature can only by general laws declare under what circumstances existing offices shall be deemed vacant.'

"In the absence of proper legislation, an attempt to provide for the selection of the judge otherwise than by an election by the qualified electors of the jurisdiction to be served is void. Sec. 2, art. VII, Const." (Italics ours.)

In the foregoing case the legislature provided for the election of the judge to serve pending the regular election, by the common councils. Under ch. 264, Laws 1937, it provided that the election of the judge, to serve pending the regular election, was to be by appointment of the governor. It is our opinion that the two cases are analogous and that if the legislature had no authority under the constitution to provide for election by a common council it likewise was without power to provide for election by appointment of the governor.

The situation set out in ch. 264, Laws 1937, does not constitute a vacancy within the terms of sec. 17.03, Stats. That statute can apply only to existing offices. *State ex rel. Reynolds v. Sande, supra.* There is no existing office in ch. 264, Laws 1937. It relates solely to the creation of a new office. Not being a general law declaring under what circumstances an existing office shall be deemed vacant, ch. 264, Laws 1937, must be construed as an attempt on the part of the legislature to deprive the qualified electors of their right under art. XIII, sec. 10, Wisconsin constitution to elect the judge and unlawfully delegate the power so to do to the governor.

It is therefore our opinion that the provision of ch. 264, Laws 1937, empowering the governor to appoint a judge for the municipal court for Burnett county to hold office until the first Monday in May, 1938, is contrary to the Wisconsin constitution and that the governor may not make such appointment.

OSL
HHP

Public Health — Basic Science Law — Revocation of medical license under sec. 147.20, subsec. (3), Stats., for commission of crime in course of professional conduct requires affirmative action by board of medical examiners and right to practice continues until such action is taken.

August 27, 1937.

BOARD OF MEDICAL EXAMINERS.
Henry J. Gramling, M. D., *Secretary.*

Our attention is called to sec. 147.20, subsec. (3), Wis. Stats., which provides:

"When any person licensed or registered by the board of medical examiners is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the board of medical examiners a certified copy of the information and of the verdict and judgment, and upon such filing the board shall revoke the license or certificate."

In this connection you state that on July 12 you received a copy of an information, verdict and judgment in a case coming under the above section. The matter of revocation was under consideration at the June meeting of the board, but no action was taken at that time because an appeal was pending and the record was not before you. On July 8 the judgment of the trial court was affirmed and sentence imposed.

You inquire whether the physician in question has the right to practice until the next meeting of the board, when his license will undoubtedly be revoked by virtue of the mandate of the above quoted statute.

We do not consider the language of sec. 147.20, subsec. (3), Stats., to be ambiguous. It is clearly stated that "upon such filing the board shall revoke the license or certificate." This clearly indicates that the statute is not self-executing. Neither the commission of the crime nor the filing of the certified copy of the information, verdict and judgment au-

tomatically revokes the license. Affirmative action on the part of the board is required and until such action has been taken the license remains in full force and effect.

The privilege granted by license to practice medicine is a very valuable one, and hence any statute providing for the revocation of such a license without notice and without hearing is highly penal in nature and should be followed to the letter.

Even if there were such ambiguity in this statute as would permit of construction, the rule in the case of penal statutes is that such construction is to be limited in favor of the person sought to be penalized. *Miller v. Chicago & N. W. R. Co.*, 133 Wis. 183; *Minneapolis Threshing Mach. Co. v. Haug*, 136 Wis. 350.

In view of the foregoing we are of the opinion that the physician in question may continue to practice medicine until such time as your board formally revokes his license.

OSL
WHR

Criminal Law — Social Security Law — Old-age Assistance — Sentence of two weeks in county jail for nonsupport of wife constitutes imprisonment for felony within meaning of sec. 353.31, Stats., so as to render husband ineligible for old-age assistance under sec. 49.22, subsec. (5), Stats.

August 27, 1937.

PENSION DEPARTMENT.

You call our attention to sec. 49.22, subsec. (5), Stats., which provides that an applicant for old-age assistance is ineligible for such aid if he has been imprisoned for a felony within ten years preceding his application. You also call our attention to sec. 351.30, Stats., which provides that nonsupport of a wife or children under the age of sixteen

shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the state prison, county jail or in the county workhouse not exceeding two years, or both, in the discretion of the court.

In view of these statutory provisions, you inquire whether a sentence of two weeks in the county jail for non-support of a wife constitutes imprisonment for a felony so as to render a person ineligible for old-age assistance.

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 provisions of this section clearly make the applicant in question ineligible for old-age assistance, assuming the imprisonment to have taken place within ten years preceding his application.

It is to be noted under sec. 353.31, above quoted, that it is not the punishment actually imposed which makes the offense a felony, but rather the punishment to which the offender renders himself liable. The applicant in this instance rendered himself liable to imprisonment in the state prison under sec. 351.30, and it makes no difference that the punishment meted out to him actually consisted of a county jail sentence rather than a prison sentence.

The statutes here invoked are so plain and unambiguous that they call for no further exposition on this question. It is therefore our opinion that any conviction under sec. 351.30, irrespective of the sentence imposed, renders such person ineligible for aid under the terms of sec. 49.22, Stats.

OSL
WHR

Criminal Law — Prisons — Prisoners — Social Security Law — Old-age Assistance — Unconditional pardon of person imprisoned for felony removes disability to receive old-age assistance.

August 28, 1937.

PENSION DEPARTMENT.

You inquire whether an applicant for old-age assistance is eligible for old-age assistance where he has been imprisoned for a felony and subsequently given an unconditional pardon.

It is our opinion that an unconditional pardon removes the bar to a pension imposed by sec. 49.22, subsec. (5), Stats.

"When a full and absolute pardon is granted, it exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the crime which he has committed. The crime is forgiven and remitted, *and the individual is relieved from all of its legal consequences. The effect of a full pardon is to make the offender a new man.*" 46 C. J. 1192-1193.

Other authorities to like effect are: 20 R. C. L. 557; 1 Whart. Crim. Law (7th ed.), sec. 591a; 18 L. ed. 882, note; *Ex parte Jones* (Okla.), 220 Pac. 978, 34 A. L. R. 206.

In the *Jones* case, *supra,* it was said in the syllabus:

"* * * a pardon is an act of grace and mercy bestowed by the state, through its chief executive, upon offenders against its laws after conviction, and a full, unconditional pardon reaches both the punishment prescribed for the offenses and the guilt of the offender; it obliterates, in legal contemplation, the offense itself, and hence its effect is to make the offender a new man."

OSL
WHR

Social Security Law — Old-age Assistance — Under sec. 49.22, subsec. (8), Stats., old-age assistance may not be granted to person having children who have been ordered by county judge to support such person and have failed to do so although no steps were taken to enforce such support.

August 30, 1937.

PENSION DEPARTMENT.

You ask whether a county pension department may grant old-age assistance to an aged person whose children have been ordered by the county judge, under the provisions of sec. 49.11, Stats., to support such aged person but where support is not forthcoming, and the county officials have taken no action.

We believe this question is answered by sec. 49.22, subsec. (8), Stats., which provides that old-age assistance may be granted only where the applicant has no children or other person responsible under the law of this state for his support and able to support him.

The express purpose of the law is to care for those who have no one to care for them, sec. 49.20, Stats., providing

"For the more humane care of aged, dependent persons a state system of old-age assistance is hereby established. * * *."

There is nothing in the law which, either expressly or impliedly, relieves relatives responsible for support of such person from their legal responsibility.

It appears from your statement of the facts that the applicant in this instance does have children able to support him, but that the necessary steps to enforce such support have not been taken. Such remedies should be exhausted first and until this has been done, the county pension department is not authorized to grant old-age assistance because of the limitation in sec. 49.22, subsec. (8), Stats.

OSL
WHR

Social Security Law — Old-age Assistance — Under sec. 49.22, subsec. (6), Stats., pension department should deny old-age assistance to husband where it has been judicially determined in divorce action that he failed to support his wife, and it makes no difference that divorce was uncontested.

August 31, 1937.

PENSION DEPARTMENT.

In connection with sec. 49.22, subsec. (6), Stats., which denies old-age assistance to a husband who has failed to support his wife and children, you inquire whether a divorced husband is eligible for old-age assistance where the findings in the divorce decree recite that such husband without cause wilfully deserted his wife and for more than one year refused to support her and the children.

It is our opinion that the divorce findings and judgment should be considered conclusive as to the facts therein found and determined.

The question of whether or not a husband has supported his wife permits of but one answer and when once judicially determined such answer ought not be disturbed collaterally in some other proceeding. In other words, if the husband has not supported his wife within the meaning of the divorce law, it would seem that he has also failed to support her within the meaning of the old-age assistance law.

You have also inquired whether it makes any difference if the divorce suit was uncontested.

The answer is the same whether the divorce was contested or not. Assuming the court has jurisdiction, there is no difference between a contested and uncontested case as far as the binding effect of the judgment is concerned. The following quotation on the doctrine of *res judicata* from 34 C. J. 743 applies to both contested and uncontested cases:

"* * * Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which

a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. * * *."

Thus the divorced husband under the circumstances would be in no position to legally attack denial of old-age assistance to him by the pension department where such denial is based upon his failure to support his wife.
OSL
WHR

Architects and Professional Engineers — Use of title "architractor" with intent to practice profession of architecture falls within purview of sec. 101.31, subsec. (1), Stats.

August 31, 1937.

REGISTRATION BOARD OF
ARCHITECTS AND PROFESSIONAL ENGINEERS.

You inquire whether the title "architractor" may be used by a person not registered as an architect.

Sec. 101.31, subsec. (1), Stats., provides:

"Any person practicing or offering to practice the profession of architecture or the profession of professional engineering in this state shall be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice the profession of architecture or the profession of professional engineering in this state, or 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."

You have not stated whether the individual in question is practicing or offering to practice the profession of architractor and whether it is his intent to practice architecture. We will assume, however, that such is the case, since the statutory limitation as to using any title or description tending to convey the impression that the user is an architect applies only where it is the intent of such person to practice the profession of architecture or professional engineering.

We find no such word as "architractor" in such standard authorities as the following: Webster's New International Dictionary; Funk & Wagnalls New Standard Dictionary of the English Language; The Century Dictionary and Cyclopedia; A New English Dictionary, and Words & Phrases.

Nevertheless, it would seem that the word has been coined from the two words "architect" and "contractor." In substance it appears to be a portmanteau word—a term which was originally applied by Lewis Carroll to a factitious word made up of the blended sounds of two distinct words and combining the meaning of both (e. g., chimpanzebra, and rocking-horse-fly from "Through the Looking Glass"). Regardless of the etymology of the term "architractor," it would tend to convey the impression that the user was skilled in architecture and contracting; at least we are unable to attach any other significance to a term which apparently has its roots in these two words. The user of the term must mean something, and if he does not intend to mean that he is an architect and contractor combined, we submit that the problem is then one for a professional philologist rather than the attorney general.

The English language, and more particularly the English language as it is used by Americans, is in a constant stage of flux and growth. Words which were relatively unheard-of a few years ago are commonplace today (e. g., realtor, mortician, beautician). The word "architractor" is both ingenious and useful, and its inventor is indeed an "architect" as well as a "contractor" of words, literally speaking, whether or not he may qualify as a registered architect of

buildings under sec. 101.31, which section he apparently seeks to circumvent by the artifice of a new name. However, as Shakespeare said:

> "What's in a name? that which we call a rose
> By any other name would smell as sweet."—
> Romeo and Juliet, Act. II, sc. 2, l. 43.

We therefore conclude that the term "architractor," where used with the intent to practice the profession of architecture, constitutes a violation of sec. 101.31, subsec. (1), Stats., unless the user has been duly registered or exempted from the provisions of that section.

OSL
WHR

Commerce — Interstate Commerce — Constitutional Law — Public Health — Cemeteries — In requiring nonresident dealers in cemetery memorials to open places of business in Wisconsin for lettering and displaying monuments, sec. 157.15, subsec. (7), Stats., constitutes unconstitutional interference with interstate commerce.

September 3, 1937.

THEODORE DAMMANN,
Secretary of State.

You call our attention to sec. 157.15, subsec. (7), Stats., which requires a nonresident memorial dealer to maintain an active place of business in this state. The term "active place of business," has heretofore been construed by this department to mean a place in which cemetery memorials are lettered and displayed. XXV Op. Atty. Gen. 126. You inquire whether such requirement constitutes an unconstitutional interference with interstate commerce, the question of constitutionality not having been presented or passed upon in the above mentioned opinion.

It appears that cemetery memorials, manufactured and lettered outside the state, are being sold by nonresident dealers to purchasers in Wisconsin. The nonresident salesman or dealer takes the order in Wisconsin and forwards it to the home factory. There the memorial is manufactured, lettered, and shipped to the representative in Wisconsin, who delivers it to the place designated by the purchaser.

In 5 R. C. L. 768 the power of the state to regulate such sales is stated as follows:

"The negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and cannot be interfered with, regulated, or taxed by the state in which the negotiation was made, though there be no discrimination between such business and domestic commerce, and this rule applies to persons who engage in the business of soliciting orders by sample or otherwise for goods to be shipped from another state, such as agents of nonresident manufacturers or dealers, drummers, or canvassers,

whether the orders are taken by residents or nonresidents, and whether the orders are taken from individuals or from manufacturers or licensed merchants or dealers."

An examination of the cases shows this to be an accurate summary of the law.

One of the leading cases on the subject is that of *Robbins v. Shelby County Taxing District,* 120 U. S. 489. There a Tennessee statute provided:

"All drummers, and all persons not having a regular licensed house of business in the Taxing District [of Shelby County] offering for sale, or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege * * *."

The statute applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, and the court held that, so far as it applied to them, it constituted a regulation of commerce among the states and violated the provisions of the constitution of the United States, which grants to congress the powers to make such regulations.

The court said at p. 497:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax,* 15 Wall. 232. *The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.* * * *." (Italics ours.)

In *Real Silk Hosiery Mills v. Portland,* 268 U. S. 325, the United States supreme court held that an ordinance of the city of Portland imposing a license tax on solicitors taking orders for hosiery to be shipped to buyers by a manufac-

turer in another state was void as a burden on interstate commerce, even though its expressed purpose was to prevent possible frauds. On page 335 the court said:

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause. Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, ante, 916 * * *

"* * * Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See Shafer v. Farmers Grain Co. 268 U. S. 189, ante, 909. * * *."

It is true that a state in the legitimate exercise of its police power may prevent fraud or protect the public health and safety by legislation which is not directly aimed at interstate commerce but which affects such commerce only incidentally and remotely and where such regulations are not inconsistent with, or in obstruction of federal regulations. *Sligh v. Kirkwood,* 237 U. S. 52; *Hall v. Geiger-Jones Co.,* 242 U. S. 539.

However, we do not consider that sec. 157.15, (7), Stats., falls within the rule as above stated. Leaving aside the question of whether the statute constitutes a legitimate exercise of police power, which would appear doubtful, to say the least, it is apparent at a glance that such section is aimed directly at interstate commerce.

This section reads:

"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."

We therefore conclude that requiring nonresident dealers in cemetery memorials to open places of business in Wisconsin where monuments are lettered and displayed amounts to an unconstitutional interference with interstate commerce.

WHR

Banks and Banking — Escheat of Bank Deposits — Courts — Estates — Escheats — Legacies — Public Officers — State Treasurer — Subsec. (15), sec. 14.42, Stats., requires state treasurer to advertise only receipt of unclaimed legacies and shares paid into state treasury under subsec. (2), sec. 318.03, Stats.

Sec. 220.25, Stats., is complete in itself, thereby making it unnecessary for state treasurer to advertise receipt of money paid by banks under escheat of bank deposits law.

September 3, 1937.

SOLOMON LEVITAN,
State Treasurer.

You state that subsec. (15) of sec. 14.42, Stats., requires the state treasurer to advertise receipt of legacies and shares which escheat to the state and request our opinion as to the application of this section to secs. 318.03 and 220.25 of the statutes.

Subsec. (15) of sec. 14.42, Stats., provides:

"The state treasurer, upon the receipt of any money which belongs to *heirs or legatees,* shall forthwith advertise the fact in the state paper by giving the name of the decedent, the time and place of his death, the amount paid into the treasury, the personal representative paying the same, the county in which the estate is probated, and that the money will be paid to the heirs or legatees without interest, on proof of ownership, if applied for within five years from the date of publication in the manner provided in section 318.03. The cost of such advertising shall be charged to the appropriation for the treasury department."

Subsec. (2), sec. 318.03 provides:

"If any legacy or any share of intestate property shall be refused or shall not be claimed by the *legatee or heir* within two years after the entry of final judgment by the county court, the executor or administrator shall convert the same into money and pay it to the state treasurer for the state school fund, and it shall be part of said fund until and unless refunded as in this section provided."

Subsec. (1), sec. 318.03 provides:

"In case there shall be no known heir of the decedent, the residue of the estate, not disposed of by will, shall escheat and shall be ordered paid into the state school fund."

Subsec. (15), sec. 14.42 requires the state treasurer to advertise the receipt of any money which belongs to heirs or legatees—that is, money paid into the state treasury under the provisions of subsec. (2), sec. 318.03. It makes no reference to money received by the state treasurer as a result of a court order determining there are no heirs—that is, money paid into the treasury under the provisions of subsec. (1) of sec. 318.03. In view of the specific mention of one class to the exclusion of another, it cannot be said that the legislature intended by this section of the statutes to have it apply to all money received by the state treasurer. Legacies and shares indicate that there are heirs. Where there are no heirs there can be no legacies or shares.

The legislature having prescribed the conditions under which the state treasurer shall advertise the receipt of money excludes those not mentioned because of the well known rule of statutory construction—*expressio unius est exclusio alterius. Chain Belt Co. v. Milwaukee,* 151 Wis. 188; *State ex rel. Owen v. Reisen,* 164 Wis. 123.

It is a fundamental rule of statutory construction, also, that all words and phrases used in the statutes shall be construed and understood according to the common and approved usage of the language. Subsec. (1), sec. 370.01. The ordinary meaning of the word "legacy" is a gift or bequest by will. 5 Words & Phrases, p. 4054. The word "share" as

used in a will is that portion of the estate which has already been set apart to a legatee and becomes such contemporaneously or subsequently to the decease of the testator. 7 Words & Phrases, p. 6474. The word "escheat" in American law signifies a reversion of property to the state in consequence of the want of any individual to inherit. 3 Words & Phrases, p. 2463.

After a construction of the above meaning of the words used in the statutes, the conclusion must be reached that the phrase "legacies and shares" is distinguished from the word "escheat." In the one case there are heirs and in the other the court determines that there are no heirs. Sec. 318.03 refers to both escheats and unclaimed legacies and shares, indicating that the legislature was aware of a distinction. It provides for a separate procedure in disposing of estates where heirs are unknown and where legacies and shares are unclaimed.

Subsec. (3), sec. 318.03 sets out the procedure to be followed in making application for refunds. It clearly states that this procedure is applicable only to subsec. (2), sec. 318.03, which refers to unclaimed legacies and shares, and it refers to subsec. (15), sec. 14.42, when referring to the publication by the state treasurer of money received under sec. 318.03.

Sec. 220.25 deals exclusively with the escheat of bank deposits which have been unclaimed for a period of more than twenty years. This section, complete in itself, provides for notice and summons, publication and a special action to establish the right of the state to unclaimed bank deposits reported to the secretary of state by the various banks. There is no reference in sec. 220.25 to subsec. (15) of sec. 14.42, Stats., and there is no duty upon the state treasurer to advertise the receipt of money paid into the state treasury pursuant to the provisions of sec. 220.25.

The provisions of sec. 14.42, then, require the state treasurer to advertise the receipt of money received under the provisions of subsec. (2) of sec. 318.03, but not the receipt of money under the provisions of subsec. (1) of sec. 318.03 or sec. 220.25, Stats.

Sec. 220.25 was added to the statutes as ch. 294, Laws 1935. This section deals exclusively with the escheat of bank deposits which have been unclaimed for a period of more than twenty years. It contains no reference to subsec. (15) of sec. 14.42, and is complete in itself, providing for notice and summons, publication and a special action to establish the right of the state to unclaimed bank deposits reported to the secretary of state by the various banks. Since this section was added after subsec. (15) of sec. 14.42 and contains no reference to it, it is apparent that the state treasurer is under no duty to advertise the receipt of money paid into the state treasury pursuant to sec. 220.25.

It is therefore our opinion that the state treasurer is required to advertise pursuant to subsec. (15), sec. 14.42 only the receipt of money paid to the state treasurer as an unclaimed legacy or shares by an executor or administrator under subsec. (2) of sec. 318.03.

OSL
ML

Public Officers — Clerk of Circuit Court — Where clerk of court has been placed on salary basis effective January 1, 1937, he is entitled to all fees for services actually performed prior to said date and may retain same upon their payment.

Clerk's fees become due and payable at time of performance of specific service rather than when action or proceedings are terminated.

Where clerk of court is on salary basis county is entitled to fees for making certified copies of records except where furnished to United States government or for congress.

Clerk of court on salary basis has no power to employ stenographer to prepare certified copies and pay her folio fee therefor unless authorized so to do by county board.

September 3, 1937.

RICHARD W. ORTON,
District Attorney,
Lancaster, Wisconsin.

You state that the clerk of the court was placed on a salary basis effective January 1, 1937, he previously having been paid a small salary and allowed to take all fees that accrued. The resolution of the county board making this change provided that all fees except those specifically exempt by sec. 59.15, subsec. (1), par. (d), Stats., be collected by the clerk and turned over to the county treasurer daily. The several questions which you have asked are considered separately.

1. Is the clerk of the court entitled to the fees for work performed by him prior to January 1, 1937, which were not actually paid until after that date?

A fee is a form of compensation for services rendered. It is earned when the services are performed and belongs to the incumbent performing the services. 22 R. C. L. 527. Regardless of when payment is made, the officer who performed the services for which the fees were to be retained by him as compensation for such services is entitled to the

fees. The clerk, being entitled to these fees, has the right to retain them upon payment and is not required to turn them over to the county.

2. Who is entitled to the clerk's fees in an action in which judgment was ordered prior to January 1, 1937, but not actually filed and recorded by the clerk until after that date?

In accordance with the answer to question 1 the clerk would be entitled to all fees for services actually rendered by him prior to January 1, 1937, and the county would be entitled to the fees for services performed by him thereafter, which would include the fee for entering the judgment, etc.

3. Do clerk's fees become due and payable at the time of the performance of the specific service or when the action or proceeding is completed?

Sec. 59.43, Stats., provides:

"The said clerk shall file with the papers in each case an itemized bill of all fees charged by him therein at the time of taxation of costs or whenever they are paid him, and before he can lawfully demand or receive the same; and before entering judgment in any action may require the prevailing party to pay all his fees in such action or proceeding remaining unpaid which have been incurred therein by either the plaintiff or defendant, and every such clerk may require his fees to be paid in advance for any services except such as are to be performed in the progress of a trial in court."

By the express wording of this statute the clerk's fees for all services except those performed in the progress of a trial in court are, in his discretion, payable in advance. If he does not choose to require such payment in advance, the fees are, nevertheless, earned and payable as soon as the services are actually performed. The provision that the clerk before entering judgment may require payment to be made of all his unpaid fees in the action or proceeding does not mean that such fees are not due and payable before that time, but merely gives the clerk a means of enforcing payment of fees that have become due and payable in the past. The clerk's fees therefore become due and payable at the time of the performance of the specific service.

4. Would the clerk or the county be entitled to the fees for certified copies of the record made after January 1, 1937?

Sec. 59.42 provides:

"Except as otherwise provided by law, the clerk of the circuit court shall collect the following fee:

* * *

"(11) For making copies of any judgment, order, report, or other paper or record, ten cents per folio."

Sec. 59.15 (1) (d), made the basis of the exception in the resolution of the county board effecting the change of method of paying the clerk of court, provides:

"Compensation received by the clerk of the circuit court for work done for the United States government or for congress."

The fees specified by sec. 59.42 (11), for making certified copies of records, would not be such fees as are exempt under sec. 59.15 (1) (d) unless such certified copies were furnished to the United States government or for congress. The county would be entitled to all fees collected for certified copies furnished to all others after January 1, 1937.

5. If the county is entitled to the fees for making certified copies of records, may the clerk hire a stenographer and pay her the folio fee?

Sec. 59.15 (3) provides:

"The county board may at any time fix or change the number of deputies, clerks and assistants that may be appointed by any county officer and fix or change the annual salary of each such appointee, * * *"

Since such folio fees belong to the county and only the county board has the authority to fix the compensation of the clerk's assistants when such compensation is payable out of county funds, it is our opinion that the clerk has no authority to hire a stenographer and pay her the folio fees for certified copies of records unless he is authorized so to do by action of the county board.

HHP
AGH

Public Officers — Industrial Commission — Jurisdiction of industrial commission under ch. 101, Stats., relating to safety regulations in public buildings, extends to rough stone stairway in privately owned park to which public is invited.

September 3, 1937.

VOYTA WRABETZ, *Chairman,*
Industrial Commission.

You have requested an opinion based upon the following statement of facts:

"In Wisconsin there is a place that is known as High Cliff Park, known for its natural scenery and which is advertised for some miles along the highway. No charge is made for admission to the park. To reach the scenic parts of the premises it is necessary to go down a rough stone stairway, the steps of which are uneven, and which at times is at the edge of the bluffs or cliffs. Nearby the owners maintain a private picnic ground for groups who hold their own private picnics, etc., for which privilege they pay a fee. Nearby there is also maintained a tavern, merry-go-round, dance hall, etc."

You inquire whether the industrial commission has any jurisdiction with regard to the application of the safety statutes to the stone stairway.

Sec. 101.01, subsecs. (5) and (12), Stats., provides as follows:

"The following terms as used in sections 101.01 to 101.29 of the statutes, shall be construed as follows:

"* * *

"(5) The term 'frequenter' shall mean and include every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."

"(12) The term 'public building' as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants."

Under secs. 101.09 and 101.10, the commission is vested with the power of supervision over "public buildings" and with jurisdiction to fix reasonable standards, rules and regulations for their construction, maintenance and repair. The problem therefore resolves itself into the question whether the stairway you describe is a public building in the meaning of the statute.

There can be no question that the public is invited to use the facilities of the park. Persons entering in response to the invitation contained in the highway advertisements are therefore "frequenters" and not trespassers. *Grossenbach v. Devonshire Realty Co.,* (1935) 218 Wis. 633.

Any "structure" used in whole or in part as a place of resort, etc., by the public is a "public building" within the meaning of the statute. Sec. 101.01 (12), Stats. It need not be a building in the ordinary sense of a walled and roofed enclosure.

The word "structure" is defined as follows in Webster's *New International Dictionary* (1926): "3. Something constructed or built, as a building, a dam, a bridge; esp., a building of some size; an edifice."

The Wisconsin supreme court has held that, as used in sec. 1636-81, Stats. (Supp. 1906) (which required employers of labor on a "house, building or *structure*" not to furnish or erect any "scaffolding, hoists, stays, ladders or other mechanical contrivances" which should be "unsafe, unsuitable or improper"), the word "structure" included a water main. In reaching this conclusion the court used the following broad language in *Kosidowski v. Milwaukee,* (1913) 152 Wis. 223, 226-227:

"* * * A structure may be below the surface of the ground as well as above. It may be erected or altered in one place as well as in another. *Any artificial creation is a structure,*—such as a canal, *Pacific R. M. Co. v. Bear Valley Irr. Co.* 120 Cal. 94, 52 Pac. 136; a fence, *Karasek v. Peier,* 22 Wash. 419, 61 Pac. 33; a mine, *Helm v. Chapman,* 66 Cal. 291, 5 Pac. 352.

"* * *

"The New York court in *Caddy v. Interborough R. T. Co., supra,* spoke very emphatically on the subject here briefly discussed, using this language, particularly as regards the word 'structure:'

" 'We incline to the view that the rule of *ejusdem generis* does not apply' to restrict the word 'structure' by reference to the word 'building.' 'The word "structure" in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner. . . . In cases like this, lexicographers' definitions are useful as guide posts, but they do not take us to our destination. The statutory meaning of a word or phrase must be gathered from the purpose for which the law containing it was enacted.' The 'evil sought to be remedied by a statute designed to charge the master with a more rigid and personal responsibility' gives direction to the judicial mind in determining the intent and extent of the effort.' " (Italics ours.)

In *Washburn v. Skogg,* (1931) 204 Wis. 29, the supreme court refers to a ladder or stairway as a "structure."

In *Bent v. Jonet,* (1934) 213 Wis. 635, 639, it was held that a temporary wooden bleacher erected for the accommodation of spectators at a football game was a public building in the meaning of ch. 101 of the statutes. The court said:

"The words of the statute are very broad. A building is any structure used for the purposes enumerated in the statute. That this is a structure is hardly open to doubt. There is no provision in the statute indicating that a structure must be an inclosure, with walls and roof, nor does the policy of the statute call for such a restricted meaning, nor do the terms of the statute support the contention that the temporary character of the structure is material. *The objective of the statute is to insure safety by the broadest sort of provisions with respect to the kind of places affected.*" (Italics ours.)

The court having held that the term "structure" is to be construed broadly to effectuate the general purpose of the act, the stone stairway, being an "artificial creation" used by the public, must be considered to be a "public building" as defined in sec. 101.01 (12), Stats., and hence subject to the safety orders promulgated by the industrial commission.

ML

Public Health — Nursing — Under sec. 149.01, subsec. (4), Stats., committee on nursing education has power to accredit schools for nurses and in proper case may remove school from accredited list after giving school hearing.

September 4, 1937.

BOARD OF HEALTH.

You have requested an opinion as to the power of the committee on nursing education to remove a school of nursing from the accredited list.

Sec. 149.01, subsec. (4), Stats., provides:

"The committee shall maintain standards for and supervise schools for nurses, and place them on the accredited list on application and proof of qualification; make a study of nursing education and initiate rules, regulations and policies to improve it, and make rules and regulations for the administration of this chapter."

The power to accredit clearly implies the power to remove from the accredited list. Any other construction of the statute would defeat the obvious legislative intent, which is to protect and safeguard the public health by providing machinery whereby only competently trained nurses may become eligible for examination and registration. If the committee were powerless to withdraw its approval, a nursing school once reputable might degenerate into a school in name only, and the safeguard set up by the statute would be nullified. It is well settled that in order to discover legislative intent, statutes are to be read in the light of the mischiefs intended to be remedied. *Koepp v. National Enameling & Stamping Co.*, 151 Wis. 302. We therefore consider that further discussion of the power of the committee to withdraw its approval in a proper case would be superfluous.

However, an important question does arise as to whether such power may be exercised in the absence of notice to the school affected thereby and opportunity for it to be heard.

In the case of *State ex rel. Milwaukee Medical College v. Chittenden,* 127 Wis. 468, the state board of dental examiners had passed a resolution to the effect that a certain school was not a reputable dental college. The school had previously been regarded as reputable, and the resolution in question was adopted without notice to the school or opportunity for it to be heard.

The court considered that the board, in passing upon the reputability of the school, was acting in a *quasi-judicial* capacity and said at p. 505:

"* * * The person directly affected [the college] is deemed to be so specially interested as to be entitled, under constitutional guaranties, as regards due process of law, the equal protection of the laws, and the general principles of free government, to some reasonable opportunity to be heard."

The court in *State ex rel. Blank v. Gramling,* 219 Wis. 196, in commenting upon the above case, said at p. 203:

"* * * That conceded status [of being a reputable medical college], theretofore always recognized, was a thing of value to the college, and deprivation of it was a denial of a property right. That right could only be taken away from it by due process of law. * * *."

We consider these remarks of the Wisconsin supreme court in the foregoing cases to be equally applicable to a nursing school on the accredited list, and therefore conclude that a school may not be deprived of such status by action of the committee on nursing education in the absence of a reasonable opportunity to be heard on the matter.

WHR

School Districts — State Aid — School district which has closed its school and provided for transportation of pupils to another district is entitled to aid under sec. 40.87, Stats., even though parents of children refuse to send children by transportation means so furnished.

September 4, 1937.

DEPARTMENT OF PUBLIC INSTRUCTION.

You state that a certain joint school district voted at its annual meeting in July, 1935, to close its school and transport its children to the public schools in an adjoining village. The school board arranged to transport these children and paid a driver the sum of six hundred thirty dollars for his services. By reason of antagonistic feelings between factions in the district only one child was transported and the parents in the other two families of the district transported their own children at their own expense, refusing to have their children ride in the bus provided by the school board.

The district was reimbursed under the transportation law, sec. 40.34, Stats., at the rate of ten cents per day per child for the one child transported.

You inquire whether the district is entitled to aid under sec. 40.87, Stats., when it failed to transport the eight children who were given transportation by their parents and in view of the fact that the district refused to reimburse these parents who transported their own children.

Sec. 40.34 provides in part as follows:

"(1) The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. The board of every consolidated school district or in a district which has voted to close its school and provide tuition and transportation shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse. The board shall provide transportation to and from school for all school children residing in the district and over two and one-half miles from the schoolhouse, in case of a common school and four miles in case of a union high

school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of twenty cents per day for the first child and ten cents per day for each additional child transported; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; provided further, that any child residing more than four miles from the school of his district other than a union high school district may attend the school of another district, in which case the home district shall pay the tuition of such child. The district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported.

"* * *

"(2) The board of any district which has suspended school shall pay the tuition of all children of school age residing in the district who attend other district schools during such suspension, and shall provide transportation to and from school for all children residing more than two miles from the nearest school which they may attend, and the district shall receive the regular state and county money and state aid on account of such transportation; and in the event such district shall provide such transportation for all such children residing more than two miles from the nearest school which they may attend one hundred dollars additional state aid."

The district has provided for the transportation of the pupils and therefore the parents are not entitled to any compensation for transporting their own children after refusing to avail themselves of the transportation facilities afforded by the district, because the statute authorizes compensation to be paid to parents only when the district "fails to provide such transportation."

Sec. 40.87 (4) (f), Stats., provides as follows:

"Provisions by a school district for the transportation and tuition of its pupils to and their instruction in some other district as prescribed by law shall entitle the former to share in the aid as though such district had maintained a school, and shall be considered as having elementary teachers on the basis of average daily attendance as provided in subsection (1) but no district shall receive more state and county aid than the operating expense of such school."

As it is not stated that the district has failed to pay the tuition for these pupils we assume that such tuition was paid by the district. Since the district has done all that the law requires it to do when it provides reasonable means of transportation and pays the tuition fees for its pupils, the fact that certain of the parents refuse to send the children to school by the transportation means that have been made available by the district can in no way affect the district's rights to aid under the above section.

It is therefore our opinion that the district is entitled to aid under sec. 40.87, Stats.

HHP

Education — School Administration — Teacher Tenure — Ch. 374, Laws 1937, relating to tenure of teachers, grants no tenure rights to teachers whose services have been lawfully terminated prior to August 1, 1937, but mere ruling by school board that both husband and wife may not continue to teach at same time in school system does not automatically operate as discharge of either or both of said teachers.

September 7, 1937.

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

You have asked for our opinion on a situation involving ch. 374, Laws 1937, the new teacher tenure statute.

A husband and wife were employed as teachers by the board of education in a certain city in September 1919. In 1928 a local tenure rule was adopted by the board, and tenure rights accrued to the couple under this rule, although at the same time a rule was adopted to the effect that marriage automatically canceled the contract of a woman teacher. However, this rule was not applied to the married women teaching at the time the rule was adopted.

In 1932, due to the economic situation, the husband was prevailed upon to take a leave of absence for further study while his wife continued to teach. This leave of absence has been continued each year since then. On July 12, 1937, the board passed a rule that both husband and wife could not teach in the city schools at the same time. The husband and wife in this instance are both claiming tenure under ch. 374.

Ch. 374 in effect provides permanent tenure during efficiency and good behavior for teachers after continuance and successful probation for five years in the same school system. This chapter was approved on July 13, 1937 and section 2 thereof provides that the act shall take effect August 1, 1937.

The effective date of the act clearly implies a legislative intent to give local school boards a free hand respecting tenure up to August 1, 1937, and any school board was at liberty on July 12 to discharge any teacher subject, of course, to outstanding valid contracts. This view is supported by the general principle of statutory construction that statutes conferring new rights do not have retroactive effect unless such intention is fairly expressed or implied. *Read v. City of Madison,* 162 Wis. 94.

However, the real question in the present instance is not whether the board had or did not have the power to discharge a particular teacher on July 12, as the answer to that question appears to be clearly answered as above indicated, but whether the board exercised its power to discharge the husband or wife or both on July 12. Can it be said that anybody was discharged by the July 12 ruling of the board? No notice of discharge was served on either husband or wife. Neither resigned, and it appears that the board may have failed to exercise a power which it undoubtedly had on July 12. If the rule operated as a discharge of one, which one was it? They both had tenure, although one was on leave of absence.

Unless the teachers concerned indicated prior to August 1 which one had elected to discontinue teaching or unless the board itself had taken the initiative prior to that time by indicating which one was to be dropped, we are of the

opinion that their former status continued and that the board is now powerless to discharge either except for cause under ch. 374.

OSL
WHR

Education — Vocational Education — State Aid — State board of vocational education in certifying reports of local boards to secretary of state for state aid under sec. 41.21, subsec. (1), par. (b), Stats., may not consider items of instructional expense which have been incurred but which have not actually been paid.

September 8, 1937.

BOARD OF VOCATIONAL EDUCATION.

You state that a certain local board of vocational education has filed its annual report with your board pursuant to sec. 41.21, Stats., and that the total salaries for vocational instructional service for the year are listed in the report at $11,789.36, although a note is attached to the report indicating that $1,090 of this sum is unpaid by reason of a shortage of funds.

You inquire whether your board should certify to the secretary of state in favor of this local board on the basis of one-half of $11,789.36 or one-half of $10,699.36.

State aid to vocational education is furnished pursuant to sec. 41.21, subsec. (1), par. (b), which provides in part:

"If it appears from such report that such school or schools have been maintained pursuant to law, in a manner satisfactory to the state board of vocational education, the said board shall certify to the secretary of state, in favor of the several local boards of vocational education, amounts *equal to one-half the amount actually expended* for salaries for instruction and supervision; * * *."

In the construction of statutes all words and phrases are to be construed and understood according to the common and approved usage of the language. Sec. 370.01 (1), Stats.

The word "actually" used in connection with the word "expended" can mean only one thing and calls for no extended exposition by this office. According to Webster's New International Dictionary the word "actually" means: "In act or in fact; really; in truth; positively."

Since the expenditure of the item of $1,090 for instruction was incurred but not paid, it clearly cannot be counted in computing "one-half the amount actually expended for salaries for instruction and supervision" within the meaning of the above quoted statute, and you are therefore advised to use $10,699.36 rather than $11,789.36 as the basis for your certification for state aid.

WHR

Appropriations and Expenditures — Public Printing — Director of Purchases — Under sec. 35.55 and sec. 20.10, subsec. (3), Stats., director of purchases is authorized to purchase special type faces required in doing public printing where such material is not required of state printers by existing contracts and is not otherwise provided for by statutes.

September 8, 1937.

BUREAU OF PURCHASES.
Attention F. X. Ritger, *Director of Purchases.*

You state that under the provisions of ch. 35, Stats., relating to book printing, the bureau of purchases has a contract with a printer to produce what is called "University of Wisconsin Studies." This is a new classification and the requirements are of the very highest as to printing, binding and workmanship. The printing calls for something new and special in the way of type faces not ordinarily required for state printing.

We are asked whether it would be possible for the state to purchase what are called linotype matrices for this work under the printed revolving fund provided by sec. 20.10, subsec. (3), Stats., and you also call to our attention sec. 35.55, Stats., as constituting possible authority for such purchase.

Sec. 35.55, Stats., provides:

"Any material necessarily required in doing public printing which is not provided for by sections 35.43 and 35.44, and is not required of state printers by existing contracts, may be procured by the director of purchases at not exceeding current trade prices."

Sec. 35.43, Stats., relates to maximum prices for public printing and sec. 35.44 covers interpretations of sec. 35.43. Neither of these sections furnishes any light on the problem and consequently it cannot be said that the material in question is provided for by these sections.

You also inform us that the special type faces could not be reasonably required of the state printer under any existing contract, and that it is impossible to interest any of the large book publishing companies equipped to do the work in bidding on work of this character because of the various statutory restrictions governing the details of state printing contracts. As a matter of fact the suggested procedure in your opinion constitutes the only practical way of getting the work done at all.

Since it appears that the material in question is not provided for by secs. 35.43 and 35.44, Stats., and is not required of state printers by existing contracts, the only question remaining is whether material consisting of special type linotype matrices is "necessarily required in doing public printing." This is a question of fact upon which we do not attempt to pass. Presumably somebody must take the initiative in the matter and, since the statute confers the power to make the purchase upon the director of purchases, we assume that it gives him considerable discretion in determining what material is "necessarily required in doing public printing" and that, in the absence of a clear abuse of such discretion, his judgment in the matter ought not to be questioned.

The words "Any material necessarily required in doing public printing" are very broad in their scope and taken literally they clearly include material without which a particular printing job cannot be done.

Sec. 20.10, subsec. (3), Stats., makes an appropriation to the director of purchases "to be used as a revolving appropriation for printing, binding and for the purchases of all paper, cuts, illustrations *and other items required in the public printing* * * *."

This section is important, since the power to purchase given the director in sec. 35.55, Stats., would be of no avail in the absence of an appropriation, as money can be paid out of the state treasury only pursuant to an appropriation. Art. VIII, sec. 2, Wisconsin constitution; *State ex rel. Bell v. Harshaw,* 76 Wis. 230.

The words "and other items required in the public printing" used in sec. 20.10, subsec. (3) are again very broad and would include such material or items as special type faces required in doing a particular job of public printing.

We therefore conclude that under secs. 35.55 and 20.10, subsec. (3), Stats., the director of purchases is authorized in his discretion to purchase special type faces in the form of linotype matrices where such material is necessarily required in doing public printing.

WHR

Appropriations and Expenditures — Horicon Marsh — Public Officers — Secretary of State — Constitutionality of appropriation made by ch. 427, Laws 1937, having been challenged by taxpayer, secretary of state should resolve doubt in favor of state and refuse to audit appropriation until its validity has been judicially determined.

September 8, 1937.

THEODORE DAMMANN,
Secretary of State.

You have called our attention to ch. 427, Laws 1937, appropriating a certain sum of money to the Horicon Marsh Farm Land Protective Association to reimburse its farmer members for expenses incurred by them in litigation involving the flooding of the Horicon marsh.

The constitutionality of this appropriation is challenged in a letter which you have received from a certain taxpayer, who demands that you refuse to sign any checks or vouchers for payment under the act until its validity shall have been passed upon by the supreme court.

Ch. 427, Laws 1937, provides in part:

"SECTION 1. There is appropriated from the general fund to the Horicon Marsh Farm Land Protective Association, to reimburse the members thereof for expenses incurred by them in certain litigation, involving the flooding of said marsh and in which they were successful, the sum of four thousand dollars; provided that only bona fide farmer members, actually engaged in farming shall be reimbursed for such expenses. Acceptance of this appropriation by the Horicon Marsh Farm Land Protective Association and its members shall operate as a full and complete release to the state of any claim on the part of said association and its members on account of all expense incurred by them as a result of such litigation."

You have inquired whether you should make a lump sum payment to the association for distribution to those of its members who qualify for reimbursement under the act or whether it is necessary to make the distribution to individual members of the association entitled thereto.

It is a general rule that the legislature is without power to appropriate the public revenues for anything but public purposes. See collection of cases in XX Op. Atty. Gen. 959 at 960. Whether the appropriation made by ch. 427 is for a public purpose may well be challenged, although we do not attempt to decide the point here.

Furthermore it has been objected that ch. 427 constitutes improper class legislation and thereby deprives citizens of the equal protection of the laws, contrary to constitutional guarantees, since only bona fide farmer members of the association actually engaged in farming are to be reimbursed for their expenses in the Horicon marsh litigation. Other landowners in the Horicon marsh area who were equally affected by the litigation will receive no reimbursement for their expenses because they do not come within the classification of bona fide farmers, actually engaged in farming. Whether the classification made in ch. 427 is a valid one depends upon whether there is any reasonable basis for division. *Mehlos v. Milwaukee,* 156 Wis. 591.

These are properly questions to be determined by the courts. If the act is in fact unconstitutional, it is in reality no law at all but is wholly void and would impose no duties, confer no powers or authority, and would afford you no protection in the event you should pay out the money, even though you acted on the mistaken advice of the attorney general in so doing. See 6 R. C. L. 117; *Bonnett v. Vallier,* 136 Wis. 193.

The supreme court has held that in cases of doubt the secretary of state and attorney general are to be commended in the discharge of their official duties where they take the position of resolving the doubt in favor of the state and leave the result to be dealt with by the courts. *State ex rel. Bashford v. Frear,* 138 Wis. 536, 541. This principle is especially applicable where you have been served by a taxpayer with a demand not to sign any checks or vouchers until the courts have passed upon the validity of the act. Your attention has thereby been called to serious doubts concerning the constitutionality of the appropriation and the probability of suit against you in the event you should disregard the warning and pay out the money. Personal li-

ability on your part might follow in such case, which liability can safely be avoided by insisting upon a court determination first.

We do not believe that it is appropriate for us to present our conclusions as to the validity of the act in an official opinion at this time, in view of the fact that we may be called upon to participate in litigation respecting this matter. However, suffice it to say that we consider the constitutional doubts raised to be not merely capricious and fanciful. On the contrary we regard them as being so substantial and serious that you cannot safely act without the protection of a court order, and we therefore advise you to withhold payment until the validity of the act has been judicially determined.

OSL
WHR

Tuberculosis Sanatoriums—In computing per capita cost of maintenance in county tuberculosis sanatoriums under ch. 285, Laws 1937, recognition should be given to cost actually expended in building additions thereto at time of audit of county bills for fiscal year, even though such additions are then incomplete and not ready for occupancy.

September 9, 1937.

BOARD OF CONTROL.

Our attention is called to ch. 285, Laws 1937, relating to maintenance charges by county tuberculosis sanatoriums. Section 1 provides in part:

"A new paragraph is added to subsection (2) of section 50.07 of the statutes to read: (50.07) (2) (d) 1. As an emergency measure to encourage the expansion and improvement of the facilities of county tuberculosis sanatoria, the state board of control shall, in the determination of actual per capita cost to be charged by a county tuberculosis

sanatorium for state-at-large and other county patients, include a sum to apply on the cost of new additions hereinafter made to such sanatorium.

"2. Such additional item of cost so included shall be based on the cost of any addition to a sanatorium or any part thereof which shall be made after January 1, 1937. Any such addition shall be approved by said board as provided in section 46.17."

You inquire as to when the cost of a new addition is to be amortized. In this connection you point out that a certain county is now building a new addition. Moneys have been expended since January 1, 1937, although it may be a year or so before the new addition is completed and ready for occupancy. You are now ready to determine the per capita cost and audit the county bills for the fiscal year ending June 30, 1937. We are asked whether you should include that part of the cost of the uncompleted addition that was expended from January 7, 1937 to June 30, 1937 or whether you should await the completion of the new addition, at which time the entire cost and figures will be available.

It is our opinion that the words "such additional item of cost so included shall be based on the cost of any addition to a sanatorium *or any part thereof* which shall be made after January 1, 1937" require that you include such part of the cost of the uncompleted addition as was expended from January 1, 1937 to June 30, 1937.

The opposite construction would require that you ignore the italicized words "or any part thereof." In construing statutes effect must be given if possible to every word, clause and sentence thereof. *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557. The words "or any part thereof" relate back to "the cost of any addition to a sanatorium," since it is a familiar rule of syntax that qualifying phrases are to be referred to the next preceding antecedent. *Dagan v. State*, 162 Wis. 353, 354.

This conclusion is further supported by the avowed legislative purpose of ch. 285, which is described in the act "as an emergency measure to encourage the expansion and improvement of the facilities of county tuberculosis sanatoria." If it is an emergency measure, it calls for immediate

action or application. To wait two or three years until an addition is fully completed before including the cost thereof in computation of actual per capita cost of maintaining patients would be to ignore the urgency of the situation, contrary to the expressed legislative intent.

You have also asked for our opinion as to what might constitute a "new addition" to a sanatorium or any part thereof. To answer this question would require us to speculate as to possible trends in sanatorium architecture and design which we are not desirous of doing. However, we will be glad to advise as to specific cases when furnished with all material facts at the time such cases actually arise. Any blanket opinion which we might attempt to give at this time on what is included in the term "new addition" would be relatively valueless. As Judge Cardozo once said: "One must see the controversy in its setting before the implications of a ruling can be prefigured with assurance." *Lowden et al. v. Northwestern Nat. Bank & Trust Co.*, 56 S. Ct. Rep. 696, 698, 298 U. S. 160.

WHR

Education — Vocational Education — Public Officers — Board of Vocational Education — Under sec. 41.15, Stats., as amended by ch. 213, Laws 1937, year of appointment of members of local board of vocational education is year of commencement of term.

September 9, 1937.

BOARD OF VOCATIONAL EDUCATION.

You inquire as to when a board of education shall appoint new members of the local board of vocational education under sec. 41.15 Stats., as amended by ch. 213, Laws 1937, and for what terms.

Prior to the enactment of ch. 213, Laws 1937, sec. 41.15, Stats., provided as follows:

"(2) Such board shall consist of * * *, and four other members, two employers, and two representative employes who have no employing or discharging power and who are not foremen or superintendents, who shall serve without pay, and who shall be appointed by the local school board, or if there be more than one local board by such boards jointly. * * *

"(3) The term of the appointive members shall be two years from the first of January; provided, however, that in the first instance two members shall be appointed for one year from the first of January."

The provisions of subsec. (2), were not affected by ch. 213, Laws 1937, but subsec. (3) was amended thereby to read as follows:

"The term of the appointive members shall be *four* years from the first of January; provided, however, that in the first instance members shall be appointed *so that the term of one member shall expire each year and that one employe member shall be appointed in each even-numbered year and one employer member in each odd-numbered year.*"

The amendment thus made becomes operative only at the termination of the term of the present members of the local vocational board. The present members continue to hold office until the expiration of the term for which they were appointed and successors will not be appointed until the terms of the old members have expired.

It is our opinion that the language of subsec. (3) as amended, stating that the members shall be appointed in certain specified years, refers to the date when the appointment becomes effective, that is, the year commencing after the expiration of the term of the prior incumbent. As all terms commence on the first of January and are for a duration measured in years the term expires on December 31 of some year. The year of appointment we construe to mean the next year. The language used must be read as directed toward and placing emphasis upon the expirations of the terms and as meaning that the appointment shall be made so as to effect a definite system of expiration in rotation of the terms of the various members. It was the intention of the legislature to set up for the future a new system of stag-

gered terms of the board members. The language used in the amendment was directed toward the appointments that would have to be made first in point of time after the adoption of the amendment. The intention was to effect the change over from the previous system to the new arrangement, so that after once under way the terms of the members in the future would automatically expire one each year and all appointments be for a four-year term.

As the statute existed prior to the amendment there was no prohibition against appointing two employer members in the same year nor against the appointment of employee members so that the terms of both of them expired at the same time. In some instances this was done so that on December 31, 1937 the terms of both employer members or else the term of both employee members will expire at that time and the terms of the other two members of the opposite classification will expire December 31, 1938. Under the statute as presently amended the terms of the employee members must expire alternately every two years on December 31 in the odd-numbered years, so that their successors may be appointed alternately in the even-numbered years. Likewise the terms of the future employer members must expire alternately every two years on December 31 in the even-numbered years, so that their successors may be appointed alternately every two years in the odd-numbered years.

With the terms of some of the present members expiring December 31, 1937 and others expiring December 31, 1938 it becomes necessary to make appointments at the expiration of their terms which will carry into effect the new system set up by the legislature. In other words, as the terms of the present members expire the new appointments must be made for such new terms as will set in motion the new system of expiration.

If the terms of both present employee members expire December 31, 1937 then two new appointments of employee members should be made for terms starting January 1, 1938, one for a term of two years and one for a term of four years. If, however, the terms of both present employer members expire December 31, 1937 then two new employer

members should be appointed for terms commencing January 1, 1938 of one and three years respectively therefrom. Should it be that the terms of both an employee member and an employer member expire December 31, 1937 then a new employee member should be appointed for a term of four years, commencing January 1, 1938, and a new employer member should be appointed for a term of three years commencing the same date.

If this procedure is followed then a similar procedure should be followed January 1, 1939 and thereafter as the terms of the members expire new appointments may be made for the full terms of four years each.
HHP

Architects and Professional Engineers — Designing and constructing of grand stand or stadium on school grounds, inasmuch as it affects public safety, should be done by licensed architect. Such structure is not within exemption provided for by sec. 101.31, subsec. (7), par. (f), Stats.

September 10, 1937.

ARTHUR PEABODY, *Secretary,*
Registration Board of Architects and
Professional Engineers.

You state that the board of education at Green Bay has proposed to erect a grand stand or stadium at the east high school. The dimensions of this grand stand are not given but it is proposed that this structure be used by the public. You inquire whether or not such a structure comes within the exemptions provided for by sec. 101.31, sec. (7), par. (f), Stats.

Sec. 101.31 (1) provides for the registration of all persons practicing or offering to practice the profession of architecture or of professional engineering in this state. This subsection also provides that it is unlawful for any person to practice or to offer to practice the profession of

architecture or professional engineering or to use in connection therewith his name or otherwise assume to use or advertise any title tending to give the impression that he is an architect or a professional engineer. The term "architect" is defined as a person who represents himself to be such an architect. The practice of architecture is defined as embracing the design or responsible supervision of the construction, enlargement or alteration of public or private buildings for others.

It is the purpose of the statute that for the protection of the public those who hold themselves out as architects or as professional engineers shall be properly qualified as such and the licensing is for the purpose of determining their qualifications and for permitting only those who are qualified to practice the profession.

Sec. 101.31 (7), Stats., provides that certain persons are exempt from the requirement that they be registered as architects in the event that they do architectural work. Subsec. (f), sec. 101.31 (7) provides as follows:

"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 builings, which do not affect health or safety."

It is apparent from a reading of the above statute that it was not the intention that persons who design or supervise the erection of all buildings should be licensed as architects. This section provides that the designing and supervising of certain buildings may be done by those who are not registered architects. However the inference is that the design-

ing and supervising of certain buildings which affect public safety or which are not included in the exemption shall be done only by a licensed architect.

In as much as this proposed grand stand will be used by the public and the matter of public safety is involved it is our opinion that the construction thereof should be under the supervision of a licensed architect.

LEV
AGH

Social Security Law — Old-age Assistance — Claim for lien is not effective as against property owned by surviving joint tenant for old-age assistance furnished to deceased joint tenant.

September 13, 1937.

PENSION DEPARTMENT.

You state that one R, a married man, received old-age assistance from April to September, 1936. He died October 8, 1936. On October 17, 1936 the county furnishing the aid filed a request for a lien against his property. This request was in the nature of a notice of claim for lien and it was filed with the register of deeds. The property against which the claim was filed was held in joint tenancy under an unrecorded deed.

You inquire as to the effect of filing this notice of claim for lien.

If the only property R had was the real estate owned in joint tenancy with his wife, the title to such property immediately upon his death became the sole property of his wife, the surviving joint tenant, and was not subject to any claim against R. The filing of a claim on October 17, 1936, nine days after the death of R, had absolutely no effect so far as it created a lien against the property of R, for the reason that on October 17, 1936 the deceased joint ten-

ant, R, had absolutely no interest in said property. The sole ownership was vested in the wife of R. *Bassler v. Rewodlinski,* 130 Wis. 26. The court there said at page 28:

"The special significant incident of joint tenancy is the right of survivorship, by which on the death of any tenant his interest goes to his survivors."

OSL
WHR

Public Health — Basic Science Law — Under sec. 147.15, Stats., burden is upon applicant for license to practice medicine to establish that he is graduate of reputable professional college, whether such college is domestic or foreign.

September 16, 1937.

BOARD OF MEDICAL EXAMINERS,
Henry J. Gramling, M. D., *Secretary.*

You inquire whether the Wisconsin state board of medical examiners is charged with the duty of determining the reputability of a foreign medical college from which an immigrant applicant for a license presents a diploma.

In this connection you state that foreign schools are not rated by the American Medical Association and that your board has no information concerning such schools nor any way of securing such information.

Applications for licenses to practice medicine and surgery are covered by the provisions of sec. 147.15, Stats. The following six requirements must be met by every such applicant:

1. He must present satisfactory evidence of good moral and professional character;

2. He must have completed a preliminary education equal to graduation from an accredited high school of this state;

3. He must have a diploma from a reputable college approved and recognized by the board;

4. He must present satisfactory evidence of having completed a two years' college course in physics, chemistry, biology and either German or French;

5. He must be possessed of the equivalent of a two years' premedical course at the university of Wisconsin;

6. He must have a twelve months' hospital interneship.

Two additional requirements must be met by an immigrant applicant. He must present satisfactory evidence of having first citizenship papers and, if his professional education was completed in a foreign college, he must accompany his application with a fifty-dollar fee instead of the twenty-dollar fee required of other applicants. This difference in fees is presumably based upon the increased work and cost of checking the credentials of a graduate of a foreign school.

The statute makes no distinction between domestic and foreign schools as far as determining reputability is concerned, and obviously it would be impossible for the board to personally inspect all of the domestic schools, to say nothing of foreign schools.

The case of *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, dealt with the question of the reputability of a dental school, and the court said at pp. 584-585:

"* * * 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. * * *."

Also, in XXV Op. Atty. Gen. 459, 462, it was said that where it was impossible for the board to gain the necessary information as to the reputability of the medical school upon its own investigation, the burden rested upon the applicant to show that the college was reputable and that the applicant must submit to the judgment of the board unless such judgment transgressed the boundaries of reason and common sense.

In *State ex rel. Blank v. Gramling,* 219 Wis. 196, at 203 the supreme court distinguished between a college which has once achieved the status of a reputable college in the eyes of the board and one which has not been accorded such a standing by pointing out that, as to the former, the conceded status is a thing of value and that such right can be taken away only by due process of law, whereas nothing is taken away by refusing to recognize a school which has never previously been recognized by the board. As to such a school the burden of establishing reputability is upon the applicant for a license, as was said in the *Chittenden* case, *supra.*

We therefore conclude that the applicant for a license to practice medicine has the burden of establishing to the satisfaction of the board that he is a graduate of a reputable professional college regardless of whether such college is domestic or foreign.

OSL
WHR

Civil Service — Public Officers — Deputy Oil Inspectors — Under sec. 16.23, subsec. (2), Stats., reinstatement rights of employee under civil service law extend only during year immediately following his last permanent employment, temporary employees not being included in that statute.

September 16, 1937.

BUREAU OF PERSONNEL.

Our opinion is requested as to the civil service status of several former deputy oil inspectors whose services were terminated on July 8, 1935 as a result of a supreme court decision holding that their predecessors had been illegally discharged under ch. 461, Laws 1933. *State ex rel. Nelson v. Henry,* 216 Wis. 80.

You call our attention to sec. 16.23, subsec. (2), Stats., the material part of which provides as follows:

"Any person who has held a position by permanent appointment under the civil service law and rules and who has been separated from the service without any delinquency or misconduct on his part but owing to reasons of economy or otherwise, may be reinstated within one year, and in the case of legislative employes within two years, from the date of such separation to positions in the same or similar grade or class in the state service; * * *."

Under the provisions of this section the eligibility of these employees would have expired July 8, 1936. However, sec. 16.17, subsec. (2), Stats., provides:

"The term of eligibility of applicants on original entrance and promotional lists shall be six months; but such term may be extended by the board after consideration of the recommendation of the director. The eligibility of individuals on reinstatement lists may be extended in like manner. But in no case may eligibility be extended for a period of more than three years."

Pursuant to the provisions of this section the eligibility of these persons was extended by order of the bureau of personnel to July 1, 1937, and they were given temporary employment from time to time prior to July 1, 1937, relieving regular employees on vacation.

You inquire whether such temporary employment results in reinstatement rights for these persons under sec. 16.23 (2), which would extend one year from the date of last employment even though such employment was temporary, or whether their reinstatement eligibility lapsed on July 1, 1937 pursuant to the extension granted by the bureau of personnel under sec. 16.17 (2). In this connection we are informed that it has long been the administrative practice of your department to consider only permanent employment as resulting in reinstatement eligibility under sec. 16.23 (2), Stats.

It is our opinion that the administrative practice followed by your department in not counting temporary employment under the reinstatement provisions of sec. 16.23, subsec. (2), Stats., is correct.

In the construction of statutes the rule is:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; * * *." Sec. 370.01, subsec. (1), Stats.

In sec. 16.23 (2) the words "may be reinstated within one year" presuppose some starting point from which said year is to commence. This starting point is to be found in the words "from the date of such separation." The words "such separation" relate back to the previous use of the word "separated" where it occurs in the first part of the section in the phrase which reads: "and who has been separated from the service." The antecedent of "who" is "Any person who has held a position by permanent appointment."

Consequently, by relating all qualifying words and phrases to their proper antecedents, it is evident that there must be a concurrence of two things to bring the statute into operation: 1. There must be permanent employment; 2. There must be separation from such permanent employment. Applying these requisites to the employees in question, the one-year reinstatement right obviously could not be counted from the date of last temporary employment, since at that time these employees were not holding positions by permanent appointment, they having ceased to be permanent employees on July 8, 1935.

It is true that eligibility of individuals on reinstatement lists such as would be included under sec. 16.23 (2) may be extended by the board under sec. 16.17 (2), but such extension is only of such length as the board may provide, and in this instance that extension expired under the board's order on July 1, 1937.

The conclusion reached in this opinion is further justified by the administrative interpretation and practice of your department in not counting temporary employment towards reinstatement rights under sec. 16.23 (2), since it has frequently been held that the practical construction placed upon a statute by the officers charged with its enforcement is of great weight and often decisive. *State v. Johnson,* 186 Wis. 59; *Mauel v. Wisconsin Automobile Insurance Co. Ltd.,* 211 Wis. 230.

WHR

Public Officers — Sheriff — County board cannot require sheriff who is compensated on fee basis to keep book or record of amount he receives as fees.

September 23, 1937.

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

You state that your county board recently hired an auditor to audit the accounts of all county officers and that at the close of the audit made certain recommendations, one of which was that the sheriff, who is on a fee basis, be required to keep books showing all moneys received for the service of papers and make such records available to the county board or its committees.

You inquire whether the county board has the right to require such a set of books to be kept and exhibited as recommended.

Neither sec. 59.07, Stats., setting forth the general powers of the county board, nor sec. 59.08, Stats., setting forth the special powers of the county board, contains any provision empowering the board to require a county officer who is on a fee basis to keep any books of account showing the receipt of fees.

Sec. 59.23, Stats., setting forth the duties of the sheriff, does not make it his duty to keep such books of account, and it is quite clear that the county board cannot enlarge the duties of the sheriff which are purely statutory.

The only provision relating to the keeping of books showing the receipt of fees by county officers is found in sec. 59.15 (7) and (8), and these subsections, by their very terms, relate to officers who receive a salary in lieu of fees, and do not relate to officers who are on a fee basis. By the application of the doctrine of *expressio unius est exclusio alterius,* this section would not require the keeping of such books by officers who are not on a salary basis.

In view of the foregoing it is our opinion that the county board cannot require a sheriff who is compensated on a fee

basis to keep records and books of the fees received by him and exhibit them to the board or its committees.
OSL
AGH

Elections — Nominations — Under sec. 5.05, subsec. (6), par. (d), Stats., Union party qualifies for party ticket at next September primary.

September 28, 1937.

THEODORE DAMMANN,
Secretary of State.

You have referred to us a copy of a petition of the Union party praying for a party ticket at the next September primary, under the provisions of sec. 5.05, subsec. (6) par. (d), Stats.

It appears that both the candidate for president and the candidate for governor on the Union ticket received in excess of one per cent of the total vote cast at the last general election on November 3, 1936.

You inquire whether the Union party is entitled to a party ticket at the next September primary upon compliance with ch. 5, Stats., by filing nomination papers under sec. 5.05, Stats.

Sec. 5.05 (6) (d), Stats. 1935, provides:

"The basis of percentage in each case shall be the vote of the party for the presidential elector receiving the largest vote at the last preceding presidential election in which such party had candidates for presidential electors. 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."

The first sentence of this section was amended by ch. 267, Laws 1937, to read:

"The basis of percentage in each case shall be the vote of the party for governor at the last preceding gubernatorial election."

In XXV Op. Atty. Gen. 238 this office ruled that if the Prohibition party candidate in any subdivision in the state received one per cent of the total vote cast at the last preceding general election, such party was entitled to a regular party ticket in such subdivision.

The copy of the petition of the Union party for a regular party ticket appears to comply sufficiently with the requirements of the statute so to entitle this party to a regular party ticket at the next September primary and, inasmuch as the gubernatorial candidate for this party polled in excess of one per cent of the total vote cast at the last general election, it is our opinion that it is entitled to a party ticket at the next September primary upon compliance with ch. 5, Stats., by filing nomination papers under sec. 5.05.

OSL
WHR

Bridges and Highways — Relocation — Public Officers — County Highway Commissioner — It is not duty of county highway commissioner to maintain barriers upon that portion of highway no longer used after relocation of federal highway.

September 30, 1937.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

You state that federal highway 70, situated in the town of Fifield, Price county, was relocated during 1936 and that temporary barriers were erected by the highway commissioner across the old highway indicating it was not fit for use. Apparently somebody used the old highway after it had been abandoned and removed the temporary barriers. Last November a car was driven over the old highway and in driving back on the new highway drove over a five-foot embankment, injuring the passengers in the car. Claim has now been made against the town for such damages. You inquire whether it was the duty of the county highway commissioner to maintain the barriers.

In an opinion, XIX Op. Atty. Gen. 421, it was held that the relocation of a state trunk highway effects a closing of such portions of the old road as are not necessary thereafter, but that such portion of the old road as is needed reverts to its former status as a town road.

Sec. 81.10, subsec. (1), Stats., provides:

"Whenever any highway in charge of the town board is impassable or unsafe for travel or during the construction or repair of any such highway and thereafter until it is ready for traffic the town board may close the same and keep it closed by maintaining barriers at each end of the closed portion. Such barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night."

This section clearly places the duty of maintaining barriers on the road in question upon the town board. There-

fore, in view of the foregoing, it is our opinion that it was not the duty of the county highway commissioner to maintain the barriers in question.

LEV
HHP
JEM

Criminal Law — Jury Trial — Change of Venue — In trial in justice court of accused for misdemeanor state cannot demand jury trial.

State is not authorized to obtain change of venue in justice court by filing affidavit of prejudice.

September 30, 1937.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

You inquire whether the state in a prosecution for a misdemeanor in justice court may demand a jury trial in the event the defendant has waived such jury trial.

Sec. 360.10, Stats., provides:

"If the plea of the accused be not guilty and no jury be demanded by him the court shall proceed to try such issue, and to determine the same according to the evidence which may be produced against and in behalf of such accused."

Under this statute it is apparent that it is only the accused who can demand a jury trial. We find no statute which authorizes the state to make such demand. All our history of trial by jury indicates that it was a right demanded by and afforded to defendants. In view of this and the failure of legislative enactment to the contrary, it is our opinion that in the event that the defendant fails to make such demand for a jury trial, the state must proceed to try the case before the court without a jury.

You also ask whether or not the state may file an affidavit of prejudice against a justice of the peace in the trial of a misdemeanor or an offense triable by a justice court.

The right to file an affidavit of prejudice is purely statutory. Sec. 360.06, Stats., authorizes the defendant to file an affidavit of prejudice. However, there is no such authorization or right given to the state. The state, in starting action before a certain justice of the peace, has in effect approved that justice as being without prejudice. Had it felt otherwise it could have started its proceeding before another and different justice. Because of this fact there seems to be no reason for such a right being available to the state. It is therefore our opinion that the state cannot file an affidavit of prejudice in cases instituted by it in cases triable before a justice of the peace.

OSL
JEM

Appropriations and Expenditures — Counties — Claims — Public Officers — Coroner — Sec. 59.77, Stats., requires that district attorney examine and approve accounts of coroner.

Under sec. 366.11, Stats., it is duty of coroner to make return of proceedings at inquest to court which has jurisdiction of subject matter regardless of whether or not information has been filed therein.

October 1, 1937.

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

You ask whether the amendment of sec. 366.01, Stats., by ch. 450, Laws 1929, which empowered the coroner to proceed with inquests upon his own initiative, affects the duty of the district attorney to certify and approve the accounts of the coroner.

Sec. 59.77, Stats., provides that the claims for official services before a justice of the peace "or other magistrate" shall be examined by the district attorney and that the fees of jurors, witnesses or interpreters in a proceeding before a justice of the peace, coroner, commissioner, county judge, "or other magistrate" shall be certified by the district attorney. While this section does not mention coroners, it has been held by a former opinion of this department, XXI Op. Atty. Gen. 361, that the coroner in holding an inquest performs the same duties as that of a magistrate or a justice of the peace.

It is, therefore, our opinion that the coroner in holding an inquest is "a magistrate" within the meaning of sec. 59.77, Stats., and therefore that the procedure of having the accounts of the coroner passed upon by the district attorney remains the same as existed prior to the amendment of sec. 366.01, Stats.

You also call our attention to sec. 366.11, Stats., which reads as follows:

"If the jury find that any murder, manslaughter or assault has been committed upon the deceased the coroner shall bind over, by recognizance, such witnesses as he shall

think necessary to appear and testify at the next court to be held in the same county at which an indictment for such offense may be found or an information filed; and he shall also return to the same court the requisition, written evidence and all recognizances and examinations by him taken, and may commit to the jail of the county any witness who shall refuse to recognize in such manner as he shall direct."

You inquire if this section means that it is the duty of the coroner to make a return of the proceedings at an inquest to the court regardless of whether an information has been filed.

It is our opinion that the word "may" as used in this section refers to the next session of the court in which it is possible to find an indictment or file an information, or, in other words, the next session of that court which would have jurisdiction to hear, try, and determine the offense, and that it is the duty of the coroner to file his return in that court without unreasonable delay, regardless of whether or not an information has been filed.

HHP
AGH

Public Officers — Town Clerk — Village Assessor — Vacancy — Taxation — Where village assessor ceases to be inhabitant of village, vacancy is thereby created in his office under sec. 17.03, subsec. (4), Stats., but his assessment as *de facto* officer is nevertheless valid.

Under sec. 70.52, Stats., clerk upon receiving assessment roll may add omitted real estate and if he fails to do this such omitted property may be entered once additionally on next year's tax roll under sec. 70.44, Stats.

October 1, 1937.

TAX COMMISSION.

You inform us that early last year the council of the village of C attempted to detach certain rural territory from the corporate limits of the village. The proceedings were later held by the court to be illegal on the grounds that the detached territory was not annexed to any other district.

In July, 1936, the matter was taken up again, and an ordinance was passed detaching the territory in question from the village of C and annexing it to the town of W. In May of this year the town of W petitioned the county court for a review of the proceedings, and the court superseded the writ on the grounds that ninety days had elapsed after the ordinance was passed before the writ of certiorari was issued. No appeal has been taken from this decision.

The assessor of the village of C resides in the territory which was annexed to the town of W and you therefore inquire as to the validity of his assessment of the property in the village of C for 1937.

Under sec. 17.03, subsec. (4), Stats., a vacancy occurred in the office of assessor of the village of C by reason of the fact that such officer ceased to be an inhabitant of that village. Nevertheless, he continued to be a *de facto* officer by holding over. 46 C. J. 1058.

Though not a lawful officer, the law, upon principles of policy and justice, will hold the acts of a *de facto* officer valid so far as they involve the interests of the public and third persons. Mechem on Public Officers, sec. 318. In other words, so far as rights of third persons are concerned, the lawful acts of an officer *de facto,* if done within the scope and by the apparent authority of the office, are as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it. Mechem on Public Officers, sec. 328. Consequently, his official acts as such *de facto* officer cannot be successfully attacked collaterally. *In re Burke,* 76 Wis. 357; XXVI Op. Atty. Gen. 52, 53. Therefore, the assessment of the village of C in 1937 must be considered valid.

You also inquire how the assessment of the detached territory will be made for 1937 in view of the fact that it is now part of the town of W, whose assessor made no attempt to assess it as of May 1, 1937, under sec. 70.10, Stats.

As to 1937 taxes, it must be held that the territory in question is a part of the town of W, since that is the effect of the court's decision, which has not been appealed from.

The situation as to assessment is governed by sec. 70.52, Stats., which provides in part that upon receiving the tax

roll the clerk "shall add to the roll any parcel of real or personal property omitted by the assessors and immediately notify them thereof; and such assessors shall forthwith view and value the same and certify such valuation to said clerk, who shall enter it upon the roll, and such valuation shall be final."

If this procedure is not followed the property may be assessed next year by the assessor of the town of W as omitted property, pursuant to the provisions of sec. 70.44, Stats.

WHR

Dogs — Under sec. 174.10, subsec. (1), Stats., no criminal or civil action is maintainable against person killing unlicensed dog, except for failure to report killing as required by sec. 174.10, subsec. (2).

October 1, 1937.

P. H. URNESS,
District Attorney,
Mondovi, Wisconsin.

You inquire whether criminal prosecution or civil action will lie where a dog, licensed in Minnesota but not in Wisconsin, owned by a person who had moved from Minnesota and been here only two weeks, was wilfully and without cause killed by another person while on his premises.

With reference to criminal prosecution, sec. 343.47, Stats., provides:

"Any person who shall wilfully, maliciously or wantonly kill, * * * any * * * dog * * * except in cases expressly authorized by law, * * * shall * * * be punished by imprisonment in the county jail for a period not less than three months or by imprisonment in the state prison for a period of not to exceed two years, or by a fine not to exceed five hundred dollars. * * *"

Sec. 174.01, Stats., provides:

"Any person may kill any dog, that he knows is affected with the disease known as hydrophobia, or that may suddenly assault him while he is peacefully walking or riding and while being out of the inclosure of its owner or keeper, and may pursue to and upon the premises of the owner or elsewhere, and kill any dog found killing, wounding or worrying any horses, cattle, sheep, lambs or other domestic animals."

Sec. 174.10, Stats., provides in part:

"(1) The fact that a dog is without a license attached to a collar shall be presumptive evidence that the dog is unlicensed. No action shall be maintained for an injury to or the destruction of a dog without a tag, unless it shall appear affirmatively that the dog is duly licensed. * * * Any dog unaccompanied by its owner or keeper which enters the field, pasture, meadow or farm inclosure of another shall constitute a private nuisance and the owner or tenant of such field, pasture, meadow or farm inclosure may seize, impound or restrain such dog while therein without liability or responsibility of any nature therefor. Any person may kill a dog, whether licensed or unlicensed, if found killing or worrying any domestic animal.

"(2) * * * Any person who shall kill a dog not his own or not in his keeping shall forthwith report such fact in writing to the town, village or city clerk of the town, village or city in which the killing occurred. * * * Any person who shall have seized or impounded a dog with or without license under section 174.10 shall deliver such dog to the humane officer of the village, town or city, if such officer exists; or if there be no such officer to the constable, village marshal, or the town, village or city police officer. * * *

"(3) * * *

"(3a) * * *

"(4) Any person who shall violate any of the provisions of chapter 174 of the statutes shall be liable to a penalty of not less than five dollars nor more than fifty dollars for such violation."

The language of the statutes is clear as to the conditions under which dogs generally may be killed, and if the dog had been licensed then the person in question who killed it wilfully when such circumstances were not existent would be subject to criminal prosecution under sec. 343.47, Stats., IV Op. Atty. Gen. 96. Likewise he could be prosecuted

criminally under sec. 174.10, subsec. (2), Stats., for his failure to report the killing.

In the case of *Skog v. King,* (1934) 214 Wis. 591, 254 N. W. 354, it was said at page 593:

"* * * Although originally, in early common-law times, dogs were not considered property, that view has long since been abandoned and today dogs are generally, if not universally, held to be property. 3 Corp. Jur., p. 16, sec. 4. * * *"

Thus a civil action will lie for injury, conversion or destruction of a dog. 3 C. J. pp. 16-17, sec. 4; IX Op. Atty. Gen. 378.

However, it is to be noted that sec. 174.10 (1) provides "No action shall be maintained for an injury to or the destruction of" an unlicensed dog. See *Bass v. Nofsinger,* 222 Wis. 480, 269 N. W. 303. Sec. 260.03 defines an action as a court proceeding. Sec. 260.05 provides:

"Actions are of two kinds, civil and criminal. * * *"

The language of sec. 174.10 (1), Stats., does not expressly limit or extend the prohibition against maintaining actions to civil or criminal actions. However, the use of the word "action" may be said to be in a general sense so as to apply to both types of actions. Also ch. 174, Stats., by its very severity evidences an intent to be drastic and thereby forcefully persuade all persons to license their dogs. We therefore conclude that the prohibition applies to criminal as well as civil actions which are maintained for an injury to or killing of a dog. The language, however, we believe should be narrowly construed and thus would not prevent a criminal prosecution for failure to report the killing of a dog, because it would not be an action "for an injury to or the destruction" of a dog but rather for the failure to make the report required by the statute.

Therefore it is our opinion that no criminal prosecution or civil action may be maintained against a person who kills a dog which is required to be but is not licensed, except a prosecution for failure to report such killing as required by sec. 174.10 (2), Stats.

HHP

Railroads — Passes — Railroad employee while on furlough may legally be given free transportation by his railroad employer.

October 2, 1937.

PUBLIC SERVICE COMMISSION.

You ask whether the use of a railroad pass by an employee of the railroad on a furlough to act as committeeman for his brotherhood is contrary to law.

Sec. 348.311, subsec. (1), Stats., provides:

"No person, association, copartnership or corporation, shall offer, or give, for any purpose, to any political committee, or any member or employes thereof, to any candidate for, or incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication."

Sec. 195.14 (2), Stats., enumerating those to whom free transportation may be given, provides in part as follows:

"Railroads may give free transportation * * * to * * * railroad officers, attorneys, physicians, directors, employes or members of their families * * *."

Art. XIII, sec. 11 of the constitution provides in part as follows:

"No person, association, copartnership, or corporation, shall promise, offer or give for any purpose, to any political committee, or any member or employe thereof, to any candidate for, or incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

"No political committee, and no member or employe thereof, no candidate for and no incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality of this state, shall ask for, or accept, from any person, association, copartnership, or corporation, or use, in any manner, or for any purpose, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

"* * *."

In our opinion the provisions of both the constitution and sec. 348.311 regarding the granting of passes apply only to committee members of political parties, that is, to persons in some measure connected with politics as related to the government. Thus, the only question that remains is whether or not the railroad employee on furlough is an employee.

It is our understanding that when an employee of a railroad is on furlough he is subject to call to return to actual work on the railroad on a very few hours' notice; that he must hold himself at all times in readiness therefor; that he must put in a requisite number of hours at actual work for the railroad within certain recurring stipulated periods in order to retain such standing; that while on such furlough the railroad recognizes his seniority rights; that the time spent on furlough is credited to him in any calculation for pension or retirement purposes; and that in order to represent his brotherhood as a committeeman the requirements are that he must maintain such standing as an employee. All of this shows the continuance of an employee relationship.

We are further advised that the interstate commerce commission has made the following ruling:

"An employee who has not been suspended or dismissed from the service, but is on leave of absence and is still carried on the roll of employees of the carrier, is still an employee and as such may lawfully use free transportation."

It is, therefore, our opinion that when a man is furloughed by the railroad he nevertheless retains his status as an employee of the railroad during the time that he re-

mains on furlough and therefore is an employee within the meaning of sec. 195.14 (2), Stats., to whom free transportation may be legally given by the railroad.
HHP

Criminal Law — Sentences — Two or more sentences imposed by court at same time run concurrently unless court at time of imposition of sentence specifies they shall run consecutively.

October 4, 1937.

BOARD OF CONTROL.

It appears that one of the inmates of the Wisconsin state prison was sentenced to a term in the state prison of not less than one year nor more than five years. On the same day and before the same court he was also convicted of a misdemeanor and sentenced to pay a fine of five hundred dollars and costs or be committed to the county jail for six months. The court did not state whether the sentences were to run consecutively or concurrently. You inquire as to the regularity of both sentences.

It seems well settled at common law that the court in cases of misdemeanors had power to impose sentences to run either concurrently or consecutively. There have been decisions, however, to the effect that the court would not have power to impose consecutive sentences in felony cases. See Bishop, New Criminal Procedure (2d ed.), vol. 2, p. 1152.

However, at common law, in those cases where the court had power to impose either consecutive or concurrent sentences, unless the court at the time of imposition of the sentences specifically stated that they were to run consecutively, such sentences ran concurrently. Bishop, New Criminal Procedure (2d ed.), vol. 2, p. 1139.

It was held in a former opinion of this office, XXIII Op. Atty. Gen. 464, that by virtue of sec. 359.07, Stats., sentences on more than one count in the same case run concurrently unless otherwise ordered by the court.

Sec. 359.07, Stats., provides as follows:

"* * * All sentences shall commence at twelve o'clock, noon, on the day of such sentence. * * *; provided, that when any person is convicted of more than one offense at the same time the court may impose as many sentences of imprisonment as the defendant has been convicted of offenses, each term of imprisonment to commence at the expiration of that first imposed, whether they be shortened by good conduct or not; * * *."

Thus at the time of the enactment of sec. 359.07, Stats., it was the law that sentences would run concurrently unless the court ordered them to run consecutively. If the provisions of sec. 359.07, setting out that all sentences commence at twelve o'clock, noon, on the day of sentence, had been enacted without any provision for sentences on more than one count at the same time to run consecutively, the statute would have been susceptible of being construed as precluding any consecutive sentences.

In order to prevent this construction the clause providing that in case of conviction of more than one offense at the same time "the court may impose" consecutive sentences was added, not as a grant of power to the court by reason of the fact that the court already had any power, but rather as a preservation of the previously existing power. It was thus not the intention of the enactment of this statute to change the common law rule that the court had power to impose either consecutive or concurrent sentences or to change the common law rule that sentences were to run concurrently unless stated to be consecutive. The purpose of the statute was to fix the time of commencement of sentences. This construction of the statute leaves the common law rule in effect the same as prior to the enactment of the statute in this regard.

The court had power to specify that these sentences should run consecutively but, not having done so, it is our opinion that the sentences were regularly imposed and run concurrently.

LEV
HHP
JEM

Criminal Law — Gambling — Slot Machines — Court may order slot machines which are gambling devices destroyed when seized by officer.

October 4, 1937.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire, Wisconsin.

You state that the sheriff, upon raiding certain taverns and roadhouses, found slot machines therein which he took into his possession together with the contents. Warrants were later issued under sec. 348.09, Stats., and the defendants all entered pleas of guilty and were fined. You ask whether under the circumstances the machines may be destroyed upon order of the court.

Sec. 348.17, Stats., contains an express authorization for the destruction of gambling devices brought before the court. In an opinion, XIII Op. Atty. Gen. 258, it was pointed out that there is no express provision in sec. 348.09, Stats., under which gambling devices can be destroyed. In XIX Op. Atty. Gen. 412, it was held that secs. 348.09 and 348.17, Stats., are to be construed as providing separate procedures and that the destruction of gambling implements is expressly authorized only when a procedure is under sec. 348.17, Stats.

Since these opinions, however, our court in *State ex rel. Meyer v. Keeler,* (1931) 205 Wis. 175, 236 N. W. 561, where certain furs, the possession of which was unlawful during a closed season, had been seized under a void search warrant and their return was sought by a writ of mandamus, held that even though the furs could not be used in evidence because seized under a void search warrant, nevertheless, in view of the statute making their possession unlawful, they were contraband and incapable of legal ownership, so that their return could not be obtained by judicial process. In the decision at pages 184-185, the court said as follows:

"It seems very clear to us that when contraband articles, such as counterfeit bills, bogus coin, stolen properties, implements useful only for committing crimes, illicit liquor,

articles which may not lawfully be possessed, or any other similar contraband, to which no one can have a property right, are found in an illegal search, they should not be returned to the persons from whom they were taken. The refusal to return such articles clearly does not involve any right guaranteed by the fourth amendment to the constitution of the United States or similar constitutional provisions. While courts should at all times jealously guard and protect a citizen in the full enjoyment of his constitutional rights, by suppressing evidence seized in violation of his rights and by prohibiting the use of such illegally obtained evidence in any criminal prosecution brought against him, they should not go farther than the constitution requires. There is nothing in such constitutional provisions that requires a court to perform the ridiculous act of ordering the return of contraband to a citizen. When evidence illegally obtained is suppressed and when courts see to it that such evidence is in no manner used in a criminal prosecution brought against the person whose constitutional rights have been invaded, his rights are completely vindicated."

It has been held that, where in the enforcing of criminal laws property has been seized, the possession of which is illegal, it cannot be replevied. 54 C. J. 434. See *Triangle Mint Corp. v. Horgan,* 133 Misc. 802, 233 N. Y. S. 570.

In *Miller v. C. & N. W. Ry. Co.,* (1913) 153 Wis. 431, 141 N. W. 263, it was held that no damages could be recovered for negligent injury to a slot machine, the court saying at page 434:

"* * * What we do hold is that, where an article is useful and usable for gambling purposes only and gambling is unlawful and it is not shown that the article has any value except for use as a gambling device, courts will not regard such value as a legitimate measure of damages to be recovered where the article is destroyed. And where the implement has no value for any lawful purpose no damages in a case of this kind are recoverable. * * *"

Sec. 348.07, Stats., makes it unlawful to keep, set up or maintain devices which can be used for gambling.

Sec. 348.09 makes it unlawful to permit the use of devices for gambling purposes.

In a recent decision in the case of *City of Milwaukee v. Burns,* decided June 21, 1937, 274 N. W. 273, our supreme court held that a pin ball machine which emits chips that

may be played back into the machine is a gambling device *per se.*

Therefore, if these slot machines you describe emit chips the machines are gambling devices *per se.* The fact that the persons from whom they were taken pleaded guilty may be taken as an admission by them that the machines are gambling devices.

In the case of *Milwaukee v. Johnson,* (1927) 192 Wis. 585, 213 N. W. 335, it was held that a slot machine into which money is played upon chance or upon the result of the action of such machine is a gambling device. See also XVI Op. Atty. Gen. 56; XXI Op. Atty. Gen. 959; XXIV Op. Atty. Gen. 673.

Inasmuch as the statute makes the possession of such gambling devices unlawful, they are therefore contraband with like effect as the property considered in the *Keeler* case. Being incapable of ownership in contemplation of law, no damages can be recovered for their destruction and their return cannot be obtained by means of legal process or proceeding.

It is, therefore, our opinion that where devices which are gambling machines *per se* are seized the court may order their destruction as contraband under the inherent power of the court, and the owner thereof is powerless to prevent their destruction thereunder.

HHP

Contracts — Public Officers — Malfeasance — Village Board — Contract which is not void under sec. 348.28, Stats., at time it was entered into between village and corporation does not become void purely because stockholder of said corporation becomes member of village board prior to complete performance of terms of contract.

October 6, 1937.

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

You state that a village located in Sheboygan county is constructing a waterworks system for the use of the village and the inhabitants. On the 23rd day of February, 1937, a contract was entered into with A as principal contractor for the construction of a portion of the waterworks. On March 9 the principal contractor entered into a contract with a corporation having its office and principal place of business in the village, to furnish certain materials and to perform certain work for the principal contractor on this project. At that time no stockholder of the subcontracting corporation was an officer of the village. On March 18, at the village caucus B, a stockholder of the subcontracting corporation, was nominated for the office of one of the trustees of the village, and at the election on April 6 he was elected to such office. On May 10 he qualified for the office of such trustee, and on the same day the subcontracting corporation commenced work on the project. All of the work to be performed by the subcontractor has been completed, and the public works administration raises a question as to the legality of the subcontract.

It appears that after the election of B as trustee there was no further action of any kind taken by the village concerning either the subcontract or the principal contract. You desire to know whether or not, in view of the provisions of sec. 348.28, Stats., this contract is valid.

Sec. 348.28, Stats., provides:

"Any officer, agent or clerk of the state or of any county, town, school district, school board or city therein, or in the employment thereof, or any member of any town board or

village board * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same, * * * in his official capacity or employment, * * * shall be punished * * *. Any contract, to which the state or any county, city, village, town or school district is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the state, county, city, village, town or school district shall incur no liability whatever thereon."

It will be noted that the disability to enter into a contract, as indicated by the statute above quoted, is placed upon the officer, agent or clerk of the state, county, town, school district, or city. At the time of the execution of the contract B was neither an officer, agent nor clerk of the state or any of its subdivisions. The corporation of which B was a stockholder had the absolute right to enter into this contract. The contract became valid between the principal contractor and the subcontractor. No statute rendered such contract null and void. Both the principal contractor and the subcontractor acquired rights under this contract, and it is our opinion that such rights could not be impaired or modified by any subsequent action or conduct of a stockholder of the subcontracting corporation. It is true that if B were a village official at the time the contract was entered into, such contract would be in violation of the provisions of sec. 348.28, Stats.

The use of the future tense throughout the statute would strongly indicate that the statute should be construed to be prospective only and aimed solely at contracts entered into and interest acquired by one after becoming such a public officer. To construe the facts as stated to be in violation of the statute would be unreasonable. It is a settled rule of construction that if possible a statute should not be construed to operate unreasonably or in such a manner as to lead to absurd results. *Price v. State,* 168 Wis. 603; *Weiberg v. Kellogg,* 188 Wis. 97.

In the case of *Menasha Wooden Ware Co. v. Winter,* 159 Wis. 437, in discussing this statute, the court said, p. 452:

"* * * The statute was undoubtedly framed for the purpose of putting beyond the reach of officers any temptation to sell supplies to towns or municipalities of which they are officers or agents. It cut off all sales between them and the municipality they represented, so that they should not act both as seller and buyer. * * *."

It is obvious that B, a stockholder in the subcontracting corporation and not then a member of the village board, was not in a position of one who was acting both as the seller and the buyer. Furthermore, B, at the time the contract was made, had no official duty to perform.

In *State v. Bennett,* 213 Wis. 456, the court construed the statute to mean that the transaction must be one in which the interested person has an official duty to perform.

It is therefore our opinion that the subcontract is not void and that there was no violation of sec. 348.28, Stats.

LEV

Intoxicating Liquors — Unit advertisements which advertise sale of intoxicating liquor joined in by number of independent drug stores, some of which do not have "Class A" retail licenses, constitute advertising in violation of sec. 176.18, subsec. (9), par. (a), Stats., by those pharmacists not holding "Class A" retail licenses.

October 6, 1937.

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

You state that there is an organization in your community known as the United Druggists Association, which consists of a number of independent drug stores and that they advertise as a unit in the local newspapers. On various occasions these unit advertisements list liquor and the prices thereof but contain a statement to the effect that liquor may be purchased only at stores holding "Class A" permits.

Some of the drug stores in this association which join in the advertising hold such "Class A" permits for the sale of intoxicating liquor, but not all of them.

You inquire whether such advertising constitutes a violation by those who hold only a pharmacist's license for the sale of alcoholic beverages of the provisions of sec. 176.18, subsec. (9), par. (a), Stats., which provides as follows:

"No registered pharmacist holding a permit issued pursuant to this section shall, unless he also holds a retail 'Class A' or 'Class B' license for the sale of intoxicating liquor, advertise for sale either directly or indirectly any intoxicating liquor except as hereinafter provided nor shall any such registered pharmacist display any such intoxicating liquor in the original package or otherwise in any show window, show case or in connection with any soda fountain or in any other manner in or about his premises except upon wall shelving not to exceed three feet in length."

That which is prohibited by sec. 176.18 (9) (a) is the advertising for sale of any intoxicating liquor by a registered pharmacist holding only a permit to sell intoxicating liquor but not having a "Class A" or "Class B" retail license for the sale of such liquor. Each one of the pharmacists who joins in the advertisement makes it his own. The effect is the same as if it were his individual advertising. That it may be the joint advertisement of a number of pharmacists collectively does not obviate the fact that each one of the pharmacists is so advertising. Each separately thereby holds himself out as ready and willing to make a sale in conformity therewith. If no statement were contained in the advertisement that the liquor so advertised could be purchased only at stores holding "Class A" permits it would be very clear that those pharmacists who did not hold "Class A" permits would be thereby unlawfully advertising the sale of intoxicating liquor. The recitation that the liquor may be purchased only at the stores holding "Class A" permits does not destroy the fact that each one of the individual pharmacists who joins in the advertisement is advertising intoxicating liquors for sale.

Anyone reading the advertisement would be unable to tell which of the pharmacists joining in the advertisement actually held such permits. A person who would be induced

by the advertisement to purchase liquor would undoubtedly go to the store joining in the advertisement which was most convenient or at which he usually traded. The one to which he would go might not be one that held a "Class B" permit. The customer's interest would not be whether the pharmacist held such permit nor would he make any such inquiry, but he would rather be interested in buying the liquor at the price as set out in the advertisement. Inasmuch as the pharmacist would have the regular pharmacist's permit to sell intoxicating liquor even though he might not have the "Class A" retail license, there would be nothing to prevent him from making the sale. He would thereby be benefiting by the advertisement. If this is not direct advertising it certainly would be indirect advertising of the kind that the statute intended to prevent.

It is our opinion that the type of advertising which you mention would constitute a violation of sec. 176.18 (9) (a) by such of the pharmacists joining therein as did not have a "Class A" retail license.

HHP
JEM

Mortgages, Deeds, etc. — Taxation — Tax Collection — In proceedings to collect delinquent personal property tax property on which tax is assessed, where subject to mortgage, is not exempt from sale but when sold should be sold subject thereto.

October 6, 1937.

SYLVAS C. JOHNSON,
District Attorney,
Spooner, Wisconsin.

You have requested our opinion on the following question:

"Where personal property upon which taxes are assessed is covered by a chattel mortgage, is such property exempt

from seizure and sale in proceedings instituted for the collection of the tax?"

Sec. 74.10 outlines the procedure to be followed by the treasurer in the collection of delinquent personal property taxes by distress and sale. This relates to any goods and chattels belonging to the person against whom the assessment was made wherever the same may be found within his town, city or village, his county, or in adjoining counties. Sec. 74.11 outlines the procedure to be followed by the treasurer in proceedings instituted by him before a justice of the peace, and sec. 74.12 outlines the procedure to be followed by the treasurer with the assistance of the district attorney in an action of debt to collect delinquent personal property taxes. Nowhere is any provision made that delinquent personal property taxes constitute a lien against the specific property assessed, as in the case of taxes assessed against real estate.

Where collection of personal property taxes is made under secs. 74.10, 74.11 and 74.12, the property against which the taxes were assessed, if still owned by the tax debtor, may be taken and sold. Such sale, however, would have to be made subject to legal outstanding encumbrances. Personal property taxes are not a lien upon personal property —they are merely a tax against the person who is the owner thereof at the time of the assessment. No lien attaches to the personal property until a levy has been made upon it as the property of the tax debtor. *C. C. Thompson Lumber Co. v. Hynes,* 84 Wis. 353. Such lien, when it attaches, naturally must be subject and subordinate to any outstanding legal encumbrance, otherwise the property of a mortgagee would be subjected to the payment of another person's taxes.

It is therefore our opinion that personal property covered by a chattel mortgage upon which taxes are assessed is not exempt from seizure if owned by the tax debtor, and may be sold for the collection of such taxes, subject, however, to the lien of the mortgage.

OSL
AGH

Taxation — Extension of Time for Payment of Taxes — Taxpayer to avail himself of any of benefits of ch. 10, Laws 1937, creating sec. 74.037, subsec. (1), Stats., must strictly comply with all provisions thereof. Tax sale and penalties are governed by other sections of statutes in force at time of passage of said ch. 10, Laws 1937.

October 6, 1937.

JOHN M. PETERSON,
District Attorney,
Neillsville, Wisconsin.

You raise several questions in relation to the rate of interest to be charged on delinquent real estate taxes with particular reference to ch. 10, Laws 1937. Your questions will be stated and considered separately.

Q. 1. Does ch. 10, sec. 1, Laws 1937, mean there shall be two methods of computing interest on certificates of delinquent taxes as of October 6, 1937, the date of sale under said ch. 10?

Ch. 10, sec. 1, Laws 1937, creating sec. 74.037, subsec. (1), Stats., provides as follows:

"The governing body of any city, village, or town may by a two-thirds vote of the members-elect authorize the treasurer to extend the time for the payment of the taxes on real estate for the year 1936 up to and including July 1, 1937, of such classes of taxpayers and upon such conditions as it shall determine. Taxpayers desiring to take advantage of any such extension shall file an affidavit in duplicate showing need with the treasurer to establish their right to such extension and the treasurer shall, by entering in red ink on the tax roll opposite the name of such party, extend the time for the payment of such taxes without penalty up to and including the first day of July, 1937. All such taxes which shall not have been paid prior to March 22, 1937, when local treasurers are required to settle with the county treasurer, shall be returned delinquent together with original individual affidavits, and, unless paid before the fourth Monday of July thereafter, the lands covered thereby shall be advertised for sale and sold at the same time and in the same manner and treated in all respects as other delinquent taxes, except that the owners of such lands shall be entitled

to pay such taxes at the amount extended upon the local tax roll without penalty, interest, or other charges at any time on or before the first day of July, 1937. If the owner shall pay such taxes as herein provided to the local treasurer before delinquent return, or to the county treasurer after that date and on or before the first of July following, the treasurer to whom such payment is made in each case shall issue a tax receipt in full for the payment thereof, which shall have the same force and effect as if such payment had been made at the regular time for payment of taxes. But if such taxes shall not have been paid on or before the first day of July, 1937, they shall be enforced by tax sale and shall be subject to the same interest, penalties, and charges as other delinquent taxes except that interest shall run from the said first day of July."

It is our opinion that interest is to be computed from the first day of July, 1937, to the date of tax sale where the taxpayer has filed an appropriate affidavit but has failed to pay his taxes on or before the first day of July. However, if the taxpayer has failed to file an affidavit to bring himself within the operation of ch. 10, or if there has been no provision by the governing body for an extension of taxes under said chapter, then the method of computing interest would be controlled by sec. 74.03 (1), 74.03 (2), pars. (a) and (b), or sec. 74.39 as the case may be.

Q. 2. If the taxpayer fails to file an affidavit, would he be charged interest at the rate of eight per cent per annum from January 1, 1937, to October 6, 1937, in addition to penalties and other charges?

Unless the taxpayer has filed the affidavit required by said ch. 10 he has not availed himself of the extension provided by that chapter and accordingly the interest to be charged will depend upon some other section of the statutes. In considering the effect of ch. 16, Laws 1933, which was very similar to ch. 10, Laws 1937, this office in a former opinion said:

"* * * Such act has a definitely limited application. It applies only in communities where the governing body has authorized the extension; it applies to taxpayers who have filed the required affidavit; and it makes the remission or penalty, interest and other charges conditional on such taxes being paid by June 1, 1933. * * *." XXII Op. Atty. Gen. 370-371.

If the taxpayer has failed to file an affidavit or there has been no extension of time payment under sec. 74.03 (1) or 74.03 (2), then the taxes fall delinquent in the ordinary manner and interest will be computed at the rate of eight per cent per annum from the first day of February until the date of sale as provided for in sec. 74.02 and sec. 74.39. It should be noted that if the taxpayer has failed to file an affidavit to obtain an extension under ch. 10, the date of sale for delinquent taxes would not be October 6, 1937, as provided in said ch. 10, but the sale would take place as provided for in sec. 74.33 on the second Tuesday in June and succeeding days.

WHR
AGH

Appropriations and Expenditures — Publicity — Public Officers — Conservation commission has broad discretion in carrying out requirements of sec. 23.09, subsec (7), par. (1), Stats., but may not allocate money appropriated therefor to regional groups and associations publicizing Wisconsin's facilities and attractions as vacation land.

October 7, 1937.

CONSERVATION COMMISSION.

Public and private groups engaged in publicizing facilities and attractions of the state as a vacation land contend that your commission should allocate funds appropriated by sec. 20.205, subsec. (3), Stats., to such groups as a part of your duties under sec. 23.09, subsec. (7), par. (1), Stats. In administering sec. 23.09 (7) (1) your department has adopted a resolution dated February 9, 1937, refusing to allocate funds to these groups. In connection with the above statement of facts, you ask:

"1. Has the conservation commission the authority for expenditure, as it may determine, of the funds provided for carrying out the provisions of subsection (7) (1) of section 23.09?"

Sec. 20.205, subsec. (3), Stats., appropriates forty-two thousand five hundred dollars annually to the conservation commission—"For the execution of its functions under paragraph (1) of subsection (7) of section 23.09." Under this section the conservation commission has broad powers to determine how this money shall be spent in order to carry out the provisions of sec. 23.09 (7) (1), and may do so by the adoption of any reasonable resolution or regulation. Such moneys, of course, may be used only for the purposes set out in that section.

"2. Has the conservation commission any authority to allocate funds to regional groups, associations, etc., in their activities to publicize the facilities and attractions of the state?"

Sec. 23.09 (7) (1), Stats., gives the conservation commission authority:

"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 purpose."

Nowhere in this section is the commission authorized to allocate funds appropriated thereunder to regional groups and associations publicizing the facilities and attractions of this state. As the commission has only those powers granted by statute (XVIII Op. Atty. Gen. 60) that may not be done in the absence of statutory authority therefor.

Furthermore, money may be paid to any person out of the state treasury only pursuant to an appropriation by law. Art. VIII, sec. 2, Wis. Const. *State ex rel. Bell v. Harshaw,* 76 Wis. 230. No appropriation being made to pay moneys to regional groups and associations, referred to above, no moneys may be paid to such groups and associations.

The commission has no power to delegate authority which was delegated to it by the legislature under the familiar rule of *delegatus non potest delegare. McKinnon v. Vollmar,* 75 Wis. 82, 89; 2 C. J. 685, and 2 C. J. S. 1357.

If the conservation commission were permitted to allocate funds to the regional groups and associations in question, to be spent as they see fit, this rule would clearly be violated.

It is, therefore, the opinion of this department that your commission has no authority to allocate funds to regional groups or associations publicizing the facilities and attractions of the state.

WHR

Appropriations and Expenditures — Counties — Social Security Law — Disbursements of pensions from county treasury issued to individual beneficiaries without separate orders of county clerk, signed by chairman of county board, are not in compliance with statute.

October 7, 1937.

TAX COMMISSION.

You state that several counties have inaugurated a different system of paying old-age pensions, blind pensions, and aid for dependent children. Upon the filing by the county judge or the county pension department of the certified schedule of amounts due the individual beneficiaries the county clerk issues a single county order for the total amount payable under the schedule. The order is then signed by the chairman of the county board and the county treasurer. This order is payable to "old-age pensions," "blind pensions," "aid to dependent children" or to the county treasurer, who endorses it and deposits the proceeds in a special bank account, upon which the county treasurer then issues separate checks to each of the individual beneficiaries named in the schedule. The checks drawn on this special account are signed only by the county treasurer.

You inquire whether this method of paying pensions complies with the requirements of sec. 59.81, subsec. (2), Stats., and other statutory provisions relating to the manner of making disbursements from the county treasury.

Sec. 59.81 (2) provides as follows:

"In all counties having a population of less than three hundred thousand, all disbursements from the county treasury shall be made by the county treasurer upon the written order of the county clerk after proper vouchers have been filed in the office of the county clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the county clerk, it shall hereafter be the duty of the county clerk to draw and deliver to the treasurer an order therefor before or at the time when such payment is required to be made by the treasurer. The provisions of this subsection shall apply to all special and general provisions of the statutes relative to the disbursement of money from the county treasury."

In an opinion in XVI Op. Atty. Gen. 666, to which you make reference, this section was under consideration and it was there held, p. 668:

* * * the legislature * * * undoubtedly intended * * * that the county clerk shall draw and deliver to the treasurer an order in every instance before payment can be made by the county treasurer."

In the same opinion it was stated that it is the positive duty of the chairman of the county board to sign all orders for disbursements of funds from the county treasury.

You make reference to secs. 59.17 (3), 59.20 (3), 59.76 (1), 59.81 (4), and 74.05, Stats. We agree that these sections indicate that county orders shall be payable to the person entitled to the proceeds thereof.

Sec. 59.20, prescribing the duties of the county treasurer, reads in part as follows:

"The county treasurer shall:
"* * *
"(2) Pay out all moneys belonging to the county only on the order of the county board, signed by the county clerk and countersigned by the chairman, except when special provision for the payment thereof is otherwise made by law; * * *."

The order to the county treasurer for the aggregate amount of the pension lists is not a disbursement from the county treasury as contemplated by sec. 59.81 (2), but is merely a transfer of the funds from one depository account to another. Such funds while in said special bank accounts still belong to the county and are subject to all of the laws and regulations pertaining to public deposits. Sec. 59.81 (2) is the only authority in the statutes given for making payment out of county funds and, being the only method that is authorized, it is the only procedure permissible.

It is our opinion that the system of paying pensions about which you inquire is not in compliance with the statutes.

HHP
JEM

Automobiles — Municipal Corporations — Municipal Law — Automobile taken into possession for city police because of fictitious licensing and stored in sheriff's garage may be sold by city under sec. 66.28, Stats.

October 8, 1937.

A. J. ASCHENBRENER,
District Attorney,
Stevens Point, Wisconsin.

You advise that an automobile which was being driven in your vicinity and licensed under a name believed to be fictitious was, upon the request of the police department of Stevens Point, placed in the garage of your sheriff. As this car was possessed some time ago and no one has called for or claimed it, you inquire what disposition should be made of it.

You call our attention to sec. 176.62, Stats., which provides for the confiscation of automobiles used in the transportation of illicit liquor. Inasmuch as you indicate that there is no evidence to show that this car was used in the transportation of illicit liquor, the car cannot be confiscated under the provisions of this statute.

You also call our attention to sec. 66.28, Stats., which provides:

"Cities and villages may, at a public auction to be held once a year, dispose of any personal property which shall have been abandoned, or shall have remained unclaimed for a period of thirty days after the taking of possession of the same by the city or village officers. * * *."

There is no provision in the statutes for the disposition of such property when taken possession of under these circumstances by county officials. In view of the fact that this automobile was seized by a city officer, it is immaterial that he temporarily placed the same in the custody of the sheriff. It is therefore our suggestion that this car be disposed of pursuant to sec. 66.28 of the statutes by the city officials.
OSL
AGH

Appropriations and Expenditures — National Youth Administration — Education — Vocational Education — Boards of vocational education have no power to furnish transportation to and from work for persons employed on national youth administration projects.

October 8, 1937.

GEO. P. HAMBRECHT, *Director,*
Board of Vocational Education.

You state that the local board of vocational education of Wisconsin Rapids is cosponsor of the NYA at Wisconsin Rapids and that a group of young men are employed on a project doing a type of recreational work in the way of developing a county lake and park for the county. As the project is located a few miles from the city, the local vocational board purchased a secondhand truck and incurred a

few other incidental expenses for the purpose of providing transportation for these young men to and from the project.

You ask whether such an expenditure can be lawfully made.

The powers of the local vocational boards are set forth in sec. 41.15, Stats., which reads in part as follows:

"(1) In every town, village and city of over five thousand inhabitants there shall be, and in every town, village or city of less than five thousand inhabitants there may be a local board of vocational and adult education, whose duty it shall be to establish, foster and maintain schools of vocational and adult education for instruction in trades and industries, commerce and household arts in part-time-day, all-day and evening classes and such other courses as are enumerated in section 41.17. Said board may take over and maintain any existing schools of similar nature. Schools created under this section shall be known as schools of vocational and adult education."

"(7) The board may purchase machinery, tools and supplies, and purchase or lease suitable grounds or buildings for the use of such schools; rent to others any portion of such buildings and grounds not presently needed for school purposes; and erect, improve or enlarge buildings for the use of said schools. Existing school buildings and equipment shall be used as far as practicable. All conveyances, leases and contracts shall be in the name of the municipality."

It is the duty of the local vocational board to furnish educational facilities and operate an educational system. It is not the duty of the board to transport students to its educational facilities. In this respect the furnishing of transportation facilities is not necessary in the operation of an edutional system. Unless express authority to provide the transportation has been granted by statute, such power does not exist as incidental to the power to operate an educational institution.

The local vocational board may exercise only such powers as are granted to it by statute. No such power having been granted to it, the expenditures mentioned by you cannot lawfully be made.

OSL
AGH

Elections — Election Inspectors — Under ch. 423, Laws 1937, repealing and recreating sec. 6.32, subsec. (4), par. (f), Stats., city or village clerk, as case may be, fills all vacancies in offices of election officials whether such vacancies are temporary or permanent.

October 9, 1937.

THEODORE DAMMANN,
Secretary of State.

You call our attention to ch. 423, Laws 1937, which provides substantially as follows:

"SECTION 1. Paragraph (f) of subsection (4) of section 6.32 of the statutes is repealed.

"SECTION 2. A new paragraph is added to subsection (4) of section 6.32 of the statutes to be numbered and to read: (6.32) (4) (f) If at any time there shall be a vacancy caused by the candidacy, sickness, or from any other cause, of any election official required to be in attendance at a polling place, such vacancy shall be filled by appointment by the city or village clerk, of the city, or village in which the polling place is located, from a list of eligible persons submitted by the county party committee of each of the two predominant political parties in the case of villages, and the city party committee in the case of cities. In the event that no such list is submitted such clerk may appoint any elector in the voting district."

You state that you understand the effect of this law to be that: 1. Such appointments are made for the day only; 2. At the next election the regular officials appointed under sec. 6.32, subsec. (4), pars. (a), (b), (c) and (d), Stats., will serve, providing they are present and qualify; 3. If the regular appointees become permanently disqualified, resign or remove, any appointment for the balance of the unexpired term, of two years, will be made by the mayor or village president, as in the first instance.

We are asked if this interpretation of the statute is correct.

Ch. 423, Laws 1937, repeals and recreates par. (f), subsec. (4), sec. 6.32, Stats. Its purpose remains the same, namely, to provide ways and means of filling vacancies of

office of election officials, and we have heretofore held that a substitute inspector chosen under sec. 6.32 (4) (f) serves at that election only, that is, he serves for the day only. XIII Op. Atty. Gen. 138.

This being true, it follows as a matter of course that in the case of vacancies the regular officials appointed under sec. 6.32, subsec. (4), pars. (a), (b), (c) and (d) will serve at the next election providing they are present and qualify.

In the case of permanent disqualification or removal the appointment would likewise be made by the clerk and not as in the first instance, by the mayor or village president under sec. 6.32, subsec. (4), pars. (a), (b), (c), and (d), Stats., as formerly. This is true because sec. 6.32, subsec. (4), par. (f), as amended by ch. 423, Laws 1937, now provides that the appointment is to be made by the clerk "If at any time there shall be a vacancy caused by the candidacy, sickness, or from *any other cause* * * *." This being a special statute relating only to election officials, it must be considered as superseding the general statutes relating to the filling of vacancies in city and village offices. Sec. 17.23, subsec. (1), par. (d), and sec. 17.24, subsec. (2), Stats.

Our opinion is further requested as to what is to be done in the event of sudden illness or unexpected absence from the polls on the morning of election, and the city clerk finds it impossible to attend at all of the polls where vacancies have occurred, or to secure lists of nominees by party authorities in order to make the proper appointments. In this connection you inquire whether the inspectors do not have authority to fill vacancies temporarily notwithstanding the repeal and re-enactment of sec. 6.32, subsec. (4), par. (f).

This situation is governed by sec. 6.32 (4) (f), as repealed and recreated by ch. 423, Laws 1937.

The authority of the election inspectors to fill such vacancies existed under the former sec. 6.32, (4), (f). This authority was specifically repealed by ch. 423, and the responsibility and authority for filling such vacancies was thereby placed in the clerk in all cases.

It does not appear to be necessary for the clerk to actually attend all polling places where vacancies have occurred on election morning, and the party authorities could have their lists of eligible nominees filed with the clerk in advance of

election day so that vacancies could be quickly filled from such lists, and if no lists were submitted, the clerk could appoint any elector in the voting district. We see no reason why this could not be done expeditiously and with a minimum of delay and inconvenience to the voters.
WHR

Criminal Law — Search Warrants — For issuance of search warrant there must be sufficient proof before magistrate from which he can reasonably determine probable cause.

October 9, 1937.

SOLOMON LEVITAN,
State Treasurer.

You state that on many occasions information as to the illicit sale of intoxicating liquors comes from informers who do not wish their names to be disclosed, and inquire whether it would be legal in such instances to hold a John Doe hearing before a justice of the peace, take the testimony of the informer therein and then have one of your representatives who was present at such hearing make application for a search warrant on the strength of such testimony.

In the case of *Hessian v. State,* (1928) 196 Wis. 435, 220 N. W. 232, it was held that a search warrant may not be issued on testimony based wholly on information and belief.

Any attempt by one of your representatives to testify upon the application for a search warrant as to the facts that have been produced at the John Doe hearing would obviously be the giving of hearsay testimony and any warrant issued thereon would be one that was issued on information and belief, which our court has said was invalid. Merely an affidavit by your informer or his testimony as to the facts, before the magistrate at the time of the application for a search warrant, would be sufficient.

When one tries to conceal the identity of the informer great difficulty is encountered and with the result as in the *Hessian* case.

The testimony or proof upon which the search warrant is issued must be before the magistrate in the proceedings upon the application for such search warrant. There must be sufficient competent testimony or proof before the magistrate to establish probable cause for the issuance of the search warrant.

In *Glodowski v. State,* (1928) 196 Wis. 265, 220 N. W. 227, pp. 268-269, the court said as follows:

"Before a search warrant can be issued the magistrate must perform a judicial function by determining whether probable cause has been established by oath or affirmation. * * * Like any other judicial finding, the finding of probable cause must be based upon proof of facts and circumstances.

"* * * It follows that a search warrant cannot be issued upon a statement under oath based entirely upon information and belief, unless competent evidence of the facts which are the basis of the belief are stated, and unless those facts are sufficient to support a finding of probable cause. * * *"

The proof must be before the magistrate, so that it is a part of the record in reference to the search warrant proceedings and may be transmitted to the reviewing court. In the *Glodowski* case the court, at p. 272, said:

"* * * This record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court."

It would be useless to hold a John Doe hearing except for the purpose of establishing the facts upon which to take criminal proceedings, because the proof or testimony produced at the John Doe proceeding would not be before the magistrate upon the application for the issuance of a search warrant. Clearly any magistrate other than the one who

held the John Doe proceedings could not take cognizance of the testimony taken before another magistrate. Even if the same magistrate that held the John Doe proceedings were the one asked to issue the search warrant, the two proceedings being entirely separate and distinct, such testimony would not be before him in the search warrant proceeding.

In our opinion any search warrant issued upon the procedure which you suggest would be invalid.

HHP
AGH

Banks and Banking — Insurance — Life insurance contract permitting insured to deposit money with insurance company, such money not being definitely committed to payment of premiums, so that it is possible to withdraw same with interest, constitutes banking business in violation of ch. 224, Stats.

October 9, 1937.

H. J. MORTENSEN,
Commissioner of Insurance.

You have requested a review of two opinions of this department relating to acceptance of advance deposits of insurance premiums, XXI Op. Atty. Gen. 294, and more particularly XXI Op. Atty. Gen. 999, in which it was held that money accepted on deposit as a regular business by an insurance company constituted a violation of the banking laws, but that if the money accepted constituted merely an advance payment of premiums, there was no violation of the banking laws.

It is your opinion that in case premiums are accepted in advance of their due date any unused deposit should be returned upon termination of the life insurance contract, and you request our opinion upon the following questions:

"1. May any unused balance be returned to the insured at any time upon request:

"a. Without termination of the insurance contract?
"b. Upon surrender of the policy?
"c. Upon maturity of the policy as an endowment?
"2. May any unused balance be paid in addition to the amount otherwise due under the policy in the event of the death of the insured?
"3. May a company allow interest on the amount deposited or grant any discount because of the prepayment of any premium?
"4. Would the same conditions and restrictions apply to fraternal benefit societies accepting advance deposits?"

To return any of the unused balance to the insured, or his beneficiary, would bring the transaction clearly within the prohibition of the case of *MacLaren v. State,* 141 Wis. 577, upon which our previous opinions were based.

The *MacLaren* case was followed in *First National Bank v. Hartford,* 187 Wis. 290, where the court said, p. 303:

"This statute [2024-78*m*, Stats. 1911, sec. 224.03, Stats. 1923] was construed in *MacLaren v. State,* 141 Wis. 577, 124 N. W. 667, where it was held that a person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business although but one of these functions be exercised. In that case, Gimbel Brothers, operating a large department store, created a deposit purchase department, accepted money on deposit, issued pass-books therefor, and charged the purchases of the depositors against the account, interest being paid upon the deposit, and the depositor having an option to withdraw the money on demand with interest. This was held to be in violation of the statute.

"That the law has been strictly enforced is indicated by reference to the annual report of the commissioner of banking for the year 1918, at page 409, where it is shown that industries attempted to organize a department for the encouragement of thrift and accepted deposits from their employees. This was held to be within the prohibition of the banking act. State banking institutions were organized and the controversy never reached this court. In the state of Wisconsin there is no person, firm, or corporation receiving deposits, issuing bills or with power to issue bills, or engaged in the business of discount as carried on by banks, except those organized under the banking law of the state *or of the United States.*"

This view of the situation is equally applicable to unused balances on deposit with insurance companies, whether the policy has been terminated, surrendered or matured, and thus disposes of your first two questions, assuming, of course, that the contract provides for the withdrawal by the insured of such balances with interest at any time.

We do not mean to intimate that the insured or the beneficiary could not recover the unused balance of the deposit from the insurance company and that the insurance company under its contract would be entitled to retain the money. It might well be that the insurance company would subject itself to liability for failure to return the unused balance, and, at the same time, would be guilty of a violation of ch. 224, Stats., relating to banking. The return of the money in and of itself does not constitute the offense. It is rather the entire contract or transaction pursuant to which the money is paid in and whereby such money may be devoted to other than premium payment purposes. The vice of the situation, as far as the banking laws are concerned, rests in the fact that money is in effect accepted for general deposit and is subject to withdrawal instead of having been deposited only for the special purpose of buying insurance. Thus the door would be left wide open for insurance companies to engage in banking business under the guise or subterfuge of accepting advance deposits on premiums, but which deposits might or might not be devoted to that purpose.

As to your third question, we see no objection to allowing interest on the amount deposited or to granting a discount because of prepayment of any premium, since the money is actually being used for premium purposes, thus bringing the transaction within the exception mentioned in the *MacLaren* case at p. 584, as follows:

"* * * However, we do not wish to be understood as holding that Gimbel Brothers might not receive money on deposit from its patrons, where such money is deposited for the purpose of enabling the depositor to purchase goods from its store and where the money is used for that purpose."

The practice of allowing interest or discounting because of prepayment of premiums is thoroughly established in the

life insurance business, and so far as we know, has never been questioned in this state. For instance, where the insured pays his entire annual premium in advance, he is given a slightly better rate than where he pays this premium semiannually or quarterly. A less common illustration is that of the single premium life insurance policy, where the whole premium for the life of the insured is paid in advance in one lump sum payment. A considerable discount is obtained in this way over what would be paid out over twenty years in a twenty-payment life policy, if that type of policy be selected for purposes of comparison. The company, of course, has the benefit of the use of the money which justifies the difference in premiums. Furthermore, where the entire premium for the life of the insured is prepaid the company sustains considerably less loss upon the early death of the insured than would be the case if he had only paid in one or two annual premiums or possibly even but one quarterly premium. Doubtless this element is also properly reflected in the discount allowed prepayment of premiums.

As to your fourth question, the same principles apply to fraternal benefit societies accepting advance deposits as applies to the regular insurance companies. In other words, such organizations are granted no exemptions from the statutory provisions relating to banking, and hence are governed by the decision in the *MacLaren* case.

We take this opportunity of specifically reaffirming the holding in XXI Op. Atty. Gen. 999, this opinion being substantially the same as that in XXI Op. Atty. Gen. 294 with respect to the general proposition that insurance companies may not accept deposits and pay interest thereon without violating the banking laws. Both opinions were based to a large extent upon the *MacLaren* case, the only substantial difference being that the opinion on page 999 applied the exception in the *MacLaren* case to the insurance business, which exception was not discussed in the earlier opinion.

It has been held that repeated construction of a statute by the attorney general without change of the law by subsequent legislature is significant, though not controlling in determining the construction thereof. *Union Free High School Dist. v. Union Free High School Dist.*, 216 Wis. 102, 106.

Three regular sessions of the legislature have come and gone since the rendering of the above opinions without amending the law in any respect material to the present discussion. As the court in the *Union Free High School District* case said:

"* * * this they would in all probability have done if they had deemed the opinion of the attorney general unsound."

It is true that the 1931 special session of the legislature by sec. 13 of ch. 10, amended sec. 224.02, which defines banking. The effect of such amendment, however, is to narrow and restrict the exception to the general definition. The exception relates solely to money left with an agent pending investment in real estate and securities and has no application here. If any inference is to be drawn from the amendment it is that the legislature intended to broaden the scope and application of the definition of banking by further restricting the only exception to the definition. The failure of the legislature to act upon the acceptance of money on deposit by insurance companies when it had an opportunity to do so in amending sec. 224.02, indicates that it had no intention to change the effect of our previous ruling on the subject.

WHR

Bridges and Highways — Railroads — Under facts stated abutting land owner does not have cause of action against county for change in grade of highway caused by making separation of railroad grade crossing.

October 11, 1937.

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

You request an opinion concerning the following situation:

A, residing in a township, owns land abutting on a county trunk highway. Widening of the highway is ordered by competent authority. Twenty feet of A's frontage is acquired by deed for an agreed consideration, the deed including a release by A of all damages arising out of the widening of the highway. Two hundred feet east of A's land an interurban electric railroad crosses the highway at grade. At the time A's land was acquired for widening the highway a railroad grade separation was not considered. Three years later a railroad grade separation was effected, whereby the highway passed under the railroad. This resulted in an eight-foot cut in the grade of the highway along A's frontage. This cut was properly sloped and the top of the cut was in the highway. A has a house on his lot and a driveway. In making the change of grade the highway contractor was requested to bring A's driveway down to the new grade. This resulted in a very steep grade on the highway. Construction of concrete steps to service A's house walk was made necessary.

It is our understanding that it was unnecessary to take any of the land belonging to A in order to construct the railroad grade separation; that it was merely a changing in the grade of the road abutting the land owned by A, without the taking of any part of A's land. The question resolves itself therefore as to whether or not there is any liability on the part of the municipality or the county for damages resulting from the change of the grade where no land was actually taken in order to effectuate the change in the grade.

It is the well settled law of this state that a municipality or governmental unit, in caring for its roads, is not liable to an abutting owner for any injury resulting from the change in grade provided there was no active negligence in changing the grade. *Wallich v. City of Manitowoc,* 57 Wis. 9; *Colclough v. City of Milwaukee,* 92 Wis. 182; *McCullough v. Campbellsport,* 123 Wis. 334.

In the *McCullough* case the court stated the rule as follows, pp. 337-338:

"* * * It has been repeatedly asserted in the decisions of this court that, in the absence of any law giving the owners of real estate adjoining a public street or highway a right to recover damages from the municipality on account

of the change of grade, no damages can be recovered on account of such change of grade unless the premises of the adjoining or abutting owner have been injured through the negligence of the municipality or its agents in making such a change, and that such a change of grade is not the taking of private property for public use. * * * If, however, the municipality or its agents, in making such improvements, are guilty of an actual physical invasion of the adjoining premises, either by occupying a part of them in making an embankment to raise the street, or by taking a part in grading, or by causing it to subside and fall by excavations, then they are not within the protection of the principle of the foregoing cases, * * *."

Under the rule laid down in this case it is clear that liability for damages attaches only when part of the property is taken by the municipality or governmental unit in changing the grade. On the other hand, if any part is so taken, then there may be liability for such damages as may be sustained by reason of the change in the grade.

You call our attention to sec. 195.29, subsec. (2), Stats., which provides as follows:

"The commission shall fix the proportion of the cost and expense of alterations, removals and new crossings, or any other work ordered, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public street or highway shall sustain by reason of a change in the grade of such street or highway * * * to be paid or borne by the railroad companies and the municipalities in interest. In fixing such proportion, the commission may order such cost and expense so apportioned to be paid by the parties against which the apportionment shall be made."

This statute simply provides the method of apportioning the costs of separation. Part of the costs referred to would be the damages sustained by the owner of adjoining property. These damages, however, can be recovered only if part of the property of the adjoining owner is actually taken within the rule laid down in the case heretofore referred to. In the present situation, inasmuch as there is no actual taking of any part of the adjoining property and consequently no liability for damages by reason thereof, it is

unnecessary to use the procedure outlined in sec. 195.29, subsec. (2), Stats. for apportioning of damages.
LEV

Courts — Evidence — Public Officers — Register of Deeds — Order under sec. 327.28, Stats., determining age of resident of county, should be recorded in volumes designated "miscellaneous" and then returned to party recording it.

October 11, 1937.

J. C. RAINERI, JR.,
District Attorney,
Hurley, Wisconsin.

Under the provisions of ch. 420, Laws 1937, creating sec. 327.28, Stats., it was provided that the county court upon application and satisfactory proof may make an order determining the age of any resident of the county, and that such order or a certified copy thereof, when recorded in the office of the register of deeds, shall be prima facie evidence of the facts therein stated.

You inquire whether the copy of the order should be recorded in the regular volume designated as "miscellaneous" in the office of the register of deeds, or whether it should be recorded in a special volume designed to contain such orders only.

There is nothing in this statute which gives any direction as to just where in the office of the register of deeds these orders are to be recorded. Specific provision is made by sec. 69.56, Stats., for the recording of birth, death and marriage certificates and the binding of them in book form. Likewise sec. 59.51, subsec. (10), Stats., specifies that a separate book shall be kept in which shall be recorded all corporate articles of incorporation and amendments. Certified copies of judgments from county courts, as well as circuit courts,

which are similar to the order determining age referred to by you, for many years have been recorded in volumes designated as "miscellaneous."

In view of the fact that there is no specific direction in the statutes and this order is similar to those which are now being recorded in the volume described as "miscellaneous," it is our opinion that the register of deeds may record this instrument in the volume designated as "miscellaneous." On the other hand, should the register of deeds, in his judgment, feel that it would be more convenient, he may provide a special book for the recording of such orders.

You also inquire whether the order should be returned to the person who presented it for recording.

When a document is filed in a particular office, it is not copied into the record, but the original filed is retained as the record. However, when there is a recording, then a copy is made which constitutes the record and the original is returned, unless there is special provision to the contrary.

Sec. 59.51, Stats., provides:

"The register of deeds shall:
"* * *
"(6) Safely keep and return to the party entitled thereto, on demand within a reasonable time, every instrument left with him for record not required by law to be kept in his office."

Ch. 420, Laws 1937, does not require that the original document be retained in the office of the register of deeds, but merely that it be recorded in said office. There is no provision relating to the disposition of this specific order after the same has been recorded. The foregoing therefore applies, and clearly such order, when recorded, should upon demand be returned to the party presenting it for recording.
HHP

Minors — Child Protection — Mothers' Pensions — Social Security Law — Mere fact that children receive aid under sec. 48.33, Stats., does not prevent father from gaining legal settlement in another municipality.

October 14, 1937.

PENSION DEPARTMENT.

You advise that aid has heretofore been granted by X county to Mrs. A under subsec. (6), sec. 48.33, Stats. The eligibility for such aid arose by reason of the physical incapacitation of the husband. The incapacitated father had no source of income to provide for his support and you assume that the family in some way managed to support him from the aid granted for the dependent children. After aid had been granted to Mrs. A for the children, the family moved from X county to Y county, where they resided for more than a year. During that time the family received no other form of public assistance.

You inquire whether, under such circumstances, a legal settlement has been acquired in Y county.

The aid granted in this case was given for the support of the children and not for the support of the incapacitated father. The amount of aid granted was deemed a sum sufficient to properly support a budget which included the children and the mother. This budget did not include any support for the incapacitated father.

Sec. 49.02, subsec. (4), Stats., provides 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. * * *."

This statute very clearly provides that a person may gain a legal settlement by residence in a town, village or city for a period of one year, providing, of course, he is not supported as a pauper during that time or employed on a fed-

eral works progress administration project. The father in this case made no application for and was granted no aid. The only aid granted to the family was intended for the dependent children and not for him. The mere fact that his children received aid under sec. 48.33, subsec. (6), Stats., can not classify him as a pauper under sec. 49.02 (4).

He had the absolute right to acquire a new legal settlement and upon removal to Y county and a residence there for a period of one year, acquired legal settlement in such county.

OSL
LEV

Contracts — Labor — In absence of provision in contract of hire for payment in goods or services emloyee may insist upon payment in money.

No law is violated by contract of hire requiring employee to accept definite part of wages in goods or other considerations besides money.

After services have been performed wage may legally be settled by agreement between parties for payment in goods, services or some other consideration besides money.

October 14, 1937.

VOYTA WRABETZ, *Chairman,*
Industrial Commission.

You ask the following questions:

"First: In the absence of any provision in the contract of hire may the employer insist after the service is rendered that the employee accept goods, services, or other forms of payment than money and upon refusal by the employee be within the law in refusing to pay the wage in money?"

In the absence of any provision in the contract of hire as to the means of payment, there is a presumption that payment will be made in money. In *Krahn v. Goodrich,* 164 Wis. 600, 610-611, the court said:

"* * * 'Pay' is a word of quite comprehensive meaning; but we agree with counsel for appellant that, as used in the deed, it was evidently intended to have its ordinary meaning which is to discharge an indebtedness by the use of money. The thought was payment which would relieve the property from incumbrance, not a mere change in form, or of creditors, leaving the property burdened as before, or a discharge of indebtedness by using the property therefor. That the ordinary meaning of the word 'pay' is as indicated, is supported by *Becker v. Chester,* 115 Wis. 90, 122, 91 N. W. 87, 650, and cases cited to our attention. *Marinette v. Oconto Co.* 47 Wis. 216, 2 N. W. 314; *Oneida Co. v. Tibbits,* 125 Wis. 9, 15, 102 N. W. 897. That, as used in this case, it contemplated the movement of money to the creditors and actual extinguishment of indebtedness, seems very plain."

In *Angelo v. Railroad Commission,* 194 Wis. 543, 547-548, the court pointed out:

"The words used, *'compensation to be paid,'* should be given their primary and ordinary significance and as used on such occasions. The word 'compensation' often occurs in our constitution and has been held to be synonymous with 'salary' (*Milwaukee County v. Halsey,* 149 Wis. 82, 86, 87, 136 N. W. 139); and this would certainly mean money; and when in sec. 13, art. I, Const., it is required that 'just compensation' shall be given for private property taken for public use, it means, of course, money. The word 'pay' primarily and ordinarily means the use of money (*Krahn v. Goodrich,* 164 Wis. 600, 610, 160 N. W. 1072), and especially so when used in connection with an obligation owing to the government, as is pointed out in *Oneida County v. Tibbits,* 125 Wis. 9, 12, 102 N. W. 897, 899. Clearly, therefore, this above quoted phrase connotes the idea of the use of money."

Under the foregoing case, where a contract of hire contains a provision for the payment of a certain sum for the performance of services, the payment must be made in money. Thus the employee would be justified in refusing to accept payment in goods, services or other form of payment and insisting upon payment in money. The absence of any provision for the payment in goods, services or other form of payment would not therefore justify the employer in insisting upon payment in any other form than money.

"Second: "Would there be a violation if as a part of the contract of hire the employer requires by such contract that the employee accept at least a definite part of his wage in goods or other consideration than money?"

There is no statutory prohibition against the making of a contract in which the emloyee receives a definite part of his wage in goods or consideration other than money. Indeed, sec. 108.02, subsec. (6) (as amended by ch. 343, Laws 1937), defining "wages" under the unemployment compensation law, expressly includes within the definition of that term "the reasonable (actual or estimated average) value of board, rent, housing, lodging, payments in kind," etc.

Payment in goods, services or other forms has at times been in quite common usage. In fact, in times of depression payment in such forms has been quite necessary. As it is a part of our mode of doing business, and in fact is recognized in sec. 108.02, subsec. (6), a contract containing a provision for payment in some consideration other than money would not be in violation of any statute of this state.

"Third: Would there be any violation of law if after the service is performed the wage is settled by agreement between the parties in goods, services or some consideration other than money?"

Since there is no law requiring that services be paid for in money, obviously there would be no violation of any law if, after the services have been performed, the wage is settled by agreement between the parties in goods, services or some other consideration besides money.

OSL
ML

Unemployment Compensation — Firms engaged in construction of dams, locks, etc., in Mississippi valley within state under contract with federal government in pursuance of flood control are subject to ch. 108, Stats.

October 15, 1937.

INDUSTRIAL COMMISSION,
Unemployment Compensation Department.

You state that there are certain firms engaged in the construction of dams, locks, breakwater, etc. in the Mississippi Valley and within the boundaries of Wisconsin, such construction being under contract with the federal government and carried out as a flood control and unemployment relief project. All of this construction is being done on land which has been purchased by the federal government. The contract between the firms and the federal government necessitates that employees be selected from relief rolls, although the contractor is not required to retain in his employment one whose work is unsatisfactory.

In determining whether such firms are subject to the provisions of the Wisconsin unemployment compensation act, ch. 108, Wis. Stats. you have raised several questions, which will be separately stated and considered.

1. Are such firms exempt from the operation of the act as being instrumentalities of the federal government?

It is quite clear that firms such as these are not exempt from state regulation or taxation on the ground that their contractual relations with the federal government render them exempt from such regulation or taxation within the rule of *M'Culloch v. Maryland,* 17 U. S. (4 Wheat.) 316.

See also: *Gromer v. Standard Dredging Co.,* (1911) 224 U. S. 362, 56 L. ed. 801, 32 S. Ct. 499; *Fidelity & Deposit Co. v. Pennsylvania,* (1915) 240 U. S. 319, 60 L. ed. 664, 36 S. Ct. 298; *Metcalf & Eddy v. Mitchell,* (1925) 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; *Trinityfarm Co. v. Grosjean,* (1933) 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469.

In *Trinityfarm Co. v. Grosjean,* (1933) 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469, the appellant had contracts with the

United States for the construction of certain levees in Louisiana to control the waters of the Mississippi. In the course of construction a considerable amount of gasoline was necessarily consumed and appellant brought suit to enjoin the collection of an excise tax imposed by the state of Louisiana on the consumption of gasoline, claiming that it was exempt from such a tax as being an instrumentality of the federal government. The court held that the contractor was not an instrumentality of the government and said, p. 472:

"* * * If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. * * *"

In *Metcalf & Eddy v. Mitchell,* (1925) 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172, the court, in upholding the imposition of a federal tax on the income of one who was a professional consulting engineer and who was employed to advise states and their subdivisions, said, pp. 524-525:

"* * * But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. * * * In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and that the tax itself cannot be deemed to be an interference with the government, for an impairment of the efficiency of its agencies in any substantial way. * * *

It is our opinion, therefore, that such firms are not instrumentalities of the federal government and are not exempt from the operation of ch. 108, Stats., on the ground that the state is taxing an instrumentality of the federal government. This makes it unnecessary for us to consider whether ch. 108, Stats., in reality levies a tax from which federal instrumentalities would be exempt under the constitution of the United States.

2. Since this work is being carried out on property acquired by the United States government by means of purchase or condemnation proceedings, does the jurisdiction of the state of Wisconsin extend to such property?

Art. I, sec. 8, clause 17 of the United States constitution provides as follows:

"The Congress shall have power
"* * *
"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority 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, dock-yards, and other needful buildings; * * *"

Where the government of the United States has acquired property under this clause of the constitution and there was cession by the state government without any reservation of jurisdiction, then the jurisdiction of the state ceases and the federal jurisdiction becomes exclusive. *Arlington Hotel Co. v. Fant,* (1929) 278 U. S. 439, 73 L. ed. 447, 49 S. Ct. 227; *United States v. Unzeuta,* (1930) 281 U. S. 138, 74 L. ed. 761, 50 S. Ct. 284; *Standard Oil Co. of Cal. v. California,* (1934) 291 U. S. 242, 78 L. ed. 775, 54 S. Ct. 381.

Where, however, the property is acquired without the cession of the particular state in which such property is situated, the rule is different. In the leading case of *Fort Leavenworth R. R. Co. v. Lowe,* (1885) 114 U. S. 525, 539, 29 L. ed. 264, 55 S. Ct. 995, the court set forth the rule in the following language:

"Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. * * *"

The inference of the language cited above to the effect that where the lands were acquired without the consent of the state the state could exercise its jurisdiction if it did not impair the effective use of the property for the purposes designated, was elaborated upon in *Surplus Trading Co. v. Cook,* (1930) 281 U. S. 647, 650-651, 74 L. ed. 1091, 50 S. Ct. 455, where the court stated as follows:

"It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the land or interfere with its right of disposal.

"* * * Another illustration is found in two classes of military reservations within a State—one where the reservation, although established before the state is admitted into the Union, is not excepted from her jurisdiction at the time of her admission; and the other where the reservation, although established after the admission of the State, is established either upon lands set apart by the United States from its public domain *or upon lands purchased by it for the purpose without the consent of the legislature of the State. In either case, unless there be a later and affirmative cession of jurisdiction by the State, the reservation is part of her territory and within the field of operation of her laws, save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained* * * *" (Italics ours.)

Therefore, in our opinion, if the property in question was acquired by purchase or condemnation by the United States with the consent of the legislature of the state of Wisconsin and there was no reservation of jurisdiction, then the United States would have exclusive jurisdiction over this property and employers within such territory would not be subject to the provisions of ch. 108, Stats. If, however, the property was acquired without the consent of the legislature, then it is our opinion that the provisions of the act would apply to such employers, as it cannot be considered that the operation of the act would tend to unduly interfere with the purposes for which the property was acquired by the United States.

3. Are such firms engaged in interstate commerce so as to not be subject to the act?

The type of construction work which these firms are engaged in is such, that, in our opinion, it is quite clear they are not engaged in interstate commerce as that term is defined by the United States supreme court. *Raymond v. Chi. Mil. & St. P. Ry. Co.,* (1917) 243 U. S. 43, 61 L. ed. 583, 37 S. Ct. 268; *New York Central R. R. v. White,* (1917) 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247.

4. Does section 108.02 subsec. (e) par. 3, Stats. 1935 (renumbered to be 108.02 (5) (f) 3, Stats. 1937), specifically exempt such employers?

Sec. 108.02 (5) (f) 3, Stats., provides as follows:

"The term 'employment,' as applied to work for a governmental unit, shall not include:—

"* * *

"3. Employment by a governmental unit on an unemployment work relief project, recognized as such by the commission."

From your statement it would seem quite clear that, although the people who are employed are taken from the relief rolls, such people are employed by the contractor and not by a governmental unit. They are paid by him; he need not retain them if their work is not satisfactory; and he is making a private profit out of the work which is accomplished with their labor. Moreover it appears that the commission does not recognize this as a government work relief project. It would seem quite clear that the legislature intended to remove from the operations of the chapter employment directly by the government for the purposes of relief, but that it did not intend to exempt employment by a private person or corporation even though such employment might be in the nature of work relief. It is our opinion that the contractors, and not the government of the United States, are the employers and that the above quoted section, 108.02 (5) (f) 3 does not exempt these contractors as employers within the meaning of the act.

HHP.

Banks and Banking — Corporations — Investments — State banks, savings banks and trust company banks may invest in FHA insured real estate mortgage loans on property no matter where located.

October 18, 1937.

BANKING COMMISSION.

You inquire whether state banks, savings banks and trust company banks in Wisconsin may invest funds in a federal housing administration insured real estate mortgage on property that is located in Pennsylvania in view of the provisions of sec. 221.32, Stats.

Sec. 221.32, Stats., which was created in substantially its present form by ch. 234, Laws 1903, provides as follows:

"No bank shall lend any part of its capital, surplus or deposits upon real estate mortgages or on any other form of real estate security, directly or as collateral, except in this and adjoining states; * * *."

Sec. 219.01, Stats., created by ch. 45, Laws 1935, and as amended by ch. 151, Laws 1937, provides as follows:

"Credit unions, building and loan associations, investment associations, state banks, savings banks, trust company banks, land mortgage associations, insurance corporations, including life companies, and fraternal benefit societies, executors, guardians, trustees, administrators, and other fiduciaries, except where it is contrary to the will or other instrument of trust, the state of Wisconsin and its agencies and its municipalities, districts, and other subdivisions, and all institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, are authorized:

"(1) To make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are insured by the federal housing administration, and to obtain such insurance.

"(2) To make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes a commitment to insure and to obtain such insurance.

"(3) To invest their funds, and money in their custody or possession (which are eligible for investment and which

they are by law permitted or required to invest), in notes or bonds secured by mortgage or trust deed insured by the federal housing administrator, and in debentures issued by the federal housing administrator, and in securities issued by national mortgage associations."

In so far as sec. 219.01, Stats., permits such institutions to invest their funds in any notes or bonds secured by mortgages or trust deeds insured by the federal housing administrator, and sec. 221.32, Stats., forbids the investment of money where the collateral consists of real estate mortgages except when such real estate is located in this or adjoining states, the two sections are in conflict.

It is a well settled rule of statutory construction that, when such a conflict exists, the terms of a specific statute will govern over the terms of a general statute; *State ex rel. Donnelly v. Hobe,* (1900) 106 Wis. 411, 82 N. W. 336; *Hite v. Keene,* (1909) 137 Wis. 625, 119 N. W. 303.

It is also a rule of construction that a later statute will prevail over an earlier one. *State ex rel. Boddenhagen v. C. M. St. P. R. Co.,* (1916) 164 Wis. 304, 159 N. W. 919; *Jones v. Broadway Roller Rink Co.,* (1908) 136 Wis. 595, 118 N. W. 170; *State ex rel. M. A. Hanna Dock Co. v. Willcuts,* (1910) 143 Wis. 449, 128 N. W. 97.

Sec. 219.03, Stats., provides as follows:

"*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.*"

The language of sec. 219.03 thus specifically authorizes such firms to invest in obligations secured by mortgages insured by the federal housing administrator, even though other sections of the statutes may provide to the contrary.

In view of the above rules of construction and the provisions of sec. 219.03 it is our opinion that such institutions

may invest in FHA insured real estate mortgages no matter where the property may be located and that any restriction on the making of investments found in ch. 221, Stats., is not to be deemed to apply to investments made under ch. 219, Stats.
HHP

Indigent, Insane, etc. — Poor Relief — Where person has been committed to and is inmate of county home contract by county providing for support and maintenance of such person in private institution in another county is void under sec. 49.14, subsec. (4), Stats.

October 18, 1937.

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

You state that a married couple in destitute circumstances and who are over seventy years of age are residents of Rock county and are being supported at the county poor farm at an estimated cost of eighteen dollars per month each. A private home for the aged in an adjoining county has offered to take the couple at the rate of nine dollars a month each. As the arrangements at the county farm are such as to make it impossible for the old couple to live together, they are very anxious to move to the private home, and you inquire as to the authority of the county to pay for their keep at this private institution in another county when Rock county has a public institution of its own for the poor.

Commitments to the county home are covered by sec. 49.07, subsec. (1), Stats., and this section contains no language authorizing commitment to a private home in another county. The county home exists solely by virtue of legislative authority. XXV Op. Atty. Gen. 433-434. Hence the powers of the county with respect thereto must be found in

the statutes or not at all. It has been held that counties have only such powers as are expressly given by statute, and such additional powers as are necessarily implied from the powers expressly given. *Spaulding v. Wood County,* 218 Wis. 224; see also XXV Op. Atty. Gen. 379 and 532 for additional citations of authority on this point.

Not only is there an absence of express or implied authority for such procedure, but other statutory provisions negative such power. Sec. 49.14, subsec. (4), Stats., provides:

"Each municipality in which a county home is established shall not contract with any person to conduct the same or to support and maintain the inmates thereof; and all agreements in violation of this subsection are void."

A contract of the sort proposed here would be for the support and maintenance of persons who have been committed to and who are inmates of the county home, and hence such contract would be void under the above quoted statute.

You state that these people are not citizens of the United States. Consequently they are precluded from receiving old-age assistance by virtue of sec. 49.22, subsec. (2), Stats. Were it not for this fact we would suggest that old-age assistance might be extended to this couple in the private institution, provided that the requirements of sec. 49.23, subsec. (1), respecting admission charges as life tenants, were met.

WHR

Bridges and Highways — Aid available for construction of bridges under provisions of sec. 87.01, Stats., is available only to towns and not to cities and villages.

Under sec. 87.01, subsec. (6), Stats., members of county board representing cities and villages have no vote upon question of whether county shall grant aid in construction and repair of town bridges.

Cities and villages are exempt from tax levied for county aid under sec. 87.01, Stats., unless they have participated in aid afforded by sec. 87.02 and sec. 87.03, Stats.

October 19, 1937.

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

You state that the city of Hayward in Sawyer county is organized under the general charter law. Three supervisors represent the city on the county board. In relation to aid provided by counties for the construction and maintenance of bridges under sec. 87.01, Stats., you have asked several questions which we will state and consider separately.

Question 1. Is the city of Hayward entitled to aid for the repair and construction of a bridge within the city in the same manner as one of the towns in the county?

The provisions of sec. 87.01, Stats., relate only to county aid for the construction and repair of town bridges. The section does not authorize the granting of such county aid to cities and villages. However, the taxes levied for this purpose are not to be levied on the property of any city or village which is required to maintain its own bridges. See subsec. (6), sec. 87.01, Stats.

The validity of this section was upheld in *State ex rel. Town of Baraboo v. The Board of Sup'rs of Sauk County,* 70 Wis. 485, where it was held that the provision exempting from taxation the property of cities or villages which are required to maintain their own bridges did not violate the constitutional provision for uniformity in taxation. The court said at pages 488-489:

"* * * Our experience tells us that towns having a sparse population, whose territory is traversed by a large river or stream, cannot well erect and keep in repair at their own expense such bridges as are necessary for the public convenience. The law in question was intended to meet such cases and equalize, to some extent, the public burden. The county, therefore, is required to aid towns in the erection and repair of bridges when the expense exceeds a certain limit. Incorporated cities and villages which ordinarily have to maintain a greater number and more expensive bridges than towns, are exempted from contributing to this county aid, doubtless in consideration of the fact that they maintain their own bridges; and it strikes one that it would be manifestly unjust and unequal to impose upon these municipalities the entire expense of erecting and maintaining their own bridges, and then require them to aid in erecting those outside their limits. * * *."

In *Battles v. Doll*, 113 Wis. 357, it was held that it is the duty of villages organized under the general charter law to build and repair bridges, and that the exemption from taxation in affording county aid to towns for the erection and repair of bridges applies to villages whether or not there are actually any bridges within its boundaries.

In IX Op. Atty. Gen. 6 it was held that the above ruling in the *Doll* case applied to cities as well as villages and, accordingly, that all cities and villages organized under the general charter are required to construct and maintain their own bridges. Further, in IX Op. Atty. Gen. 187 this office said, p. 189:

"* * * but this bridge cannot be built under that section [sec. 87.01, Stats.], for the very plain reason that said section is available only to towns. Cities and villages may not avail themselves of its provisions."

Therefore, it is our opinion that the aid available under sec. 87.01 is not available to cities and villages and that they are required to build and maintain their own bridges. It should be noted, however, that this does not apply to all bridges, as under sec. 87.02 certain bridges described in pars. (a) and (b) of subsec. (1), 87.02, may have their costs apportioned between the state and county and the town, village or city in which the bridge is located, and in this con-

nection your attention is called to ch. 55, Laws 1937, which effects extensive revision of sec. 87.02 and other sections referred to in this opinion.

Question 2. Are the three members of the county board representing the city of Hayward entitled to vote on the question of giving aid to towns for building and repair of bridges, under sec. 87.01, Stats.?

Subsec. (6), sec. 87.01 provides as follows:

"Nothing herein contained shall authorize the levy of a tax upon the property in any city or village which is required to maintain its own bridges, and the supervisors from such cities and villages shall have no vote upon any matter arising under this section."

This section quite clearly answers your question in the negative. Since you do not state any facts to the contrary, we assume that the city of Hayward has not availed itself of the aid afforded by secs. 87.02 or 87.03, Stats., for under such a situation a different problem would arise under sec. 87.06 (3), which provides as follows:

"Whenever any municipality shall have participated in the cost of the construction, reconstruction, or purchase of a bridge under the provisions of sections 87.02 and 87.03, the property in such municipality shall thereafter be subject to taxation by the county for the construction and repair of bridges within such county under section 87.01."

Question 3. Are villages in the county entitled to aid the same as a town under sec. 87.01?

Question 4. Are the representatives on the county board from such incorporated villages entitled to vote on such questions?

Our answers to questions 1 and 2 apply to villages as well as to cities, and we therefore deem it unnecessary to further answer questions 3 and 4.

Question 5. Is the city of Hayward chargeable with its proportional share of tax for county aid under sec. 87.01?

As we have already indicated, unless the city of Hayward has participated in the aid afforded by sec. 87.02 and 87.03, Stats., then subsec. (6), sec. 87.01 specifically exempts the property therein from the tax imposed by virtue of that section.

Question 6. If question 5 be answered in the negative, is the city of Hayward entitled to recover from the county the tax which the city has paid for aid to towns under sec. 87.01?

Sec. 74.73, Stats., controls recovery of illegal taxes. You do not state facts sufficient for us to determine whether the limitation provided for therein has expired. Therefore it is impossible for us to answer this question.

WHR
AGH

Taxation — Tax Collection. — Sec. 74.455, Stats., relating to correction of tax certificates, applies where erroneous description of real estate appears in tax certificate only and does not extend to certificates containing erroneous descriptions where such errors prevail throughout entire tax assessment and collection proceedings.

October 19, 1937.

GEORGE J. LARKIN,
District Attorney,
Dodgeville, Wisconsin.

You state that Iowa county is the holder of a number of tax certificates in which there are erroneous real estate descriptions. Such misdescriptions are not confined to the tax certificates but extend throughout the entire tax assessment and collection proceedings.

You ask whether these tax certificates may be corrected pursuant to the provisions of sec. 74.455, Stats., which 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."

Sec. 74.455 appears to contemplate reformation of tax certificates where clerical errors and misdescriptions are confined to the tax certificates themselves. There is no language in this section which either expressly or impliedly authorizes correction of the tax roll. Provisions for correcting the tax roll are contained in sec. 70.52 and 70.73 of the statutes, and such provisions are to be regarded as exclusive, since a particular specification of jurisdiction conferred in certain cases by statute excludes the idea that the legislature intended to confer jurisdiction in other instances. *State ex rel. Owen v. Reisen,* 164 Wis. 123.

This department has held on numerous occasions that county owned tax certificates containing incorrect or indefinite descriptions may be canceled and the tax reassessed as provided in secs. 75.22 to 75.25, Stats. XVI Op. Atty. Gen. 33; XX 993; XXIII 362; XXV 57.

We therefore conclude that the tax certificates should be canceled and the taxes should be reassessed as above suggested, since sec. 74.455, Stats., does not apply where the error in description prevails throughout the entire tax proceedings, and serious fundamental errors have existed for years in the tax rolls. However, as intimated in XXVI Op. Atty. Gen. 149, the statute might apply in the case of a single error of a simple and purely clerical sort in the tax roll for a certain year, resulting in an incorrect tax certificate. At least the former owner would probably be barred from successfully raising any objection thereto after having been made a party defendant in an action resulting in a judgment under sec. 74.455.

WHR

Abandonment — Mothers' Pensions — To legally charge abandonment so as to entitle wife to aid under sec. 48.33, subsec. (5), par. (b), Stats., warrant should be issued for arrest of husband in accordance with sec. 361.02, Stats.

October 19, 1937.

PENSION DEPARTMENT.

You call our attention to sec. 48.33, subsec. (5) (d), Stats., which provides that aid may be granted to the mother or stepmother of a dependent child if she is "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 * * *."

We are informed that many district attorneys are reluctant to issue abandonment warrants and put the county to unnecessary expense if the whereabouts of the husband is unknown, or he is without the state, or where it is quite clear that he will be unable to support his wife and children.

You inquire whether it is sufficient if complaint has been made to the district attorney or whether it is necessary that a warrant actually be issued in order to constitute being "legally charged with abandonment."

Obviously the complaint of any individual to the district attorney or other officer does not in and of itself result in the husband being "legally charged with abandonment." Not every complaint would justify the issuance of a warrant for abandonment, and in such instances the district attorney or magistrate, in his discretion, would doubtless refuse to issue a warrant.

Sec. 361.02, Stats., provides:

"Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate, or before some other mag-

istrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."

At common law the warrant could be issued on mere suspicion, and the above statute was enacted in 1839, while Wisconsin was a still a territory, for the purpose of protecting citizens against such danger as attended the common law practice. *State ex rel. Long v. Keyes,* 75 Wis. 288.

Apparently the issuing of a warrant is mandatory if it shall appear on the examination of the complainant that the offense has been committed. In the absence of the issuance of a warrant the record would indicate that the magistrate or district attorney must have concluded that no such offense had been committed.

It has been held that the words "charged with crime" means charged in the regular course of judicial proceedings by an authority having a right to try. *Ex parte Morgan,* 20 Fed. 298, 308; *Ex parte Cheatham,* 95 S. W. 1077, 1081, 50 Tex. Cr. R. 51. In the case of *State v. Ju Nun,* 98 Pac. 513, 514, 53 Ore. 1, it was said that the word "charged" as applied to criminal proceedings may have different meanings according to the text; that it may mean the accusation which precedes the formal trial, or it may mean the responsibility for the crime itself, and that in common parlance it signifies the formal commencement of a criminal proceeding by the filing or returning of the accusatory paper.

In *People v. Ross,* 209 N. W. 663, 666, 235 Mich. 433, it was held that a "charge" is the first step in prosecution of a crime, being accusation in legal form, for apprehension of an offender and his trial before a court of competent jurisdiction, and it may mean a formal complaint, information, or indictment, according to the holding of the case of *People v. Lepori,* 169 Pac. 692, 694, 35 Cal. App. 60.

In view of the foregoing it would seem that one could not be considered as being "legally charged with abandonment" upon a complaint so groundless as to induce the magistrate or district attorney not to issue a warrant under sec. 361.02, Stats.

We therefore advise that no aid be extended in such cases unless a warrant is issued. Any other construction would

be contrary to public policy and also inconsistent with the apparent legislative intent of sec. 48.33 (5) (b), Stats., which is to provide aid in bona fide abandonment cases, and if aid were to be extended on complaints insufficient to justify the issuance of a warrant, the door would be opened for extending aid improperly.
WHR

Public Health — Cemeteries — Cemetery Memorial Dealers — Under sec. 157.15, subsec. (2), par. (a), Stats., license may be granted to cemetery memorial dealer even though he may not have been in business in this state for one year prior to granting of such license.

October 20, 1937.

THEODORE DAMMANN,
Secretary of State.

You have called our attention to sec. 157.15, subsec. (1), par. (b), Wis. Stats., which defines a cemetery memorial dealer as follows:

"(1) As used in this section:
"* * *
"(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.*"

In this connection you ask the following two questions:

"1. Granting that the law requires each Wisconsin dealer in cemetery memorials to have a place of business in which memorials may be lettered and displayed, must he have had such a place of business for one full year before a license may be granted to him under section 157.15 (2)?

"(2) If a business which has been continuously operated for a year, more or less, passes by purchase or descent to a new owner, may such new owner be licensed notwithstanding he lacks a year of experience as a memorial dealer?"

Sec. 157.15 subsec, (2) par. (a), Stats., referred to in your first question, reads as follows:

"(a) No person shall engage in or follow the business or occupation of, or advertise or hold himself out as, or shall act temporarily or otherwise as a cemetery memorial dealer or salesman in this state without first procuring a license therefor from the secretary of state."

Applying secs. 157.15 (1) (b) and 157.15 (2) (a), above quoted, so as to refuse licenses to those not in business for a year would result in setting up a classification based upon existing circumstances only and so as to preclude additions to the number included within the class. This interpretation would mean that in order to qualify as a dealer so as to secure a license, one must have been in business for a year, and in order to be lawfully engaged in business for a year one must have a license. The practical effect would be that only those dealers who have been in business for one year prior to the passage of the law could be licensed and they would have a monopoly of the cemetery memorial business. So construed the law would be unconstitutional.

"* * * In the exercise of the police power of the state the legislature is limited by the constitutional provision that restraints and burdens imposed shall affect all persons equally. Sec. 1, art. I, Const. Wis.; sec. 1, Amend. XIV, Const. U. S.; * * *." *Wis. Asso. of Master Bakers v. Weigle,* 167 Wis. 569, 575.

This does not mean, however, that there may not be proper legislative classifications within certain limits, which are defined in *Maercker v. Milwaukee,* 151 Wis. 324, 329, as follows:

"The general rule governing proper classification has often been laid down by this court. The classification must be germane to the purpose of the law. It must not be based upon existing circumstances only, or so constituted as to

preclude additions to the number included within a class, and the law must apply equally to each member of the class, and all classification must be based upon substantial distinctions which make one class different from another. * * *." (Numerous citations.)

It seems clear that the foregoing rule is violated if the law be so construed as to limit licenses to dealers who have been in business for a year.

In *Williams v. McCartan, et al.,* (1914) 212 Fed. 345, it was held that a city ordinance prohibiting the granting of a license to run a stationary engine unless the applicant had been a resident of the city for three years, was unjust, discriminatory, and void under the Fourteenth Amendment to the United States constitution, it not appearing that this provision was necessary to protect the public health, safety, or welfare. Similarly, in *Frazer v. Shelton,* (1926) 320 Ill. 253, 150 N. E. 696, it was held that a statute whereby only one who had been certified as a public accountant on or before a certain date could thereafter be called "certified public accountant," was unconstitutional.

In the light of this discussion, we feel that it is incumbent to adopt a construction of the statute which will save it from the condemnation of the foregoing cases, since, if a law is open to two constructions, that construction which will save it from condemnation will be adopted in preference to one which renders it unconstitutional, even though a different construction would be more obvious or natural. *Petition of Breidenbach,* 214 Wis. 54.

You are therefore advised that a license may be granted to a cemetery memorial dealer under sec. 157.15 (2) (a), Stats., even though he may not have had an established place of business in the state of Wisconsin which has been operated continuously for at least one year.

The answer to the first question makes it unnecessary to answer your second question, which could arise only in the event we had reached a different conclusion as to the first question.

WHR

Taxation — Extension of Time for Payment of Taxes — County treasurer should credit town, city, or village treasurer with amount of taxes returned as unpaid pursuant to sec. 74.19, subsec. (1), Stats., regardless of whether or not time for payment has been extended by affidavit pursuant to ch. 10, Laws 1937.

As to taxes time for payment of which has been extended under ch. 10, Laws 1937, county treasurer must return balance to city, town or village treasurer when paid on or before July 1, 1937, after deducting county taxes and amount due for advertising at tax sale, provided amount so returned shall not exceed delinquent taxes eligible for credit in settlement of county taxes and charges.

It is not purpose of subsec. (2), sec. 74.037, created by sec. 1, ch. 10, Laws 1937, to compel municipalities to carry their own delinquent taxes.

October 20, 1937.

PAUL E. ROMAN,
District Attorney,
Manawa, Wisconsin.

You ask our opinion upon the following questions which will be stated separately with their answers:

1. Under subsec. (2) of sec. 74.037, Stats., created by section 1 of chapter 10 of the laws of 1937 what shall the county treasurer allow in the way of credits when the treasurer of the city, village or town makes his return of unpaid or delinquent taxes:

(A) Where an affidavit has been filed by the taxpayer requesting an extension to July 1, 1937?

(B) Where no affidavit has been filed for an extension?

The answer is the same to both parts of your first question.

Sec. 74.19, subsec. (1) of the statutes provides that the county treasurer shall credit the town, city or village treasurer with the amount of the taxes returned unpaid.

This includes all unpaid taxes regardless of whether or not the time for payment has been extended. The only

effect of granting an extension is to permit the payment of overdue taxes without a penalty attaching. See XX Op. Atty. Gen. 139 and 144.

The situation is in no way affected by ch. 10, Laws 1937, creating sec. 74.037 of the statutes, relating to the authority of cities, villages and towns to extend the time for payment of taxes on real estate assessed in the year 1936 to persons who are unable to pay such taxes.

2. What is the duty of the county treasurer after July 1, 1937, as to refunding to the several treasurers of municipalities of the county moneys collected by the county treasurer from delinquent taxpayers:

(A) Where the taxpayer has filed an affidavit for extension and extension was granted?

(B) Where no affidavit was filed requesting an extension?

Subsec. (2) of sec. 74.037, Stats., created by sec. 1, ch. 10, Laws 1937, has reference only to payments of delinquent taxes for which affidavits for extension of time of payment have been filed, where payments are made up to and including July 1, 1937. As to such payments, the county treasurer, after retaining the amount due the county as county taxes and the amount due for advertising at tax sale, must return the balance to the city, town or village treasurer. The amount returned, however, must not exceed the delinquent taxes in the city, town or village in excess of the amount eligible for credit in the settlement of county taxes and charges.

The phrase "in excess of the amount eligible for credit in the settlement of county taxes and charges" refers to the amount of credit the city, town or village treasurer is legally entitled to receive under sec. 74.19, subsec. (1) on account of delinquent taxes unpaid, by reason of his having, in accordance with that section, filed with the county treasurer a sworn statement setting forth the taxes unpaid. The amount eligible for credit would thus equal the amount of unpaid taxes set forth in the return of the city, town or village treasurer to the county treasurer.

This conclusion is reached after a consideration of the phrase "in the settlement of county taxes and charges,"

which would seem to have reference to the amount of credit the city, town or village treasurer is legally entitled to when he makes his delinquent tax return to the county treasurer. Normally, the delinquent tax return is made at the time of settlement with the county treasurer and it is usually at that time that the city, town or village treasurer becomes eligible for credit.

There is no provision in this special statute regarding payments of taxes made to the county treasurer after July 1, 1937, for which affidavit for extension of time of payment has been filed. As to such payments sec. 74.19, subsec. (3) of the general statutes would apply. Since, under sec. 1, ch. 10, Laws 1937, the extension can only be made up to and including July 1, 1937, if the taxes are unpaid after that date, they are no different than delinquent taxes where no affidavit was filed requesting an extension. Both of these classes of taxes are thus covered by sec. 74.19 (3).

Sec. 74.19, subsec. (3), provides that the county treasurer must turn over to the city, town or village treasurer the sum by which the amount of delinquent taxes collected by the county exclusive of the penalty provided by sec. 74.23 exceeds the sum due the county for unpaid taxes. In counties having a population in excess of five hundred thousand, there is a different provision, which is not considered here.

3. What is meant in subsec. (2), sec. 74.037, created by this chapter, by the term "eligible for credit," in other words, what is now eligible for credit by the county treasurer?

We deem this question to be sufficiently answered in our answer to your second question.

4. Is it not now the purpose and intent of subsec. (2), sec. 74.037, to compel the several municipalities of the county to carry their own delinquent taxes, except as to the amount of county taxes that may be owing the county from the particular municipality?

It does not appear to us that this is either the purpose or intent of subsec. (2) of sec. 74.037. As previously suggested, this subsection is designed to cover only those cases where affidavits of extension for time of payment have been filed.

In XXIII Op. Atty. Gen. 260 at 262, it was pointed out that once a municipality has returned the taxes to a county as delinquent, it has no control over what is done with them and no interest in the proceeds beyond the right to any excess remaining after the county's claims have been satisfied. For instance, a municipality has no voice in compromise of delinquent taxes, as was held in the above mentioned opinion. These general characteristics of delinquent taxes were in no way changed by the enactment of subsec. (2) of sec. 74.037. This subsection merely affects the settlement with respect to taxes paid to the county treasurer up to and including July 1, 1937, where affidavits for extension for the time of payment have been filed.
WHR

Bridges and Highways — Damages — County is not liable for damages resulting to lands abutting highway caused by placing of culvert which changes drainage of surface waters where county acted reasonably in so placing culvert.

October 20, 1937.

P. H. URNESS,
District Attorney,
Mondovi, Wisconsin.

You have inquired whether a county is liable for ditches washed in a property owner's field by reason of the fact that the county highway department changed the natural drainage flow from one side of the road to the other by the use of culverts and small dams so as to secure better drainage of the right-of-way.

An examination of the cases indicates that our supreme court has been most liberal in protecting persons disposing of surface waters, whether they be property owners, municipal corporations, townships or counties.

In *Hoyt v. City of Hudson,* 27 Wis. 656, it was held that there is no liability resulting from grading and raising a street surface and thus preventing water from flowing off certain property; nor does a municipal corporation have to make any provisions for carrying off surface waters flowing on a street. *Waters v. Village of Bay View,* 61 Wis. 642. There is no liability attached to diverting surface water from its usual course and causing it to flow on particular property. *Champion v. Town of Crandon,* 84 Wis. 405; *Clauson v. Chicago & Northwestern R. Co.,* 106 Wis. 308.

Municipal and county officers have been given wide discretion in this state in the placing of culverts or conduits which direct the flow of surface waters. In *Heth v. City of Fond du Lac,* 63 Wis. 228, it was held that the resident owner of a lot fronting upon a public street in a city cannot be permitted to restrain such city from constructing drains along the side or culverts across such street, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land.

In *Johnson v. Chicago, St. Paul, Minneapolis & Omaha R. Co.,* 80 Wis. 641, and in *Merkel v. Town of Germantown,* 120 Wis. 494, it was held that if drains and culverts are necessary for the purpose of protecting the reasonable use and enjoyment of a road, the court will not inflict liability for damages resulting from the diversion of surface waters. However, it was suggested in the *Champion* case, *supra,* that if the location of the drain results in no fair or reasonable advantage to the public and a definite and serious injury to a property owner, the court might be prone to find liability.

In view of the foregoing authorities, we conclude that there is no liability on the part of the county on the facts stated, and in this connection we also wish to call your attention to an opinion in XXIII Op. Atty. Gen. 325, ruling that the state is not liable for alteration in surface water drainage. The authorities therein cited may be helpful to you.

OSL
WHR

Appropriations and Expenditures — Civil Service — Constitutional Law — Public Officers — State Employees — University — Salary Waivers — Sec. 10a, ch. 6, Laws 1937, is valid act.

October 21, 1937.

THEODORE DAMMANN,
Secretary of State.

You have requested an opinion as to the validity of sec. 10a of ch. 6, Laws 1937, which provides as follows:

"(1) There is appropriated from the general fund to the board of regents of the university for the fiscal year ending June 30, 1936, seventy-two hundred dollars, and for the fiscal year ending June 30, 1937, thirty-five hundred dollars, to be used exclusively for restoring the full salary waivers during each of said years of all persons employed at the university in the classified service whose minimum salaries under the salary schedules are seventy-five dollars per month and which are paid from specific appropriations.

"(2) The board of regents is authorized and directed forthwith to use funds in the respective revolving appropriations in restoring as far as possible the salary waivers during the fiscal years 1935-1936 and 1936-1937 of all persons in the classified service whose salaries are paid from said appropriations and whose minimum salaries under the salary schedules are seventy-five dollars per month."

Art. IV, sec. 26, Wisconsin constitution, provides:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

If the effect of sec. 10a of ch. 6, Laws 1937, is to grant extra compensation to the employees covered thereby, it is in violation of the above constitutional provision. However, by referring to the records it appears that each month the departmental pay roll was made up and submitted to the director of personnel for certification, and that in each such pay roll so submitted and certified during the time covered

by sec. 10a (as to each employee) the base minimum salary of seventy-five dollars was set out in one column, in the next column was set out the amount of waiver consented to and in the last column the net amount payable after deduction of the amount of the waiver. This showed that the employee was entitled to a compensation of seventy-five dollars per month and that was the rate of pay.

The deduction made therefrom by voluntary waiver in effect was that the employee received the full compensation but returned to the state by voluntarily refraining from taking the amount of the waiver deduction and took from the state only the remaining amount of his earned compensation. By the voluntary waiver arrangement the employee, acting upon a realization of the existing economic situation, made a donation or gift to the state of the amount of the waiver deduction, so as to co-operate in a time of financial distress and to bring the state expenditures within the limits of the moneys available for appropriation, thereby eliminating the necessity of discharging some of the employees. There not being sufficient moneys which the state could appropriate to maintain the wage scale, such arrangements were imperative if the full force was to be retained and employment given to all.

While in an opinion, XXV Op. Atty. Gen. 263, it was held that employees who voluntarily waived portions of their salaries could not recover the portion so waived even though they received less than the minimum salary levels set by the bureau of personnel, yet at the time of the deduction pursuant to waiver there was an implied condition or reservation by the state at the time of the acceptance thereof that at some time in the future, when financial conditions had improved, the state, acting through the legislature, at its option, but without obligation to do so, might make an appropriation to refund or repay the employee such sums. Viewed thus, sec. 10a does not pay to an employee extra or additional compensation for service performed, but gives back to the employee by way of reimbursement or repayment the amount which the employee had foregone and let the state have in its time of need due to adverse financial conditions.

After a deduction under the waiver system the transaction became closed so far as the employee is concerned, but

there remained thereafter a power in the legislature, to be exercised at such time and only if it saw fit, to make reimbursement of all or a part of the deduction made pursuant to a waiver. Sec. 10a of ch. 6, Laws 1937, is thus a declaration that, after due consideration of the equities of the situation, the legislature has decided to exercise this reserved right by making refund or repayment to those employees covered by the act of the amount they surrendered to the state pursuant to waiver.

It is therefore our opinion that sec. 10a, ch. 6, Laws 1937, is a valid act.

We are mindful that upon occasions where serious and grave doubts have arisen as to the constitutionality of a statute it has been recommended that no payment be made under the act until after a court adjudication, yet here the conditions, circumstances and equities seem so strong as to eliminate the following of that course of action.

OSL
HHP

Public Health — Embalmers — In view of ch. 141, Laws 1937, and under facts stated, applicant may not take examination for embalmer's license under sec. 156.05, Stats., after completing one year of practical experience in embalming.

October 22, 1937

BOARD OF HEALTH.

You state that subsec. (2) of sec. 156.05, Stats. 1935, requires that to be eligible to take the examination for an embalmer's license a person, in addition to meeting certain requirements, must have had either at least two years of practical experience in embalming under a licensed embalmer, or at least one year of practical experience in embalming under a licensed embalmer and must have a diploma of

graduation from a school of embalming which requires twenty-four weeks of study before graduation and which is approved by the state board of health. This law was amended by ch. 141, Laws 1937, published May 19, 1937, to require a three-year apprenticeship or a two-year apprenticeship and a diploma from a school of embalming.

About two months prior to said amendment, a person attending an embalming school applied for registration as an apprentice; he had not been previously registered as an apprentice. He was not granted such registration due to the fact that he was attending this school. You ask whether, under the facts outlined above, such person is entitled to take the emblamer's examination after he has completed one year's apprenticeship in addition to graduation from a qualified school as required by sec. 156.05 (2), Stats.

Ch. 141, Laws 1937, provides that it shall take effect upon passage and publication, which is May 20, 1937. After that date any person wishing to take the examination for an embalmer's license must have at least three years practical experience in embalming or two years practical experience in embalming and a certificate of graduation from an approved school in embalming. Sec. 156.05 (2) as amended by said ch. 141, Laws 1937, applies to the situation outlined above. The applicant was not qualified to take the examination prior to the time ch. 141, Laws 1937, was enacted, as he had not had two years practical experience in embalming nor one year of such experience and a certificate of graduation from an accredited school in embalming. The fact that he attempted to begin such year of practical experience prior to its enactment does not change his status. Therefore, it is our opinion that such person may not take the examination pursuant to sec. 156.05 (2) as amended after he has completed one year of practical experience in embalming. Such examination may be taken only after he has had two years of practical experience and a diploma from an accredited school of embalming or in lieu thereof a three-years' apprenticeship.

WHR
AGH

Physicians and Surgeons — Public Health — Basic Science Law — Work done by internes during twelve months' interneship required of applicant for license to practice medicine under sec. 147.15, Stats., does not constitute practice of medicine, but after completing such interneship license is required for work done by internes or resident physicians.

October 22, 1937.

BOARD OF MEDICAL EXAMINERS.

Henry J. Gramling, M. D., *Secretary.*

You state that physicians from other states frequently come here to work in institutions and hospitals as resident physicians and that they have not been obtaining licenses from your board.

We are asked whether a ruling by the board that such physicians must be licensed after one year of residence is proper in view of the fact that these physicians are really practicing medicine while acting as resident physicians.

Sec. 147.14, subsec. (1), Stats., provides in part:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute * * *."

Sec. 147.19, subsec. (1), Stats., specifically provides that sec. 147.14 shall not apply to commissioned surgeons of the army, navy, federal health service, or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practioners of this state.

There is also an implied exception to sec. 147.14, Stats., in the case of internes. In *Nickley v. Eisenberg*, 206 Wis. 265, the Wisconsin supreme court held that since sec. 147.15 makes previous interneship a condition of being licensed to practice medicine, the statute constitutes legal sanction of the performance of such duties as are usually and ordinarily performed by internes and that the performance of such

duties does not, therefore, constitute unlawful practice of medicine.

The answer to your question therefore resolves itself into a matter of determining whether the work of resident physicians fits into the foregoing express and implied exceptions of sec. 147.14, subsec. (1), Stats.

We are informed that the word "resident physician" is a term which is used rather loosely, but that generally it is applied to postgraduate medical students who are doing what really amounts to advanced interneship work. One of the medical schools in this state applies the term "resident physician" to a postgraduate student after he has completed a one year's interneship. In some medical schools in other states such students are called internes for the first two years and resident physicians thereafter.

It is also customary to increase the subsistence allowance in accordance with the period of such work and study, and for economic or other reasons there has been a tendency in recent years for more and more students to stay on for advanced work after completing the twelve months' interneship required by sec. 147.15 of applicants for licenses to practice medicine.

The reason internes are exempted from the licensing provisions of sec. 147.15, as pointed out in the *Nickley* case, is that sec. 147.15 requires a twelve months' interneship as a condition precedent to applying for a license. This reason no longer exists after such interneship has been served, and the exemption likewise then ceases to apply.

We are unable to read into the statutes or into the *Nickley* case any authority for unlicensed treatment of the sick subsequent to completion of the required medical education and interneship specified in sec. 147.15.

You are therefore advised that it is illegal for so-called "resident physicians" to practice medicine after completing the interneship required by law without a license and the ruling of the board referred to is invalid to the extent that it is inconsistent herewith.

WHR

Criminal Law — Waste — Taxation — Person who wilfully, maliciously or wantonly removes buildings from lands which have been sold for nonpayment of taxes is criminally liable under sec. 348.426, Stats.

County injured by such removal of buildings is entitled to injunction to prevent further removal and also to accounting for property already removed, so long as amount collected does not exceed amount of taxes, penalties and interest due less value of remaining premises.

October 22, 1937.

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

You state that Sheboygan county holds tax certificates on a piece of property located within the city of Sheboygan. At the time the tax was levied there was a going industry located on the premises, and the valuation of the property was determined to a considerable extent by the value of the buildings thereon. At the present time the company owning the land no longer operates within the city of Sheboygan and the buildings are in the process of being removed from the land, the same being knocked down and probably taken and sold as used lumber.

You desire to know what the county can do to prevent the continuance of this practice, and also whether action may be brought in the name of the county to recover the value of the buildings removed, in the event the county is unsuccessful in satisfying the tax claim it has out of the property remaining at the present time.

Sec. 348.426, Stats., provides as follows:

"Any person who shall wilfully, maliciously or wantonly injure, destroy or commit waste upon any lands, tenements, or anything appertaining thereto which have been sold for the nonpayment of taxes while such taxes remain unpaid or in cases where the tax certificate is the property of the county shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail not more than ninety days or by both such fine and imprisonment."

It appears from your statement of facts that waste is being committed on these premises, and inasmuch as the certificates are owned by the county of Sheboygan, the above cited criminal statute is violated and prosecution may be had thereunder.

If you do not desire to proceed with the criminal action, it is our opinion that you may commence an action in court to restrain the acts complained of. In other words, the law affords a remedy to restrain the commission of waste. The rule is stated in 27 R. C. L. 1039-1040 as follows:

"The right of a person to restrain the commission of waste by an owner of realty against which such person has a specific lien is well established. * * * Where taxes against real estate are past due and unpaid, the county by which the taxes have been levied may maintain a suit to restrain waste by acts that will reduce the value of the property to an amount insufficient to pay the taxes. In order to maintain such suit it is not necessary that the county shall first become a purchaser of the property at tax sale."

We call your attention to the case of *State ex rel. Tillman v. District Court,* 101 Mont. 176, 53 Pac. (2d) 107, also reported in 103 A. L. R. 376. In that case the facts were almost identical with those which you submit. The court not only granted an injunction but also provided for an accounting for past waste committed by the owner. The amount to be collected, however, could not exceed the amount of the tax. It is our opinion therefore that the county may resort either to criminal prosecution or to an action in equity to prevent waste and obtain an accounting.

LEV
AGH

Bridges and Highways — County proceeding under provisions of sec. 81.14, Stats., may charge total cost of construction of bridge back to town and include same in next year's tax.

Said county may, under provisions of sec. 83.03, subsec. (6), Stats., assume any portion of cost of construction thereof if it so desires.

If total cost thereof is to be charged back to town, then whole of such charge must be included in tax before next ensuing year.

If amount of tax so apportioned exceeds any constitutional limitation imposed upon town, then any balance over such limitation will necessarily be carried to following year or years but will not draw interest.

Provisions of sec. 83.03, subsec. (6), Stats., authorizing county to charge forty per cent of cost of construction back to town, do not apply to improvements of town roads or bridges.

October 22, 1937.

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

You state that during the month of July, 1935, a bridge, which was part of a town road, was washed out. Thereafter due application was made under the provisions of sec. 87.01, Stats., both to the town board and at an annual town meeting, to repair and reconstruct said bridge, but that the town has refused, failed and neglected so to do. After a lapse of one year from the making of said application to the town, an appeal was properly taken to the county board under sec. 81.14, Stats., and pursuant to the terms of said section, the county board ordered the reconstruction of said bridge and appropriated fifteen thousand dollars for such purpose.

You also state that the county board passed a further resolution that the entire cost of reconstruction be charged back to said town, with the further provision that if the town would raise fifty per cent of the cost the county would then pay fifty per cent of the cost of construction. This

money has not been raised by the town board and it cannot be done without a meeting of the electors and the passage of a resolution authorizing a bond issue.

You ask the following questions:

1. Is the county authorized to charge back the total cost of construction against the town under sec. 81.14, Stats., or may it charge back fifty per cent even though no petition for aid under sec. 87.01 has been filed?

2. In the event that the total cost of the bridge is charged back, must this cost be placed in the next tax under sec. 81.14, Stats., or may it be made payable over a period of years at one thousand dollars per year?

3. If the levy of the tax therefor should exceed any constitutional limitation, could the county prorate such charge over a period of years?

4. If the county may prorate such tax, would the deferred payments draw interest?

5. Do the provisions of sec. 83.03, Stats., relative to the county charging back forty per cent of the cost at not more than one thousand per year, apply?

Sec. 83.03, subsec. (6), Stats., reads of follows:

"The county board may construct or improve or aid in constructing or improving any road or bridge in the county. If any county board shall determine to improve any portion of the system of county trunk highways with county funds, it may assess not more than forty per cent of the cost of such improvement against the town, village or city in which the improvement is located as a special tax, provided that the amount of such tax shall not exceed one thousand dollars in any one year; provided, that no assessment under this subsection shall be made against any town in which the combined appropriation of the town and county for the improvement of county highways in such year shall exceed two mills on the assessed valuation of such town. The county clerk shall certify such tax to the town, village or city clerk who shall put the same in the next tax roll, and the same shall be collected and paid into the county treasury as other county taxes are levied, collected and paid. A portion or all of such special assessment may be paid by subscription or donation."

The above provision provides for charging back of forty per cent of the cost of construction of county trunk high-

ways only, and does not apply to town roads or bridges. Therefore, the county would not be justified in charging back forty per cent of the cost of construction of this bridge under the provisions of this section. Of course, the county board is authorized by the first sentence of said section to aid in the construction of any road or bridge in the county if it desires to do so. XXIII Op. Atty. Gen. 778. However under this section, the county cannot be compelled to aid in such construction.

Sec. 87.01, subsecs. (1) and (2), Stats., read as follows:

"(1) When any town has voted to construct or repair any bridge on a highway maintainable by the town, and has provided for such portion of the cost of such construction or repair as is required by this section, the town board shall file a petition with the county board setting forth said facts and the location of the bridge; and the county board, except as herein provided, shall thereupon appropriate such sum as will, with the money provided by the town, be sufficient to defray the expense of constructing or repairing such bridge, and shall levy a tax therefor, which tax when collected shall be disbursed on the order of the chairman of the county board and the county clerk, when the town board and county highway committee shall file a written notice with the clerk that the work has been completed and accepted. The county board of any county which has never granted aid under this section may in its discretion refuse to make any appropriation.

"(2) If the town has an assessed valuation of four hundred thousand dollars or over as last equalized by the county board, the county shall pay the cost in excess of two hundred dollars up to four hundred dollars. The town and county shall each pay one-half of the cost of construction or repair above four hundred dollars. If the town has an equalized assessed valuation of less than four hundred thousand dollars, the county shall pay the cost in excess of one-twentieth of one per cent of said valuation until the cost equals one-tenth of one per cent of said valuation. The town and county shall each pay one-half of the cost of such construction or repair in excess of one-tenth of one per cent of said valuation of the town. In determining the cost of construction or repair of any bridge, the cost of constructing or repairing any approach not exceeding one hundred feet in length shall be included."

The above statute provides for certain benefits which a town may receive from the county, providing the town per-

forms certain specified acts. XV Op. Atty. Gen. 121, XXIII Op. Atty. Gen. 778. In the present case the town has failed and refused to perform the acts required therein and therefore has not placed itself in the position to receive the benefits thereunder. However, upon refusal or failure of the town to act under the above section of the statutes and after the lapse of one year from the date of such refusal, a method of appeal is provided for under the provisions of sec. 81.14, subsec. (1), Stats., which reads as follows:

"If any town, or towns in case of a town line highway, whether wholly within one county or upon the line between two or more counties, either by its or their proper officers, or by a majority vote of its or their electors, pursuant to section 80.30, or otherwise, voting on such question, shall refuse, fail or neglect to open and put in reasonable condition for travel a highway, within one year from the date when the same has been laid out, or refuse, fail or neglect to repair any public highway or build or repair any bridge thereon, in such town or towns, any fifteen freeholders, whether residents or not of such town or towns, may appeal from such decision, refusal, failure or neglect to the county board of the county in which such highway or bridge is wholly situated, by notice in writing served on the chairman or chairmen of such town or towns. For the purpose of this act all highways and bridges on town lines, which shall have been apportioned between said towns for the purpose of maintenance, such apportioned part of such highway or highways and bridges thereon, shall be considered as wholly within the county wherein the town to which such part of said highway or bridge so apportioned, is situated; provided, that in case of town line highways, and bridges thereon, which are also upon lines between two or more counties and which said highways or bridges have not been apportioned between such towns for the purpose of maintenance, then such appeal may be made to the county board of either or any county, bounded in whole or in part by such highway. When an appeal is taken as hereinbefore provided for, the county board shall, at the next regular meeting thereafter, either by a majority of its members or by a committee of not less than three, examine such highway or bridge, and if after such examination they shall determine that it ought to be opened and put in reasonable condition for travel or ought to be repaired, the said county board shall thereupon appropriate therefor sufficient funds to defray the estimated cost of opening or repairing such highway or building or repairing such bridge, and the chairman

of such county board shall cause the said highway to be opened and put in reasonable condition for travel or cause such bridge to be repaired or built, and keep an accurate account of the expense thereof, and such expense when audited and allowed by the county board shall be charged to such town or towns and added to the next county tax apportioned thereto and collected therewith."

This matter was properly appealed under the provisions of the above quoted section, 81.14, subsec. (1), Stats., and the county board has decided to construct a bridge under the authority of that section. This leaves us with the following facts. Sec. 87.01 provides for benefit to a town providing said town avails itself thereof, which the town has failed to do. This failure on the part of the town caused an appeal to be taken under an entirely different section of the statutes. Proceeding under this different section of the statutes, to wit, sec. 81.14 (1), the county board has now authorized the performance of the act which the town board refused to authorize. This leaves the county board with no alternative but to comply with the terms of the statute under which it is proceeding. Said section, 81.14, does not provide for the payment of instalments of one thousand dollars per year; it simply says that "such expenses when audited and allowed by the county board shall be charged to such town * * * and added to the next county tax apportioned thereunder and collected therewith." However, this does not deny the county the right to aid in such construction in the event the county board desires to do so under sec. 83.03 (6), Stats. XXIII Op. Atty. Gen. 778.

Therefore, it is our opinion that, unless the county board has definitely acted to aid in the construction thereof, it will be necessary for the county, upon the auditing of the expense of constructing the bridge, to add the total amount of the cost thereof to the next tax apportioned to said town and collect the same in one year. However, if the amount of said tax should exceed any constitutional limitation upon the taxing power of the town, it is obvious that the total amount thereof could not be collected in one year. In that event, it would be necessary to carry any amount which it would be unconstitutional for the town to raise in a given

year to the next ensuing year or years until the whole thereof is paid.

We have found no provision in the statutes and no cases which would indicate that it would be possible for the county to charge interest on an unpaid balance which could not be collected in one year because of the constitutional limitation. Therefore, we advise that interest could not be charged thereon.

AGH

Bonds — Municipal Borrowing — Bond Issues — Taxation — Taxes must be levied in such manner that money is on hand in treasury to pay interest upon all county bond issues as it falls due.

October 22, 1937.

HIGHWAY COMMISSION.

Attention Thos. J. Pattison, *Secretary.*

You have asked when a levy must be made for the payment of bond interest in a county bond proceeding where the first interest paying date of the succeeding year falls in the months of January, February, or March.

Sec. 67.05, subsec. (10), Stats. 1935, in part, reads as follows:

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

You will note that this statute provides that the tax is to be levied to pay the interest *as it falls due* and to pay principal thereof *at maturity.*

While taxes are payable to the treasurer of each town, city, or village on or before the 31st day of January as provided for in sec. 74.02, Stats. 1935, the county's share of taxes are not payable to the county treasurer by the cities, towns, or villages until the 22d day of March of each year, according to sec. 70.68, Stats. Thus the funds to provide for interest payments that may accrue during January, February and the first twenty-two days of March would have to be paid out of taxes collected by the county in March of the previous year, which taxes would have had to be levied two years before. For example, if the first interest payment accrues some time in January or February of 1939, the tax money to pay such interest would have had to be collected from the cities, towns or villages on March 22, 1938. That would mean that the tax would have had to be levied for the year 1937, payable to the county treasurer on March 22, 1938.

Therefore, a county bonding resolution providing for interest payments falling due during the months of January, February or the first twenty-two days of March will necessarily have to provide for the levy of the tax in such a manner as to be paid to the county treasurer prior to March 22d of the year preceding the date the interest payment falls due.

OSL
AGH

Education — School Administration — Teacher Tenure — School board rule providing for termination of teacher's contract upon marriage during probationary period is not affected by ch. 374, Laws 1937, but rule making maternity cause for discharge, in so far as it applies to tenure teachers, is invalid under ch. 374, Laws 1937.

October 25, 1937.

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

You have called our attention to the following rules of a certain city school board:

"303.1200 Marriage. Women teachers in the ———— Schools who marry during their probationary period in the schools shall be required to resign their teaching positions immediately after their marriage.
"303.1300 Maternity. Married women teachers who are to become mothers will have their contracts terminated immediately."

We are asked how these rules will be affected by the passage of ch. 374, Laws 1937 (creating sec. 39.40, Stats.), which provides in part as follows:

"(2) All employment of teachers as defined in subsection (1) of this section shall be on probation, and after continuous and successful probation for five years in the same school system or school, either before or after the taking effect of this section, such employment shall be permanent during efficiency and good behavior and until discharge for cause. * * *
"(3) No teacher who has become permanently employed, as herein provided, shall be refused employment, dismissed, removed, or discharged, except for cause, upon written charges preferred by the managing body or other proper officer of the school system or school in which such teacher is employed. Such charges shall, after ten days' written notice thereof to such teacher, and within thirty days of receipt of such notice, upon such teacher's written request, be heard and determined by the managing body of the school system or school in which such teacher is employed and hearings shall be public in all cases when re-

quested by such teacher. The action and decision of such managing body in any such matter shall be final."

It is apparent that the power of the school board to remove a teacher during her probationary period is unchanged by the passage of ch. 374, Laws 1937. That is purely a matter of contract between the parties, and you are therefore advised that the application of this school board's rule respecting marriage during the probationary period is the same now as it was prior to the passage of ch. 374, Laws 1937. The same would be true as to this school board's rule respecting maternity in the case of probationary teachers.

However, the school board's rule respecting maternity as applied to teachers who have acquired permanent tenure is invalid under ch. 374, since the rule makes no provision for written charges or a hearing on ten days' written notice, although we do not attempt here to pass on the question of whether or not maternity would constitute sufficient cause for dismissal upon a hearing given pursuant to ch. 374.
WHR

Bridges and Highways — Law of Road — Civil Service — Public Officers — Investigators — Those employees of motor vehicle division of secretary of state's department who are to exercise powers of sheriffs under ch. 298, Laws 1937, creating par. (k), subsec. (4), sec. 85.01, Stats., are to be designated as special investigators. Matter of their civil service rating and salary ranges is to be determined by bureau of personnel.

October 26, 1937.

THEODORE DAMMANN,
Secretary of State.

Our attention is called to ch. 298, Laws 1937, which added par. (k) to subsec. (4) of sec. 85.01, Stats. This paragraph reads:

"To facilitate the securing of necessary evidence in the field and to assist in the administration and enforcement of the provisions of this chapter the secretary of state shall designate not to exceed five qualified employes of the motor vehicle division as special investigators, with the powers of sheriffs when engaged in the performance of their duties."

You inquire whether it was the purpose of this law merely to provide the employees in question with the powers of sheriffs, or whether, in addition thereto, it was intended to give such employees a different civil service rating, such as that of special investigator, in place of the ratings which they now have in their present administrative work. In this connection you state that the bureau of personnel is of the opinion that these employees should be classified and compensated as special investigators.

The words "the secretary of state shall *designate* not to exceed five qualified employees of the motor vehicle division *as special investigators,*" clearly implies that such employees should be called "special investigators." The word "designate" means "to name" in common parlance, and it is a well established rule that in construing statutes, words are to be used and understood according to the common and approved usage of the language. Sec. 370.01, subsec. (1), Stats.

The question of civil service ratings and salary ranges is not touched upon in ch. 298. This office has heretofore held that such matters are within the power of the bureau of personnel under ch. 16, Stats., and that the sole authority of a department head is to appoint employees, designate their titles and fix their compensation within the range prescribed by the bureau of personnel. XXV Op. Atty. Gen. 17.

WHR

Taxation — Emergency Relief Tax — Telephone company is not exempt from emergency relief tax imposed by chs. 6 and 325, Laws 1937, on receipts for services rendered United States government or its agencies.

October 26, 1937.

SOLOMON LEVITAN,
State Treasurer.

You state that in making payment of the emergency relief tax imposed by chs. 6 and 325, Laws 1937, the Wisconsin Telephone Company has claimed exemption from said tax on receipts during 1936 from the United States government and its agencies for exchange and toll service, and you inquire if the company is entitled to such exemption.

The taxes imposed upon telephone companies under chs. 6 and 325, Laws 1937, are taxes for the privilege of doing business, the amount being measured by the gross receipts.

It is well settled that a state has no power to tax the means and instrumentalities which the federal government employs to carry on its proper functions. 26 R. C. L. 95, sec. 71. In the case of *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 48 S. Ct. 451, 56 A. L. R. 583, the United States supreme court by a divided decision held that a state may not impose a tax measured by the quantity sold, upon the privilege of one of its citizens of selling gasoline to the federal government for use of its coast guard fleet or veterans' hospital, which the United States is empowered by the constitution to maintain and operate. The majority opinion there pointed out that the validity of the tax is to be determined by the practical effect of enforcement in respect of sales to the government, and that to use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale and hence to tax the United States.

Similarly, it was held in *Graves v. Texas Co.,* 298 U. S. 393, 80 L. ed. 1236, that a state excise tax upon storers of gasoline, accruing at the time of withdrawal from storage, cannot constitutionally be imposed in respect of gasoline withdrawn for the purpose of sale to the United States for use in performing governmental functions.

However, where the burden of the tax affects operations of the federal government only remotely there is no immunity from the tax imposed by the state. In *Alward v. Johnson,* 282 U. S. 509, 75 L. ed. 496, it was held that one having a contract to carry the mails is not immune as an agency of the federal government from state taxation of property used in the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government.

The tax here is not a tax on sales to the government with the amount of the tax being determined by the amount of the sales. The telephone rates are regulated by public authority and it does not appear that the telephone company proposes to or would be permitted to lower its rates to the federal government if its exemption claims were allowed. Under the circumstances it must be considered that the tax affects the federal government only remotely and indirectly, if at all. As was said in *Union Pac. R. Co. v. Peniston,* 85 U. S. (18 Wall.) 5, 30-31, 21 L. ed. 787:

"It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

To a similar effect see, also, *Metcalf v. Mitchell,* 269 U. S. 514, and authorities cited in XXVI Op. Atty. Gen. 68.

You are therefore advised that the Wisconsin Telephone Company is not exempt from the tax imposed by chs. 6 and 325, Laws 1937, on its receipts from the United States or its agencies.

WHR

Banks and Banking — Trust Company Banks — Trust account cash of trust company banks operating under ch. 223, Stats., should not be included as assets or liabilities in computing ratio of quick assets to deposits or in computing legal reserves of such companies.

Neither is such cash to be included in determining resources of trust company for purpose of levying assessment provided by sec. 220.05 subsec. (2), Stats.

October 27, 1937.

BANKING COMMISSION.

You state that certain questions have arisen regarding the including of trust account cash by trust company banks in their call report. You inquire whether it is proper to include trust account cash either as an asset or as a liability in determining the ratio of quick assets to deposits and whether trust account cash should be included either as an asset or as a liability in computing the legal reserve of the trust company at the date of the report.

You have also asked for our opinion on the somewhat related question of whether or not trust account cash may be included in determining the resources of a trust company for the purpose of levying the assessment provided by sec. 220.05, subsec. (2), Stats.

A trust company bank may accept trusts as well as time or nondemand deposits. Thus the funds in its possession are ordinarily trust assets belonging to specific trusts or moneys received in the course of commercial banking. As to trust funds, legal title is in the trust company as trustee, but it may exercise no control or dominion over the funds except in accordance with the trust. Sec. 223.05, Stats., provides in part as follows:

"Every such corporation shall keep its trust accounts in books separate from its own general books of account. All funds and property held by it in a trust capacity shall, at all times, be kept separate from the funds and property of the corporation, and all deposits by it of such funds in any banking institution shall be deposited as trust funds to its credit as trustee, and not otherwise. * * *."

This is but a statutory declaration of the common law, and it has been held in this state that the slightest intermingling of funds on the part of the trustee, or the exercise over the funds of any account inconsistent with the trust constitutes an unlawful use of trust funds subjecting the trustee to personal liability. See *O'Connor v. Decker*, 95 Wis. 202.

It is elementary that the trustee can use trust assets only for the purposes of the trust and that such funds can in no way be used to meet the individual liabilities of the trustee. While legal title to the funds is in the trustee, it is impressed with an equitable ownership which must be preserved for the benefit of the equitable owner.

On the other hand, the ordinary bank deposit stands on an entirely different footing. Such a transaction makes the money the property of the bank absolutely and creates the relation of creditor and debtor between the bank and the depositor. *State Bank Board v. Jones*, (Tex.) 264 S. W. 145, 149; *Rice v. Webb*, 141 Miss. 66, 105 So. 854.

In view of the foregoing you are advised that it is improper to include trust account cash either as an asset or as a liability in determining the trust company bank's ratio of quick assets to deposits. The same reasoning requires that trust account cash shall not be included, either as an asset or as a liability, in computing the legal reserve of the trust company under sec. 223.04, Stats.

Your third question calls for a similar answer.

Sec. 220.05, subsec. (2), Stats., provides:

"On or before the fifteenth day of July of each year, each state bank, mutual savings banks and trust company bank shall pay to the banking commission an annual assessment for the maintenance of the state banking department in an amount to be determined by the banking review board, but which shall not exceed eight cents per thousand dollars of resources, or part thereof, for the first five million dollars and shall not exceed six cents per thousand dollars, or part thereof, for all resources over five million dollars."

The problem is to determine whether trust account cash falls within the meaning of the word "resources" as used in the above statute.

As previously indicated, trust account cash is held by the trustee exclusively in trust, the equitable ownership being in others. This being true, there is no more reason for considering such cash to be a part of the resources of the trust company bank for the purposes of sec. 220.05, subsec. (2), Stats., than it is for considering it to be an asset or a liability for report purposes.
WHR

Appropriations and Expenditures — Bridges and Highways — Street Improvements — Snow Removal — Under sec. 20.49, subsec. (8), Stats., town may authorize its road improvement for year to be done by county and direct that its allotment for next year under above statute be turned over to county in payment for such work done by county.

October 27, 1937.

HIGHWAY COMMISSION.

You state that in April, 1937, a certain town entered into an agreement with the county whereby the county will maintain the roads of the town and do all snow removal work thereon for one year therefrom in consideration of the direction by the town to the state highway commission that the March 1, 1938, allotment under sec. 20.49, subsec. (8), Stats., to the town of funds for the improvement of roads be paid directly to the county. You inquire whether this proposed procedure is proper and legal.

Sec. 20.49, subsec. (8), Stats., provides in part as follows:

"On March 1, 1934, and annually thereafter, to the towns, villages and cities of the state, for the improvement of and removal of snow on public roads and streets within their respective limits which are open and used for travel, and which are not portions of the state or county trunk highway systems, * * * the following sums: * * *. The

amounts allotted to the towns and villages shall be expended by the town and village officers, subject to the supervision and approval of the county highway committee, but the town and village boards may authorize the work to be done by the county. If the work is done by the county, the amount allotted for towns and villages shall be paid into the county treasury. * * *."

No time limitations are imposed by the provisions of sec. 20.49, subsec. (8), above quoted. The statute provides: "If the work is done by the county, the amount allotted for towns and villages shall be paid into the county treasury." This may apply equally as well to work done in the past as it does to work to be done in the future. If the legislature had intended the allotment to be restricted to work to be done in the future, it could easily have said "If the work *is to be done* by the county, etc." Its failure to impose any such restriction is significant.

The controlling consideration in the statute is that the allotment is to be used "for the improvement of and removal of snow on public roads and streets." This underlying consideration is as well served by applying the allotment to improvements completed in one year as it is to apply it to improvements completed in the next year, and as a matter of fact the intelligent use of allotments calls for some flexibility in such matters. Take, for example, the case of a town which has received an allotment of ten thousand dollars on March 1, 1937. Assume that this particular town is interested in a program of road improvements which can and ought to be completed in 1937 but which will cost twenty thousand dollars. If it were to be held that none of the March 1, 1938, allotments could be used to pay for any of the work done in 1937, it might be necessary for the town to split up its program into two years' work, thereby losing the economies which could be effected by doing the work all at one time, in addition to inconveniencing the public in the use of highways.

In construing the words "If the work is done by the county" with reference to the time element, due consideration should be given to the evident and controlling purpose of insuring that the allotment be used for highway improvement and, when that is done, such legislative intent

should not be defeated nor hampered either by a too narrow or too liberal application of the words employed. It has been held that words susceptible of different applications are to be limited or extended so as to subserve the object which the legislature had in view. *Lawrence v. Vilas,* 20 Wis. 381. Also, to clear up obscurities in the law it should be read with reference to the leading idea thereof, if reasonably practicable. *State ex rel. M., St. P. & S. S. M. R. Co. v. R. R. Comm.,* 137 Wis. 80.

We might add in support of the foregoing view of the statute that in XX Op. Atty. Gen. 820 this department expressed the opinion that a town board and the county highway committee might accept work done on a town road during the previous year and pay for the same out of allotments under sec. 20.49, subsec. (8), Stats.

You are therefore advised that the agreement in question may properly be made with respect to the town's allotment under sec. 20.49, subsec. (8), Stats.

WHR

Building and Loan Associations — Wisconsin Statutes — Sec. 215.114, Stats., created by ch. 236, Laws 1937, is prospective in operation and applies only to dividend paying periods subsequent to June 15, 1937, effective date of act, regardless of whether notice of withdrawal was given prior or subsequently thereto.

October 28, 1937.

BANKING COMMISSION.

You have called our attention to sec. 215.114, Stats., created by ch. 236, Laws 1937. This section relates to building and loan associations, and reads as follows:

"(1) Whenever unpledged shares of stock have been noticed for withdrawal in the manner as provided in section 215.11, said shares, instead of being without rights to divi-

dends, interest or profits from the time of giving notice of withdrawal, shall hereafter be entitled to dividends at the times, in the manner and in amounts as follows: for the first dividend paying period after the filing of the notice of withdrawal, said shares shall not be entitled to any dividends; for the second dividend paying period after the filing of the notice of withdrawal, such shares shall be entitled to one-half the rate of dividends declared on stock of the same class not on notice; for the third dividend paying period after the filing of the notice of withdrawal and thereafter such shares shall be entitled to the same rate of dividends declared on stock of the same class not on notice.

"(2) Such dividends are to be paid or credited only on such unpledged shares as are on the books of the association on dividend paying dates as provided for in the by-laws of the association and shall not be paid for any dividend paying period prior to the taking effect of this section."

Formerly no dividends, interest or profits were payable from the time of notice of withdrawal. Sec. 215.11, Stats. You inquire as to the rights of a shareholder to receive dividends where the notice of withdrawal was given prior to June 15, 1937, the effective date of ch. 236.

"It is a familiar principle of law that a legislative act not remedial in its nature will not be construed to act retrospectively unless the language used clearly evinces such a purpose. * * *." *State ex rel. Kieckhefer v. Cary,* 186 Wis. 613, 615.

Nothing is said in the statute clearly indicating that it should have a retroactive effect, and where there is any doubt, the doubt must be resolved against the retrospective effect and in favor of prospective construction only. 59 C. J. 1169.

In view of the foregoing it is clear that the shareholder who has served notice of withdrawal prior to June 15, 1937, is entitled to no dividends for dividend paying periods which have elapsed before the effective date of ch. 236.

However, as to dividend paying periods subsequent to June 15, 1937, a notice of withdrawal given prior to that time will stand on the same footing as a notice given thereafter. The condition precedent to invoking the rights created by ch. 236 is to be found in the words "Whenever un-

pledged shares of stock have been noticed for withdrawal in the manner as provided in section 215.11." In construing statutes, words are to be given their common and approved usage. See sec. 370.01, subsec. (1), Stats. The words denoting time in the above quoted language are "whenever" and "have been." These words are used without restriction and limitation and apply as well to notices given prior to June 15 as they do to notices given after that date.
WHR

Social Security Law — Old-age Assistance — All guardians for recipients of old-age assistance must be appointed by court of competent jurisdiction pursuant to provisions of ch. 319, Stats.

October 28, 1937.

PENSION DEPARTMENT.

Attention George M. Keith, *Supervisor of Pensions.*

A question has arisen in respect to reimbursement of counties from state and federal funds in cases where the quasi guardian or alternate payee has been appointed under sec. 49.31, subsec. (2), Stats., to receive the payments made for the benefit of an old-age assistance recipient.

Prior to the 7th day of January, 1937, you were advised as follows by the federal social security board:

"The definition in the Social Security Act of old-age assistance and aid to the blind as money payments to aged individuals and to blind individuals respectively precludes the matching of payments to persons other than the beneficiary with the single exceptions of legally appointed guardians. This means a guardian appointed by a court of competent jurisdiction under the laws of the State, not merely 'a responsible person or corporation' appointed by the administrative agency granting the assistance."

On January 7, 1937, the Wisconsin pension department issued a bulletin to all county administrations regarding the

appointments of guardians. Subsequently, on January 11, 1937, the department issued a bulletin in which the matter of guardians as contrasted with "a responsible person or corporation" was discussed. It was the thought of the department that these bulletins definitely put the county pension agencies upon notice that a difficulty had arisen with respect to sec. 49.31, subsec. (2), Stats.

Some of the counties failed to put into force the requirements that guardians be appointed by the court pursuant to the provisions of ch. 319, Stats. You ask whether or not the state is required to reimburse the counties in the amount of eighty per cent for payments made to persons other than beneficiaries themselves or their guardians appointed under ch. 319, Stats.

Sec. 49.31, subsec. (2), Stats., provides that if an old-age beneficiary is unable to care for himself and his money, a responsible person or corporation may be selected who can handle pension moneys received by such beneficiary. This office held in XXV Op. Atty. Gen. 115 that a person so appointed need not be a guardian appointed pursuant to ch. 319, Stats. On December 27, 1935, certain rules and regulations were promulgated in accordance with sec. 49.50 of the statutes. Rule 3 is as follows:

"All judges and county pension departments and other officers charged with duties in connection with the administration of old age assistance, aid to dependent children and blind pensions shall observe the rules and regulations of the federal social security board with respect to the conduct of the work of administration in order that this state and the political subdivisions thereof may qualify for federal grants in aid for these purposes."

On January 11, 1937, it was called to the attention of all pension departments and administrative officers that the social security board had passed an order requiring that the guardians be appointed by a court of competent jurisdiction under the laws of the state. The rule of the social security board in effect provided that such guardians could not be appointed pursuant to sec. 49.31, subsec. (2), Stats. After the promulgation of Rule 3, cited above, it was the duty of county pension administrators to comply with any rulings of

the federal social security board. Attention was called to these rules by your department as of January 11, 1937.

It is our opinion that if the counties have not complied with the rules as to the appointment of guardians after being so notified, your department may withhold approval of certificates for reimbursement until the rule is complied with and until such time as all guardians are appointed in the manner provided for by ch. 319, Stats.

LEV

Taxation — Forest Crop Lands — When lands are withdrawn from operation of forest crop law pursuant to provisions of sec. 77.10, subsec. (2), par. (a), Stats., such lands are to be taxed for years during which they were under law at same rate as was applied to other lands in taxing district for same years.

November 1, 1937.

TAX COMMISSION.

Our attention is called to sec. 77.10, subsec. (2), par. (a), Stats., which reads as follows:

"Any owner of any forest crop lands on which all acreage share has been paid may elect to withdraw all or any of such lands from this chapter, by filing with the conservation commission a declaration withdrawing from this chapter any description owned by him which he specified, and by payment by such owner, other than a county, to the conservation commission within thirty days the amount of all real estate tax that would ordinarily have been charged against such lands had they not been subject to the provisions of this chapter with simple interest thereon at five per cent per annum, less any severance tax and supplemental severance tax or acreage share paid thereon, with interest computed according to the rule of partial payments at the rate of five per cent per annum. The exact amount of such tax shall be determined by the tax commission after hearing and upon due notice to all parties interested, provided that when the tax rate of the current year has not been determined the rate of the preceding tax year may be used. On receiving such payment the conservation commission shall issue an order of withdrawal and file copies thereof with the tax commission, the assessor of incomes, the clerk of the town and the register of deeds of the county in which such land lies. Such land shall then cease to be forest crop lands."

Upon a hearing in connection with the withdrawal of certain lands under the above statute, the taxpayer contended that in determining the tax for the years involved the assessed value of the forest crop lands in question should now be added to the total assessed value of the town and that the tax rate should then be recomputed and this adjusted rate should be applied in arriving at the tax to be paid on withdrawal.

You state that you have always applied the actual tax rate in the taxing district for the years involved, thus subjecting forest crop lands on withdrawal to the same tax rate as was applied to all other real estate in the taxing district for the same years, and you ask for our opinion as to the proper method to be applied under the above statute.

The method contended for by the taxpayer, in the absence of a recomputation and readjustment of the tax for all other property owners in the town, would violate the constitutional rule relating to uniformity of taxation. Art. VIII, sec. 1, Wis. Const.

This is true because the adjusted rate which would result from including his lands in the total assessed value of the lands of the town for the years involved would be less than the rate actually paid by other land owners for such years when these forest crop lands were excluded from the total valuation. Expressed mathematically, the tax rate is determined by dividing the tax to be raised by the assessed valuation. The quotient will necessarily be less if the divisor is increased. To achieve equality under such circumstances after applying a lower rate to the lands in question would require the making of corresponding rebates to all other taxpayers for the years in question. The statutes do not provide for this, and indeed the task of doing so might be well-nigh impossible and result in a cost which might be far in excess of the amount of the tax collected from the owner of the forest crop lands. To state such a proposition is to demonstrate its unsoundness.

On the contrary the statutes contemplate the use of the method now being employed by the tax commission. Evidence that the legislature did not intend a recomputation of the tax rate for the taxing district is to be found in the words "when the tax rate of the current year has not been determined the rate of the preceding tax year may be used." This clearly implies that as to taxes for the current year the current rate is to be applied where that rate has been determined; otherwise, the rate of the preceding year is to be followed. In neither event is there a redetermination of the tax rate, either for the benefit of the withdrawn forest crop lands or for the benefit of any other lands in the taxing district.

Under the circumstances the method now employed by the tax commission is expressly approved. Any other construction would render the statute either invalid or unworkable, or both, and hence should be avoided under familiar principles of statutory construction. The method now employed can result in no unfairness or injustice to the owner of forest crop lands. He is being treated the same as all other taxpayers as far as the tax rate is concerned, and if such payment results in an unexpected surplus in the town treasury, his lands, along with all other lands in the township, will benefit by reduced taxes in subsequent years.
WHR

Social Security Law — Old-age Assistance — Trade Regulation — Negotiable Instruments — Checks — Old-age pension check becomes property of estate of pensioner where it is mailed to him and he dies without endorsing it.

November 6, 1937.

PENSION DEPARTMENT.
Attention George M. Keith, *Supervisor of Pensions.*

You advise that where old-age assistance checks have been mailed by you to one entitled thereto, and such checks have not been endorsed by the recipient prior to his death, the social security board will make its contribution of federal funds provided the laws of this state are to the effect that the mailing of the check or the possession of it by the recipient unendorsed constitutes payment.

You inquire specifically whether a check mailed prior to the death of the intended recipient becomes a part of the property of his estate.

Checks, like other negotiable paper and choses in action, are in the nature of personalty. 8 C. J. 36. Where a note is in the possession of a payee, legal title thereto vests in the administrator upon the death of the payee and the admin-

istrator may properly transfer such legal title or maintain an action thereon against the maker. *Murphy v. Hanrahan,* (1880) 50 Wis. 484, 7 N. W. 436; *Clark v. Clark,* (1890) 76 Wis. 306, 45 N. W. 121.

Although the foregoing cases related to notes rather than checks, the same conclusion would apply in the case of checks.

In the case of *Canterbury v. Bank of Sparta,* (1895) 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, it was held that the delivery necessary to make a negotiable instrument legally operative must be a parting with possession so as to vest title in the payee, and that the mailing of a draft is a legal delivery even though it may still be possible for the drawer to regain possession of the instrument while in transit in the mail. Whether there has been a delivery depends upon the act of the transferor. No act is required on the part of the transferee. Delivery therefore has been completed when the check has been placed in the mail. The death of the payee prior to its receipt would be of no consequence.

You also inquire whether, in the event the check has been received by the beneficiary, his endorsement is necessary to constitute payment or for this check to become a part of his estate.

Upon the mailing of the check to the recipient, it became his property. The mere fact that he did not have an opportunity to endorse it after its receipt does not change its status. It is still personal property and becomes a part of his estate.

You also inquire in whom authority exists to cash such unendorsed check.

Title to all personalty of the deceased passes directly to the administrator. *Murphy v. Hanrahan,* 50 Wis. 485, 7 N. W. 436. Therefore it will be necessary that an administrator be appointed as provided by statute before this check can be cashed.

OSL
LEV

Municipal Corporations — Cities — Villages — No referendum is requisite to issuance of city charter under sec. 61.58, Stats.

Before city charter is issued under sec. 61.58, Stats., secretary of state should be furnished documentary evidence of valid adoption of resolution by village board and census results showing required population.

Date of incorporation of village as city under sec. 61.58 is date of issuance of charter.

November 8, 1937.

THEODORE DAMMANN.
Secretary of State.

You have presented for examination the documents sent to you relative to the incorporation of the village of Eagle River as a city of the fourth class. The certified report of the clerk sets out the result of the first election and a description of the territorial limits of the proposed city. In a letter accompanying this report the clerk states that a census was taken revealing a population of 1526, and that the original report of such census is on file with said clerk and a verified copy filed with the clerk of the circuit court.

You inquire whether such documents are sufficient to authorize the issuance of a city charter since the certified report does not contain the result of the census taken under sec. 61.58, subsec. (3), Stats., nor the result of a referendum proposing incorporation as a city as provided by sec. 62.06, subsec. (6), Stats. You also ask whether the date of referendum or the date of issuance of a charter will be the date of incorporation of the city.

The statutes provide two methods of procedure by which a village may become a city. One way is by the filing of a petition and the holding of a referendum upon the question as provided by sec. 62.06. The other procedure requires no referendum and the change may be effected through the adoption of a resolution by the village board pursuant to sec. 61.58.

We are informed that the village of Eagle River proceeded under sec. 61.58, Stats. 1935, which provides as follows:

"(1) Whenever the resident population of any village shall exceed twelve hundred as shown by a census herein provided for, such village may become a city of the fourth class, and the trustees of such village may at a regular meeting, by a two-thirds vote of the members thereof, by resolution, so determine. Such resolution shall fix the number and boundary of the wards into which such city shall be divided and fix the time for holding the first city election, which shall not be less than twenty days from the date of such resolution, and shall therein name three inspectors and one clerk of election for each ward.

"(2) The election shall be noticed and conducted and the result canvassed and certified as in the case of regular village elections and the village clerk shall immediately certify the fact of holding such election and the result thereof to the secretary of state, including in such certificate a description of the legal boundaries of such village or proposed city; and thereupon a certificate of incorporation shall be issued to such city as provided in subsection (6) of section 62.06. Thereafter such city shall in all things be governed by the general city charter law. All debts, obligations and liabilities existing against such village at the time of such change shall continue and become like debts, obligations and liabilities against such city, and such city may carry out and complete all proceedings then pending for the issue of bonds for improvements therein.

"(3) The village trustees shall cause to be taken an accurate census of the resident population of the village on some day not more than ten weeks previous to the time of the adoption of such resolution, exhibiting the name of every head of a family and the name of every person a resident in good faith on such day and the lot on which he resides, which shall be verified by the affidavit of the person taking the same affixed thereto. The original of such census shall be filed in the office of the village clerk and a duly verified copy filed with the clerk of the circuit court of the county wherein such village is situated."

Having proceeded under sec. 61.58, no referendum was required, and if the resolution was adopted by a two-thirds vote of the village board at a regular meeting it is sufficient. See XIII Op. Atty. Gen. 517.

While the only express requirement of sec. 61.58 is that the clerk certify as to the election and the description of the legal boundaries of the proposed city, until it is established that the requisite number of residents has been ascertained by census and also that a resolution was properly passed

no occasion arises for the application of sec. 61.58. The existence of the requisite number of residents and the passage of the resolution are prerequisites to the issuance of the charter.

It is therefore our opinion that, in addition to the certified report of the election and of the legal boundaries of the city, you should be furnished a certified copy of the resolution adopted by the village board and also a certification as to the date and result of the census. The certificate attached to the resolution should show that it was adopted at a regular meeting by a two-thirds vote. The certified report which you presented to us should contain not only the result of the election and the legal boundaries of the city, but also facts showing that the election was regularly noticed, conducted, and canvassed. Only when you have been furnished all of the above specified information can you be satisfied that the proceedings under sec. 61.58 were regularly instituted and followed so as to authorize the issuance thereunder of a charter.

Subsec. (2) of sec. 61.58, Stats., states that upon the certification of the proper information to the secretary of state the charter shall issue and that thereafter the city shall be governed by the general city charter law. It is not until the issuance of the charter that the city will be governed by the general city charter law and, therefore, until the issuance of the charter the incorporation of the village as a city is not complete. It is, therefore, our opinion that the date of incorporation should be the date of issuance of the charter. HHP

Dogs — Damage by Dogs — County board may refuse to allow claim presented under sec. 174.11, Stats., for damages to domestic animals by dogs and claimant may appeal to circuit court.

November 16, 1937.

JAMES P. CULLEN,
District Attorney,
Prairie du Chien, Wisconsin.

In your recent request for an opinion from this department you state that in one township of Crawford county a dog license fee of one dollar was collected and turned over to the county clerk by the town treasurer without any delinquent list being submitted for those owners of dogs who did not pay their license. You also state that there were claims filed with the county clerk by owners of domestic animals in this particular township for damage done by dogs during the license year although a number of these claimants own dogs for which no license fee has been paid, and you inquire whether the county board must allow these claims or whether such allowance is discretionary.

Sec. 174.11, subsec. (2), Stats., relating to claims for damages by dogs to domestic animals, provides:

"* * * The county clerk shall lay before the county board at its first meeting, following the receipt of any such claim, all claims so filed and reported and the same shall be acted upon and determined by the county board as other claims are determined and acted upon, and the county board shall equalize the values and claims between and within the various towns of the county. The amount of damages filed and reported to the county clerk shall be prima facie proof of the actual damages sustained, but evidence may be taken before the county board relative to the claims as in other cases and appeals from the action of the county board shall lie as in other cases. On appeal from the action of the county board, said trial shall be by the court without a jury."

All claims for damages done by dogs filed pursuant to the above section of the statutes are to be considered and acted upon the same as other county claims under sec. 59.76, Stats., which provides that the county board may allow or

disallow any claim presented to it, and if a particular claim is disallowed, an appeal may be had as provided therein. This section of the statutes is applicable to claims filed under sec. 174.11, Stats., and accordingly it follows that the county board is not required to pay every claim filed under that section. However, payments should be made if the claimant complies with the requirements of sec. 59.76 and follows the procedure outlined in sec. 59.77, Stats., and establishes conclusive proof that the damages in question were caused by a dog.

Under sec. 174.11, subsec. (3), Stats., all claims are paid from the dog license fund, and such claims create no other liability against the county. XVI Op. Atty. Gen. 807; IX Op. Atty. Gen. 480; XVIII Op. Atty. Gen. 164. If there is any doubt as to the authenticity of a claim, the county board may refuse to allow it and the claimant may then appeal to the circuit court as provided by statute. The fact that one dollar was received from a particular township as a dog license fee is immaterial in passing upon claims filed by persons residing in such township.

OSL

Indigent, Insane, etc. — Poor Relief — Under provisions of subsec. (2), sec. 49.03, Stats., municipality furnishing relief to transient poor person sends bill to county in which such municipality is located.

Under provisions of subsec. (2), sec. 49.03 municipality furnishing relief to transient poor person must look entirely to county for payment.

Where county changes from county system to township system of poor relief, municipalities are not liable to reimburse county for relief to poor persons receiving relief in outside counties until county clerk notifies municipality in accordance with provisions of subsec. (4), sec. 49.03, Stats.

November 17, 1937.

CLAYTON J. CROOKS,
District Attorney,
Wausau, Wisconsin.

You state that Marathon county is operating on the township system of relief, and you ask several questions relating to the interpretation of sec. 49.03, Stats.

Sec. 49.03, as amended by ch, 344, Laws 1937, which was published on July 3, 1937, provides in part:

"(1) When any person not having a legal settlement therein shall be taken sick, lame, or otherwise disabled in any town, city or village, or from any other cause shall be in need of relief as a poor person and shall not have money or property to pay his board, maintenance, attendance and medical aid and shall make a sworn statement as to his legal settlement, the town board, village board or common council shall provide such assistance to such persons as it may deem just and necessary, and if he shall die, it shall give him a decent burial. It shall make such allowance for such board, maintenance, nursing, medical aid and burial expenses as it shall deem just, and order the same to be paid out of the town, city, or village treasury.

"(2) The expenses so incurred shall be a charge against the county. The account therefor shall be audited by the county board and paid out of the county treasury, and may be recovered by said county of the town, city or village in which such person so relieved has a legal settlement if within said county; and if not, it may be recovered from the

county where such person has his legal settlement, and such county in return, except when operating under the county system of relief pursuant to section 49.04, may recover from the town, village or city of such person's legal settlement.

"(3) The clerk of the municipality furnishing such relief shall ascertain, if possible, the municipality in which such settlement is located, and within ten days after such person becomes a public charge, shall serve upon the county clerk of his county a written notice which shall state the name of the person who has received public aid, the name of the municipality where such person claims a legal settlement, or, if such place could not, after due diligence, be ascertained, a statement of such fact, and the date on which the first aid or support was furnished. In case such notice is not given within ten days, the same may be given at any other time, but the county shall be liable only for the expense incurred for the support of such person from and after the time of the giving of such notice.

"(4) The county clerk shall file such notice in his office, and shall within ten days after the receipt thereof serve a written notice, containing the information so received, upon the county clerk of the county in which such person claims a legal settlement, and, if such county is not under the county system of maintaining its poor, the county clerk thereof shall at once forward such notice to the clerk of the town, city or village in which such person claims a legal settlement. In case such notice is not given within such ten days the same may be given at any other time, but the municipality so notified shall only be liable for the expense incurred by such county for the support of such person from and after the time of the giving of such notice. If the clerk of the town, city or village upon whom such notice is given, shall fail to deny responsibility by registered mail within ten days from the time of the receipt of the notice, such municipality shall be liable for the expense and support of such poor person until such denial shall be sent to the clerk of the municipality or county giving the relief. Such denial of responsibility shall state the facts and other data upon which legal settlement is disputed.

"* * *."

Your first question is: Should the county or municipality furnishing the relief to a transient poor person bill Marathon county or bill the municipality in which legal residence of the poor person is established?

Subsec. (2) of sec. 49.03 expressly provides that the expenses "so incurred" shall be charged against the county.

Necessarily, therefore, the municipality furnishing the relief to a transient poor person should send the bill to Marathon county. Marathon county under the provisions of subsec. (2) of sec. 49.03 pays the bill and may recover from the town, city or village in which the person so relieved had a legal settlement if in Marathon county; if the person has legal settlement outside of Marathon county, Marathon county may recover from the county in which the person receiving relief has his legal settlement.

Your second question is: In the event of nonpayment, should action be taken against the municipality or against Marathon county?

In view of the express provision of subsec. (2) of sec. 49.03, the municipality furnishing the relief must look entirely to Marathon county for payment.

Your third question is: If the county clerk of Marathon county failed (when Marathon county went off the county system and back to the township system) to file notices with all municipalities in Marathon county of individual transient poor persons receiving relief in outside counties or municipalities, does his failure so to do relieve the municipalities in Marathon county from their liability to the county or municipalities furnishing such relief and, if so, does it cause a continuance of Marathon county's liability until such notice has been given?

Subsec. (4) of sec. 49.03 provides for the giving of notice, by the county clerk of the county in which the person receiving aid claims a legal settlement, to the clerk of the town, city or village in which such person claims a legal settlement. This section provides that the municipalities so notified shall be liable for expenses incurred from and after the time of giving such notice. Therefore, until Marathon county notifies municipalities in accordance with the provisions of subsec. (4) of sec. 49.03, those municipalities are not liable to reimburse Marathon county.

ML

Commerce — Interstate Commerce — School Districts — Textbooks — Ch. 384, Laws 1937, relating to home study and correspondence school courses, is invalid as applied to interstate commerce.

November 18, 1937.

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

You have asked for our opinion on a number of questions arising under ch. 384, Laws 1937, relating to home study or correspondence school courses.

We will not take the space here to quote ch. 384, as it is lengthy. In substance it may be said that this chapter widens the application of sec. 40.28, Stats., relating to school textbooks and encyclopaedias or other reference books so as to include home study or correspondence courses. A section is also added making it unlawful to represent as an inducement to the sale of any home study course that employment will be secured for the purchaser upon completion of the course, unless there is a written contract between such school and an employer whereby the latter is bound to furnish such employment as represented. There is also a section excluding from the operation of the act any college or university organized and operating in the state of Wisconsin whose credits are accepted by the North Central Association of Colleges and Secondary Schools or to any correspondence course or courses they may offer.

Your first question reads as follows:

"1. The United States supreme court having held that teaching by correspondence is classified as interstate commerce and therefore subject to control by the United States congress, has the legislature of the state of Wisconsin burdened textbook companies and home study course schools, which are incorporated under the laws of other states, with undue restraint by the terms of chapter 384, laws of 1937?"

The United States supreme court decision to which you refer is that of *International Textbook Co. v. Pigg,* 217 U. S. 91. This case holds that a foreign corporation engaged in

teaching by correspondence is engaged in interstate commerce and that a state statute which makes it a condition precedent to a foreign corporation engaging in a legitimate branch of interstate commerce to obtain what practically amounts to a license to transact such business, is a burden and restriction upon interstate commerce, and as such is unconstitutional under the commerce clause of the federal constitution.

The statute there under consideration in effect required a corporation doing business in the state of Kansas to file with the secretary of state a statement of its financial condition, the authorized capital stock, the paid up capital stock, the par value and the market value per share, the names of its officers, etc. The statute denied to a corporation doing business in Kansas the right to maintain an action in a Kansas court unless it first obtained a certificate from the secretary of state to the effect that the proper statements had been filed.

It is true that a state is not without power to protect the public health, safety and welfare of its citizens against acts by those engaged in interstate commerce. *Hall v. Geiger-Jones Co.*, 242 U. S. 539; *Hartford Accident & Indemnity Co. v. Illinois*, 298 U. S. 155. However, a state is without power to control prices charged by persons or corporations engaged in interstate commerce. *Baldwin v. Seelig*, 294 U. S. 511.

Ch. 384, in so far as it requires companies selling home study courses to reduce prices in Wisconsin whenever reductions are made elsewhere in the United States and to file statements of list prices, lowest wholesale prices and lowest exchange prices, etc., lays a burden upon interstate commerce so as to come within the condemnation of the *International Textbook Co.* case and the case of *Baldwin v. Seelig, supra.*

Our answer to your first question makes unnecessary any discussion of your second question which is hypothecated upon the assumption that ch. 384 does not interfere with interstate commerce.

In your third question you inquire whether there is any defensible distinction between textbook publishing com-

panies and home study course schools which may be exercised by the department of public instruction in the administration of ch. 384, Laws 1937.

There is no distinction between a textbook publishing company and a home study course company so far as the law on interstate commerce is concerned; that is to say, whatever constitutes an interference with interstate commerce in the case of one would likewise constitute an interference in the case of the other.

You also ask whether the administration of ch. 384, Laws 1937, is limited in application to Wisconsin textbook companies and home-study schools.

In view of our answer on the invalidity of ch. 384 as applied to interstate commerce, it follows that the application of this chapter must be limited to intrastate commerce.
WHR

Recovery Act — Codes — Under sec. 110.04, Stats., governor may prescribe codes of fair competition and trade practices for trade areas within state.

November 18, 1937.

E. M. ROWLANDS, *Commissioner,*
Trade Practice Commission.

You have requested an opinion as to whether sec. 110.04, Stats., gives the governor power and authority to prescribe a code or standard of fair competition and trade practices in a trade area within the state, such as the city of Milwaukee or Milwaukee county, thereby leaving all other areas in the state without such code.

Sec. 110.04, subsec. (1), par. (a), Stats., reads in part as follows:

"* * * The governor is hereby vested with the power and jurisdiction and it shall be his duty to investigate, as-

certain, declare and prescribe reasonable codes or standards of fair competition and trade practices for the various trades and industries in the state in which the competition is essentially and preponderantly intrastate or for certain trade areas within the state, and to make reasonable classification of persons, employments and standards of fair competition and trade practices in such business. * * *"

This statute first uses language which authorizes a code to be effective throughout the state generally, and then says "or for certain trade areas within the state." Had it not been intended that a code might be prescribed for a territory less in area than the whole state, the latter language would not have been used. It is clear that it is the intention of the statute that a code may cover the whole state or only a portion thereof if the latter comprises a trade area.

It is therefore our opinion that under sec. 110.04, Stats., the governor may prescribe a code or standard of fair competition and trade practices for a trade area which is less in territory than the whole state, thereby leaving the remaining area of the state without such code or to be later dealt with by further code or codes for the whole or such portions thereof as may comprise trade areas.

HHP

Bonds — Public Health — Cemetery Memorial Dealers — Upon denial of license as cemetery memorial salesman under sec. 157.15, Stats., money deposited with bank in escrow as cash bond, required of applicant for license, may be returned by bank.

November 22, 1937.

THEODORE DAMMANN,
Secretary of State.

You state that an applicant for license as a cemetery memorial salesman under sec. 157.15 Stats., prior to making application, deposited as a cash bond the sum of two hun-

dred dollars with a bank, which agreed to keep it in escrow until the statute of limitations should expire, in order to comply with this section. The application for a license as a salesman was denied, however, by your department on the ground that his employer was not qualified under the law as a memorial dealer. The applicant now wishes to secure release of this two hundred dollars from the bank and you ask if the bank is authorized to return it to him at this time.

The purpose for which this money was deposited with the bank by the person subsequently making the application for a license as a cemetery memorial salesman was to effect the cash bond required by sec. 157.15, subsec. (3), par. (e), Stats. This section requires that each application for a salesman's license shall be accompanied by a surety bond or a cash bond indemnifying any person against damages by misrepresentation, breach of warranty or fraud of the salesman. As the statute requires the bond to be effected prior to the making of the application, no license may be issued until such bond has been entered into. The salesman may not sell any cemetery memorials until he has his license. It is thus apparent that the bond is intended to cover and indemnify against damages by reason of misrepresentation, breach of warranty, or fraud by the salesman arising out of activities occurring after he receives his license. That is the clear intent of the statute.

Until the license is issued the bond does not become effective, as the conditions against which it indemnifies or is intended to indemnify have never come into existence. Before there can be any liability on the bond or the bond can be said to have gone into effect the license of the salesman must be issued. The issuance of the license operates as an acceptance of the bond.

It is said in 9 Corpus Juris, pages 18-19, sec. 28:

"Every bond, in order that it may be a binding obligation, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If, for any reason, an obligee in a bond refuses to accept it, the bond does not become operative, and no liability on the part of the maker thereunder arises.

"Statutory or official bonds made payable to the state cannot become effective until they are accepted by those duly authorized to accept them."

It is our opinion that the deposit of the two hundred dollars with the bank to be held in escrow as a cash bond required by sec. 157.15, Stats., has never become operative because the license as a salesman was never issued and in fact was denied, and that the bank is authorized to return the two hundred dollars to the depositor at this time, since no liability has arisen under the bond.
HHP

Criminal Law — Felony — Minors — Child Protection — Child between ages of sixteen and eighteen years who has committed felony may be proceeded against either as delinquent child under provisions of ch. 48, Stats., or in same manner as adult who has committed felony, although sound social policy suggests use of former procedure.

November 23, 1937.

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

You direct our attention to secs. 54.02, subsec. (1), and 48.01, Stats., and ask to be advised as to the proper procedure to follow where a boy over sixteen but less than eighteen years of age has committed a felony.

Sec. 54.02 (1), or as much thereof as is pertinent, reads as follows:

"Male persons not less than sixteen nor more than twenty-five, and female persons not less than eighteen nor more than thirty years of age, of the following classes, may, in the discretion of the court, be sentenced and committed, respectively, to the said reformatory or industrial home, namely:

"Class one: Male persons convicted the first time, of a felony, or convicted the first time of any misdemeanor punishable by imprisonment in the county jail or house of cor-

rection for one year or more; except male persons convicted of murder in the first or second degree."

Clearly under this section of the statutes the courts of your county having jurisdiction to hear, try and determine felony actions will have jurisdiction over the person of a boy over the age of sixteen years who is properly charged with committing a felony and upon conviction thereof can, in its discretion, sentence and commit him to the Wisconsin state reformatory. However, that is purely discretionary with the court, as sec. 48.15, Stats., specifically provides that such a boy, in the discretion of the judge or magistrate before whom the case is tried, may be committed to the industrial school of this state instead of the state prison, state reformatory, house of correction, county jail or police station, as the case may be.

You may also follow the procedure laid down in ch. 48, Stats., which permits of filing a complaint with the juvenile court setting forth the fact that the child has violated a law of this state. The court then may issue a summons or capias to cause the boy to be brought before it under the provisions of sec. 48.06, Stats. If this procedure is followed, there cannot be a conviction for the commission of a felony. See subsec. (3) of sec. 48.07. However, subsec. (1), par. (b), sec. 48.07, Stats., does provide that said boy if found to be delinquent may, in the discretion of the judge, be committed to the industrial school. Therefore, it is our opinion that you may proceed against the boy by way of complaint and warrant in the usual manner in which you proceed against adults or you may proceed against him under the provisions of ch. 48, Stats., as a delinquent child.

Ordinarily it would seem that the procedure provided for in ch. 48 should be followed, since the very purpose of this chapter is to provide for an approach to the problems of juvenile delinquency more humane and enlightened than had been possible in the regular criminal courts. Irremediable harm might be done by proceeding against a juvenile between the ages of sixteen and eighteen in the same manner as in the case of adults. That is why sociologists, criminologists and social workers have advocated the enactment of juvenile delinquency statutes such as we have in Wisconsin.

Consequently sound social policy suggests the use of this procedure which the legislature has so wisely made available in the case of juvenile delinquents.
WHR
AGH

Appropriations and Expenditures — Bridges and Highways — Street Improvement — Snow Removal — Allotment of motor vehicle fuel taxes under sec. 20.49, subsec. (8), Stats., may be used by town to purchase snow removal equipment.

Authorization for such purchase may be made at special town meeting.

Money in general fund of town may be used to purchase snow removal equipment.

November 24, 1937.

T. W. ANDRESEN,
District Attorney,
Medford, Wisconsin.

You state that at an annual town meeting an oral motion was made that the town officers purchase a grader and snow plow for such price and upon such terms as the board deemed "feasible." Some question has arisen as to whether the town would have the right to purchase a machine that would probably cost about five thousand dollars. You have requested an opinion on several questions.

Question 1. Can the town's share of motor vehicle fuel taxes be used for the purpose of purchasing such equipment?

Sec. 20.49, subsec. (8), Stats., appropriates from the motor vehicle fuel taxes certain sums to the towns, villages and cities "for the improvement of * * * public roads and streets." In XXI Op. Atty. Gen. 380, this department

held that the money appropriated under this section could be used for the purchase of equipment necessary for the improvement of such roads. In XXI Op. Atty. Gen. 66, we held that the term "improvement" must be given a broad interpretation so as to include actual maintenance, and, in accordance with that opinion, we held in XXII Op. Atty. Gen. 538 that snow removal fell within the meaning of "improvement."

It is our opinion, therefore, that since snow removal is a road improvement within the meaning of this subsection and since these allotments may be used for the purchase of equipment needed for road improvement, a grader and snowplow can lawfully be purchased with the money allotted to the town by sec. 20.49 (8).

Question 2. Can a special meeting be called for such a purpose and can the board be authorized to purchase such equipment by a resolution duly passed?

The town board is empowered by sec. 81.01 (3), Stats.,

"To provide machinery, implements, material and equipment needed to construct and repair said highways and bridges, and for that purpose may acquire by purchase or by condemnation in the manner provided by chapter 32 gravel pits and stone quarries, but the total sum spent under this subsection shall not exceed one thousand dollars in any year, unless a greater sum be authorized by the town meeting."

Sec. 60.07, Stats., provides as follows:

"There shall be an annual town meeting of each town on the first Tuesday of April at which all business shall be transacted which is by law required or permitted to be transacted at such meeting; * * *."

Sec. 60.12 provides as follows:

"Special town meetings may be held for the purpose of transacting any lawful business which might be done at the annual meeting, on a request being made to the town clerk in writing signed by twelve qualified voters of such town specifying in such request the purposes for which such meeting is to be held. No matter voted upon or decided at

any such special town meeting shall be acted upon in any subsequent special town meeting held in such town prior to the time for holding the next annual town meeting."

If the cost of the equipment to be purchased does not exceed one thousand dollars, under 81.01 (3) the board may purchase without any authorization. If it does exceed such sum, then authorization must be secured at a town meeting. Since this would be a lawful order of business at a regular annual meeting, it is our opinion that it may be the subject of business at a special meeting as provided in sec. 60.12.

Question 3. Can money from the general fund be used for the purpose of paying for such machinery even though the town will later have to borrow money for general administration purposes?

We find no statutory provision that will prevent a municipality from making such expenditures from its general fund, when duly authorized so to do, even though it is apparent that such expenditures will necessitate temporary borrowing under sec. 67.12. While such action may be inadvisable from a financial standpoint, there is no provision of the statutes to prevent such action and, accordingly, it is our opinion that the general fund may be used for such purpose.

HHP

Navigable Waters — Public Lands — Title to artificially made lands above waters of navigable lakes is in state.

Title to such lands does not arise out of any grant from federal government and such lands do not belong to common school fund.

State may alienate title to lands submerged by lake for public park purposes where to do so does not substantially interfere with commerce or navigation.

November 29, 1937.

COMMISSIONERS OF PUBLIC LANDS.

You call our attention to ch. 633, Laws 1919, which authorized and directed the commissioners of public lands to execute state patents conveying certain lands to the city of Kenosha for public park purposes. These lands included lands which are now or have heretofore been submerged beneath the waters of Lake Michigan.

In this connection you inquire whether title is in the state in the case of artificially made lands above the waters of navigable lakes beyond what is absolutely needed for navigation purposes and for the protection of original banks from the action of water.

The state holds title to all artificially made lands above navigable lakes. This arises from the fact that the state holds legal title to all land under the waters of lakes and ponds in this state. *Diedrich v. The Northwestern Union Ry. Co.*, 42 Wis. 248; *McLennan v. Prentice*, 85 Wis. 427; *Rossmiller v. State*, 114 Wis. 169.

Such legal title to submerged lands is subject to numerous limitations. Riparian owners have a right to build piers and docks in aid of navigation. *Diedrich v. The Northwestern Union Ry. Co., supra.* They also have the right to protect original banks by embankments. Legal title to submerged lands is subject to partial divestment by gradual accretion or reliction. *Boorman v. Sunnuchs*, 42 Wis. 233.

It has been held that the state holds the legal title to submerged lands in trust for the people of the state. *Priewe v. Wis. State Land & Improvement Co.*, 93 Wis. 534; *Illinois Steel Co. v. Bilot and Wife*, 109 Wis. 418. The trust charac-

ter of such submerged lands imposes certain limitations on the power of alienation, which will be discussed more fully later in the opinion. In the case of *McLennan v. Prentice,* 85 Wis. 427, it was held that lands lying under the shoal waters of the Great Lakes, and between the bank and navigable waters, are held by the state in trust for the public purposes of navigation and fishing, and that no grant thereof for purely private purposes can operate to impair or defeat the previously acquired rights of riparian owners. It was also held there that where such lands have not been granted to any one by the state they are not the subject of private ownership so that they can be conveyed in fee or otherwise. And, in the case of *Attorney General ex rel. Askew v. Smith,* 109 Wis. 532, 540, it was held that the state could not convey submerged lands to private persons.

Secondly, you inquire whether the title to artificially made land in navigable lakes automatically becomes school lands under the common school fund set up in art. X, sec. 2 of the Wisconsin constitution, and particularly under the clause thereof which includes in such fund "all moneys arising from any grant to the state where the purposes of such grant are not specified."

Prior to the ordinance of 1787 a number of eastern states laid claims to lands in the Northwest Territory, Virginia in particular laying claim to all the territory northwest of the Ohio river. In 1784 Virginia relinquished her claims to western lands for the benefit of states which should be carved out of such lands in the future. By the ordinance of 1787 the territory northwest of the Ohio river was provided with a government. Subsequent to the adoption of that ordinance, and before the state of Wisconsin was admitted into the Union, the title to all submerged lands was held by the United States in trust for the states to be formed out of the Northwest Territory. Upon entering the Union the state of Wisconsin automatically became vested with title to all submerged lands, no grant from the United States being necessary. In other words, when Wisconsin entered the Union she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Virginia had possessed over the submerged lands. The United States government,

so to speak, acted only as a sort of depository for the title between the time the lands were ceded by Virginia and the time when Wisconsin and other western states were admitted into the Union. See *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212.

It was established in the *Pollard* case that title to submerged lands does not rest on a grant from the United States. In that case the plaintiff, having a patent to certain submerged lands in Alabama, sought to eject the defendant from the occupancy of such lands. The court pointed out that the deed of cession by which Virginia relinquished her claims to the Northwest Territory was similar to the one by which Georgia relinquished her claims to Alabama territory. In neither case did the United States get title to submerged lands. As to uplands, it was specifically provided by the various deeds of cession that the lands ceded should be sold and that the money received should constitute a common fund for the use and benefit of the United States.

In the case of *Illinois Steel Co. v. Bilot and Wife,* 109 Wis. 418, Justice Marshall said, pp. 425-426:

"* * * A patent from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary highwater mark. The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. * * *."

Since the title to submerged lands does not come to the state by grant, it is not within that portion of art. X, sec. 2 of the Wisconsin constitution which allocates to the common school fund "all moneys arising from any grant to the state where the purpose of such grants is not specified."

Thirdly, you inquire whether the land commission has authority to convey lands submerged under the waters of Lake

Michigan for public park purposes in accordance with the provisions of ch. 633, Laws 1919.

It is well established that school lands cannot be converted into parks. *State ex rel. Sweet v. Cunningham,* 88 Wis. 81. However, as pointed out in the answer to the preceding question, submerged lands cannot be considered as school lands.

Also, as previously pointed out, the state holds submerged lands in trust for public purposes and cannot convey the same to private persons. It has been held that the state cannot authorize the drainage of lands covered by the Mississippi river, since such acts would interfere with navigation. *In re Crawford County L. & D. District,* 182 Wis. 404. However, drainage has been permitted where there is no substantial interference with navigation. *Merwin v. Houghton,* 146 Wis. 398; *Milwaukee v. State,* 193 Wis. 423. Nor is it legal to convey away the rights to an entire harbor. *Illinois Central Railroad v. Illinois,* 146 U. S. 387. In the *Illinois Central Railroad* case it was suggested that the state could convey parcels of submerged lands where no substantial interference with commerce or navigation would result. In the case of *People ex rel. Attorney General v. Kirk,* 162 Ill. 138, 45 N. E. 830, it was held that the state could alienate parts of submerged lands in Lake Michigan for park purposes.

While the decisions of the Wisconsin supreme court do not very clearly define the limits of the power of the state to alienate submerged lands, we conclude, on the basis of the foregoing discussion, that any conveyance of submerged lands for public park purposes which does not substantially interfere with commerce or navigation would be valid. See Farnham, Waters and Water Rights, Vol. I, p. 173, and following.

WHR

Public Officers — Highway Commission — University — Regents of university of Wisconsin may co-operate with state highway commission by leasing to it lands for construction of highway materials and testing laboratory to be used by both highway commission and students of university for laboratory and research purposes.

November 29, 1937.

J. D. PHILLIPS, *Business Manager,*
The University of Wisconsin.

You have submitted to us for examination a copy of a proposed lease agreement between the regents of the university of Wisconsin and the state highway commission of Wisconsin whereby the regents propose to lease certain university lands to the highway commission for the purpose of providing a site for the construction of a materials testing and research laboratory under the provisions of ch. 303, Laws 1937, said building to be used jointly by the highway commission and by students of the university of Wisconsin engineering school.

Our opinion is requested on the question of whether or not the regents have legal authority to enter into such an arrangement with the state highway commission.

Without here taking the space to specifically enumerate the details of the leasing arrangement, suffice it to say that by the terms of the agreement the state highway commission of Wisconsin is permitted to use certain described university lands for a period of forty years for the purpose of constructing and maintaining a materials testing and research laboratory, the design of such building or buildings to be subject to the approval of the regents. The consideration for the granting of the lease is that during the term of the lease the laboratory and equipment may be used by students of the university of Wisconsin without charge to the university. Questions of renewal of the lease and disposition of the buildings at the termination of the lease are left to the agreement of the parties, or in default of reaching any agreement, to the determination of the legislature.

The agreement, among other things, refers to sec. 14.65, subsec. (1), Wis. Stats., which provides that the several

state officers, commissions and boards shall co-operate in the performance and execution of state work. Reference is also made to ch. 303, Laws 1937, which appropriates to the state highway commission on August 1, 1937, not to exceed one hundred seventy-five thousand dollars for the purchase or lease of a suitable site for, and the constructing and maintaining of a highway materials testing and research laboratory and sign shop.

Under ch. 36 of the statutes, the regents of the university are given very wide powers respecting the management and control of university property.

Sec. 36.03 provides in part:

"The board of regents and their successors in office shall constitute a body corporate by the name of 'The Regents of the University of Wisconsin,' *and shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law,* * * *."

Sec. 36.10 provides in part:

"All moneys which shall be derived to the university * * * *from sales or rents of real property* * * * may be paid to the secretary of the board in all cases where the board shall authorize him to receive the same * * *."

In the case of *Aberg et al. v. Moe et al.*, 198 Wis. 349, it was held that the taxing authorities of a city have no authority to go behind a transaction whereby the regents acquired title to real estate, and subsequently leased the same. The court said at p. 356:

"* * * It cannot be denied that in a proper case the Board of Regents has power to make a valid and binding lease; * * *"

Unfortunately, the court did not elaborate on what might constitute a proper case.

It is true that the regents have no powers except those conferred by statute, either by express language or fair intendment. *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159. However, the court said at p. 166:

"* * * The board is a creature of law, and hence cannot rise above the law, nor be a law unto themselves, in matters outside of the scope of the powers granted to them. *But this does not mean that it can do no act except such as is specifically mentioned in the statute. It would be altogether impracticable to prescribe by statute the numerous and varying duties of such a board. Much must necessarily be implied from the character and objects of the corporation, the nature of the trust imposed, and the general powers granted.* * * *." (Italics ours.)

While we have found no express statutory authority for a lease such as the one under consideration, such power may fairly be implied "in a proper case" from the express powers given the board of regents as was indicated in the *Aberg* case, *supra*. The only question is whether such power comes within the limitations imposed upon the board in the exercise of its implied power. In other words, to use the language of the court,—Is this a proper case?

It seems clear at the outset that the board would probably not have the implied power to lease university property for a strictly private purpose. Public officials are generally held not to have such powers with respect to public property. See *Hilgers v. Woodbury County*, 200 Iowa 1318, 206 N. W. 660. See also 33 L. R. A. 118, Note, and 63 A. L. R. 614, Note.

It may well be that the court had this type of limitation in mind when it restricted the power to lease to "a proper case" in its discussion in the *Aberg* case, *supra*.

However, this is not the case of leasing public property for a private purpose. The board of regents is undoubtedly acting within the scope of its authority in making provision for laboratory and research facilities for its students. The highway commission has express statutory authority to lease property and construct the building in question. Apparently both contracting parties will benefit from the plan, and both are merely arms or agencies of the state. See *Aberg v. Moe, supra,* and *State ex rel. McDonald v. Nemachek,* 199 Wis. 13, 17. The purpose is public as to both parties and both departments or bodies are at all times subject to the complete control of the state through the legislature.

Coupled with the foregoing considerations is the fact, as we understand it, that the highway commission for some

time past has, with the permission of the regents, maintained a structure on the university campus for the same purpose, subject to use by students in engineering courses.

Sec. 14.65 (1), Stats., expressly commands the several state officers, commissions and boards to co-operate in the performance of state work. These words are not idle rhetoric, and the agreement in question would seem to furnish an excellent example of what the legislature probably had in mind in the enactment of the above statute. Such an arrangement saves money for both state departments concerned, and hence to the state itself, and it appears to be highly desirable upon the basis of past experience. The interests of the state appear to be promoted by such co-operation, and it is concluded that the proposed lease is a proper one and within the implied powers of the board of regents.
WHR

Trade Regulation — Trading Stamps — Giving of parking stamps to customer at rate of ten cents for one dollar or more of merchandise, which stamps can be used to pay for parking at certain garages and parking lots, constitutes violation of sec. 100.15, subsec. (1), Stats.

November 30, 1937.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You have asked whether sec. 100.15, subsec. (1), Stats., the trading stamp statute, applies to the following plan.

A number of down town business houses in a city where the parking problem is particularly acute have formed a nonprofit association. Patrons of the members of this association may park their cars at any one of a number of garages and parking lots. A parking check is issued when the car is parked. On purchases of one dollar or more in the

stores belonging to the association parking stamps are affixed to the parking check at the request of the purchaser. Each of these stamps entitles him to a ten cent reduction on his parking charge. He may make purchases at other member stores and obtain further stamps on the same basis, although stamps affixed in excess of the charge made for parking have no redemption value.

Sec. 100.15, subsec. (1), Stats., provides in part:

"No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or deliverd to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise, privilege, *or thing of value* in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same; * * *."

The problem presented is whether the parking stamps in question constitute a "thing of value" within the meaning of the above statute.

The answer to this question is too plain to call for any extended discussion. Without such parking stamps the customer would be obliged to pay the regular parking charge for his car; with the stamps this charge is either wholly or partly saved, depending upon the amount of his purchases. The saving is direct and its value can be clearly measured in dollars and cents. See XIX Op. Atty. Gen. 547, holding that the giving of an insurance policy on the life of a customer in exchange for five hundred trading stamps issued in connection with the sale of merchandise to the purchaser is in violation of the trading stamp law.

Aside from the fact that the parking stamps constitute a thing of value, there is also present the element of lure and

the purchasers at the stores following this plan are subjected to the evils mentioned by the court in the *Trading Stamp Cases,* 166 Wis. 613, in that they rely upon something else than the articles sold and are tempted by a promise of a value greater than that article which is apparently not represented in its price.

The parking stamps serve to lure people to the stores which issue them and customers who would otherwise patronize their neighborhood stores are thus induced to purchase in the down town shopping district. Furthermore, there is the lure to purchase more merchandise than otherwise would ordinarily be purchased, since the customer is anxious to save the entire parking cost if possible.

It may well be that the stamps are later redeemed by the parking lot or garage owners at considerably less than their face amount. Otherwise the store owner could as well issue regular trading stamps redeemable in cash and thus avoid any question of illegality under the trading stamp statutes.

You are therefore advised that the parking stamp plan is in violation of sec. 100.15, subsec. (1), Stats.

OSL
WHR

Building and Loan Associations — Insurance — Matured stock in building and loan association under secs. 215.13 and 215.134, Stats., should be fully retired in cash or matured share certificates should be issued therefor in event of inability of association to retire same.

Building and loan association may act as agent of life insurance company in collection of premiums.

December 2, 1937.

Banking Commission.

You have called our attention to a plan whereby several Wisconsin building and loan associations propose to issue a new type of instalment stock. The shareholder, instead of receiving a lump sum upon maturity of the stock, will be paid on an annuity basis over a period of years. It is further contemplated that the shareholder may take out life insurance to protect the annuity contract so that in the event of his death before the contract is completed the insurance would pay up the balance due. The policy would be made payable to the secretary of the association, as trustee, and he would apply the proceeds of the policy to complete the instalment contract. The surplus, if any, would be used to purchase additional paid up shares. The sum total of these shares would then be paid out as annuities to a beneficiary on a monthly basis.

Under this plan an agreement would be made with the shareholder whereby his monthly payments to the building and loan association would include payments on his life insurance premiums, although such moneys would be kept separate and apart from the funds of the building and loan association and would be transmitted by the association to the life insurance company.

Should the shares mature before the death of the owner, he would have the option of receiving full cash payment of the shares plus the cash surrender value of the insurance policy, or he might elect to receive monthly payments until the face value of the certificates and accredited dividends should be paid. In lieu of accepting the cash surrender value of the cash insurance policy, the insured could elect to re-

ceive the policy itself and continue it in the same manner as any other insurance if he so desired, or he could elect to apply its cash surrender value to additional shares of the building and loan stock. In this connection you have asked for our opinion upon the following questions:

"(1) Under the present building and loan law may a building and loan association issue instalment stock payable on an annuity basis after maturity?

"(2) May a building and loan association or one of its officers act as an agent of the shareholder or the agent of the insurance company in the collection of the above mentioned insurance premiums providing that the association be not liable for the money so collected and that it at no time become a part of the assets of the association?"

In answering the first question it would appear that the building and loan statutes do not contemplate the issuance of stock payable on an annuity basis.

Sec. 215.13, Stats., provides in part:

"* * * The holders of unpledged shares shall be paid out of the funds of the association the matured value thereof, with such rate of interest or dividends as shall be determined by the by-laws, from the time the directors shall declare such stock to have matured until paid. * * *."

Nothing is said about paying out on an annuity basis. Furthermore, sec. 215.134, Stats., sets up provisions for issuance of matured share certificates where the association is unable to retire instalment shares in cash on maturity.

It is a familiar rule of statutory construction that the expression of one method results in the exclusion of others. *State ex rel. Owen v. Reisen,* 164 Wis. 123. Here the legislature has made provision for payment in full upon maturity of building and loan shares and for the issuance of matured share certificates where the association is unable to retire the shares at maturity. Such provisions therefore impliedly exclude any other treatment of matured shares.

This view is further supported by a consideration of the underlying purposes of building and loan associations. Originally, the object of such associations was to enable those of small means to acquire or to build homes and thus to become

better citizens. The theory was that such persons might become, by a system of compulsory saving, the owners of homesteads, either at the end of a certain time or in anticipation of it. 9 Am. Jur. 98-99.

It is true that the encouragement of thrift has also become one of the purposes of building and loan associations, as was pointed out in the case of *Hopkins Federal Savings & Loan Asso. v. Cleary,* 296 U. S. 315. However, the making of annuity contracts has heretofore been pretty largely confined to life insurance companies and is far afield from the primary purpose of building and loan associations.

In view of the foregoing it is very doubtful whether building and loan associations are empowered to engage in the sale of annuity contracts in Wisconsin under the present statutes. It is therefore our opinion that building and loan associations are not authorized to issue instalment stock payable on the annuity basis after maturity.

In answering your second question attention is called to sec. 209.04, subsec. (6), Stats., which, among other things, prohibits a corporation from being licensed as an agent of any insurance company for the purpose of collecting premiums. Consequently, a building and loan association, being a corporation, could not act as such agent. Sec. 209.05, Stats., excepts from the definition of agents one who receives no compensation for his services. The building and loan association is indirectly compensated for its services in handling insurance premiums under the plan discussed by the fact that its contract is automatically paid up by the death of the insured and the insurance feature doubtless aids in the sale of its shares. This, coupled with the express provision of sec. 209.04, subsec. (6), Stats., leads to the conclusion that a building and loan association may not act as agent of a life insurance company in collecting premiums. This department has previously so ruled in XIV Op. Atty. Gen. 461. See also VI Op. Atty. Gen. 244.

WHR

Social Security Law — Old-age Assistance — Ch. 7, Laws Special Session 1937, relating to old-age assistance, requires return to beneficiaries of all real property previously conveyed to county, regardless of form of conveyance.

Certificate of lien filed with register of deeds under ch. 7, Laws Special Session 1937, should cover all assistance previously rendered.

December 2, 1937.

PENSION DEPARTMENT.

Attention George M. Keith, *Supervisor of Pensions.*

You have called our attention to the provisions of ch. 7, Laws Special Session 1937, amending portions of ch. 49, Stats., relating to claims and liens for old-age assistance and the property of old-age assistance beneficiaries. It is quite evident from the language used in ch. 7 that the legislature intended to liberalize the administration of the old-age assistance law as it relates to the property of old-age assistance beneficiaries. The desire on the part of the legislature was to make available old-age assistance to those who needed it without requiring the transfer of real property by the beneficiary to the counties as a condition precedent to receiving old-age assistance.

In this connection you inquire as to the application in this chapter of the words "returned or released" to transfers of real property heretofore made to counties.

This question arises in connection with sec. 49.26, subsec. (5), Stats., which now reads:

"All real property in the state of Wisconsin previously transferred to the county court or the manager of county institutions under section 49.26 of the statutes of 1935 and held by said county court or said manager of county institutions on the effective date of this subsection shall be returned or released forthwith to the beneficiary or person from whom it was received, and a lien shall thereupon be acquired by the county in the manner provided in subsection (4) for any amounts previously paid or which thereafter may be paid and shall be enforceable in the manner provided in said subsection."

This section requires the return of all real property or interests therein whether conveyed to the county by deed, mortgage, or other type of lien. The language of the statute is quite clear and calls for no additional construction.

You also inquire whether the lien certificate to be filed with the register of deeds will give to the county a lien against the beneficiary's property for all amounts of old-age assistance previously paid to him.

The answer is. "Yes." Sec. 49.26, subsec. (4), provides:

"* * * From and after the time of such filing in the office of the register of deeds the lien herein imposed shall attach to any and all real property of the beneficiary presently owned or subsequently acquired, including joint tenancy interests, in any county in which such certificate is filed for any amounts paid or which thereafter may be paid under sections 49.20 to 49.51, and shall remain such lien until it is satisfied. Such lien shall take priority over any other lien subsequently acquired or recorded except tax liens. * * *."

This language applies as well to sums advanced without requiring a deed or other conveyance as it would to payments made where conveyances have previously been given.
WHR

Recovery Act — Codes — Delinquent code assessments under ch. 110, Stats. 1935, may be collected under ch. 110 as re-enacted by ch. 3, Laws Special Session 1937.

December 2, 1937.

TRADE PRACTICE COMMISSION.

Attention E. M. Rowlands, *Commissioner.*

Our attention is called to the fact that the highway contractors' code expired in July, 1937 by virtue of the fact that sec. 110.02, Stats. 1935, provided that the industrial

recovery statute, ch. 110, and any agencies established thereby, shall cease to exist on July 25, 1937.

At that time members of the highway contracting industry were in arrears on assessments for the maintenance of the code in the amount of approximately sixteen thousand dollars.

You inquire if your department is entitled to the assessments due under the old code whether or not a new code is established by the industry.

Ch. 3, Laws 1937, Special Session, re-enacted ch. 110 of the 1935 statutes, subject to certain changes.

Sec. 110.09, as re-created by ch. 3 provides:

"The governor shall continue under the provisions of this chapter administrative powers and duties connected with records and property that were acquired, *rights and obligations that became fixed,* and the balance in the state treasury, *under chapter 110 of the statutes of 1935.*" (Italics ours.)

This language evidences a legislative intent that the provisions of the former code statute, with respect to rights and obligations arising thereunder, should be continued. Such construction is further supported by the general proposition that where a statute has been repealed and then is wholly or partially re-enacted, such re-enacted portion of the statute will be regarded as a continuation of the old statute. *E. L. Husting Co. v. Milwaukee,* 200 Wis. 434.

The word, "rights and obligations that became fixed * * *under chapter 110 of the statutes of 1935," as used in the recreated section 110.09, must be given some meaning, and unpaid assessments due by virtue of the operation of ch. 110 of the 1935 statutes clearly fall within the purview of such language. Furthermore, it is immaterial whether the industry in question has established a new code under the present statute, since there is no language in sec. 110.09 limiting its application to industries in which new codes have been set up under the present law.

You are therefore advised that code assessments due and payable under the former ch. 110 may now be collected under the re-enacted ch. 110.

WHR

Marriage — Examination required by sec. 245.10, subsec. (5), Stats., created by ch. 311, Laws 1937, may be made only by physician licensed to practice in Wisconsin.

December 4, 1937.

HERBERT F. GUENZL,
District Attorney,
Merrill, Wisconsin.

You call our attention to sec. 245.10, subsec. (5), Stats., created by ch. 311, Laws 1937, and ask whether the certificate referred to therein may be given by a nonresident physician.

Sec. 245.10 (5) provides:

"In addition to the requirements of subsection (1) both parties to a proposed marriage shall, within fifteen days prior to making application for a license to marry, submit to and be given the Wassermann test for syphillis, such test shall at the request of any physician in the state be made at the Wisconsin psychiatric institute free of charge. If the test for any such party shall result in a negative finding he shall be given a certificate in the following form:

"I, _____ (name of physician), being a physician, legally licensed to practice in the state of Wisconsin, (and one of the staff at the Wisconsin physchiatric institute), do certify that _____ (name of person) was given the Wassermann test for syphillis at said institute _____ (or by whom made) on the _____ day of _____ 19___ and that the result of such test was negative.

"_____ (Signature of physician).

"Such certificate of negative finding as to each of the parties to a proposed marriage shall be filed with the county clerk at the time application for a license to marry is made, and it shall be unlawful for any county clerk to issue a license to marry if such certificates of negative finding as to both parties to the proposed marriage are not so filed."

It is to be noted that this certificate is made by a physician "legally licensed to practice in the state of Wisconsin." On the other hand, subsec. (2), sec. 245.10 provides that the physical examination of male persons wishing to marry shall be made by a physician "licensed to practice in this

state, or in the state in which such male person resides." Furthermore, the certificate of the physician under that section, in subsec. (1), reads:

"I, _____ (name of physician) being a physician, legally licensed to practice in the state of _____
* * *."

The certificate required by subsec. (2) might therefore be made by a physician licensed to practice in this state or the state in which the male person resides. However, the certificate set out in subsec. (5) refers only to a physician licensed to practice in the state of Wisconsin.

Applying the familiar rule of *expressio unius est exclusio alterius,* it is our opinion that the examination provided for in sec. 245.10 (5), Stats., created by ch. 311, Laws 1937, must be made by a physician licensed to practice in this state.

WHR

Recovery Act — Codes — Ch. 110, Stats., does not empower governor or trade practice commission to adopt code for women and girls employed as "domestics."

December 6, 1937.

TRADE PRACTICE COMMISSION.

Attention E. M. Rowlands, *Commissioner.*

You inquire whether ch. 110, Stats., gives the governor and your commission power and authority to promulgate a code or standards of fair competition regulating maximum hours of labor, minimum wages, and standards of fair competition for all women and girls employed in the city of Milwaukee and its suburbs as domestics.

Sec. 110.04, subsec. (1), par. (a), Stats., provides in part:

"Methods of competition in business and trade practices shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

The governor is hereby vested with the power and jurisdiction and it shall be his duty to investigate, ascertain, declare and prescribe reasonable codes or standards of fair competition and trade practices for the various trades and industries in the state in which the competition is essentially and preponderantly intrastate or for certain trade areas within the state, and to make reasonable classification of persons, employments and standards of fair competition and trade practices in such business. * * *."

Under this section the governor may promulgate codes of fair competition and trade practices "for the various *trades and industries* in the state in which the competition is essentially and preponderantly intrastate" and to make "reasonable classification of persons, employments and standards of fair competition and trade practices in such business." Ch. 110 in effect gives the governor authority to promulgate codes for trades and industries that protect the interest of the consumer, prevent monopoly, promote competition and stabilize industries generally. "Domestic service" does not come within the purview of the term "trades and industries" as used in this chapter. The consuming public will not be affected by the wages granted to and hours worked by women and girls in such service, nor can it be said that there is competition in a trade or industrial sense that should be maintained and encouraged by means of a code as between various housewives engaging domestic help or between domestics seeking employment.

Such a code would benefit only those employed as domestics. Ch. 110 of the statutes was adopted to benefit and protect the consuming public, while stabilizing competitive industries and trades, and was not intended to be used solely as a method of improving the conditions of persons employed as domestics.

This construction is further supported by the fact that power, jurisdiction and authority to investigate, ascertain, determine and fix reasonable classifications and to issue orders determine living wages for women is vested in the industrial commission under sec. 104.04, Stats., rather than in the trade practice commission. It is also to be noted that under ch. 6, Laws Special Session 1937, similar jurisdiction was granted to the industrial commission over types, places

and conditions of employment of women by virtue of secs. 103.65 and 103.66. These special statutes, relating particularly to the employment of women, must, under familiar principles of statutory construction, be regarded as controlling over any general trade and industry statutes, such as ch. 110.

It is therefore our opinion that ch. 110 of the statutes does not give the governor or trade practice commission power to promulgate a code for all women and girls employed in the city of Milwaukee and its suburbs as "domestics."

WHR

Corporations — Co-operative Associations — Vote necessary to amend articles of incorporation of co-operative association, pursuant to terms of sec. 185.07, Stats., is majority vote of all of its members.

December 7, 1937.

THEODORE DAMMANN,
Secretary of State.

You ask whether the vote necessary to amend the articles of incorporation of a co-operative association pursuant to the terms of sec. 185.07, Stats., is a majority vote of the total membership or the majority of a legal quorum.

Co-operative associations came into existence in Wisconsin in 1911. The act providing for their organization required that articles of incorporation of such association could be amended only by the vote of a majority of all of its stockholders. The legislature in 1917 amended the law of 1911 and provided that ten per cent of the total membership present at a stockholders' meeting could transact any business that a majority of all of the stockholders could lawfully transact if present at such meeting. This amendment now becomes immaterial for the reason that in 1921 the entire

law involving co-operative associations was again amended. The amendment of 1921 did not permit the amendment of the articles of incorporation by a vote of ten per cent of the total members present at a stockholders' meeting. The law as thus amended, so far as amendment to articles of incorporation is concerned, relates back to the same as it was in 1911, which required a majority vote of all of the stockholders for amendment to articles of incorporation. This law has not been amended since 1921 in so far as it pertains to the power to amend the articles of incorporation.

Sec. 185.07, subsec. (1), Stats., provides:

"The association may amend its articles of incorporation by a majority vote, except as stipulated in section 185.02, of its members at any regular or special meeting, legally called. * * *."

According to established rules of statutory construction, portions of statutes omitted in the amendment thereof are presumed to be repealed. *State v. Ingersoll,* 17 Wis. 631; *Goodno v. City of Oshkosh,* 31 Wis. 127.

Inasmuch as that part of the statutes of 1917 which permitted ten per cent of the stockholders at a meeting regularly called to transact all the business that a majority of all the stockholders could lawfully transact if present at that meeting was not included in the 1921 amendment but was apparently eliminated, it is our opinion that it was the intention of the legislature to require a majority vote of all the stockholders in order to amend the articles of the corporation.

In this connection the enactment of ch. 143, Laws 1937, amending sec. 180.25, Stats., is pertinent. The amendment accomplished by this enactment gave co-operative associations organized under ch. 185 to furnish water, heat, light, power, telegraph or telephone service certain borrowing powers "by a *vote of a majority of a quorum* of its stockholders or members present at any regular or special meeting." Thus when the legislature intended to authorize action to be taken by a majority of a quorum of a co-operative association it deemed it necessary to express that intention by specific language to that end. This would seem clearly per-

suasive in negativing any contention that such intention is to be found by implication in the language used in sec. 185.07 (1).

So far as amendment to the articles of incorporation of a co-operative association is concerned, the law is now just as it was in 1911, when it was originally drawn, and requires a majority vote of all of its stockholders to amend its articles of incorporation.

LEV
HHP
AGH

Taxation — Tax Collection — Delinquent Taxes — Town is entitled to balance of money collected by county for delinquent taxes for particular year where all claims of county for taxes of that year have been satisfied and all lawful charges have been deducted.

December 7, 1937.

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

You inform us that the delinquent tax roll for the town of Vilas, Langlade county, was turned over to your county clerk in March, 1932, pursuant to ch. 21, Laws Special Session 1931-1932. On June 15, 1932, the county treasurer paid the town treasurer all real estate taxes collected up to and including June 1, 1932 on which affidavits for extension of time were filed, after deducting the amount due for advertising fees. The payment made at that time was not large enough to take care of all outstanding delinquent taxes due the county and town. At the present time the county treasurer has collected enough money to satisfy all the 1931 taxes due the county.

Recently a tax deed was taken on certain property in the town of Vilas under a 1932 tax certificate held by the county. The original tax on this property was $11.88, but after taking the tax deed the property was sold for $125.00. After deduction of outstanding tax certificates issued prior to 1932 and deduction of redemption fees a balance of $78.63 remains in the hands of your county treasurer. You ask if this sum must be turned over to the town since the county has been paid for all 1931 taxes.

Sec. 74.19, subsec. (3), Stats., provides in part:

"All taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use; and all actions and proceedings commenced and pending for the collection of any personal property tax shall be thereafter prosecuted and judgments therein be collected by the county treasurer for the use of the county; but if such delinquent taxes exceed the sum then due the county for unpaid county taxes such excess, when collected, with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village. * * *."

In construing this section our court has held that a county is not entitled to credit upon the claim of a town for delinquent taxes collected by the county treasurer during a given period for uncollected taxes returned by the town in the delinquent tax list for subsequent years. *Town of Bell v. Bayfield Co.*, 206 Wis. 297. The town of Bell brought an action against Bayfield county to recover certain taxes collected by the county upon the delinquent tax list returned by the town prior to 1927. The county claimed that this money could be used to offset the county's claim for unpaid county taxes for 1927, 1928 and 1929.

The court in effect held that the collection and settlement of delinquent taxes for a particular year is a separate transaction that is not affected by any subsequent taxes returned delinquent by the town. As all 1931 county taxes due from the town of Vilas have been satisfied, the town is entitled to the sum of $78.63 representing 1931 delinquent taxes turned over to the county. This construction is in conformity with the rule that the town is entitled to the entire proceeds of money collected on a particular tax item after the county's

claim has been satisfied. XX Op. Atty. Gen. 613, 1005; XXIII Op. Atty. Gen. 269, 271.

It is therefore the opinion of this department that the town of Vilas is entitled to the sum of $78.63 now held by the county treasurer.

WHR

Indigent, Insane, etc. — Legal Settlement — Homeless person or transient supported in transient camp as such does not gain legal settlement in municipality in which camp is located.

December 8, 1937.

BOARD OF CONTROL.

You advise that one X was admitted to the Camp Douglas transient camp as a homeless person or pauper September 14, 1934; that later, upon the establishment of Camp Mather as a transient camp, he was transferred to that place, where he remained until May 23, 1935. At that time he was transferred to the staff pay roll as a mess steward. Later, and on June 30, 1935, he was transferred to La Crosse as a bookkeeper, but failed, however, to go to La Crosse and returned to Camp Mather on July 1 of said year. From that date to July 16 he was employed as a member of the Camp Mather staff, at which time he was transferred to the camp relief roll until August 14, 1935, when he was again transferred to the staff pay roll as a mess steward and the relief case was closed. On August 18, 1935, his relief case was reopened and he was again transferred to the relief roll. During a part of this time he was employed as a timekeeper on WPA work, being assigned from the relief roll. On October 14 he returned to Camp Mather as a relief case and worked in said camp until December 6, 1935.

When the resettlement administration began work in the vicinity of Mather it took over Camp Mather and a consider-

able number of the transients who were housed in the camp. They were furnished board and lodging at the rate of $15.00 a month. Most of these men were laborers working on the resettlement projects and were paid at the rate of $40.00 per month. X, who was living at the transient camp at the time the resettlement administration work started in this area, began work on the resettlement project on February 3, 1936. He worked there as a laborer until April 1, 1936, at which time he was reclassified to the position of chef at $55.00 per month. Later he was again reclassified to laborer on June 15, 1936, earning $40.00 a month until September 1, 1936, when he was again reclassified to the position of kitchen aide at $50.00 a month. His services were terminated on September 30, 1936, he having been committed to an asylum.

You inquire whether X gained a legal settlement in the municipality in which Camp Mather is located by virtue of the work which he performed during the times hereinbefore set forth.

Sec. 49.02, subsec. (4), Stats., 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. 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. * * *"

The foregoing statute clearly provides that X could not gain a settlement unless he resided within the municipality in question for a period of one full year without receiving aid as a pauper.

The only periods where X was not supported as a pauper were those when he was employed on the staff pay roll from May 23, 1935 to July 16, 1935, from August 14, 1935 to August 18, 1935, and from February 3, 1936 to September 30, 1936. During all of the intervening periods he was supported as a homeless person or pauper.

Not having resided within the municipality in question for one full year without being so supported, it can not be said that he has gained a legal settlement in said municipality.

OSL
AGH

Social Security Law — Poor Relief — State pension department may offset aid improperly extended in past against future allotments when making reimbursements pursuant to sec. 49.38, subsec. (2), Stats.

XXVI Op. Atty. Gen. 218 is overruled to extent that it is inconsistent herewith upon basis of departmental rule not previously submitted to attorney general.

December 8, 1937.

PENSION DEPARTMENT.

Attention George M. Keith, *Supervisor of Pensions.*

You ask for a review of the opinion given your department on June 3, 1937 (reported in XXVI Op. Atty. Gen. 218), in which it was held that the state pension department may not offset aid improperly granted in the past against future allotments to counties throughout the state. Attention is called to pages 220-221 of the opinion, where it was said:

"In view of the fact that neither sec. 49.50 (5) nor sec. 49.38 (1), heretofore discussed, gives your department authority to offset aid improperly extended in the past against

future allotments, and there is no such authority specifically granted by statute, it is our opinion that your department cannot properly withhold or offset from the future allotment to P county aids improperly extended in the past.

"It is a fact that section 49.50 (2) grants the pension department authority to adopt rules and regulations not in conflict with the express provisions of any law of this state, but our attention has not been called to any rules or regulations of your department purporting to authorize the practice here in question, nor do we express any opinion as to the propriety of setting up any rule or regulation respecting such practice."

In connection therewith you state that Rule 26 had been adopted by the department January 3, 1936, relating to corrections of improperly granted aid, but that through an oversight it was not called to the attention of this department when the prior opinion was requested. Rule 26 provides:

"The allocation of state aids to counties for old age assistance, aid to dependent children and blind pensions on the basis of certified statements of the county treasurers showing payment from and after October 10, 1935, will be based on the amounts shown by such certified statements to permit the immediate payment of state aids to counties for this period as early as possible but the State Pension Department reserves the right to audit and make corrections and adjustments of such claims on the basis of amounts of state aid paid over or under the amount to which the counties are entitled, corrections to be made in the next or following quarters."

This rule, in effect, gives the state pension department authority to make corrections and adjustments of county claims for reimbursement in subsequent quarters. It was adopted pursuant to authority granted by sec. 49.50, subsec. (2), Stats., reading as follows:

"The pension department shall adopt rules and regulations, not in conflict with the express provisions of any law of this state, for the efficient administration of these forms of public assistance, in agreement with all requirements governing the allowance of federal aid to the states for these purposes. The department shall advise all county officers charged with the administration of such laws of these re-

quirements and shall render all possible assistance in securing compliance therewith, including the preparation of all necessary blanks and reports. * * *."

Rule 26 appears to be a proper exercise of the power granted your department by sec. 49.50 (2). As pointed out in XXVI Op. Atty. Gen. 218, there is on statute either authorizing or prohibiting the correction or adjustment of accounts in subsequent quarters submitted pursuant to sec. 49.38 (1), Stats. Consequently this rule is not in conflict with the express provisions of any law in this state. Furthermore, Rule 26 will materially assist your department in efficiently administering the old age assistance, mothers' pension, and blind pension statutes inasmuch as sec. 49.38 (1), Stats., gives your department only five days in which to "be satisfied that the amount claimed has actually been expended in accordance with the provisions of sections 49.20 to 49.39." Obviously such an audit would only disclose patent and obvious errors and the eligibility of any particular person could not be checked. Neither does it give the pension department time to check the sufficiency of documentary evidence on which the aid was granted as required by the federal social security board. By permitting corrections and adjustments in subsequent periods, the board is given ample opportunity to comply with all federal requirements.

If the provisions of the law do not in themselves permit of their efficient administration, the state pension department may properly promulgate necessary rules to provide for the deficiency. XXV Op. Atty. Gen. 119. Rule 26 does this, and is therefore a proper exercise of the power granted to the state pension department by sec. 49.50, (2).

The state pension department may therefore correct and offset aid improperly granted in the past when making future allotments. That part of the opinion in XXVI Op. Atty. Gen. 218 holding this may not be done is hereby overruled solely on the basis of Rule 26, which was not before us at the time that opinion was written.

WHR

School Districts — Tuition — Fact that widow and child live in Milwaukee indefinitely so widow may receive care and treatment during protracted ill health, with intention to return to city of former residence when health permits, does not constitute child resident of Milwaukee for school purposes.

December 9, 1937.

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

It appears that A was for many years a resident of the city of Wauwatosa and had a homestead there. Upon his death his widow found it necessary to lease out the homestead and rent more economical quarters for herself and son. Subsequently, due to an illness requiring care, she found it necessary to be near her sister in Milwaukee and so moved to Milwaukee, taking her son with her. The widow intends to stay in Milwaukee only temporarily and, as soon as her health will permit, to return to Wauwatosa. While they were in Milwaukee the son attended the Wauwatosa high school and you inquire whether the Wauwatosa high school may properly charge tuition for the time he attended it while living in Milwaukee.

Sec. 40.535, subsec. (1), Stats., provides:

"The school board or board of education of any city maintaining a graded system of schools of at least twelve grades, but no free high school, the four upper grades of which contain substantially the same amount of work as adopted and offered in free high schools established under section 40.62, the board of any district maintaining a free high school, and the board of any state graded school offering an approved course of instruction in the ninth or in the ninth and tenth grades shall be entitled to charge nonresident pupils as tuition an amount to be determined by or agreed upon by the methods provided in subsection (2)."

The problem is to determine whether or not the son is a "nonresident pupil" at Wauwatosa high school within the meaning of this section. In *Kidd v. Joint School District,* (1927) 194 Wis. 353, 216 N. W. 499, the court interpreted the term "residence" for tuition purposes as follows, p 357:

"* * * The authorities are not uniform in different jurisdictions, and as to the special considerations as to what constitutes residence. Residence, however, is a very broad and liberal term, used most frequently to apply to a place where a person resides without present purpose to remove therefrom. 'Resident' is synonymous with 'inhabitant.' See 'Residence' and 'Resident', Words and Phrases; 34 Cyc. 1647, and cases cited."

While that definition would permit a very broad use of the term, and the court has held that a student can acquire a residence separate and apart from that of his parents or guardians, the problem here is somewhat simplified by the fact that the pupil has continued to live with his parent.

While our court has stated the general rule that a "minor child who has a father or mother, or both, living, can have no residence for the purpose of the privileges of a public school different from the residence of the * * * mother after the death of the father," it does recognize an exception thereto, that a minor can require a residence different from that of his parent, but this exception applies only when an application of the general rule would deprive the child of the advantages of the school. *State ex rel. School District v. Thayer,* (1889) 74 Wis. 48, 58, 41 N. W. 1014.

Since the child is still living with his mother, his residence would be that of his mother. The fact that the widow was temporarily in Milwaukee for medical care and treatment did not cause her to lose her residence in Wauwatosa. Therefore "ultimate liability for the tuition of * * * children falls upon the place of their legal settlement," namely, Wauwatosa. See XXIV Op. Atty. Gen. 602.

The facts clearly show that the widow of A is still a resident of Wauwatosa. Her husband had lived there for thirty years prior to his death in 1924 and the widow remained there continuously, except for a few months that she spent in West Allis by reason of her distressed financial condition, until September 1936, when she took small living quarters in Milwaukee so as to be near her sister. The widow took these quarters in Milwaukee so that she could continue her medical treatments until she was well enough to return to Wauwatosa. Since the question of residence, in the absence

of fraud, is largely one of intention, her residence remains in Wauwatosa. *In re Village of Chenequa,* (1928) 197 Wis. 163, 168 221 N. W. 856.

Her physical presence in Milwaukee does not constitute a change of residence as laid down in *Kempster v. The City of Milwaukee,* (1897) 97 Wis. 343, 347, 72 N. W. 743, as follows:

"The word *residence* * * *is used in the broad sense of domicile requisite for citizenship. For the purposes of such residence there must be an actual location in the place in question, with the intention of making it a permanent home. * * *"

Furthermore, the purpose of the statute here involved has been stated to be as follows:

"To guard against the precipitancy of nonresidents to points where superior advantages exist and schools of high order are maintained, * * *" *State ex rel. School District v. Thayer,* (1889) 74 Wis. 48, 59, 41 N. W. 1014.

See also *State ex rel. Smith v. Board of Education,* (1897) 96 Wis. 95, 100, 71 N. W. 123.

Had the widow taken rooms in Milwaukee in order to enable her son to attend Milwaukee schools then the statute would be specifically applicable.

It is, therefore, our opinion that A's widow and son are still residents of Wauwatosa and that the son is entitled to free attendance at Wauwatosa high school.

HHP

Public Officers — Alderman — Malfeasance — Teacher — Office of alderman and employment as teacher in city schools in same city are incompatible.

December 15, 1937.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You inquire whether an individual who is under contract with the school board of the city of Manitowoc in the capacity of high school teacher is qualified to hold the office of alderman in the same city.

Sec. 62.09, subsec. (2), par. (c), Stats., provides as follows:

"No person shall be eligible to any city office who directly or indirectly has any pecuniary interest in any contract for furnishing heat, light, water, power, or other public service to or for such city, or who is a stockholder in any corporation which has any such contract. Any such office shall become vacant upon the acquiring of any such interest by the person holding such office."

Sec. 62.09 (6) (d) provides as follows:

"No officer receiving a salary shall receive for services of any kind rendered the city any other compensation, except as provided in subsection (5) of section 70.46 and section 70.48, 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."

Sec. 62.09 (7) (d) provides as follows:

"No city officer shall be interested, directly or indirectly, in any improvement or contract to which the city is a party, and whenever it shall appear that such is the case such contract shall be absolutely null and void and the city shall incur no liability whatever thereon. * * *"

Since Manitowoc is a city of the third class it operates under the "city school plan" as provided for by secs. 40.50 to 40.60, inclusive. Under that plan teachers in the city schools must be considered as employees of the city.

In *State ex rel. Board of Education v. Racine,* (1931) 205 Wis. 389, 236 N. W. 553, it was definitely decided that the board of education is a branch of the city government and that teachers employed by the board of education under the city school plan are employees of the city. The court in its opinion in this case pointed out that the contracts of the board of education are city contracts and cited *Stroud v. Stevens Point,* (1875) 37 Wis. 367.

In an opinion in XX Op. Atty. Gen. 834, where almost the identical situation was presented, it was held that an alderman of a city could not accept a position as bandmaster for the city school and receive compensation therefor without violating the provisions of sec. 62.09 (2) (c) and 348.28, Stats.

Inasmuch as an alderman is an officer of the city it follows that sec. 62.09 (2) (c) would be applicable to him. It also follows from the provisions of sec. 62.09 (6) (d), Stats., that he would be forbidden from receiving compensation both as an alderman and as a city school teacher.

By reason of the decision of our supreme court that a teacher by entering into a contract with the board of education of a city is in fact entering into a contract with the city itself, an alderman is prohibited by sec. 62.09 (7) (d), Stats., from entering into such contract. The penal provision of sec. 348.28 Stats. would also be violated.

It is therefore our opinion that under the statutes as they presently exist and the law as established by our supreme court, the position of school teacher under a city school plan and the office of alderman in the same city are incompatible. HHP

School Districts — Tuition — Where pupil is of school age town is required to pay nonresident tuition for graduate work in high school, even though student has completed four year high school course in such school and town has paid tuition therefor under sec. 40.47, subsec. (4), Stats.

December 15, 1937.

CHARLES D. MADSEN,
District Attorney,
Luck, Wisconsin.

You have requested an opinion as to whether or not a town which has been paying tuition for high school education under sec. 40.47, subsec. (4), Stats., can be compelled to pay tuition for graduate work in the high school by the same student who, though he has completed the four year high school course, is still of school age.

The identical situation was considered in two former opinions of this office in XVI Op. Atty. Gen. 513 and XXIII Op. Atty. Gen. 218, in which it was held that the township of the student's residence must pay the tuition during the time the pupil was taking the graduate work.

There have been no statutory changes in reference to this question since these opinions and we find no reason for now reaching a different conclusion. We therefore adhere to the former opinions which answer your question.

HHP

Criminal Law — Gambling — Slot Machines — Municipal Corporations — Ordinances — Cities and villages may, by ordinance, prohibit slot machines and pin ball games as potential gambling devices.

When authorized by town meeting, pursuant to sec. 60.29, subsec. (13), and sec. 60.18, subsec. (12), Stats., town boards therein referred to may prohibit slot machines and pin ball games as potential gambling devices.

December 16, 1937.

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

You inquire whether amusement devices may be prohibited by municipal ordinances on the ground that they constitute potential gambling devices.

It is our opinion that this question requires an affirmative answer.

Gambling devices have long been suppressed through exercise of the police power and are now illegal in this state. Sec. 348.07, Stats. *City of Milwaukee v. Burns,* 274 N. W. 273. The confiscation of such devices is sanctioned by statute. Sec. 348.17, Stats.; XVI Op. Atty. Gen. 71; XIX Op. Atty. Gen. 412. See also opinion to the district attorney of Eau Claire county, dated October 4, 1937.*

In enacting a police regulation the legislature may include within the purview of the statute acts which are innocent and not in themselves the subject of police regulation where the inclusion of such acts is necessary in the opinion of the legislature to make the police regulation effective. *Pennell v. State,* 141 Wis. 35, 123 N. W. 115; *Booth v. Illinois,* 184 U. S. 425; *Otis v. Parker,* 187 U. S. 606.

The legislature may delegate to municipalities the power to enact such police power regulations applicable to the municipality itself with like effect as if enacted by the legislature. *La Pointe v. O'Malley,* 47 Wis. 332, 2 N. W. 632; *Lund v. Chippewa Co. et al.,* 93 Wis. 640, 67 N. W. 927; *State ex*

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rel. Rose v. Superior Court of Milwaukee Co., 105 Wis. 651, 81 N. W. 1046.

Sec. 62.11, subsec. (5), Wis. 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."

An almost verbatim provision with respect to the powers of the village board is found in sec. 61.34, subsec. (1), Stats.

Sec. 60.29, subsec. (13), Stats., provides that a town board is empowered and required "To exercise powers relating to villages and conferred on village boards when lawfully authorized so to do by resolution of the town meeting adopted pursuant to subsection (12) of section 60.18."

Sec. 60.18, subsec. (12), Stats., provides that the qualified electors of each town shall have power at any annual town meeting by vote:

"To direct, by resolution, the town board in towns having a population of not less than five hundred, and having therein, one or more unincorporated villages, to exercise all powers relating to villages and conferred on village boards by chapter 61 of the statutes, except such power, the exercise of which would conflict with the statutes relating to towns and town boards. Any such resolution heretofore adopted pursuant to existing law or hereafter adopted pursuant to this law, shall remain in force until rescinded."

The granting to town boards of powers conferred upon village boards was sustained in *Land, Log & Lumber Co. et al v. Brown et al.*, 73 Wis. 294, 40 N. W. 482, and in *Bennett v. Town of Nebagamon et al.*, 122 Wis. 295, 99 N. W. 1039.

It therefore appears that cities, villages and town boards have the power to enact ordinances prohibiting slot machines and pin ball games as potential gambling devices.
OSL
WHR
JRW

Taxation — Tax Sales — Sec. 75.01, subsec. (1), Stats., providing for apportionment of delinquent taxes upon application for redemption, applies only where property is owned in severalty.

December 16, 1937.

SCOTT LOWRY,
District Attorney,
Waukesha, Wisconsin.

You request an opinion as to whether the county treasurer under sec. 75.01, Stats., is required to apportion delinquent taxes on the following set of facts:

A corporation took title to approximately forty acres of land in Waukesha county through foreclosure proceedings. The property consists of a gravel pit and some residential property along the highway. Real estate taxes are delinquent on the property for the years 1931 through 1936. All of the property was assessed as one parcel. The corporation has contracted to sell a part of the property along the road for residential purposes. Application has been made by the corporation for a redemption of the taxes as to the parcels sold.

Sec. 75.01, Stats., provides in part as follows:

"* * * when an application is made to the county treasurer to redeem from any tax sale any part or portion of any lot or parcel of land which was sold for taxes as a whole, but *which is owned in severalty,* said treasurer be-

fore making a receipt for the redemption of such part or portion thereof, may ascertain by affidavits or by actual view the true proportion of taxes chargeable to the part or portion sought to be redeemed, and the amount so found shall be deemed to be the amount required for the redemption thereof. * * *"

Your attention is called to the fact that this statute applies only in the event that the land is owned in severalty. Under the statement of facts the land at present is still owned as it was assessed, that is, the whole is owned by the corporation. The statute only contemplates that a part of the land which was sold as a whole may be redeemed from delinquent tax sales in the event that the parts thereof are owned in severalty.

It is therefore our opinion that under the provisions of sec. 75.01 (1), Stats., above quoted, the county treasurer upon the facts stated is not required to apportion the delinquent taxes as to different parts of this real estate and that no redemption of said property can be effected by the corporate owner thereof, except by the redemption of the tax as to the whole of the property.

HHP

Municipal Corporations — Beer Licenses — Under sec. 66.05, subsec. (10), par. (j), Stats., cities, villages and towns may adopt reasonable rules or regulations for enforcement of sec. 66.05, subsec. (10), and bring violation of such ordinance under provisions of sec. 66.05 (10) (m), Stats. Any such rule or regulation must be reasonable.

December 17, 1937.

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

You inquire whether a municipality may by ordinance restrict taverns under sec. 66.05, subsec. (10), par. (k), Stats.,

in matters other than closing hours in order to bring the violation of such ordinance under sec. 66.05, subsec. (10), par. (m), Stats.

Sec. 66.05 (10), pars. (j), (k) and (m) 1, Stats., reads as follows:

"(j) The common council of any city, the board of trustees of any village and the town board of any town may adopt any reasonable rule or regulation for the enforcement of this section not in conflict with the provisions of any statute."

"(k) Nothing in this subsection shall be construed as prohibiting or restricting any city, village or town ordinances from placing additional regulations in or upon the sale of fermented malt beverages, not in conflict with the terms and provisions of this subsection."

"(m) 1. Any person who shall violate any of the provisions of this subsection, or of any municipal ordinance adopted pursuant thereto shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for a term of not more than ninety days, or by both such fine and imprisonment, and his license shall be subject to revocation. No city, village or town shall pass any ordinance which shall fix the penalty for violation of any ordinance so that the same shall be greater than the maximum provided by this subsection. In event that such person shall be convicted of a second offense, such offender, in addition to the penalties herein provided, shall forthwith forfeit any license issued to him without further notice, and no license shall thereafter be granted to such person for a period of one year from the date of such forfeiture."

The words "this section" as used in par. (j) above, undoubtedly refer to sec. 66.05, subsec. (10), Stats., relating to licensing for the sale of fermented malt beverages.

Sec. 176.43, subsec. (1), Stats., provides in part:

"Any city, village, or town may by ordinance prescribe additional regulations in or upon the sale of intoxicating liquor, not in conflict with the provisions of this chapter. Such ordinance may prescribe different penalties than those provided in this chapter, but no ordinance shall provide a greater penalty than the maximum allowed by law. * * *."

While persons are separately licensed for the sale of intoxicating liquors and fermented malt beverages, every person licensed for the sale of intoxicating liquor must also be licensed for the sale of fermented malt beverages. Sec. 176.05, subsec. (10) (b). Consequently, the provisions of sec. 66.05 (10) (k) and (m) affect all tavern keepers.

"Authority to define offenses against the state and to designate what acts shall be punishable as such cannot be delegated, nor can the power to determine the penalty for the violation of a state law be delegated, but the legislature may prescribe a penalty for the violation of rules and regulations which it authorizes one of its governmental agencies to make." 12 C. J. page 859.

The case of *State v. Syas,* 136 La. 628, 67 S. 522, is cited in support of the foregoing proposition, and the court there said, p 630:

"The statute in effect says that whoever shall violate an ordinance of the board of health shall be punished thus and so. The offense consists in the violation of an ordinance of the board of health. We do not see what further definition than this could be necessary. The question of whether the Legislature may denounce a penalty for the violation of the rules and regulations which it authorizes one of its governmental agencies to make was considered, and decided affirmatively, in U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, and Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570."

It is to be noted, however, that sec. 66.05 (10) (j), Stats., authorizes the adoption of a reasonable rule or regulation only for the enforcement of sec. 66.05, subsec. (10). Sec. 66.05 (10) (k) is not in itself a grant of power to cities, towns and villages to enact additional regulations. Par. (k) is negatively worded and is for the sole purpose of indicating that sec. 66.05, subsec. (10), was an enactment of statewide concern. See sec. 66.05, subsec. (10), par. (m), Stats., and *State ex rel. Tores v. Krawczak,* 217 Wis. 593, 259 N. W. 607. It was not intended that supplemental rules and regulations might not be passed by local municipalities provided they do not conflict with sec. 66.05 (10). In order to bring a municipal ordinance under the provisions of sec.

66.05 (10) (m) it must be an ordinance "adopted pursuant" to sec. 66.05 (10). Ordinances can be adopted pursuant thereto only by virtue of sec. 66.05, subsec. (10).

Ordinances other than for the purpose of enforcing the provisions of sec. 66.05 (10) would, of course, not be rules and regulations for the enforcement of sec. 66.05 (10) and consequently would not be punishable under par. (m) of that section as an ordinance adopted pursuant thereto.

In connection with this question you have not submitted any particular proposed ordinances; consequently, we cannot say whether any particular ordinance would be one providing for reasonable rules or regulations for the enforcement of sec. 66.05, subsec. (10), Stats., so that punishment for violation thereof could be had under sec. 66.05 (10) (m) 1. Attention is here called to the case of *State ex rel. Higgins v. Racine,* 220 Wis. 107, 109, 264 N. W. 490, in which it was held that "A municipality has authority to regulate the operation of taverns in a reasonable manner."

WHR
JRW

Public Health — Basic Science Law — Masseurs — Applicant for examination for masseur's license under sec. 147.185, Stats., is not required to have certificate of registration in basic sciences.

December 17, 1937.

BOARD OF MEDICAL EXAMINERS.
Attention Dr. Henry J. Gramling, *Secretary.*

Sec. 147.01, subsec. (1), par. (a), Stats., provides as follows:

"Definitions. (1) * * *
"(a) To 'treat the sick' is to examine into the fact, condition, or cause of human health or disease, or to treat, op-

erate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof."

Sec. 147.02, Stats., provides in part:

"No person shall treat, or attempt to treat, the sick unless he shall have a certificate of registration in the basic sciences, and shall have recorded the same with the county clerk in the manner provided in section 147.14, and shall have complied with all other requirements of law. * * *."

You ask whether or not masseurs must have a certificate of registration in the basic sciences as provided by sec. 147.02, Stats., before they can be licensed as masseurs.

Sec. 147.185, Stats., provides for the licensing of masseurs, and is as follows:

"* * * The applicant therefor shall present satisfactory evidence of good moral and professional character, and of having completed a preliminary education equivalent to graduation from an accredited high school of this state, and of the completion in a scientific or professional school of an adequate course in physiology, descriptive anatomy, pathology and hygiene, and shall file a verified statement that he is familiar with the state health laws and the rules and regulations of the state board of health relating to communicable diseases. * * *."

The statute also provides for examination in particular subjects and indicates a complete plan for the testing of the competency of those desiring to be licensed as masseurs. There is nothing in sec. 147.185 which requires the applicant to present a certificate of registration in the basic sciences. In the absence of such a provision, it is our opinion that such certificate cannot be required.

Sec. 147.02, if considered alone, might lead to the conclusion that a certificate of registration in the basic sciences is necessary for the licensing of any person who desires to treat the sick in any manner. However, the legislature has indicated in the provisions of sec. 147.185 just what conditions must be met in order to obtain a masseur's license. It

enumerates these conditions in detail. It is a familiar rule of statutory construction that special statutes control over general statutes. It is therefore our opinion that the provisions of sec. 147.185 take precedence over the provisions of sec. 147.02, Stats.

A dentist treates the sick within the meaning of sec. 147.02, Stats.; yet a dentist need not secure a certificate of registration in the basic sciences. In the licensing of chiropractors there is a requirement that the licensee possess a certificate of registration in the basic sciences. It would seem that if the legislature intended that masseurs be required to possess such a certificate, it would have been very easy to place this requrement in sec. 147.185 when the details of the requirements were set up. Boards, commissions and other administrative bodies have only such powers as are expressly granted or necessarily implied by statute. *Kelley v. Tomahawk Motor Co.*, 206 Wis. 568. It is therefore our opinion that your board may not require an applicant for a masseur's license to present a certificate of registration in the basic sciences as a prerequisite to the taking of an examination for such license.

LEV

Taxation — Tax Sales — Amount charged back and reassessed under sec. 70.74, Stats., is tax presented to county for credit. Amount charged back and reassessed under sec. 75.25, Stats., is tax plus interest at eight per cent for period specified in statute.

December 18, 1937.

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

You have requested an opinion on the following questions:

"1. "In charging a tax back to a town under section 70.74 or 75.25, does the county board charge back the face of the tax plus the penalties and interest? If not, what amount should be charged back?"

2. "In making a reassessment under section 70.74, does the town reassess the full amount charged back by the county board or merely the original tax? If neither, what amount is charged on the reassessment?"

Sec. 75.25, Stats., provides as follows:

"If the county board, on making an order directing the refunding of money on account of the invalidity of any tax certificate or tax deed, shall be satisfied that the lands described in such certificate or deed were justly taxable for such tax or some portion thereof; or, when the treasurer shall have withheld from sale any delinquent lands under the provisions of section 74.39, they shall be satisfied that such lands were justly taxable for such tax or some portion thereof, they shall fix the amount of such tax justly chargeable thereon on each parcel thereof, and direct the same to be assessed in the next assessment of county taxes, with interest thereon at the rate of 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."

The express wording of this statute is that the county board "shall fix *the* * * * *tax* justly chargeable" and direct such tax, with interest thereon at eight per cent from the time when it was due to the end of the year in which reassessed, to be assessed in the tax assessment of county taxes. Thus any reassessment under this section includes in amount both the tax itself and the interest as specified.

The statute then states that in the next apportionment of county taxes the county clerk "shall charge *the same*" as a special tax to the municipality. In our opinion the words

"the same" as thus used refer to the tax and the interest specified by the statute that are to be reassessed. Therefore it is our opinion that the amount charged back under this section should include the tax and interest thereon at eight per cent computed according to the statute.

The only occasion for any charging back under sec. 70.74, Stats., would be pursuant to the following portion of that section:

"Whenever any tax or assessment or any part thereof levied on real estate, whether heretofore or hereafter levied, shall have been set aside or determined to be illegal or void or the collection thereof prevented by the judgment of a court or the action of the county board; * * *"

Such an occasion might occur if, notwithstanding the commencement of some proceedings in reference to the tax prior to settlement with the county treasurer, the tax was turned over to the county and subsequently the tax or assessment was set aside or determined to be illegal or void.

In sec. 70.74, Stats., there is no language specifying any rate of interest such as is contained in sec. 75.25. Sec. 70.74 merely states that "such tax, * * * may be reassessed or relevied * * *." This section then provides that the local municipality shall direct "the same" to be reassessed, direct the clerk to insert "the same" in the tax roll as an additional tax and provides that "the same" shall be collected as a part of the tax for the year in which so placed on the roll. This use of the words "the same" in the latter part of this section must refer to "such tax" as previously used in the section. As the statute does not direct or authorize the charging back or reassessing of any greater sum than the tax itself, the amount charged back and the reassessment is thereby limited to the tax. It is, therefore, our opinion that the amount that the county should charge back under this section is the same amount as was presented to the county for credit and settlement, and that the amount for which the reassessment should be made under this section would be the amount of the tax thus charged back.

HHP

Corporations — Securities Law — Whiskey warehouse receipts sold to general public constitute securities within meaning of sec. 189.02, subsec. (7), Stats.

December 18, 1937.

PUBLIC SERVICE COMMISSION.

You have inquired whether whiskey warehouse receipts are securities within the meaning of ch. 189 of the statutes.

Whiskey warehouse receipts are at present being sold to the general public upon the theory that they constitute an investment rather than a sale of liquor. The hope of profit is predicted upon the sales talk that during the course of time the liquor represented by the warehouse receipt will greatly increase in value.

In XXIII Op. Atty. Gen. 637 it was ruled that under the state liquor laws such receipts could be sold only by Wisconsin manufacturers, rectifiers and wholesalers to other Wisconsin manufacturers, rectifiers, wholesalers and retailers but not to the general public and that out-of-state manufacturers or rectifiers could sell only to Wisconsin manufacturers, rectifiers and wholesalers but not to Wisconsin retailers nor to the general public. Attention is directed to that opinion in order to emphasize the fact that nothing contained in the present opinion relating to the sale of such receipts as securities under ch. 189 should be considered as implying that such receipts may be sold in violation of the Wisconsin liquor laws.

The question of what constitutes the sale of securities under ch. 189, Stats., was considered by this office in an opinion to your department under date of August 25, 1937, XXVI Op. Atty. Gen. 370, in which it was ruled that a contract whereby a peanut vending machine is sold and the seller agrees to lease the machine, operate it, and pay the purchaser a percentage of the gross intake as rent, constitutes a security under sec. 189.02, subsec. (7), Stats. The holding in that case applies with equal force to the sale of whiskey warehouse receipts to the general public and, therefore, it must be held that whiskey warehouse receipts constitute securities with in the meaning of sec. 189.02 (7).

The purpose of the sale of a warehouse receipt is to finance the manufacture and storage of whiskey. Ordinarily, it is not intended that the whiskey be actually delivered to the holder of the warehouse receipt, and indeed such procedure would be unlawful in the case of the general public as pointed out in XXIII Op. Atty. Gen. 637. The investor in these receipts waives his rights to any interest or dividends as such, but he does invest with the hope and expectation of making a considerable profit over a period of time through the increased value of the whiskey as it ages in bonded warehouses. His capital or money is laid out in a way intended to secure income or profit from its employment, and he runs the risk of such hazards as may attend the storing of whiskey, such as shrinkage, possible falling prices caused by overproduction and such future legislation as may restrict or prohibit the sale of whiskey, etc.

Clearly, the purchaser of whiskey warehouse receipts is seeking an "interest in the profits of a venture" within the statutory definition of a security given in sec. 189.02, subsec. (7), Stats., and no useful purpose would be served by repeating here the analysis of the statute and the authorities on the subject set forth in our opinion to you of August 25, 1937. The correctness of that opinion is substantiated by the decision in the case of *Securities and Exchange Commission v. Crude Oil Corporation,* 17 Fed. Supp. 164, which holds that a bill of sale and contract for delivery of oil by a corporation purchasing oil royalties is a security within the provisions of the federal securities act.

ML

Banks and Banking — Intoxicating Liquors — Wisconsin state bank may loan money to Wisconsin manufacturer, rectifier or wholesaler of intoxicating liquor upon collateral security consisting of warehouse receipts for liquor stored in Wisconsin public warehouses licensed under ch. 176, Stats., in absence of any banking statutes to contrary.

December 20, 1937.

BANKING COMMISSION.

You inquire whether a Wisconsin state bank may take warehouse receipts for bonded whiskey stored in warehouses pursuant to government rules and regulations as collateral for loans.

We assume that by governmental rules and regulations you refer to the regulations of the state of Wisconsin contained in ch. 176, Stats.

Our attention is called in this connection to an opinion of the attorney general rendered to the state treasurer on September 25, 1934 (XXIII Op. Atty. Gen. 637), in which it was ruled that warehouse receipts covering intoxicating liquor can be sold by Wisconsin manufacturers, rectifiers and wholesalers to other Wisconsin manufacturers, rectifiers, wholesalers and retailers but not to the general public and that such receipts can be sold by out-of-state manufacturers or rectifiers only to Wisconsin manufacturers, rectifiers, and wholesalers, not to Wisconsin retailers or the general public.

The situation with reference to intoxicating liquor stored in a public warehouse as a pledge for the loan of money is covered by sec. 176.75, Stats., which provides:

"Whenever intoxicating liquor is stored in a public warehouse licensed as provided in this chapter, by a Wisconsin manufacturer, rectifier or wholesaler as a pledge for the loan of money, it shall not be necessary to affix to such liquor either front labels or state tax stamps until such liquor is sold or removed from such public warehouse. Whenever it shall become necessary for a pledgee to sell such intoxicating lnquor in good faith pursuant to the terms of the pledge, and not for the purpose of avoiding the provisions of this chapter or chapter 139, such liquor shall be sold to a

Wisconsin manufacturer, rectifier or wholesaler for the purpose of affixing front labels and state revenue stamps."

This statute provides a procedure whereby the pledgee of liquor in public warehouses may lawfully realize upon his security, and we see no reason why it does not apply where the pledgee is a state bank. In arriving at this conclusion we are assuming, of course, that the type of loan you mention is permissible under the banking statutes, as you infer in your inquiry that the request for this opinion was prompted solely by the opinion of the attorney general above mentioned and is requested without regard to any other limitations as to loans.

By providing a procedure for the sale of liquor stored in a public warehouse in Wisconsin in cases where such liquor is pledged by a Wisconsin manufacturer, rectifier or wholesaler for the loan of money the legislature has impliedly recognized the legality of loaning money on the security of warehouse receipts for liquor in the cases mentioned in sec. 176.75, Stats. If such practice were illegal, the legislature would not have been interested in providing a remedy for defaults under such a loan. Ordinarily the law leaves parties to an illegal transaction where it finds them, and it is not to be presumed that in the present instance the legislature intended to abrogate this wholesome common law principle in the absence of express language to that effect. See *Sullivan v. School District,* 179 Wis. 502, 506, to the effect that the rules of the common law are not to be changed by doubtful implication nor to be overturned except by clear and unambiguous language.

You are therefore advised that a Wisconsin state bank may loan money to a Wisconsin manufacturer, rectifier or wholesaler of intoxicating liquor upon collateral security consisting of warehouse receipts for liquor stored in Wisconsin public warehouses licensed under ch. 176, Stats.

LEV
WHR

Counties — Traffic Ordinances — Public Officers — Clerk of Circuit Court — Justice of Peace — Judgment for violation of county traffic ordinance, not being criminal in nature, should not be filed in office of clerk of circuit court by justice of peace nor should clerk record same as certificate of conviction if it is so filed.

December 20, 1937.

PAUL E. ROMAN,
District Attorney,
Manawa, Wisconsin.

You state that justices of the peace in your county have in the past been certifying convictions for violations of the county traffic ordinance to the clerk of the circuit court in the same manner in which they certify convictions in criminal matters.

You ask whether convictions under a municipal ordinance, which are in fact civil actions for the collection of a forfeiture, should be filed by the clerk of the circuit court and a short alphabetical record thereof made in his register for certificates of conviction.

Sec. 360.27, Stats., which is the only statutory provision which requires that a justice of the peace file a certificate of conviction with the clerk of the circuit court, reads as follows:

"Within twenty days after such conviction the said justice shall cause such certificate to be filed in the office of the clerk of the circuit court of the county in which the conviction shall have been had, and in counties having a court other than the circuit court vested with exclusive appellate criminal jurisdiction such certificate shall be filed with the clerk of such court who shall make a short alphabetical record thereof."

This statute clearly relates only to convictions of criminal offenses. An action for a violation of your traffic ordinance is one to collect a forfeiture and is in the nature of a civil action rather than a criminal action. *Olson v. Hawkins,* 135 Wis. 394, *Ogden v. City of Madison,* 111 Wis. 413, *State v.*

Grove, 77 Wis. 448, XXV Op. Atty. Gen. 665. Also the violation of a municipal ordinance is not an offense against the state. *State v. Hamley,* 137 Wis. 458, *Oshkosh v. Schwartz,* 55 Wis. 483 and *Oeland v. Woldenberg,* 185 Wis. 510.

Therefore, it is our opinion that the clerk of the circuit court should not file or make an alphabetical record of certificates of violations of traffic ordinances sent him by justices of the peace or other magistrates.

OSL
AGH

Criminal Law — Venue of Prosecution — Attempt to commit abortion or cause miscarriage in one county which results in death of expectant mother in another county may be prosecuted in either county.

December 21, 1937.

A. J. ASCHENBRENER,
District Attorney,
Stevens Point, Wisconsin.

You state that an assault was committed in Clark county upon a pregnant woman with intent to destroy her unborn child on the 26th day of February, 1937 and that said assault caused the death of the woman in Portage county on the 21st day of March, 1937.

You ask whether an action may be maintained in Portage county under sec. 340.16, Stats., and whether sec. 353.11 is compatible with sec. 7 of art. I of the Wisconsin constitution. Sec. 7 of art. I of the Wisconsin constitution in part reads as follows:

"* * * a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law."

Sec. 353.11, Stats., reads as follows:

"If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in one county, by means whereof death shall ensue in another county, the offense may be prosecuted in either county."

Said sec. 353.11 clearly provides that the action may be prosecuted in either county. This leaves only the question as to whether said section is compatible with the constitution. In dealing with this question, our supreme court has said:

"The statute which provides that where a mortal wound shall be given in one county, by means whereof death shall ensue in another, the offense may be prosecuted in either county, is not in conflict with that provision of the constitution which secures, to a person accused, the right to a trial by a jury of the county or district wherein the offense was committed.

"Where a mortal blow is struck in one county, and death ensues therefrom in another, that court, in either county, which first takes cognizance of the offense, has exclusive jurisdiction thereof, and no other court can acquire any jurisdiction of it, except by a change of venue, as provided by statute." *State v. Pauley,* 12 Wis. 537 (syllabus).

This case has been explained and followed in *State ex rel. Brown v. Stewart, Circuit Judge,* 60 Wis. 587, 595 and *In Re F. Eldred. In Re Oliver B. Ford,* 46 Wis. 530, 547.

Therefore, it is our opinion that sec. 353.11, Stats., is constitutional and the action may be prosecuted in Portage or Clark county.

AGH

Banks and Banking — Insurance — While life insurance companies or fraternal benefit societies may not accept money of policy holders on deposit for withdrawal at any time on demand as in case of bank, they may accept and accumulate deposits with interest to pay future premiums and, in event of death, maturity or surrender of policy, pay out unused portion of accumulation as part of benefit provided in policy.

December 21, 1937.

H. J. MORTENSON,
Commissioner of Insurance.

You refer to our opinion to you under date of October 9, 1937,* which held that a life insurance contract permitting the insured to deposit money with an insurance company and to withdraw the same with interest constitutes banking in violation of ch. 224 of the statutes. You have asked for a discussion of this ruling in so far as it may relate to the acceptance of bona fide advance premium deposits.

It was not our intention in the previous opinion to go beyond the doctrine of *MacLaren v. State,* 141 Wis. 577, and the earlier opinions of this department on the subject, XXI Op. Atty. Gen. 294 and XXI Op. Atty. Gen. 999.

In our opinion of October 9 we specifically pointed out that there was no objection to allowing interest on prepaid premiums or of granting discounts on premiums paid in advance. Our objection was directed rather to the vice of accepting money under the guise of prepayment of premiums on general deposit so as to constitute the operation of a banking business by subterfuge and without the supervision and safeguards provided by the banking laws.

It is very desirable that the insured should be able to pay the insurance company payments to be applied on premiums falling due in the future. This safeguards both the insured and the company against the hazard of the policy lapsing through nonpayment of premiums. Not infrequently it happens that the insured at some particular time is so situated

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financially that he can take care of several advance premiums whereas he might not have the necessary funds available were he to wait for the regular due dates of such future premiums.

However, if the policy matures either by death of the insured or otherwise, or is surrendered before the advance premiums have been fully earned by the company, then the purpose for which the advance deposit was made has ceased to exist and there is no good reason why the company may not pay out the unused portion of deposit as a part of the benefit and have its policies so provide. We doubt that such procedure would fall within the condemnation of the *MacLaren* case, where the purchaser was as much or more concerned with the interest on his deposits as he was with the possibility of having his deposit applied to the purchase of any particular goods. Normally, the purchaser of life insurance hopes to live during the period covered by the advance premium payments and he is interested in keeping his life insurance in force. If this happens his prepaid premiums will be used up in the normal course of events. However, if death intervenes or circumstances compel the surrender of the policy, the insured or his beneficiary should be permitted to have the benefits under the policy increased by the amount of the unearned premiums without falling afoul of the banking laws. Such transaction was never intended by either the company or the insured as a subterfuge for carrying on a banking relationship, and it should not and probably would not be so considered by the courts.

You are therefore advised that nothing contained in our previous opinion should be so construed as holding that a life insurance company or fraternal benefit society may not lawfully and in good faith receive payments to be accumulated with interest for the payment of future premiums on a policy and, on termination of the policy by death, maturity or surrender, pay the remaining balance of the accumulation with and as part and parcel of the benefit provided in the policy.

WHR

Corporations — Securities Law — Solicitation and sale of membership in Universal Order of Plenocrats constitutes sale of securities within meaning of ch. 189, Stats.

December 27, 1937.

PUBLIC SERVICE COMMISSION.

You have submitted a form entitled "application for enrollment in the Universal Order of Plenocrats" and inquire whether the solicitation and sale of membership therein constitutes a sale of securities within the meaning of our statutes.

This order seemingly professes a new theory of economics. Its fundamental idea appears to be that there can be no true earning of profits or interest by the investment of capital but that correctly applied money can be made to yield what it terms a "natural increase." While the operation of this fundamental principle may be clearly established in the minds of the leaders of this society, the practical method of obtaining a "natural increase" up to thirty per cent per year does not seem to be very well disclosed to the prospective members. In signing the application for enrollment the applicant, after setting forth his belief in the law of a "natural increase" and his desire to assist in the propagation of knowledge concerning this "divine economic law," states that he elects to contribute a certain sum per month for a period of sixty months, and that, from his contributions the order is to use certain amounts for organizational expense, other amounts for educational purposes, and the remainder in co-ordinating money, labor, and land in producing a natural increase of thirty per cent or more annually from the natural resources of the land. The applicant further stipulates as follows:

"Third: Out of the products received from the natural resources of the earth, I elect to take, at the expiration of five years, whatever is produced to the total amount of my contributions and the natural increase up to 30% annually or 150% in five years in full for the use of my contributions in assisting to make this demonstration.

"Fourth: If I should decide that I want the natural increase in cash at the expiration of each year, I understand

that sufficient products resulting from the use of my monthly contribution will be converted into cash to return to me an amount equal to the natural increase of 30% annually out of the accumulated natural increase.

"Fifth: In case I should not make the full sixty monthly contributions as contemplated and have contributed an amount of $40.00 or more, I understand that the Universal Order of Plenocrats desires to deliver to me at the expiration of five years the amount contributed and the natural increase obtained from the use thereof, not exceeding 30% annually for the period of five years. This action will be satisfactory to me with the further understanding that contributions aggregating less than $40.00 over the period of five years are hereby donated to the Universal Service Association for University extension work.

"* * *

"In the event of my death I designate . . . . . (name of beneficiary) to take my place and be entitled to the same service and natural increase that I would be if living.

"Whatever surplus is produced after I have received the total amount of my monthly contributions and the natural increase of 30% annually or 150% in five years, I direct the Universal Order of Plenocrats and its Officers and Board of Managers to divide in two parts, one part I direct be given the Universal Service Association University, as a donation gift from me to the University for its expenses and the University extension work, and that the Universal Order of Plenocrats retain the other part of the surplus for use by it as shall appear to its Officers and Board of Managers for the best interests of all concerned."

The term "securities" as used in the securities law of this state is defined by sec. 189.02, subsec. (7), Stats., as follows:

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

Although there does not seem to be any legal obligation on the part of the applicant to continue making monthly con-

tributions or payments, it seems quite clear that immediately upon the payment of the first monthly contribution, which accompanies the application, the contributor has an interest in the funds of the order in the nature of a beneficial interest in a trust fund to the extent of his contributions and thirty per cent annually as his share of the natural increase thereof. At least the language of the application is so phrased as to create an idea in the mind of the applicant that he has such interest in the funds of the order and to induce in his mind the expectation of unusual profits.

Part of the fund resulting from the contributions is to be devoted to educational purposes and part to the ultimate repayment to the contributor, or his named beneficiary in case of his death, of the original and thirty per cent annually for the use of the contribution. In case the contributor does not make monthly payments for the full five year period, nevertheless, after he has contributed over forty dollars, such sum, plus the natural increase thereof, is to be returned to him at the end of five years. In case less than forty dollars has been contributed the contributor donates his interest in the fund to the Universal Service Association University for educational purposes. Therefore, throughout the entire scheme the contributor has an equitable interest in the fund created by his contributions, plus the amount that the order terms the "natural increase" thereof.

It is quite clear that this whole scheme falls within the definition of a security as set out in sec. 189.02 (7), Stats. Whatever may be the avowed purposes of the organization and its economic views as to the use of capital, any "natural increase" derived from the use of money or capital by the order is in reality "profits" as that term is used in the statute. Each contributor has an "interest in the profits of a venture."

The purposes of our securities law are such that the law must be liberally interpreted and construed. Our supreme court said in *Klatt v. Columbia Casualty Co.*, (1933) 213 Wis. 12, 21, 250 N. W. 821:

"* * * When we consider that the entire purpose of the so-called 'Blue Sky Law' is to protect the investors of this state and to restrain the flotation and sale of improvident securities, it is apparent that the law should receive

liberal construction for the purpose of carrying out that very manifest legislative intent. * * *"

It is not necessary that we determine with nicety the exact legal relationship between a contributor and the order, but it is sufficient that here is a scheme for the raising of capital and that the contributors of the capital are assuming a risk in obtaining the return of their contributions and that such risk is supposedly compensated for by the hope of receiving back something in addition to that originally contributed. The language of the court in *Brownie Oil Company v. Railroad Comm.*, (1932) 207 Wis. 88, 240 N. W. 827, seems so conclusively to establish this scheme as a sale of securities within the meaning of the securities law that we quote from it at length. The court said at pages 93-94:

"* * * It is probably not important in this action that the relations between the certificate holder and the corporation be definitely labeled. It is not at all clear that the stock of labels is sufficient accurately to describe the relationship. In several respects the person purchasing one of these books falls short of being a creditor; in several others he falls short of being a stockholder. The question therefore arises whether this failure definitely to bring the certificates within the category of stock, on the one hand, or bonds, on the other, prevents this from being a security. We think it does not. This is a device for financing a corporation. The inducement to secure this financing is the promised creation of a fund which will later be distributed to the person making the investment or furnishing the financing. This person waives his right to any interest or dividends as such, but he does invest with the hope or expectation that the money invested will be returned to him together with some payment for its use. He acquires the right to have the fund accumulated and to receive his distributive share when it is accumulated. He accepts the risk that the enterprise will be unable to get into operation and that the period of its operation will be neither sufficiently long nor successful to bring him the expected returns. In *State v. Gopher Tire & Rubber Co.* 146 Minn. 52, 177 N. W. 937, the court said:

" 'The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an "investment" as that word is commonly used and understood.'

"We think the contract which evidences the investor's right to this return should be treated as a security unless it

is without the definition of 'security' contained in sub. (7), sec. 189.02. Since the contract under examination here evidences a right to have accumulated the fund heretofore referred to, it is 'evidence of . . . interest in . . . property . . . of a company.' It therefore seems to us to fall within the letter and spirit of the securities law.

"In *Creasy Corp. v. Enz Bros. Co.* 177 Wis. 49, 187 N. W. 666, it was said, referring to the act:

" 'Its purpose was to protect the residents from the purchase of worthless obligations for the payment of money in whatever form such obligations took.'

"While the earlier methods of corporation finance took the form of notes and bonds, on the one hand, and various forms of stock, on the other, new requirements have caused corporations to offer for investment securities combining the two relationships. The mere bringing into combination of the two principal forms of investment does not of itself prevent the combination from constituting a security, or take that which is essentially a security device outside the operation of security laws."

Quite clearly we have here a scheme for financing of an organization by raising capital through the means of contributions by membership. While the compensation of those who contribute the capital does not come in the form of dividends or interest payments as they are commonly known, still those who do outlay their money are induced to do so by the prospect which is held out to them of receiving a return in five years of one hundred fifty per cent of their contributions. Thus membership in the Universal Order of Plenocrats is both "evidences of * * * interest in * * * the property or profits of an issuer" and an "interest in the profits of a venture" within the meaning of the securities law.

It is, therefore, our opinion that the solicitation and sale of membership in such an organization comes within the regulatory provisions of ch. 189, Wis. Stats.

HHP

Indigent, Insane, etc. — Poor Relief — Hospitalization — Person injured while employed on WPA project in city is entitled to necessary medical attention and hospitalization therein, even though he has no legal settlement therein and place of his legal settlement is liable therefore under sec. 49.18, Stats., even though prior to such employment order was entered pursuant to sec. 49.03, subsec. (9), Stats.

December 27, 1937.

PAUL E. ROMAN,
District Attorney,
Manawa, Wisconsin.

You state that A, who had a legal settlement in the town of Harrison, Waupaca county, temporarily resided in Stevens Point and that an order was issued by the county court of Waupaca county relieving said town of Harrison from furnishing him further relief until he returned to that town, a certified copy of which order was served in the city of Stevens Point. Shortly thereafter, A was certified to the WPA rolls by the department of public welfare of the city of Stevens Point and was on such WPA employment continuously therefrom until he was injured so as to require hospitalization. The city of Stevens Point thereupon notified the town of Harrison that the latter was liable for the hospitalization, medical care, and relief of A's family on the ground that A did not acquire a legal settlement in Stevens Point since he was employed by WPA. You inquire whether the town of Harrison is liable for such relief.

Sec. 49.02, subsec. (4), Stats., provides:

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

In view of this section of the statutes and the opinion in XXV Op. Atty. Gen. 16, A could not acquire a legal settlement in Stevens Point while employed on a WPA project therein. Accordingly Stevens Point could properly charge relief given to persons entitled thereto back to the place of legal settlement.

Sec. 49.03 (9), Stats., provides as follows:

"When a poor person is given relief in some other county or municipality than the one in which he has a legal settlement, either county or municipality involved may apply to the county judge or municipal judge of its county or municipality for an order directing such poor person to return to the county or municipality of his legal settlement, all expenses of removal to be paid by the county or municipality in which such poor person has a legal residence or settlement. Upon the filing of such petition the county or municipal judge shall issue an order directing the poor person to return to such municipality, unless it shall clearly appear that such removal would be against his best interests. Upon issuance of any such order no further public relief shall be given to the person to whom it is directed until he shall comply therewith."

When an order is entered pursuant to this section such order operates merely to keep the person from being entitled to any relief until he returns to his place of legal settlement in compliance therewith or acquires a new legal settlement. He cannot be compelled to return by means of any compulsion other than the refusal of the authorities to grant further relief. XXII Op. Atty. Gen. 435. When A was given employment by the WPA he was not being given relief within the meaning of the statute even though such employment prevented him from acquiring a new legal settlement. It was as proper for A to accept such employment as it would have been to accept private employment. The only difference is the effectiveness in reference to legal settlement.

Sec. 49.18, Stats., provides for the furnishing of hospitalization and medical relief for persons entitled to relief and the medical attention and hospitalization given to A following his injury would be given pursuant to that section. Whether or not the city of Stevens Point or the town of Harrison is liable for such hospitalization and medical care depends upon whether or not A was a person entitled to relief.

The case that you present is not substantially different than it would have been if, after the issuance of the order mentioned, A had found private employment in Stevens Point, but several weeks before the elapse of a full year, that would have given him a new legal settlement, he suffered the

injury and was without funds to provide for his medical care, hospitalization and maintenance. The fact that he could not do the impossible by returning to the town of Harrison to receive such aid should not operate to make the city of Stevens Point liable therefor nor to deprive A of the assistance which he needed. A court order issued under sec. 49.03 (9), Stats., should be construed reasonably and interpreted to mean that the person must return to his old settlement, if he is in immediate need of relief at the time of the order, but that he need not return immediately if he is sustaining himself and family by means other than relief; further, that if in the future he should need relief without in the meantime having acquired a new legal settlement then he must return as soon as it is reasonably possible, but that if it is not physically possible for him to so return, such as in the case you present, then he still is a person entitled to relief and it may be properly charged to his place of legal settlement. It is therefore our opinion that the town of Harrison is liable for the costs of hospitalization and medical expenses furnished to A while he was in the city of Stevens Point, and that if the same were furnished by the city of Stevens Point and notice was given in accordance with the provisions of sec. 49.18 (2), Stats., the city of Stevens Point may recover therefor from the town of Harrison.

HHP

Appropriations and Expenditures — Counties — County Board Committee — Executive committee of county board has no authority to expend money for replacement of worn-out county highway department trucks until appropriation has been made by county board.

December 28, 1937.

HUGH W. GOGGINS,
District Attorney,
Wisconsin Rapids, Wisconsin.

You state that under the present system operative in your county an executive committee has been elected by the county board in open session and vested with apparent powers to make purchases, examine bills, and authorize payment thereof, so that the business of the county may continue as to those matters while the board is not in session. You further state that the executive committee proposes to expend about two thousand dollars to replace worn-out trucks of the highway department, although there has been no affirmative action of the county board authorizing it or appropriation of money that could be used therefor. You inquire whether under these circumstances the executive committee has power so to do.

Sec. 59.02, Stats., provides as follows:

"(1) Except as provided in subsection (2) of this section, the powers of a county as a body corporate can only be exercised by the county board thereof, or in pursuance of a resolution or ordinance adopted by such board.

"(2) Ordinances and resolutions may be adopted by any county board by a majority vote when a quorum is present, or by such larger vote as may be required by law in special cases; also in the special manner provided for cities by section 10.43, which section is applicable to counties."

Sec. 59.06 (1) Stats. provides:

"Any county board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before the first day of June in any year a committee or committees

from the members of the county board elect, and the committees so appointed shall perform the duties and report as prescribed in such resolution."

County boards have no other powers than those expressly granted by statute or which are necessarily implied from the powers granted to them by the legislature. In providing for the appointment of committees of the county board the legislature has contemplated that some powers of the county board might be delegated to such committees. The statutes, however, do not define the extent of the powers that may be so delegated.

The functions which are purely executive, administrative, or ministerial may be delegated to a committee. The general rule is that the county board may not delegate such of its powers as are legislative, governmental or discretionary. See XV Op. Atty. Gen. 461. 15 C. J. 465.

The appropriation of money is a legislative and discretionary function involving the sound judgment of the county board. It is, therefore, one of the powers which the county board may not delegate to its committee. Until the county board has taken action appropriating a sum of money for the purpose of purchasing trucks to replace the worn out highway equipment the executive committee would have no power or authority to make such expenditure. If, however, the county board did appropriate a sum of money for that purpose then it could delegate to the committee the ministerial and administrative activities of selecting the equipment to be purchased and of completing the purchase.

Accordingly, it is our opinion that the executive committee selected by the county board has no authority to expend money for the replacement of worn-out highway department trucks until the county has appropriated a sum of money for that purpose.

HHP

Courts — Public Officers — Clerk of Circuit Court — Taxation — Clerk of circuit court of Milwaukee county is entitled to charge same fees in respect to income tax warrants as any other clerk of circuit court as provided by sec. 59.42, subsec. (42), Stats.

December 28, 1937.

TAX COMMISSION.

Attention Mr. John M. Rooney.

You have requested an opinion in respect to the fees to be charged by the clerk of the circuit court of Milwaukee county in connection with delinquent income tax warrants.

Our attention is directed to sec. 3 of ch. 1 of the laws of the Special Session of 1937 which amended sec. 59.42 Stats., the general statute relating to the fees of clerks of circuit courts. Sec. 3 of ch. 1 of the laws of the Special Session of 1937, in adding a provision specifically setting out the fees to be charged by clerks of circuit courts, merely clarified the question as to what fees they are entitled to charge in reference to delinquent income tax warrants. However, these provisions of ch. 1 of the laws of the Special Session amending the general statutory provisions have only such scope and effect as the general statute, sec. 59.42, Stats., possesses. Thus, the effectiveness of sec. 59.42, Stats., in reference to your question is the same as it was prior to the enactment of ch. 1, laws of the Special Session of 1937, except that it is now specific as to the fees to be charged in reference to delinquent income tax warrants. Sec. 59.42 is thus controlling except when special legislation conflicts therewith, in which event the latter governs.

In reference to any claim that the clerk of the circuit court of Milwaukee county, by virtue of the fact that the fees he is entitled to are governed by special act of the legislature, is entitled to a fee of two dollars for the docketing of delinquent income tax warrants, we refer you to XXVI Op. Atty Gen. 358. In that opinion we held that the special legislative act setting out the fees which the clerk of the circuit court of Milwaukee county might charge did not authorize such clerk to charge a fee of two dollars for each in-

come tax warrant filed in his office under sec. 71.36, subsec. (2), Stats.

Therefore, the special act in respect to the fees of the clerk of the circuit court of Milwaukee county not being applicable to and containing no provision for fees in respect to income tax warrants, the only provision of law under which the clerk of the circuit court of Milwaukee county could make any charge for the docketing of such warrants would be that of the general statute, sec. 59.42, Stats., as amended. The application of the rule that special legislation shall control over general legislation has the limitation that where the subject matter is not covered by the special legislation then general legislation should control. When it is considered that no provision of the special legislative act governing the fees of the clerk of the circuit court of Milwaukee county is applicable to income tax warrants it would therefore seem that the legislature, by this amendment to sec. 59.42, specifically providing for the payment of specific fees in respect to income tax warrants, intended that the general statute as thus amended should, in so far as income tax warrants are concerned, be effective generally throughout the whole state.

It is therefore our opinion that the clerk of the circuit court for Milwaukee county is entitled to charge fees in respect to delinquent income tax warrants the same as any other clerk of the circuit court as set out in sec. 59.42 (42), Stats. 1937.

HHP

Bonds — Counties — County Board — Public Officers — County Judge — County board may not require county judge to furnish surety bond or pay premium thereon.

December 30, 1937.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You state that the county board at its annual meeting adopted a resolution requiring elected county officers, including the county judge, to file surety bonds, and inquire whether thereunder the county must pay the premium on the bond of the county judge.

There is no statute stating that the county judge must furnish a bond. The provisions of subsec. (4), par. (c), sec. 19.01, Stats., cannot be read as requiring a bond of the county judge because subsec. (7) of that section expressly says it shall not be construed as requiring any particular officer to file a bond but is applicable only to officers who are elsewhere in the statutes required to furnish bond. These provisions merely specify the place where the county judge shall file the oath of office required by sec. 256.02, Stats.

We find no statutory provision giving the county board authority to exact a bond of any kind from a county judge. A public officer cannot be compelled to give a bond in the absence of a statute requiring the same. The only provision of the statutes authorizing the county board to require surety bonds is sec. 59.13 (3), Stats., which applies by its terms solely to the county clerk, county treasurer and county abstractor. If the county board requires surety bonds of the officers thereby authorized it is mandatory that the county pay the premium on such bonds. XXII Op. Atty. Gen. 94.

It has been held in an opinion in XX Op. Atty. Gen. 3 that the county board has no authority to require surety bonds of other officers than those specified in sec. 59.13 (3), Stats., even though other provisions of the statutes require such other officers to furnish bonds.

The provisions of sec. 204.11, Stats., authorize a public officer to pay the premium on his bond out of the moneys available for the expenses of his department only if such officer is required by law to give such bond. Likewise, sec. 19.01 (8), Stats., permits the payment by the county of such premium only when furnished "pursuant to law or any rules or regulations requiring the same." As the county board possesses only such powers as are granted to it by statute and so is powerless to exact any bond from a county judge, it follows that it is not authorized to expend public funds in payment of the premium upon such bond.

Therefore it is our opinion that a county board has no power to require the county judge to file a bond, and thus may not pay the premium on a surety bond of such judge.
HHP

Agriculture — Appropriations and Expenditures — Co-operative agreement between department of agriculture and markets and United States department of agriculture for grading cheese, providing that fees collected therefor shall be deposited in trustee bank and disbursed therefrom in payment of expense upon order of contracting parties, is contrary to sec. 20.78, Stats.

December 30, 1937.

DEPARTMENT OF AGRICULTURE AND MARKETS.

You state that an arrangement has been proposed whereby grading of certain types of cheese would be done in Wisconsin under a co-operative agreement between your department and the bureau of agricultural economics of the United States department of agriculture. Under the proposed agreement fees would be collected for such grading and paid to a bank as trustee to be agreed upon by the parties and the salary and expenses of graders and other incidental items of expense in connection with such grading

would be paid through orders drawn on the trustee. You inquire whether such arrangement can legally be entered into and maintained under the laws of Wisconsin for cheese graded in this state.

Sec. 20.78, Stats., provides as follows:

"All appropriations made by law from state revenues for any department, board, commission, or institution of the state, or for the state historical society, are made on the express conditions that such department, board, commission, institution, or society pays all moneys received by it into the state treasury within one week of receipt, and conforms with the provisions of sections 14.31, 14.32 and 20.77 of the statutes, both as to appropriations of its own receipts, and as to appropriations made by the state from state revenues. Upon failure to comply with the above conditions, the secretary of state shall refuse to draw his warrant, and the state treasurer shall refuse to pay any moneys appropriated to any such department, board, commission, institution, or society, from state revenues, until compliance is made with said conditions; and upon failure or refusal to so comply, after due notice received from the secretary of state, any appropriation made by law from state revenues to such department, board, commission, institution, society shall permanently revert to the fund from which appropriated."

It is apparent that under this section any fees collected by your department for services rendered in connection with grading or inspection of cheese must be paid into the state treasury within one week of receipt. Neither sec. 93.09, Stats., dealing with the establishment of standards and grades, nor secs. 93.10 and 93.11, Stats., dealing with certification by inspectors, contains any authorization for your department to enter into the type of arrangement which you have described. In the absence of any special statutory authorization, any fees collected by your department, its representatives or under its supervision, if paid over directly to a bank, would be in contravention of sec. 20.78, Stats., above quoted.

While it would be unlawful for your department to enter into the arrangement which you mention, your attention is invited to sec. 178.03, Stats., created by ch. 4, sec. 1, Laws Special Session, 1937, which provides in part as follows:

"178.03 DUTIES AND FUNCTIONS OF WISCONSIN AGRICULTURAL AUTHORITY. Subject to the provisions of section 178.02 Wisconsin agricultural authority shall use and expend the funds appropriated to it by section 20.59 solely for the execution of the following duties and functions:

"(1) To promote and encourage, and assist in establishing and maintaining, high grades and standards of quality for agricultural products of the state.

"* * *

"(3) To promote and encourage, and assist in establishing and maintaining, improved means and methods of * * * grading and standardizing of Wisconsin agricultural products.

"* * *

"(5) To co-operate with and assist * * * other political or governmental units of the state in the execution of its duties and functions under this section, and to co-operate therein with the federal government and its agencies."

Under paragraph G of Article First of its articles of incorporation, Wisconsin agricultural authority is authorized:

"To furnish technical services, * * * and to enter into, make, perform, and carry out contracts and furnish services of every kind and description, necessary or useful for the successful prosecution of its business and purposes, without limitation as to kind or amount, with any person, firm, association, cooperative association, corporation or other organization."

The proper grading of cheese is a matter of vital importance to the dairy farmers of the state and falls directly within the purposes for which Wisconsin agricultural authority was organized. It is suggested that there is ample authority for Wisconsin agricultural authority, in co-operation with your department, to achieve the desired result.

ML
HHP

Public Officers — County Purchasing Agent — County Treasurer — Offices of county purchasing agent and county treasurer are incompatible.

December 30, 1937.

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

You have requested an opinion as to whether the county board may appoint the county treasurer as purchasing agent upon an agreement that he is to receive no compensation therefor.

Sec. 59.07, subsec. (7), Stats., provides as follows:

"* * *; and, except in counties of a population of two hundred fifty thousand or more, may appoint a county purchasing agent, who need not be a member of the county board, and make appropriations for his services. Such purchasing agent shall provide all books, stationery, blanks, safes, furniture, telephone service, fuel and lights necessary for the discharge of official business in the offices of the county clerk, clerk of the circuit court, register of deeds, treasurer, sheriff and county judge, * * *" .

In an opinion, XX Op. Atty. Gen. 196, at page 198, it was held that the offices of county clerk and of county purchasing agent are incompatible. The same reasoning that would prevent the county clerk from acting as purchasing agent would likewise apply to the county treasurer.

The county purchasing agent makes the purchases that may be necessary for use in the county treasurer's office. If the county treasurer were also the purchasing agent then as purchasing agent his duty would be to pass upon his requirements as county treasurer as to supplies, etc. Even if this would not be sufficient to give him a pecuniary interest in a contract with the county in violation of sec. 348.28, Stats., he would have such conflicting interests in this respect in the discharge of both positions as would render the two positions incompatible.

It is therefore our opinion that the county treasurer may not act as county purchasing agent.

HHP

Public Health — Cemeteries — Under sec. 157.11, subsec. (9), par. (b), Stats., as amended by ch. 259, Laws 1935, it is not mandatory for county to accept deposit of cemetery funds and pay interest thereon and county treasurer is not authorized to accept such funds without express authority of county board.

December 30, 1937.

GEORGE J. LARKIN,
District Attorney,
Dodgeville, Wisconsin.

You ask if sec. 157.11 (9) (b) makes it mandatory upon counties to accept funds from a cemetery association and pay the association interest on the same.

Sec. 157.11, subsec. (9), par. (b), Stats., provides in part as follows:

"* * * or it may be deposited with the treasurer of the county *or city* in which such cemtery is located, and such county *or city if it accepts such deposits* shall pay said association annually interest on sums so deposited of not less than three per cent per annum. * * *."

The italicized portion of the above statute was added by ch. 259, Laws 1935.

This department held in several opinions that under the wording of the statute as it existed prior to the above amendment, it was mandatory on counties to accept funds from cemetery associations and pay interest on the same. XXI Op. Atty. Gen. 821, XXIII Op. Atty. Gen. 441 and 607. As the law now provides, counties and cities shall pay interest on moneys deposited by cemetery associations "if it accepts such deposits." The obligation to pay interest on the deposit being dependent upon the affirmative action of the county or city in accepting the deposit, it follows that it was intended by the legislature that a county or city must take some affirmative action in accepting the deposit before it can be made. If the county or city has the right to accept the deposit then it would seem, clearly, that it has the right to also refuse the same. Such being the situ-

ation, the law is no longer mandatory upon counties and cities.

It is therefore our opinion that under the provisions of sec. 157.11 (9) (b), Stats., it is not mandatory for a county to accept cemetery trust funds.

You ask also if it is necessary that the county board take some formal action authorizing the county treasurer to accept cemetery trust funds under this section of the statute and what the situation is if the treasurer has accepted such funds subsequent to the amendment of the statute without any formal action of the county board.

It is a fundamental principle that a county may delegate to its officers and committees such functions and activities of the county as are purely ministerial and administrative, but may not delegate to them functions and activities which are legislative in character or involve the making of decisions for the county based upon the exercise of sound judgment or discretion. 15 C. J. 465.

The acceptance or rejection of the deposit of cemetery funds is a decision legislative in character and involves discretion. The county treasurer may not make this decision for the county and has no authority under the statute to accept deposits from cemetery associations without express authority from the county board so to do. If such funds have been received by the county treasurer without such express authority the county is in no way obligated by reason thereof, except to return the funds received without its authority. This, of course, applies only to funds received by the county treasurer without express authority after the amendment of the statute.

The foregoing applies with equal force to additions made after the amendment to funds deposited prior to the amendment. The deposit with the county of cemetery funds when the statute made it mandatory would not authorize the treasurer to accept additions thereto after the amendment. The additions would stand in the status of a separate deposit the same as if no funds had been deposited prior to the amendment.

It is our opinion that under sec. 157.11 (9) (b), Stats., as amended by ch. 259, Laws 1935, it is not mandatory for a

county to accept the deposit of cemetery funds and pay interest thereon and the county treasurer is not authorized to accept such funds without express authority of the county board.
HHP

Public Officers — Register of Deeds — Trade Regulation — Conditional Sales Contracts — Condition sale contract filed in office of register of deeds should be retained in his office even though it has been properly satisfied.

December 31, 1937.

CLARENCE J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.
Attention Charles K. Bong.

You state that a demand has been made upon the register of deeds that a conditional sales contract filed in his office and thereafter released in writing be returned to the person filing the same. You ask whether it is the duty of the register of deeds to return the contract upon such demand.

Sec. 122.10, Stats., in part reads as follows:

"The register of deeds shall mark upon the contracts or copies filed with him the document number, and day and hour of filing and shall file the contracts or copies in his office for public inspection. He shall enter alphabetically the names of the grantor or buyer in indices of which each page shall be divided into nine columns with heads to the respective columns as follows: Number of instrument, the date and time of filing, name of grantor or buyer, name of grantee or seller, name of instrument, date of instrument, amount or price named in the contract, a brief description of the property, and date of cancellation thereof; * * *."

Sec. 122.12, Stats., in part reads as follows:

"After the performance of the condition, upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller, or his assignee if the contract be assigned, shall execute, acknowledge and deliver to the demandant a statement that the condition in the contract has been performed. * * * Upon presentation of such statement of satisfaction the register of deeds shall file the same and enter on the same line in the last column where such mortgage or contract appears in the index, the document number and date of filing, of all assignments, foreclosure affidavits, extensions or releases thereof. * * *"

The above statutes set forth in detail all that the register of deeds is required to do in reference to conditional sale contracts. He shall make an alphabetical entry of each contract so filed, setting forth certain specific facts therein and file the original contract. He shall file all written statements of satisfaction of such contracts and enter the same in his alphabetical record as provided in said sec. 122.12, Stats. Compliance with the above statutes and nothing more provides a complete and orderly system of recording the transaction. We find no statutory authority making it the duty of the register of deeds to return such instruments upon demand.

Therefore, it is our opinion that it is the duty of the register of deeds to retain such contracts and written satisfactions thereof in his office rather than to return them upon demand to the person who presents them for filing.

AGH

University — After board of regents of university has accepted bequest it may not thereafter reconsider its action and reject bequest.

June 18, 1937.

C. A. DYKSTRA, *President,*
J. D. PHILLIPS, *Business Manager,*
University of Wisconsin.

You submit a copy of the will of Florence Porter Robinson, together with a resolution adopted by the board of regents of the university of Wisconsin on March 4, 1931, accepting the trust created by the will, and inquire whether the board may reconsider its action and reject the trust.

Under the provisions of Miss Robinson's will a sum of money is bequeathed to named trustees for the purpose of establishing a professorship of American history at the university of Wisconsin, to be held at all times by a woman at a salary of not less than six thousand dollars a year. The trustees are to accumulate the income from the fund until such a time as the principal will provide the necessary salary, and thereafter the income is to be turned over to the board of regents to pay the salary of the professor. If the board rejects the bequest, the trustees are directed to make arrangements with the university of Chicago for the establishment of a professorship at that institution.

On June 21, 1930, the regents unanimously adopted a resolution accepting the trust, and on March 4, 1931, a resolution was adopted establishing a professorship in accordance with the terms of the will.

Subsec. (1), sec. 36.065, Stats., provides in part:

"All gifts, grants, bequests and devises for the benefit or advantage of the university * * * or to provide any means of instruction, * * * whether made to trustees or otherwise, shall be legal and valid and shall be executed and enforced according to the provisions of the instrument making the same, * * *."

The Robinson will creates a charitable trust for an educational purpose. The beneficiary of this trust is not the

university of Wisconsin, but the people of the state of Wisconsin. The women named as trustees in Miss Robinson's will are the primary trustees of the fund and the board of regents is the secondary trustee, or the agency designated for carrying out the purpose of the trust. In fact, the situation is essentially the same as if the fund had been turned over to the board directly to be used for the stated purpose.

The board of regents is governed by the rules applicable to any other trustee of a charitable trust. In *Maxcy v. Oshkosh,* (1910) 144 Wis. 238, 250, the decedent left money to three trustees named in her will, in trust to build and maintain a school in Oshkosh provided that the city should accept the gift and also add a certain amount to the trust fund. It was held that the city became the trustee of the charitable trust upon acceptance of the fund:

"* * * When the trust is accepted the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and among them is the obligation to perpetually administer the charitable fund in accordance with the expressed wish of the testator."

The general rule is that once a trustee has accepted a charitable trust he may not thereafter be relieved of it by disclaimer:

"If a trustee has accepted the trust, whether the acceptance is indicated by words or by conduct, he cannot thereafter disclaim." Restatement of the Law of Trusts, sec. 102 (2).

"* * * In case the trustee named is a town or a city, it may, like other trustees, elect either to accept or to decline the trust; * * * but after the town or city has accepted such a trust it cannot renounce it." 11 C. J. 334.

"* * * Once a trustee for charity has accepted, he cannot be rid of the trust by disclaimer, but must resign." 2 Bogert, Trusts and Trustees, sec. 396.

"In the absence of statutory provision allowing a trustee to vacillate between acceptance and disclaimer, it would seem that either act should be final. Once he has by any conduct shown a willingness to be a trustee, he should not be

allowed to disclaim, but should be obliged to seek relief through the medium of resignation. * * * And likewise, action which shows a rejection of the trust should not be recallable." 1 Bogert, Trusts and Trustees, sec. 150, p. 453.

And see *In re Kellogg,* (1915) 214 N. Y. 460, 108 N. E. 844.

In *Drury v. Inhabitants of Natick,* 10 Allen (Mass.) 169, 182-183, which involved a situation analogous to the present one, the Massachusetts court said:

"The devise and bequest to the town of Natick vested in the town from the death of the testatrix, subject to be renounced by the town within a reasonable time and before manifesting an intention to accept it, *Townson v. Tickell,* 3 B. and Ald. 31; *Doe v. Smyth,* 9 D. & R. 136; S. C. 6 B & C 112. *Ex parte Fuller,* 2 Story R. 330. The town in April 1863, at a meeting duly called for the purpose, voted to accept and receive this gift, and chose trustees to take charge of it according to the will. Upon such acceptance, the power to renounce the gift ceased, and the estate could not pass from the town without a conveyance in due form of law.

"Besides; the gift being for a charitable purpose, and once accepted, could not afterwards be renounced or conveyed away, so as to defeat the charity. *American Academy v. Harvard College,* 12 Gray 551; *Harvard College v. Society for Theological Education,* 3 Gray 280; *Atty. Gen. v. Christ's Hospital,* 1 Russ. & Myl. 626; S. C. Tamlyn, 393; *Attorney General v. Caius College,* 2 Keen, 163."

In *Maxcy v. Oshkosh,* (1910) 144 Wis. 238, 256, discussed above, the court said:

"* * * The general rule of law is that money or property devoted to a charitable use, where a trust is created, must, if the gift is accepted, be irrevocably devoted to such use, and that in case of attempted diversion a court of equity will intervene, and if necessary name a new trustee to carry out the objects and purposes of the trust."

Immediately upon the acceptance of the trust, or at least upon the establishment of the professorship referred to in the Robinson will, the board of regents became a trustee of the fund and the beneficial interest vested in the people of the state of Wisconsin—in other words, the beneficial interest became the property of the state. As in the case of other

property of the state, no use may be made of it other than such as is specifically authorized by the statutes.

Under subsec. (1) of sec. 36.065, Stats., quoted above, the board of regents may use property donated or bequeathed to the university only in the manner set forth in the instrument creating the gift or bequest. There is nothing in the will of Miss Robinson giving the regents authority to use this property in any way other than to pay, out of the income, the salary of a woman professor of American history.

It is well settled that the legislature may not use state property for other than public purposes. *Wisconsin Keeley Institute v. Milwaukee County,* (1897) 95 Wis. 153; *State ex rel. Consolidated Stone Co. v. Houser,* (1906) 125 Wis. 256; *In re Opinion of the Judges,* (1932) 59 S. D. 469, 240 N. W. 600; *Lertora v. Riley,* (1936) 6 Cal. (2d) 171, 57 P. (2d) 140. The same rule prevails as to municipal corporations. *Maxcy v. Oshkosh,* (1910) 144 Wis. 238; 1 McQuillin Municipal Corporations (2d ed.) 942.

If the legislature itself cannot use public property for private purposes, then certainly its creature, the board of regents, may not so do. If the board should now reject the Robinson bequest, it would obviously be turning property now belonging to the state over to a private use.

Furthermore, the intention of the testatrix is of primary importance. Her intention to create a charitable trust for an educational purpose is clearly and unambiguously stated and should be given effect. *Cawker v. Dreutzer,* (1928) 197 Wis. 98; *Will of Schilling,* (1931) 205 Wis. 259; *Will of Schaefer,* (1932) 207 Wis. 404; *Will of Larson,* (1933) 211 Wis. 237.

In *Will of Schaefer,* (1932) 207 Wis. 404, 409-410, just cited, the court held as follows:

"* * * Such a will is not to be considered in the light of what the court, in a particular case, deems just or unjust, but rather in the light of what the testator really desired. If a will expresses the desires and wishes of the testator and was properly executed by one having testamentary capacity and is not the result of undue influence, it is the imperative duty of the courts to give such will effect and to carry out its provisions no matter how strongly a different distribution might appeal to the court."

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