

OPINIONS
OF THE
ATTORNEY GENERAL
OF THE
STATE OF WISCONSIN

VOL. XXVII

January 1, 1938, through December 31, 1938

ORLAND S. LOOMIS
Attorney General



MADISON, WISCONSIN
1938

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ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee -----from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee -----from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison -----from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point...from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh -----from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay -----from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee -----from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown -----from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ----from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam ----from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral
Point -----from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend --from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manito-
woc -----from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ----from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ----from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh -----from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT,
Neillsville -----from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison -----from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock --from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson -----from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel -----from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee --from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison -----from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay --from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee --from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston ----from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee -----from Jan. 2, 1939, to -----

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*Appointed March 14, 1938.

OPINIONS
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OF
WISCONSIN

VOL. XXVII

Automobiles — Law of Road — Municipal Corporations — Parking Ordinances — Use of parking meters by municipality in regulation of parking on streets is valid and not prohibited by secs. 85.84 and 85.85, Stats.

January 3, 1938.

HERBERT STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You have requested an opinion whether cities have the power under our statutes to use the device known as a parking meter in the regulation and control of parking on city streets. The use of such parking meters contemplates a plan whereby mechanical meters are installed on the sidewalk near the curb at the head of each stall indicated by lines in the street surface for the parking of a car.

A motorist upon parking in a stall deposits a specified sum of money, usually five cents, in the meter. This clears the meter and it then goes into operation so as to indicate the time subsequent to the deposit a car has been parked in that stall. Such deposit entitles the motorist to park his car in the stall for a designated length of time. When the meter indicates the allotted time has expired, the motorist thereafter no longer may park his car there without making another deposit. The parking, other than during a period of

time allotted by such deposit, becomes a violation of the ordinance and penalties therefor are imposed the same as for other overparking. The deposits in the parking meters go to the city as revenue, usually being placed in the traffic regulation fund, and often are used to defray the cost of installation and operation of the meters.

The idea behind the use of this parking meter plan is that it is a more efficient method of supervising and maintaining a check upon the observance of parking limits. It is claimed that the use thereof eliminates unnecessary parking of cars upon the streets, with the result that the available space for parking in congested areas is not monopolized and parking facilities are kept open so as to practically eliminate the present parking problem. Also, not only is the supervision of parking restrictions more efficient but the cost thereof is not placed upon the public at large but is borne to a large measure by the persons who make use of such parking facilities, the deposits in the meters being used in payment of such supervision.

Sec. 85.84, Stats., provides as follows :

“No local authority shall have power to enact, pass, enforce or maintain any ordinance, resolution, rule or regulation requiring local registration or other requirements inconsistent with the provisions of this chapter, or in any manner excluding or prohibiting any motor vehicle, trailer, or semitrailer, whose owner has complied with the provisions of this chapter, from the free use of all highways except as provided by section 66.45; * * *”

Sec. 85.85, Stats., provides as follows :

“Local authorities, except as expressly authorized by the provisions of this chapter, shall have no power or authority to enact or enforce any rule, ordinance, or regulation contrary to the provisions of this chapter.”

An ordinance putting into operation a parking meter plan would not restrict “the free use of” the highways. The effect of such regulation would be to expedite the passage of traffic as it would tend to relieve the conditions existing in congested areas. Without the right to prohibit or regulate parking no orderly passage of vehicles could be accomplished therein.

Moreover the term "free use of the streets" does not include the right to park. In *Ex parte Duncan*, (1937) 65 Pac. (2d) 1015, which cites *Wonewoc v. Taubert*, (1930) 203 Wis. 73, 233 N. W. 755, the Oklahoma supreme court said at page 1017:

"* * * the decisive issue is whether the 'free use of the streets' includes the right to 'park.' The public has the absolute right to the free use of the streets, and this means any use that is incident to the primary purpose for which the streets have been dedicated. The primary purpose is travel. Thus this right has been interpreted to mean only free passage and the right to use the street to convey one's self or property from one place to another. * * *"

In *Pugh v. Des Moines*, (1916) 176 Iowa 593, 156 N. W. 892, 897-898, the Iowa court stated the proposition as follows:

"* * * Conceding * * * that the city has no power to exclude [drivers] from the free use of the public streets, we must construe this language to mean that free use which is involved in the right to come and go and drive upon the streets without let or hindrance. The idea of the free use of a street does not involve the right to obstruct the free use of the street. * * *"

In so far as an abutting owner may be involved his rights where a parking plan is used are no greater than his rights as they exist in reference to any ordinance or regulation placing restrictions upon parking in the streets. The right of the abutting owner extends to the middle of the street subject, however, to the easement of the public for public use. Our court in *Wonewoc v. Taubert*, (1930) 203 Wis. 73, 233 N. W. 755, has definitely established the principle that local ordinances regulating parking on streets are valid. Not only has the power of the local authorities to regulate the time of parking been recognized but the courts have upheld the right to prohibit parking altogether in certain areas as an incident of the police power to regulate traffic. See *Ex parte Duncan*, (1937) 179 Okla. 355, 65 Pac. (2d) 1015; *Pugh v. Des Moines*, (1916) 176 Iowa 593, 156 N. W. 892.

The validity of such an ordinance depends in a large measure upon the rights of the public in public ways and a determination of what those rights are is vital.

“Whatever cannot be justified as incidental to travel is a violation of the rights of the abutting landowner in the ordinary case where he owns the fee of the public way, and is also an obstruction to the rights of travel by the public.” *In re Opinion of Justices*, (1937) (Mass.) 8 N. E. (2d) 179, 182.

Without the right to prohibit or regulate parking no orderly passage of vehicles could be accomplished therein. This is in accord with the fundamental principle of the exercise of police power in controlling private interests for the public welfare. See 12 C. J. 931, 2 McQuillin on Municipal Corporations, p. 1615; *Harper v. City of Wichita Falls*, (1937) (Tex.) 105 S. W. (2d) 743. See also *Park Hotel Co. v. Ketchum*, (1924) 184 Wis. 182, 199 N. W. 219.

Up to the present time we find only five states in which the courts of last resort have expressed themselves on the specific question of the validity of parking meters. *State ex rel. Harkow v. McCarthy*, (1936) (Fla.) 171 So. 314; *Ex parte Duncan*, (1937) (Okla.) 65 Pac. (2d) 1015; *In re Opinion of Justices*, (1937) (Mass.) 8 N. E. (2d) 179; *Harper v. City of Wichita Falls*, (1937) (Tex.) 105 S. W. (2d) 743, *City of Birmingham v. Hood-McPherson Realty Co.*, (1937) 233 Ala. 352, 172 So. 114.

In all of these cases except the Alabama case the validity of parking meter ordinances has been upheld. The Alabama case can be distinguished because of the specific restrictive clauses in the deed of dedication of the public streets in the city of Birmingham.

Having found the existence of the right of local authorities to regulate parking, the courts have experienced no difficulty in permitting the imposition of a reasonable fee by means of parking meters to defray the cost of erecting, maintaining and operating such parking meters.

On this point the Florida court in *State ex rel. Harkow v. McCarthy*, *supra*, said, pp. 316-317:

“* * * inasmuch as the parking of motor vehicles in down town public streets is a privilege, the city may employ the means reasonably necessary to make effective the regulatory ordinance and to safeguard the restrictive parking privileges granted. That had the city augmented the regular police force sufficiently to enforce the ordinance, no one could have questioned such action. That, in the exercise of a choice of means, the city elected to employ mechanical po-

policemen to aid in large part the accomplishment of that purpose, because they are efficient and economical and enable the authorities to pass the cost of providing parking privileges onto those who enjoy those privileges. That the ordinance, as indicated indeed by its provisions, was adopted in the bona fide exercise of the police power, and not primarily for the raising of revenue. That the aim of the ordinance is to regulate traffic and keep such traffic as liquid as is reasonably possible, and that the cost of providing parking privileges, and the extra cost of supervising and policing parking, is placed by the ordinance where it belongs, on those who individually enjoy such privilege."

In passing their parking meter ordinance the people of Wichita Falls expressed the necessity of such ordinance by saying that previous attempts to regulate parking in congested business areas had not been as successful as was desirable for the safety and welfare of the public, because of the small number of traffic policemen available therefor and the size of the area to be patrolled, numerous operators having taken advantage of the situation by parking for unreasonably long periods of time, which tended to further impede traffic and was in turn unfair to business interests in such areas and to the motorists and constituted a danger to life, limb and property. See *Harper v. City of Wichita Falls, supra*.

The only provisions of ch. 85, Stats., dealing with parking upon highways are contained in sec. 85.19, Stats. This section deals with parking only in reference to the place and manner of parking, and does not in any way have anything to do with time limitations upon parking. As it is only in respects covered by the provisions of sec. 85.19 that the legislature has provided any uniform system or regulation of parking, local regulations placing time limitations on parking are not contrary thereto. The power of local authorities to prescribe regulations as to other aspects of parking than those within the provisions of sec. 85.19 arises by virtue of the provisions of art. XI, sec. 3, Wisconsin constitution, and secs. 62.04 and 85.10 (20), Stats.

It is significant that at the time of the passage of secs. 85.19, 85.84 and 85.85 in 1929, ordinances and regulations of local authorities limiting the length of time for parking in congested areas were in common use. All of the larger cities

then had regulations respecting time limits on parking as did also many of the smaller cities. Thus it is apparent that the legislature felt that regulations of this type were purely local in character and not within the scope of a uniform law for the regulation of traffic throughout the state and continued to leave the same to be handled by the local authorities.

The same circumstances undoubtedly apply to the conditions at present existing in our own cities and villages and if confronted with an ordinance putting into effect a parking meter plan our court would undoubtedly recognize as did Mr. Justice McReynolds in *Frost Trucking Co. v. R. R. Comm. of Calif.*, (1926) 271 U. S. 583, 603, 46 Sup. Ct. 605:

“The States are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution.”

It is therefore our opinion that cities have the power under our statutes by ordinance to put into operation the parking meter plan of regulation of parking upon the streets thereof.

HHP

Taxation — Tax Sales — Sec. 75.01, subsec. (1m), Stats. 1935, is not repealed by ch. 294, Laws 1937, but subsequent to June 27, 1937, flat interest rate prescribed by ch. 294 applies.

January 4, 1938.

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

You ask whether ch. 294, Laws 1937, published June 26, 1937, repeals sec. 75.01, subsec. (1m), Stats.
Ch. 294, Laws 1937, provides:

"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 tax payer 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.

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

Sec. 75.01 (1m), Stats. 1937, provides:

"The county board may fix the interest rate to be paid upon redemption of tax certificates held by the county, but such interest rate shall not be more than eight tenths of one per cent per month or fraction thereof. The board may require that a given interest rate chargeable upon such redemption of such certificates shall apply only upon condition that such certificates are redeemed within a period of time fixed by the board."

As sec. 75.01 (1m) appeared in the 1935 statutes the words "eight per cent per annum" were used in place of the words "eight-tenths of one per cent per month or fraction thereof" as now contained in that section. The change to the present form of the statute was made by the revisor of statutes pursuant to the express direction contained in ch. 294, Laws 1937.

The avowed purpose of ch. 294 was to simplify the administration of the collection of delinquent taxes. Prior to its enactment there existed the necessity of several calculations concerning the two per cent penalty, advertising fee, selling fee, redemption fee, and eight per cent interest charge, to arrive at the total penalty payable. See XXIII Op. Atty. Gen. 529, XXIV Op. Atty. Gen. 32. Ch. 294 eliminated these time consuming operations and in lieu thereof substituted a single computation of a flat interest charge of eight-tenths of one per cent per month from January first on the principal of the tax.

In an opinion to the Wisconsin tax commission on July 19, 1937, XXVI Op. Atty. Gen. 315, we held that ch. 294, Laws 1937 did not repeal ch. 10, Laws 1937, authorizing cities, villages and towns to extend the time of payment of the 1936 real estate taxes to July 1, 1937. It is there pointed out that while ch. 294 in one sense is general legislation because it applies to taxes generally, yet all it does is to change the rate or method of computation of penalty for delinquency and in this last respect is special legislation.

It is a well settled rule of statutory construction that implied repeals are not favored and if a supposed incongruity between statutes can be avoided by reasonable construction such construction should be adopted. *Hite v. Keene*, (1909) 137 Wis. 625, 119 N. W. 303; *State ex rel. Hayden v. Arnold*, (1912) 151 Wis. 19, 138 N. W. 78; *Krueck v. Phoenix Chair Co.*, (1914) 157 Wis. 266, 147 N. W. 41.

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.

All that was intended to be accomplished by ch. 294 was a simplification of procedure. Sec. 75.01 (1m), Stats., is a grant of authority to the county boards to fix the amount that should be paid upon redemption of certificates held by the county. Each of these two provisions of law has a separate objective and covers independent although related subjects. Thus ch. 294, Laws 1937 and sec. 75.01 (1m), Stats., may be properly read together without conflict, each controlling in its separate field. Ch. 294 is controlling in so far as the rate of penalty or method of computation thereof is involved and sec. 75.01 (1m), Stats., remains in full force and effect in all other respects. Such construction so given to these statutes is in conformity with the principle that a later legislative act must control over a previous enactment.

There is nothing in ch. 294, Laws 1937, that gives to it retroactive effect. Thus sec. 75.01 (1m), Stats. 1935, applies to the authority of the county board prior to the effective date of ch. 294, Laws 1937, but after that date the change effected by ch. 294 is operative.

It is therefore our opinion that sec. 75.01 (1m), Stats. 1935, is not repealed by ch. 294, Laws 1937, and that such statute remains in full force and effect until June 27, 1937,

the effective date of ch. 294, but that thereafter the authority of the county board is to fix the interest rate to be paid upon redemption of tax certificates held by the county at not more than eight-tenths of one per cent per month or fraction thereof.

HHP

Public Officers — County Board — Tax Collector —
County board may not hire one of its members to work on collection of delinquent taxes.

January 4, 1938.

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

You have called our attention to a county board resolution whereby the county board purports to hire one of its members to segregate the delinquent tax lists, make his report thereon to the delinquent tax committee and the county clerk, request payment of delinquent taxes in the name of the county, investigate circumstances of tax collection in other counties, and submit a report thereon with recommendations to the tax committee.

The committee on finance, ways and means recommended a salary of one thousand three hundred twenty dollars for one year, plus three hundred dollars car expenses. We gather from your letter that this recommendation was adopted with the resolution.

You request our opinion as to the validity of the resolution.

Sec. 66.11, subsec. (2), Stats., reads in part as follows:

“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.
* * *”

This section expressly provides that no member of a county board shall be eligible during the term for which he was elected to any office *or position* created by the board of which he is a member. The facts submitted fall squarely within the prohibition of this statute. Transactions similar to that outlined above have been disapproved by this department in the following official opinions: XIX Op. Atty. Gen. 258 (highway patrolman), XX 212 (weed commissioner), XX 1193 (dance supervisor), XXI 235 (deputy county clerk), XXI 400 (county probation officer), XXIII 343 (member of administrative committee for promotion of CWA projects), XXIV 394 (quarry foreman), XXIV 698 (county pension assistant), XXIV 762 (county pension investigator), XXV 700 (superintendent of WPA project).

The same principle applies even though the county board member should resign from the county board in an effort to make himself eligible for such position. XI Op. Atty. Gen. 408, XIX 258, XXI 209.

WHR

Indigent, Insane, etc. — Poor Relief — Labor — County may bargain collectively with labor union regarding relief but is not required to do so by Wisconsin labor relations act, ch. 111, Stats., nor by secs. 103.51 to 103.63, Stats.

January 11, 1938.

LYALL T. BEGGS,

District Attorney,

Madison, Wisconsin.

You have requested an opinion as to whether a labor union has the right to act as bargaining agent with the county relief department in reference to relief for unemployed members of such union. We are advised that this question arises by reason of a rule or regulation of the county relief committee permitting a person seeking relief

or additional allowance to present his request to such committee personally or by the supervisor from his residence district, but not otherwise.

Sec. 103.51, Stats., provides :

“Public policy as to collective bargaining. In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows :

“Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

Sec. 103.62, Stats., provides :

“Definitions. When used in sections 103.51 to 103.63, and for the purposes of these sections :

“(1) * * *

“(2) * * *

“(3) The term ‘labor dispute’ includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe.”

In *Amer. Furn. Co. v. I. B. & T. C. & H. of A.*, (1936) 222 Wis. 338, 268 N. W. 250, our court said the purpose of the Wisconsin labor code (secs. 103.51 to 103.63, Stats.) is to encourage associations of workmen to conduct collective bar-

gaining and to protect them from dominance or control by employers "to the end that workmen might be able to bring to bear in their negotiations with employers whatever weight or power results from collective or group effort" (p. 368).

The following provisions of the Wisconsin labor relations act enacted in 1937 are pertinent:

Sec. 111.01 "Declaration of policy. The provisions of this chapter are enacted in furtherance of the public policy as to collective bargaining declared in section 103.51."

Sec. 111.02 "Definitions. When used in this chapter:

"(1) * * *

"(2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but does not include the state, or any political subdivision thereof, or any labor organization, or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' includes any employe, and is not limited to the employes of a particular employer, unless the chapter expressly states otherwise, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

"(4) * * *

"(5) * * *

"(6) * * *

"(7) * * *

"(8) The term 'labor dispute' includes any controversy concerning terms, tenure or other conditions of employment, or concerning the association or representation of persons, in negotiating, fixing, maintaining, changing or seeking to arrange terms, tenure or other conditions of employment, or concerning the violation of any right granted or affirmed by this chapter and all disputes as defined in sections 103.51 to 103.64 regardless of whether the disputants stand in the proximate relation of employer and employe.

"(9) * * *

"(10) * * *."

Sec. 111.09 "(1) Representatives designated or selected for the purpose of collective bargaining by the majority of the employes in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such

unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, * * *

Both the Wisconsin labor relations act and the labor code are pointed towards matters involved in the employment relationship. The scope of these statutes includes only such things as arise out of the relationship between employers and employees. They depend for their application upon the existence of something that pertains to the employee-employer relationship. The text of each act supports this view. In order to bring into operation the rights granted thereby it is not required that the principals to the particular situation at hand stand in the relationship of employer and employee. *Amer. Furn. Co. v. I. B. & T. C. & H. of A., supra.* It is necessary, however, that the matter involved be within the purview of the provisions of the statutes.

The rights given by these statutes to employees to bargain collectively are in relation to and for the purpose of solving problems in reference to working conditions, hours, wages and other things involved in employment. The tenor of these acts is to deal with matters that arise out of and are distinctly peculiar to this subject. The granting of relief to those who are without means to maintain themselves is not of such character that it can be said to relate to conditions of employment or industrial relations. It is something distinctly apart therefrom and not within the scope of either the Wisconsin labor relations act or the labor code.

Disputes or differences that might arise in reference to public relief certainly do not come within the definition of a "labor dispute" contained in either sec. 103.62 (3) or sec. 111.02 (8), Stats., above quoted. Furthermore, the definition of an "employer" in sec. 111.02 (2), Stats., specifically excludes the state and any political subdivision thereof. Accordingly, even though the other provisions of these legislative acts confer enforceable positive rights of collective bargaining in labor matters generally, the express language of sec. 111.02 (2) would certainly exclude the county from any obligation to so bargain collectively with a union. It would seem quite clear that if the county is not required to bargain collectively in reference to matters of employment, then

the county relief committee as an agency of the county would not be obliged to bargain with a union as to relief matters.

However, even though there be no abstract right in the union to represent its members in such matters so as to be able to insist thereon, still a union would possess the same rights as any other organization would have in this regard. By virtue of its very existence as an organization interested in the welfare of its members it may advocate the cause of its members and urge bodies or persons to do those things advantageous to them. This permissive right exists in all organizations. It is only in matters pertaining strictly to employment and labor relations that the statutes give unions the additional special rights which are requisite to effectuate favorable conditions of labor. We fail to find anything in these statutes that confers such special privileges in other matters.

It is therefore our opinion that a labor union may act as the bargaining agent for its members with the county representatives regarding relief, but that the county is not required to so bargain with such union.

HHP

Navigable Waters — Where recession of water on lands bordering on Sturgeon Bay results in new shore line, each riparian owner along old shore line is entitled to his proportionate share of new shore line.

January 11, 1938.

CONSERVATION DEPARTMENT.

You state that the conservation department owns certain lands fronting on Sturgeon Bay and that due to the recession of the waters in the bay new land has been uncovered. You inquire as to the method to be followed in fixing the property lines on such new lands.

The primary aim and object of any of the rules used to fix the property lines on land resulting from reliction is to

assure to each riparian owner his proportionate share of the shore line.

When the shore line is straight or nearly so, the method used in fixing the property lines is to draw property lines at right angles to the shore line from the points where the various property lines intersected the shore line. Clark, *Surveying & Boundaries*, sec. 268; Gould on Waters (3d ed.), sec. 163. This method was one of the methods suggested in your letter.

When the shore line is curved such procedure tends to work an injustice to certain riparian owners. Lines drawn at right angles to a curved shore line tend to converge, and if the water recedes sufficiently, certain property owners are deprived of access to the water under this method.

A second method which is used when the shore line is curved, as in the present instance, is to give each riparian owner a section of the new shore line which is proportionate to his share in the old shore line. The property lines are then extended from the old shore line to points on the new shore line.

This method is more fully described in the case of *Northern Pine Land Co. v. Bigelow and another*, 84 Wis. 157, 164-165, as follows:

“The general rule early adopted in Massachusetts, and since adhered to, was borrowed from the civil law, and is to the effect: (1) To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; (2) to divide the newly-formed bank or river line into as many equal parts as such shore line contained rods, yards, or feet, and then to appropriate to each proprietor as many of such parts of such new river line as he owned rods, yards, or feet on the old; and then, to complete the division, lines are to be drawn from the points at which the proprietors, respectively, bounded on the old, to the points thus determined as the points of division on the newly-formed, shore. *Deerfield v. Arms*, 17 Pick. 45, 46. In stating the rule, Shaw, C. J., there indicates that it may perhaps require modification under particular circumstances, as, for instance, where such lines happen to be elongated by deep indentations or sharp projections, and then the *general line* ought to be taken, instead of the actual line. ‘In such case it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the river.’ *Rust*

v. Boston Mill Corp. 6 Pick. 158; *Sparhawk v. Bullard*, 1 Met. 95; *Trustees of Hopkins Acad. v. Dickinson*, 9 Cush. 552; *Wonson v. Wonson*, 14 Allen, 84, 85. That rule is expressly sanctioned by the highest courts of the United States, New York, and Michigan. *Johnston v. Jones*, 1 Black, 222, 223; *S. C. 18 How.* 150; *O'Donnell v. Kelsey*, 10 N. Y. 415; *Blodgett & D. L. Co. v. Peters*, 87 Mich. 506, 507. In the case last cited the rule stated was applied to the division between coterminous riparian owners of lands fronting on the waters of Green Bay in Lake Michigan, and hence that case is peculiarly applicable to the case at bar. As there said by Champlin, C. J., speaking for the court: "The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water and an equal share of the dockage line at navigable water in proportion to his share on the original shore line of the bay. . . . We cannot deal with Green Bay as we would with the rivers in this state, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundaries of owners of land bordering upon the ocean and great inland seas are more proper for the disposition of the case before us.'"

This procedure appears to be particularly appropriate under the circumstances prevailing in the instant case and the rule above set forth is still followed in Wisconsin. See *Hathaway v. Milwaukee*, 132 Wis. 249; *Thomas v. A., S. & I. R. L. R. Co.*, 122 Wis. 519.

In applying the rule laid down in the *Northern Pine Land Company* case, *supra*, it should be noted that in measuring the original shore line the general contour of the shore should be taken rather than the actual shore line. The rule as stated may involve some surveying difficulties. It is, however, the most equitable one and the one sanctioned by the courts of this state.

The alternative method of running lines perpendicular to the main channel of the bay, which was suggested in your letter, has not received the sanction of the courts where the shore line is curved.

WHR

Insurance — Town Mutuals — By virtue of ch. 226, Laws 1937, town mutual insurance companies may no longer issue policies against loss by windstorm, tornado or cyclone.

January 11, 1938.

H. J. MORTENSEN,

Commissioner of Insurance.

You have inquired whether the effect of ch. 226, Laws 1937, is to deny town mutual insurance companies the right to issue insurance against loss by windstorms, cyclones and tornadoes.

Prior to the enactment of ch. 226, Laws 1937, which was published June 10, 1937, town mutual insurance companies were permitted to write tornado insurance by complying with the requirements of subsec. (3), sec. 202.06, Wis. Stats. Ch. 226; Laws 1937, repealed subsec. (3), sec. 202.06, and the same was not recreated in any other form. Ch. 226 also amended sec. 202.01 so as to require each existing town mutual insurance company to amend its articles to conform to subsec. (2), sec. 202.01 of the 1937 statutes. Subsec. (1), sec. 202.01 provides:

“Any number of persons not less than one hundred residing in the same county, who collectively own one hundred thousand dollars’ worth of insurable property therein which they desire to insure, may form a town mutual insurance company *for mutual protection against loss by fire and lightning.*”

It is clear that town mutuals are now limited to the issuing of policies covering only loss by fire and lightning as indicated in sec. 202.01 (1) 1937 Stats., above quoted.

This plainly follows from the repeal of the section which formerly permitted such practice, sec. 202.06, subsec. (3), and from the fact that the present statutory authority under which town mutuals are permitted to be organized specifically states the purpose to be “for mutual protection against loss by fire and lightning.” It is, of course, a well recognized rule of statutory construction that when the legislature has enumerated the powers granted by a particular statute, such enumeration results in an implied exclusion of all other pow-

ers, *expressio unius est exclusio alterius*. For instance, it was held in the case of *State ex rel. Owen v. Reisen*, 164 Wis. 123, that a particular specification of jurisdiction conferred in certain cases by a statute excludes the idea that the legislature intended to confer jurisdiction in other cases.

It should, however, be mentioned that the operation of ch. 226 is prospective in operation only and that it should not be so construed as to disturb vested rights arising under policies issued prior to its effective date. This is true because of the general rule that statutes are not to be given retrospective operation ordinarily in the absence of express language to that effect and more particularly for the reason that such a construction in this case would result in the impairment of contract obligations, contrary to art. I, sec. 10 of the United States constitution and art. I, sec. 12 of the Wisconsin constitution. Such construction of a statute is to be avoided, if possible. See *Petition of Breidenbach*, 214 Wis. 54, which holds that 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.

WHR

Banks and Banking — State Banks — To invoke application of thirty per cent loan limitation provided by sec. 221.29, subsec. (1), Stats., in case of state banks all of such loan must be secured by warehouse receipts or United States government obligations in amount not less than one hundred forty per cent of face amount of obligation. Such requirement as to collateral security cannot be extended, however, to loans coming under fifteen per cent and twenty per cent limitations in said section.

January 17, 1938.

BANKING DEPARTMENT.

You call our attention to sec. 221.29, subsec. (1), Stats., relating to the limit of bank loans at state banks.

This section, with certain exceptions, limits individual loans to twenty per cent of the amount of the capital stock and surplus or to fifteen per cent of the amount of capital and surplus of the bank. However, it provides that obligations secured by warehouse receipts issued by licensed warehousemen where the market value is not less than one hundred forty per cent of the face of the obligation or where the loan is secured by not less than a like amount of certain types of bonds or notes of the United States the loan "shall be subject to a limitation of thirty per cent in addition to the limitation hereinbefore stated, * * *."

You ask whether the provisions of this section mean that if a bank exercises the privilege of making a loan under the thirty per cent additional limitation, such loan must be entirely secured by warehouse receipts or government bonds, or whether only the thirty per cent additional line need be so secured.

Deleting for the moment those portions of sec. 221.29, subsec. (1), Stats., which do not bear upon the answer to your question, the relevant part of the statute reads:

"* * * but obligations of any person, * * * secured by the warehouse receipts issued * * *, when the market value of such staples securing such obligation is not at any time less than one hundred forty per cent of the face amount of such obligation, and in the form of notes secured by not less than a like amount of bonds or notes of the United States * * * shall be subject to a limitation of thirty per cent in addition to the limitation hereinbefore stated, * * *."

It is our opinion that a borrower seeking to avail himself of the thirty per cent maximum loan limitation must, as a condition precedent, have such obligation or obligations to the bank entirely secured by warehouse receipts or government bonds to the extent of one hundred forty per cent of the face amount of such obligations, but that such requirement has no relationship to loans of the borrower coming under the fifteen per cent and twenty per cent provisions relating to loans secured by other types of security. In other words, a borrower may have total loans which equal fifty per cent of the amount of capital stock and surplus of the bank,

but of this amount thirty per cent must be secured by warehouse receipts or government securities to the amount above indicated.

The words, "when the market value of such staples securing such obligation is not at any time less than one hundred forty per cent of the face amount of such obligation" operate as a condition precedent to the application of the thirty per cent loan limitation.

In construing statutes, 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.

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. Thus the words above quoted relate back and refer to "obligations of any person, * * * secured by the warehouse receipts issued * * *." This is also plain from the context of the words employed, since the words "the market value of such staples securing such obligation" could not possibly relate to anything except warehouse receipts. Otherwise these words would have no intelligible meaning and it is a well known rule of statutory construction that a statute should be so construed as to give meaning and effect to every word and phrase in it if possible. Furthermore, it is plain from the first part of the statute above quoted that the obligations coming under the thirty per cent limitation are obligations secured by warehouse receipts or government bonds. The statute does not say "partially secured," nor even one hundred per cent secured. The amount of the security necessary to invoke the operation of the limitation is not left open to conjecture but is specifically set at one hundred forty per cent as above explained.

WHR

Counties — County Board — Parliamentary Procedure — Traffic Ordinances — Even though rules of parliamentary procedure are violated, in absence of appeal from ruling of chair, county ordinance passed in method set out in sec. 59.02, subsec. (2), Stats., is valid.

Publication of ordinances pursuant to sec. 59.09, subsec. (1), Stats., should be separate and independent of publication of county board proceedings pursuant to sec. 59.09 (2).

January 17, 1938.

JAMES P. CULLEN,

District Attorney,

Prairie du Chien, Wisconsin.

You state that your county board enacted a traffic ordinance which provided for the hiring of a traffic officer in the following manner, to wit: that a committee reported recommending the adoption of such an ordinance; that at the evening meeting of the board held on the 12th of November, 1937, the ordinance received its first reading in full, after which a vote was taken on its adoption, which was 21 ayes and 3 noes, 5 members being absent and not voting; that immediately thereafter the rules were suspended and it was read a second time by title only. The following morning, on motion, another vote was taken on said ordinance, which resulted in 25 ayes and 1 no with 3 members absent and not voting. The ordinance was then advanced to its third reading, was read in full and carried by 28 ayes and 1 no.

You request an opinion as to whether said ordinance was validly enacted.

Subsec. (2), sec. 59.02, Stats., reads as follows:

“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.”

Other than the above quoted, we find no statutory provision relating to the passage of ordinances by a board. The legislature has thus not prescribed any rule or method of

procedure that must be followed by a county board in the exercise of its power granted by this subsection to enact ordinances. It is usual, however, that each county board adopts its own rules of procedure to govern the conduct of its meetings. You have not stated what rules, if any, the county board of your county had in force at the time it took the action above mentioned.

However, even though the procedure in the passage of such ordinance was contrary to rules of parliamentary procedure adopted by the board, no appeal having been taken from the ruling of the chairman declaring it passed, such ordinance will still be valid if the procedure is in compliance with the statutes. XV Op. Atty. Gen. 324. See also XXII Op. Atty. Gen. 51. It is therefore our opinion, based upon the facts you submit, that the ordinance in question was validly enacted.

You also inquire whether the publication of said ordinance would be sufficient if included in the publication of the county board proceedings within sixty days of the adjournment of the board or whether the ordinance should be published separately.

Subsec. (1), sec. 59.09, Stats., provides as follows:

“Whenever any county board passes any ordinance under the provisions of this chapter the county clerk shall immediately cause the same to be published in some newspaper published in such county, and if there is none, then in the paper which he determines has the most general circulation therein; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices.”

The language of this subsection clearly specifies that the county clerk shall publish an ordinance immediately following its passage. In our opinion such publication should be independent and separate from the publication of all the proceedings of the county board pursuant to subsec. (2), sec. 59.09, Stats.

HHP
AGH

Elections — Public Officers — Election Officers — Vote in precinct of each party for governor should be used in determination under sec. 6.32, subsec. (1), Stats., of party preference in selection of election officials at election where last preceding general election was in presidential year.

January 18, 1938.

THEODORE DAMMANN,
Secretary of State.

You inquire whether we adhere to a former opinion of this office reported in XXIV Op. Atty. Gen. 17, which construed sec. 6.32, Stats., to the effect that at an election in a presidential year, the precinct election officials may be selected from nominees by representatives of a political party, even though such party is not a national party. In arriving at this result it was there held that in the determination as to which of several political parties are the two dominant parties the vote for governor at the last general election should be used.

Sec. 6.32, subsec. (1); Stats., provides in part:

“* * * Not more than two of such inspectors, nor one of said clerks of election, nor one of said ballot clerks, shall be members of the same political party, but each one of said officers shall be a member of one of the two political parties which cast the largest vote in the district at the last preceding general election, the party which cast the largest vote being entitled to two inspectors, one clerk and one ballot clerk, and the party receiving the next largest vote being entitled to the remainder of said officers. The basis for such division shall be the vote of each party for its presidential elector receiving the largest vote, or for its candidate for governor, at the last preceding general election.”

At an election in a year of a presidential election it is obvious that there could not have been a vote for presidential electors at the preceding general election because presidential electors are chosen only every four years. Clearly then in such a situation the only vote at the last preceding general election that would be available for use in determining party strength at such preceding election would be the vote for

governor. Accordingly the former opinion in XXIV Op. Atty. Gen. 17 is correct in so far as it covers such a situation.

However, a different situation is now presented than existed when the former opinion was written, for the reason that this year election officials are appointed in an off-presidential year, whereas the last preceding general election was one in which a vote for president, as well as for governor, was had. It is obvious that a party which is not a national party would have no vote for presidential elector at the last preceding election which could be used as a yardstick in the determination of party strength.

The situation is further complicated by the fact that at the last general election there was no such thing as "the vote of each party for its presidential elector receiving the largest vote." This phenomenon arises by virtue of the fact that by the use of the short ballot in this state the voters no longer actually vote directly for presidential electors. The votes cast in each precinct in the 1936 presidential election were directly for presidential candidates. The names of the presidential electors were not set out on the ballots nor did the voters directly vote for them. The presidential electors were certified as elected in the state upon the basis of the total vote throughout the state for each party's presidential candidate. In making such certification each presidential elector of a party was accorded the same vote as the total vote cast in the state for that party's presidential candidate. Thus, because in so far as the presidential electors of a party can be said to have received any vote at all, they all received the same, there is no opportunity for selecting from the presidential electors that one "receiving the largest vote." Thus, strictly speaking, there are now no votes in each precinct for presidential electors which could be used as provided in sec. 6.32 (1), Stats. We do not consider, however, that this factor standing alone would be controlling as to the conclusion reached in this opinion.

The statute in question was enacted at a time when there were but two political parties of strength in Wisconsin. These were also national parties and presidential electors were voted for directly in each precinct. Since then there have been material changes. There are now more than two

strong parties in the state, although one of these is not a national party, and the direct vote for presidential electors has been eliminated. Since, in the light of the foregoing discussion, the statute is now clearly ambiguous it becomes necessary to resort to rules of judicial construction, so as to arrive at a workable administrative interpretation which will carry out and apply to present day conditions the underlying and controlling legislative intent of the statute.

No extended study is necessary to determine that the broad general purpose of the statute is to give the offices of election officials to the two dominant parties. The words "but each one of said officers shall be a member of one of the two political parties which cast the largest vote in the district at the last preceding general election" are perfectly clear as are also the words "the party which cast the largest vote being entitled to two inspectors, one clerk and one ballot clerk, and the party receiving the next largest vote being entitled to the remainder of said officers." The measuring stick which is set up in the last sentence of the statute is purely incidental and should not be used in a way which will defeat the controlling legislative purpose as expressed in the words quoted above.

It has been held that the true rule for judicial construction of a statute is to look to the whole and every part, to the intent apparent from the whole, to the subject matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present in the legislative mind at the time of its enactment and, if that can be reasonably spelled out of its words, to give effect thereto. *Wisconsin Industrial School for Girls v. Clark County*, (1899) 103 Wis. 651.

Again in the case of *State ex rel. M., St. P. & S. S. M. R. Co. v. R. R. Comm.*, (1908) 137 Wis. 80, 117 N. W. 846, it was held that by judicial rules of construction the court may look at a law as a whole, its subject, its reason and spirit, give words a broad or narrow construction within their reasonable scope, supply omitted words clearly implied, substitute the right word for one clearly wrong, and so find the real intent of a law, even though contrary to its letter.

In view of such broad and liberal rules of construction it would be ironical, to say the least, that where the legislature has clearly expressed the intent to favor the two dom-

inant parties in the distribution of positions as election officials, the measuring stick specified for determining which are such parties should be so applied as to defeat its very purpose as a measuring device and in such a manner as to exclude one of the dominant parties, contrary to the avowed intent of the statute.

Where a party had no presidential candidate at the last general election then to test its strength as against other parties in the district by the vote of that party's candidate for governor as against the vote of the other parties for president does not truly ascertain the comparative strength of the parties. Necessarily the vote of the other parties for president includes therein votes of the followers of a party which had no presidential candidate. Surely, then, if a party is one of the two dominant political parties in state politics, and has no national strength which may be compared with the strength of the other national parties, it should be accorded due recognition of its strength as a state organization at elections in which state and municipal affairs solely are at issue. Any attempt to compare the strength of the parties by using the vote for president of the national parties and the vote for governor at the same election of a party without a national candidate is an endeavor to use standards of measure based upon two totally different situations. One shows the strength of a national party as compared with the strength of other national parties, while the other shows the comparative strength between all political parties. In one comparison the competition of the party without national scope is eliminated and in the other the competitive force of such party is given full effect.

To suggest that the matter is one for legislative correction is no solution of the present problem, as the situation calls for immediate action and election officials must be selected in some manner until the legislature meets. It is facts rather than theory that must be met, and the choice is between following the letter of the statute while defeating its intent or giving effect to the plain purpose of the statute when the letter no longer applies to the existing facts. In such dilemma we are guided by the fundamental rule of construction that the spirit or reason of the law is to prevail over the letter. *State ex rel. Time Ins. Co. v. Superior Court, Douglas County*, (1922) 176 Wis. 269, 186 N. W. 748. This is

true even though the very letter of the statute is violated in carrying out the manifest legislative purpose. *State ex rel. Husting v. Board of State Canvassers*, (1914) 159 Wis. 216, 150 N. W. 542.

Thus it appears that the use of the vote of each party for governor is the proper method for measuring the relative strength of the political parties in the last election. Such test truly reflects the strength of the parties, one against the other, in accordance with the legislative intent of the statute in question.

Therefore, in the light of the foregoing discussion, you are advised that the party vote for governor in each precinct at the last general election, being the only workable standard consistent with the intent of the statute, should be applied in determining preference in the selection of election officials under sec. 6.32 (1), Stats.

OSL
WHR
HHP

Elections — Public Officers — Election Officers — Under sec. 6.32, subsec. (1), Stats., three election inspectors must be chosen notwithstanding provisions of sec. 6.32, subsec. (1a).

XXI Op. Atty. Gen. 252 is reaffirmed so far as it is now applicable.

January 18, 1938.

THEODORE DAMANN,
Secretary of State.

You have called our attention to sec. 6.32, subsec. (1), Stats., which provides in part as follows:

“Except as otherwise provided, there shall be three inspectors, two clerks of election and two ballot clerks at each poll at every election held under the provisions of this title,
* * *”

Attention is also called to sec. 6.32, subsec. (1a), Stats., which reads:

"The governing body of any city, village or town may, not less than sixty days prior to any election, reduce the number of election officials for any election, and may provide for a redistribution of the duties among the remaining officials."

In view of this latter provision you inquire as to the extent the number of officials provided for in sec. 6.32, subsec. (1) may be reduced.

It is our opinion that the number of inspectors provided for in sec. 6.32, subsec. (1), Stats., may not be reduced and that reductions must be limited to election clerks and ballot clerks.

This conclusion is prompted by the numerous provisions in chapter 6 relating to instances where action may be taken by a majority of the inspectors.

Sec. 6.32, subsec. (4), par. (e), permits the inspectors to appoint one of their number chairman.

Sec. 6.57, Stats., provides in part that in case a majority of the inspectors decide that certain ballots folded together were voted by the same person, the ballots shall be destroyed.

Under sec. 6.60 the inspectors by a majority vote may decide that certain ballots are defective.

Sec. 11.63 authorizes the inspectors to determine the legality of mail ballots.

Certain decisions of inspectors are to be determined by a majority of the inspectors, which comprehends the presence of more than one inspector.

This view is further substantiated by the fact that sec. 6.32 provides that the party receiving the largest vote at the last general election shall be represented by two inspectors, one election clerk, and one ballot clerk. Should the number of inspectors be reduced to two or one, the minority party would be without representation or, if one inspector were appointed from the dominant party and one from the minority party, the dominant party would lose the majority of its inspectors provided for by sec. 6.32, subsec. (1), Stats.

It is true, however, that if less than three inspectors were provided for, the ensuing election would not be declared void.

State ex rel. Bancroft v. Stumpf, 21 Wis. 579. By the provisions of sec. 5.01, subsec. (6), Stats., effect should be given to the will of the electors, notwithstanding informalities or failure to comply with certain provisions of the election laws. However, as pointed out in *State ex rel. Oaks v. Brown*, 211 Wis. 571, sec. 5.01, subsec. (6) affords no excuse for nonperformance of official duties, and the holding of an election might be enjoined for failure to comply with certain formalities, although the same formalities, if overlooked, would not justify setting aside the election.

It would therefore appear that the minimum number of election officials should be three, that is, three inspectors, and under sec. 6.32, subsec. (1a), the governing body might redistribute the duties of the election clerks and ballot clerks among the three inspectors. Sec. 6.58, Stats., provides that the clerks of election, except in cities of the first class, shall certify to the correctness of the tally sheets. It might be contended from this that at least two clerks of election are required. However, we see no reason why the inspectors could not assume the dual rôle of inspector and election clerk and sign in both capacities.

The governing body if it sees fit might reduce the number of ballot clerks and election clerks appointed solely as such but the duties of those thereby eliminated should be assigned to the other election officials. It would seem that if the number of election clerks or ballot clerks is reduced to one, or if one election clerk and one ballot clerk are provided for, they should each be members of the dominant party.

The foregoing opinion is based upon the assumption that by the enactment of sec. 6.32, subsec. (1a), Stats., it was not intended to repeal other provisions of chapter 6 and that all apparent inconsistencies should be reconciled if possible. It is a well established rule of statutory construction that implied repeal is not favored. *Ward v. Smith*, 166 Wis. 342. If supposed incongruities between two enactments can be avoided by a reasonable construction, such construction should be adopted. *Hite v. Keene*, 137 Wis. 625.

You have also inquired if it is our desire to reaffirm the opinion contained in XXI Op. Atty. Gen. 252.

We wish to affirm all the answers in XXI Op. Atty. Gen. 252, but point out that in connection with the answer to the

fourth question in that opinion the manner of filling vacancies in the ranks of election officials is now different than it was at the time the above opinion was written. Under sec. 6.32, subsec. (4), par. (g), 1937 Stats., the city or village clerk selects persons to fill vacancies from lists filed with him by the two predominant parties, and in case no list is filed, he may choose any elector. Sec. 6.32, subsec. (4), par. (b), at the time the foregoing opinion was written provided that a majority of inspectors should fill vacancies and that if there was not a majority of inspectors or they failed to act, the electors present might do so.

WHR

Labor — Public Officers — County highway committee may bargain with employees as group and by such means reach agreement as to hours, wages, seniority, classifications, non-discrimination, etc., but neither county highway committee nor county board may make contract stipulating that all employees must be members of particular organization.

January 18, 1938.

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

You have submitted to us for examination a proposed agreement to be entered into between the county highway committee and the officers of a local CIO municipal workers union. You inquire as to the authority of the county highway committee to enter into such agreement and as to the authority of the county board to authorize such an agreement.

The proposed agreement contains various provisions relating to hours, wages, seniority rights, classifications, etc. However, the most significant part of the agreement, as far as the present discussion is concerned, is article I, relating

to recognition. Under this article the highway committee agrees to recognize the union as the duly authorized and sole bargaining agency of all its employees, that it will not discriminate against union members, and section 3 thereof provides:

"All employees of the La Crosse county highway committee shall be members in good standing of said Local No. 103. All present employees shall have thirty days in which to become members of said Union. All new employees shall become members after a thirty day probationary period."

The county highway committee is the executive committee of the county board in the expenditure of county funds used in the construction and maintenance of any roads or bridges within the county. Sec. 82.05, subsec. (1), Stats. All work of the county board in that respect must be executed through it and the county highway commissioner. X Op. Atty. Gen. 1115, 1116. It has certain powers given by statute and others delegated to it by the county board. Sec. 82.06, Stats. If the power sought to be exercised is not expressly or impliedly within those granted the committee by statute, it must be found within those properly delegated to it by the county board. For the board properly to delegate a power to this committee, it must itself have that power. The county board possesses and can exercise 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.

Specifically, the board has authority to provide the county highway commissioner with assistants for the discharge of his duties. Sec. 82.03, subsec. (6), Stats. The statutes are silent as to the manner in which these assistants are to be provided. Consequently, that is discretionary with the board and it may hire them directly or authorize the highway committee or the commissioner to do so. XX Op. Atty. Gen. 57. This power includes fixing of wages and terms of employment which may also be delegated. XXI Op. Atty. Gen. 327, 330, 331. When duly delegated the committee's powers respecting details of road improvement are as extensive as those of the county board itself. *Kewaunee County v. Door County*, 212 Wis. 518, 250 N. W. 438. The

committee can in such case do no more than the board could have done. That which could not be done directly cannot be done indirectly.

Under sec. 82.06, subsec. (3), Stats., the committee has power "To enter into such contracts in the name of the county, and to make such arrangements as may be necessary for the proper prosecution of such construction and maintenance of highways and bridges as is provided for by the county board."

In so far as the board, through the committee, directs the construction, reconstruction or maintenance of highways and bridges, it directs the expenditure of public funds, whether the funds originate in a county tax, allotment from state funds under sec. 20.49, Stats., or in federal aid grants. It is a commonplace of constitutional law that public funds must be expended for public purposes. *State ex rel. Garrett v. Froehlich*, 118 Wis. 129, 94 N. W. 50; *State ex rel. Consolidated Stone Co. v. Houser*, 125 Wis. 256, 104 N. W. 77. Where part of the expenditure is for labor costs, that part must be expended for a public purpose as well as the rest.

The board or committee, having authority to hire, has a discretion as to who may be hired. Reasonable requirements may be set up as a prerequisite to hiring and employees may be hired or discharged without the necessity of giving a reason for such action. The county is free to hire whomsoever it pleases and as a matter of policy may hire all union labor if it sees fit. No one has a right to a job and on one therefore can complain. *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318, 116 N. E. 158; *Seattle High School Ch. #200 v. Sharples et al.*, 159 Wash. 424, 293 Pac. 994.

The power of a municipality to prescribe the conditions on which public works shall be done is inherent in the delegated power to provide for such works. *Milwaukee v. Raulf*, 164 Wis. 172.

If the committee can make individual employment contracts there is no apparent reason why it cannot contract with employees as a group, and by such means reach an agreement as to hours, wages, seniority rights, etc.

However, the proposed agreement in this instance attempts to go beyond these subjects in that the section above quoted provides that all employees shall be members of the local union. This is not merely an employment contract; it is

a contract between a public body having direction of the spending of public funds, on the one hand, and a purely private organization on the other, whereby the public body agrees to spend those funds for the benefit of the private organization to the exclusion of the other members of the public. The county board could not delegate such authority to the committee, since it has no such authority itself.

In the case of *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, the Chicago board of education made a contract with the Chicago Building Trades' Council, whereby it was provided that in all public contracts under the board's jurisdiction, none but union labor could be employed. The court said at pp. 201-202

“* * * The results, in either case, are equally in conflict with the organic law, and such legislation, contract or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or any one else the rights of those for whom he acts.

“* * * The question is, whether the board of education has a right to enter into a combination with such an organization for the expenditure of the tax-payers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right.”

The following cases are in accord with the above decision: *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Fiske v. The People*, 188 Ill. 206, 58 N. E. 985; *Miller v. Des Moines*, 143 Ia. 409, 122 N. W. 226; *Goddard v. Lowell*, 179 Mass. 496, 61 N. E. 53; *Lewis v. Detroit Board of Education*, 139 Mich. 306, 102 N. W. 756; *State ex rel. Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 66 Pac. 496; *Paterson Chronicle Co. v. Paterson*, 66 N. J. L. 129, 48 A. 589; *Davenport v. Walker*, 57 App. Div. 221, 68 N. Y. S. 161; *People ex rel. Single Paper Co. v. Edgcomb*, 112 App. Div. 604, 98 N. Y. S. 965.

WHR

Criminal Law — Arrest — Town officers having right to arrest for misdemeanors may arrest violators of speed laws on highways on Indian reservation who are not tribal Indians.

January 19, 1938.

HIGHWAY COMMISSION.

Attention Chas. W. Thompson.

You state in your letter that that portion of the United States highway No. 2 which runs through the village of Odanah was surfaced with concrete. Since the highway was completed there have been numerous arrests by officials of the town of Sanborn for violation of speed laws. Fines have been assessed and fees collected by the local judge and arresting officer of the town of Sanborn. Numerous protests have been filed with the superintendent and he has raised the question of jurisdiction of local officials to make such arrests. You state that when the highway was laid out, easements were given for the road wherever it crossed government or tribal lands without remuneration and the ownership therefor remains with the United States government.

You ask to be advised whether, under the facts related, the officials of the town of Sanborn have the authority to make arrests for speed law violation and to impose fines and costs for such violations. You have orally stated to me that the question pertains only to violations of laws by others than Indians.

Your question must be answered in the affirmative. The fact that these arrests were made on the Indian reservation does not militate against their legality. The state has jurisdiction over Indian reservations to enforce its laws against any person who is not subject to the United States criminal law as an Indian. In 14 R. C. L. 143 the rule is stated as follows:

“* * * But unless restricted by treaty with the Indian tribe or by the act admitting the state into the Union or by other act of Congress then in existence, the state jurisdiction extends over the territorial limits of an Indian reservation so as to apply to all crimes committed thereon by persons not members of the tribe against other non-

members of the tribe, and in such case the United States courts have no jurisdiction. And it has been ruled that a clause in an enabling act merely providing that 'Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States,' does not deprive the state courts of such exclusive jurisdiction over crimes on Indian reservations not committed by or against Indians.
* * *

You are therefore advised that town officers who have the right to arrest for misdemeanors may legally arrest for the violation of speed laws on the Indian reservation committed by other than tribal Indians.

JEM

Commerce — Interstate Commerce — Constitutional Law — Fish and Game — Sec. 29.48, Stats., relating to sale of game, is not invalid as applied to interstate and foreign commerce.

January 20, 1938.

CONSERVATION DEPARTMENT.

You state that the objection has been raised that sec. 29.48, Stats., as applied to interstate and foreign commerce is invalid under the commerce clause of the federal constitution, and our opinion on the matter is requested.

Sec. 29.48, Stats., reads:

"Except as provided by section 29.52 no person shall sell, purchase, or barter, or offer to sell, purchase, or barter, or offer to sell, purchase, or barter, or have in his possession or under his control for the purpose of sale or barter, any deer, squirrel, game bird, black bass, muskellunge, sturgeon, pike from inland waters, or trout other than lake trout, or the carcass or part thereof, at any time; nor any other game fish taken from inland waters during the period extending from the first day of January to the next succeeding twenty-ninth day of May of each year; nor any other game or other wild

animal, or carcass or part thereof, during the close season therefor. This section applies, whether such animals were lawfully or unlawfully taken within or without the state."

Your question is clearly answered by the so-called Lacy act, 31 U. S. Stats. at Large 188, sec. 5, and the case of *Silz v. Hesterberg*, 211 U. S. 31, where it was held that the provisions of the forest, fish and game law of New York, which prohibited possession of game during close season, was a valid exercise of the police power of the state and was not in conflict with the constitution of the United States either as depriving persons importing game of their property without due process of law, or as an interference with, or a regulation of interstate commerce.

In this case *Silz*, a dealer in imported game, had in his possession an imported golden plover, originally taken, killed and captured in England during open season for such game birds there. He likewise had in his possession an imported blackcock, a member of the grouse family, which was lawfully taken, killed and captured in Russia during open season for such game there. These birds were imported by *Silz* in accordance with the provisions of the tariff laws during the open season for grouse and plover in New York. The court said at pp. 40-41:

"It is next contended that the law is an attempt to unlawfully regulate foreign commerce which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a State may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws. *M., K. & T. Ry. Co. v. Haber*, 169 U. S. 613; *Pennsylvania Co. v. Hughes*, 191 U. S. 477; *Asbell v. Kansas*, 209 U. S. 251."

In this case the court also quoted from *Geer v. Connecticut*, 161 U. S. 519, at p. 534, as follows:

" 'Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of

its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd v. Pearson*, 128 U. S. 1; *Hall v. De Cuir*, 95 U. S. 485; *Sherlock v. Alling*, 93 U. S. 99, 103; *Gibbons v. Ogden*, 9 Wheat. 1. * * * .”

Aside from these principles which alone would have sustained the regulations in question in the opinion of the court, reference is also made to the so-called Lacy act, 31 U. S. Stats. at Large 188, sec. 5, which provides that when foreign game animals are imported into any state they shall upon arrival be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state.

Another case upholding a similar regulation is that of *State v. Heger*, 194 Mo. 707. See also *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505.

You are therefore advised that sec. 29.48, Stats., is constitutional as applied to interstate and foreign commerce.

WHR

Constitutional Law — Municipal Corporations — Housing Authorities Law — Sec. 66.40, Stats., as amended by chs. 10 and 15 Laws 1937, Special Session, relating to public housing projects, is not in violation of art. VIII, sec. 1, Wisconsin constitution, relating to uniformity of taxation.

Such projects may not be undertaken without approval of city council and act is not in conflict with federal act, Wagner-Steagall act.

January 20, 1938.

HONORABLE PHILIP F. LA FOLLETTE,
Governor.

You have called to our attention a letter from the Milwaukee housing council in which reference is made to certain objections, some being of a legal nature, raised by opponents of public housing, to chs. 10 and 15 of the Laws of the Special Session of 1937, relating to housing authorities in certain cities, and our construction of the act is requested with respect to these objections.

The first objection is that no taxes may be charged against such housing projects, even though the common council is willing to make a charge for municipal services only.

Apparently it is thought that the payments in lieu of taxes provided by subsecs. (22) and (29) of sec. 66.40, Stats., created by these chapters violate the rule of uniformity with respect to taxation, provided by art. VIII, sec. 1 of the Wisconsin constitution.

Subsec. (22) reads:

“TAX EXEMPTION AND PAYMENTS IN LIEU OF TAXES. The property of an authority is declared to be public property used for essential public and governmental purposes and such property and an authority shall be exempt from all taxes of the state or any state public body; provided, however, that the city in which a project or projects are located may fix a sum to be paid annually in lieu of such taxes by the authority for the services, improvements or facilities furnished to such projects or projects by such city, but in no event shall such sum exceed the amount that would be levied as the annual tax of such city upon such project or projects.”

Subsec. (29) provides that the city and the authority may by contract agree that a certain sum or that no sum at all be paid in lieu of taxes.

Art. VIII, sec. 1 of the Constitution provides that the rule of taxation shall be uniform, and as amended in 1908 it divides the subjects on which taxes may be levied into two classes, one on property, the other on incomes, privileges and occupations. *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Comm.*, 161 Wis. 111. The rule as to uniformity applies as to direct property taxes only. *Chicago & N. W. R. Co. v. The State*, 128 Wis. 553. It applies to municipal as well as state taxes. *Wisconsin G. & E. Co. v. Tax Comm.*, 207 Wis. 546. It requires that taxation shall affect all property similarly situated alike. *Beals v. State*, 139 Wis. 544. However, uniformity with respect to subjects of taxation is not required. *Milwaukee E. R. & L. Co. v. Tax Comm.*, 207 Wis. 523; *Wisconsin G. & E. Co. v. Tax Comm.*, *supra*.

The legislature has power to designate which property shall be taxed, and hence necessarily has the power to declare which shall be exempt, since the act of designating certain property as taxable automatically exempts other property. Subject to constitutional limitations this power of exemption is plenary. *Nash Sales, Inc. v. Milwaukee*, 198 Wis. 281.

This does not mean that the legislature may classify property and tax each class at a different rate. The rule requires that all taxable property be taxed by a uniform rule, and that all the rest be exempt. *Knowlton v. Supervisors of Rock Co.*, 9 Wis. 410; *Chicago & N. W. R. Co. v. The State*, 128 Wis. 553.

On the basis of these principles it is clear that the power of the legislature to exempt this property is beyond question, but whether the payments in lieu of taxes referred to are valid and collectible depends upon whether they are "taxes" within the constitutional provision requiring uniformity. While they are not referred to as taxes, the answer to the problem rests rather on their true nature.

Subsec. (28) of the housing act empowers the municipality or "any state public body" to do a number of things with a view to co-operation with housing authorities. Among these are the furnishing of numerous "services, improve-

ments or facilities" referred to in subsec. (22), sec. 66.40. These may be furnished with or without consideration, as may be determined.

Subsec. (22), relating to exemption "from all taxes of the state or any state public body," provides that the city "may fix a sum to be paid annually in lieu of such taxes" "for the services, improvements or facilities furnished to such project or projects by such city," "but in no event shall such sum exceed the amount that would be levied as the annual tax of such city upon such project or projects." The city may fix the sum at anywhere between zero and the amount of a normal city tax. Once the sum is so fixed, the authority must pay it, unless void for want of uniformity.

Under subsec. (29) the same result may be attained by "contract" between the city and the authority, "for any year or period of years." The difference between subsecs. (22) and (29) is the difference which exists between an express and an implied contract, with the supporting consideration being the services, improvements and facilities.

In *Burlington v. Industrial Comm.*, 195 Wis. 536, the court held valid a contract to furnish fire protection and services to territory adjacent to the city under the power of the city to act "for its commercial benefit" within the meaning of sec. 62.11, subsec. (5), Stats. If such contracts can be made with respect to territory beyond the limits of a city, it is hard to see why the same rule should not apply to territory within its limits which is otherwise immune from charges therefor, unless the same be looked upon as a tax.

Without breaking down the services, facilities and improvements into their component parts, and without attempting to analyze which constitute an exercise of a governmental function and which constitute a proprietary function, it is clear that the power of the city to contract with respect to proprietary functions exists even though it is at least doubtful as to how far the power of the city extends with respect to contracts relating to governmental functions. See 43 C. J. 73, and cases cited. See also, *Milwaukee v. Raulf*, 164 Wis. 172; *Chicago, St. P., M. & O. R. Co. v. Black River Falls*, 193 Wis. 579; *Normal School v. Charleston*, 271 Ill. 602.

The payments in lieu of taxes may, however, be sustained on another ground, and that is that they are an equivalent for the taxes which would otherwise be levied. In both subsecs. (22) and (29) they are referred to not as payment for services but as "payments in lieu of taxes," and if the legislature chooses to regard them as such equivalent, they would seem to be clearly within the principle of the early railroad cases under ch. 74, laws of 1854, imposing a gross earnings tax on railroads in lieu of other taxes. The case which upheld this principle is *Milwaukee & Mississippi R. Co. v. Supervisors, etc.*, 9 Wis. 431, followed in *Kneeland v. Milwaukee*, 15 Wis. 454. In *Wisconsin Central Railroad Co. v. Taylor County*, 52 Wis. 37, the court said that the decision in the case of *Milwaukee & Mississippi R. Co. v. Supervisors*, 9 Wis. 431, construing art. VIII, sec. 1, was eminently sound and should be sustained. Just what the principle of that case was, however, was not made clear until 1906, for no opinion was ever filed in the early case. In *State v. Railway Cos.*, 128 Wis. 449, the doctrine was discussed at great length by Justice Marshall and its approval then, after a lapse of fifty years, can only mean that it is settled law.

The doctrine is there stated to be that payments in lieu of taxes are not taxes in the constitutional sense, the court saying at pp. 484-485:

"The payment by a railroad of a percentage of its gross earnings as compensation for the privilege of operating its road, or exemption of its property from the burdens of ordinary taxation, is generally spoken of as a tax, and properly so in the broad general sense, since the sum paid goes into the public funds to meet public expenses, and the method by which it is secured is an indirect way of reaching the railroad property for the purpose of obtaining public revenue therefrom. * * * When we keep in mind the distinction between a privilege tax involving the element of contract, and a direct tax on property, which does not involve such element, we can easily see that though the former are commonly and properly denominated taxes they are not referable to the taxing power in the constitutional sense. * * *"

Cooley calls this a commutation of taxes and states the rule to be that, if the power to commute exists, the legisla-

ture is the sole judge of the propriety of any specific commutation. 2 Cooley, Taxation (4th ed.), sec. 660.

The only difference between the instant case and that of the railroad taxes is that instead of fixing the amount this is left up to the city, for the practical reason that the amount is to be influenced not only by the value of the services to be furnished but by the policy of lowest rentals set forth in subsec. (26).

The second objection raised is that once a local housing authority is established the common council of the city will have no powers at all with respect thereto.

Under subsec. (9), pars. (a) and (b), it is clear that no project can be undertaken without the approval of the council. Nowhere is a standard set on which to base an approval or disapproval. It must therefore be taken to be entirely a discretionary matter. That being so, the council may insist on certain rentals being fixed, or, what is more important, may compel the authority to make such a contract as is provided for in subsec. (29).

The authority has power, however, under subsec. (9) (a) to revise the rents, and this power must necessarily be a flexible one, for under subsec. (26) the authority is charged with the duty of maintaining lowest possible rentals on the one hand and deriving sufficient revenue therefrom "together with all other available moneys, revenues, income and receipts of the authority from whatever sources derived," as will be sufficient to meet the principal and interest on its bonds, the costs of operating and maintaining the projects, administrative expenses, insurance, and to establish a reserve under subsec. (26) (c).

Subsec. (9) (1) of sec. 66.40, 1937 Stats., provides that in connection with a loan by a government the authority may agree to a limitation on the exercise of any powers. The authority derives its power from the legislature, although the authority is set in motion by act of the council, and the council may not limit its powers except as provided by statute.

While the objection here considered in no way goes to the validity of the act, we believe the foregoing discussion shows that such criticism is without any great practical merit.

The third objection raised is that since the council has the right to approve projects, the act is in conflict with the United States housing law.

The fact that all projects must be approved by the council before they become projects at all does not bring the state act into conflict with the federal act. The federal act contemplates sale or lease of federal projects "to a public housing agency." 42 U. S. C. A., sec. 1412 (c) and (d). Sec. 1409 provides for loans for low rent housing and slum clearance projects to be made to "public-housing agencies." The second and third sentences of this section refer to "loans outstanding on any one project." It is clear that the act contemplates loans only with respect to specific projects. The same applies to the alternatives in furtherance of low rentals, that is, annual contributions (sec. 1410) or capital grants (sec. 1411). Such contributions or grants are made to the public housing agencies and each section refers to specific projects.

Sec. 1402 (11) reads:

"The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance."

Under sec. 66.40 (9), pars. (a) and (b) of the Wisconsin act, it is plain that the state housing authority has no power with respect to any specific project until such project has been approved by the council, and hence until that time it is not a "public housing agency" within the meaning of the federal act, at least for the purposes covered by the foregoing provisions. This, however, would not prevent the authority from acting as agent of the federal administrator pursuant to 42 U. S. C. A., sec. 1404, par. (c), and sec. 66.40 (9) par. (c), Wis. Stats.

It is therefore concluded that none of the objections raised are of such a character as would invalidate the act.

WHR

Criminal Law — Gambling — Mechanical device commonly known as “merchandiser,” although it may be game of skill, is gambling device and use thereof is prohibited under sec. 348.085, Stats.

January 22, 1938.

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

You describe a mechanical device, sometimes called a “merchandiser.” The insertion of a coin starts the rotation of a disk or table upon which are set various articles of merchandise. There is an arm which the player may release by pressing a button in a hope that as it sweeps across the revolving table it will push some articles of merchandise into the center, so that the player will be entitled to such merchandise. The player has no control over the direction that the arm will travel, his only control being over the time when it shall start to operate. An unsuccessful player must insert another coin in order to replay the machine. You state that it is contended that this is a game of skill and inquire whether the same is a gambling device.

Sec. 348.085, subsec. (1), Stats. provides :

“All devices or things whatever, whereby any person shall or may be induced to believe that he will or may receive any money, thing or consideration whatever as the result, in whole or part of any contest of skill, speed or power of endurance of man or beast, are hereby declared to be gambling devices and to be public nuisances. The co-called ‘contribution and refund’ system and any and all variations thereof, whereby any person is or may be induced to believe that upon his paying to, or depositing with, any other person, any money, token or thing of value, he may as the result in whole or part of any contest of skill, speed or power of endurance of man or beast receive as a refund or otherwise any money, token or thing of value, is hereby declared to be gambling and to be unlawful and to constitute a public nuisance.”

In an opinion in XXIV Op. Atty Gen. 673 it was pointed out that although the department had previously ruled that

a game of skill was not included in the term "gambling devices" the enactment of sec. 348.085 (1), Stats., by ch. 218, Laws 1929, changed the rule.

That opinion held that the playing of a game of skill for money or other thing of value is the engaging in gambling and that devices used in so doing are gambling devices prohibited by sec. 348.085 (1) Stats.

You are therefore advised that the "merchandise" which you describe, even though it may be a game of skill, falls within the meaning of sec. 348.085 (1) Stats., and is a gambling device.

HHP

AGH

Bridges and Highways — Municipal Corporations — Municipal Borrowing — County board is not authorized to appropriate money to pay town obligation incurred to improve town roads.

Town is not authorized to transfer town funds to county treasurer to be used by county in improvement of town roads.

January 25, 1938.

GEORGE J. LARKIN,

District Attorney,

Dodgeville, Wisconsin.

You direct our attention to an opinion rendered by this office on the 3d day of May, 1937, XXVI Op. Atty. Gen. 167, and in reference thereto ask two questions, which will be stated and considered separately.

1. If a town should borrow thirty-five thousand dollars for building roads with the idea of improving prospective county trunk highways and then turns the sum over to the county to complete such improvement at one time, which the county then does, would the county board each year there-

after, if it wanted to, have the right to appropriate up to two thousand dollars or over to assist the town in payment of its bonds for the work already done or would it be illegal for the county board to take such action?

The question which you ask in reality is: May the county board lawfully appropriate two thousand dollars, or any other amount, per year, for the purpose of retiring outstanding obligations of a town?

It is well established that counties have only such powers as are expressly granted by statute or necessarily implied. XXIV Op. Atty. Gen. 424, XXV Op. Atty. Gen. 92, 316, 379, 532 and 702.

While it is true that under sec. 83.03, subsec. (6), the county board may construct or improve or aid in constructing or improving any road or bridge in the county and under certain circumstances is required to furnish aid under sec. 83.14 (3), Stats., we find no authority, either express or implied, whereby the county board may appropriate money to pay town obligations incurred for the purpose of improving town roads.

2. May a town bond itself for a specified sum for the purpose of improving prospective state highways and town roads and then turn the total sum raised by said bonds over to the county to be expended by said county in the improvement of prospective state trunk highways and town roads located within said town?

The procedure for a town bonding itself for original improvement of prospective state highways is provided for by sec. 67.16, Stats. A portion thereof reads as follows:

(3) "For the original improvement of prospective state highways any town meeting may by resolution authorize the issuing of town semiannual coupon bonds, bearing interest at a rate not exceeding five per cent per annum, and due in not more than ten years after date and not to be sold below par. The money obtained by such bond issue shall be promptly paid to the county treasurer and credited to the highway fund to be expended in such town in the construction of the particular highways designated in the bonding resolution. The bonds shall be in the form approved by the state highway commission, and blanks therefor ready for signing shall be furnished by the state highway commission at cost, and paid for out of the general fund of the town."

The above section specifically provides that moneys obtained from sale of such bonds shall be paid to the county. This answers your question in regard to bonds issued for improving prospective state trunk highways.

The above leaves only the question in regard to moneys raised for the improvement of town roads to be answered.

Subsec. (3), sec. 67.10, Stats., reads as follows:

“All borrowed money shall be paid into the treasury of the municipality borrowing it, be entered in an account separate and distinct from all other funds, disbursements charged thereto shall be for the purpose for which it was borrowed and for no other purpose, except as provided by section 67.11 and such disbursements shall be only upon orders or warrants charged to said fund and expressing the purpose for which they are drawn.”

Even though the above statute provides that borrowed money shall be kept in a separate account, it also clearly provides that such money must be paid into the treasury of the municipality, thereby causing said money to become a part of the funds of the town. Sec. 81.04, Stats., provides for a method of expending town funds for highway purposes and reads as follows:

“All payments for work performed and materials furnished on town highways and payable out of town funds shall be by order drawn upon the town treasurer and signed by the town clerk and countersigned by the town chairman, but in a town where there is a superintendent of highways no order shall be drawn until the claim therefor has been certified by the superintendent of highways to be correct and due and has been entered in the books of the superintendent, showing the date, amount and nature of the claim.”

The above statute precludes any idea that the town may pay funds to the county and the county then expend the same in improving town roads, as it provides specifically that such money shall be expended by town officers.

There is some language in sec. 82.065 relating to assumption of compensation liability by the county for certain highway projects which might imply that town roads may be maintained by the county with “local funds.” However, this

section contains no express grant of authority and is probably to be read in connection with the doing of work by the county from the town's share of gas tax allotment as provided in sec. 20.49 (8), Stats.

Therefore, it is our opinion that a town cannot pay money to the county from its borrowed money fund and then expend such moneys in the improvement of town roads within said town.

WHR

AGH

Education — School Administration — Teacher Tenure
— Marriage is not cause for discharge under sec. 39.40, Stats., relating to tenure of teachers, and resignation of married teacher cannot be forced by subterfuge of unreasonable salary reduction employed solely to achieve that end.

January 26, 1938.

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

You call our attention to the following situation arising under the teacher tenure law, sec. 39.40, Stats.

In a certain city a teacher who has taught in the high school for the past nine years married during the early part of September, 1937. Her contract for the school year 1937-1938 calls for an annual salary of one thousand six hundred dollars. A school board rule of this city requires that teachers who marry must drop out of service at the close of the semester in which they marry. This teacher has been informed that if she will file her resignation to take effect at the close of the school year her salary at the rate of one thousand six hundred dollars per year will be continued throughout the year, but that otherwise her salary for the second semester will be reduced to seventy-five dollars per month. (Incidentally, it might be mentioned here that pay-

ment of the salary of seventy-five dollars per month would preclude the granting of state aid to the city in question by virtue of the operation of sec. 40.87, subsec. (4), par. (b) Stats.)

Our opinion is requested as to the validity of this proposed procedure under the tenure law.

Sec. 39.40, subsec. (2), Stats., provides in part:

“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.
* * *”

While this statute is silent as to reductions in pay it is doubtful that a dismissal contrary to the provisions of the tenure law would be indirectly effected under the guise and subterfuge of reduction in pay. In *State ex rel. Karnes v. Board of Regents*, 222 Wis. 542, the court indicated that a tenure statute could not be circumvented by abolishing a position while continuing the work. Thus indirect methods of disturbing tenure are frowned upon where the facts appear to indicate bad faith. It should, perhaps, be said at this point with reference to the *Karnes* case, however, that on a subsequent trial on the merits the good faith of the board of regents of normal schools in abolishing the position in question in that case was established and the board's action was upheld.

In the present instance the teacher's monthly salary, computed on a ten months' school year, is one hundred sixty dollars. If this salary can be reduced to seventy-five dollars per month in the middle of the school year without valid reasons and solely as a means of forcing resignation, then the teacher tenure law is indeed a “splendid bauble,” to use the words of Chief Justice Marshall.

The courts are more concerned with substance than with form, and the underlying realities of plan, purpose, and effect must prevail over the form of disguise which may be used to encumber or enshroud such realities. Tendencies and consequences count for more than forms and names,

and the law does not favor the accomplishment by indirection of that which is forbidden by statute when done directly.

"It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." *United States v. Butler*, 297 U. S. 1, 68, 80 L. ed. 477, 489.

The thing which cannot be done directly, and which the board in this instance is apparently trying to do indirectly, is to force the teacher in question out of service because of her marriage.

The courts have consistently held that a tenure teacher cannot be discharged because of marriage. *People ex rel. Murphy v. Maxwell*, 177 N. Y. 494; *Richards v. District School Board*, 78 Ore. 621; *Kostanzer et al. v. State ex rel. Ramsey*, (Ind. 1933) 187 N. E. 337; *School City of Elwood v. State ex rel. Griffin*, 203 Ind. 626, 180 N. E. 471, 81 A. L. R. 1027.

In the *Griffin* case, *supra*, the court pointed out that marriage bears no reasonable relation to fitness or capacity to hold the position of teacher in the public schools and to discharge the duties thereof. See also *School District of Wildwood v. State Board of Education, et al.*, (N. J. 1936) 185 Atl. 664.

The only case coming to our attention from which it might be inferred that teaching efficiency is predicated upon celibacy is that of *Rinaldo v. Dreyer*, (Mass. 1936) 1 N. E. (2d) 37. In an article entitled "Marriage as 'Cause' for Dismissal" appearing in the Wisconsin Journal of Education for January, 1938, at p. 229, there appears a quotation from a review of the foregoing decision in the 1937 Yearbook on School Law. This review is by Daniel R. Hodgdon, lecturer on school law at New York University and editor of the School Law Review. The quotation reads as follows:

"* * * * The Massachusetts Court . . . in an illogical decision seemingly unsubstantiated by any well established legal principles, developed the strange and unusual doctrine that a women teacher on tenure must remain an

“old maid” for all time in order to have the privilege of continuing her professional career. This holding is without precedent in any state in the union.’”

You are therefore advised that a school board may not circumvent the provisions of sec. 39.40, Stats., by the subterfuge of an unreasonable salary reduction employed solely for the purpose of forcing the resignation of a married teacher.
WHR

Indigent, Insane, etc. — Legal Settlement — Blind Pensions — Receipt of assistance under sec. 47.08, Stats., prevents gaining of legal settlement.

January 26, 1938.

PENSION DEPARTMENT.

A, while receiving a blind pension from X county, moved into Y county. X county continued to pay his pension as required by law during the first year A resided in Y county. At the expiration of that period, application for a pension was made to Y county. A has now become ill and needs considerable medical attention, which cannot be cared for by his pension and consequently will have to be supplied through the regular relief channels.

You ask if X county is liable for this additional expense or whether Y county is liable by reason of the fact that A has established a legal settlement therein.

The answer to your question depends upon whether a person receiving a blind pension under sec. 47.08, Stats., is receiving public assistance within the meaning of sec. 49.02, subsec. (4), Stats., so as to prevent the gaining of a legal settlement. In this connection our attention is directed to an opinion reported in XIV Op. Atty. Gen. 188, where it was held that the receipt of a blind pension did not prevent the gaining of a legal settlement. The result reached by that opinion does not appear to be borne out by prior or subsequent opinions of this department.

When considering sec. 572*i*, Stats. 1915, this department said in V Op. Atty. Gen. 830, 831-832:

“* * * it was the manifest intention of the legislature in the enactment of this statute to provide for aid and relief to blind persons who have not otherwise sufficient means of support. * * * Except upon ground of indigency or pauperism, or the prevention of pauperism the statute, providing, as it does, for a donation of public funds to private individuals, could not be sustained. * * *

“* * * it is not a public purpose to aid persons who are neither indigent nor likely to become indigent merely because they have the misfortune to be blind.

“* * * I am of the opinion that the legislature intended, in using the word ‘income’ here, to include such means of support as the blind person might have and be legally entitled to. * * *.”

It is true that the legislature from time to time has materially changed sec. 572*i* since that opinion has been given. See XVII Op. Atty. Gen. 221. However, in considering sec. 47.08, (1), Stats. 1931, similar to the present statute, this department said:

“* * * We believe that the legislature intended to provide every blind person with public aid in an amount sufficient to enable such person to maintain himself under conditions consistent with his welfare. It is a matter of common knowledge that living expenses vary greatly in the different communities in this state. In one community \$300 might suffice to provide a blind person with every reasonable comfort necessary to his physical well-being. In another community, a blind person might need \$500 to provide himself with food, shelter and clothing. So the county boards are given discretion to determine what amount a blind person would need as public aid in addition to other sources of income to provide himself with the necessities of life.” XXI Op. Atty. Gen. 300, 302.

Again, in XXIV Op. Atty. Gen. 109 it was pointed out that pensions granted blind persons constituted a special form of public assistance. This construction of sec. 47.08 (1), Stats., as given in the opinions referred to above, appears to have been approved by the legislature when it amended that section by adding the word “needy.” See ch. 554, Laws 1935.

In view of what was said in previous opinions of this department, it is our opinion that receipt of a blind pension under sec. 47.08, Stats., constitutes public assistance within the meaning of sec. 49.02 (4), Stats., and consequently prevents the gaining of a legal settlement. *Sheboygan County v. Sheboygan Falls*, 130 Wis. 93; XXIII Op. Atty. Gen. 744.

That part of the opinion in XIV Op. Atty. Gen. 188 inconsistent herewith is hereby overruled.

Under the facts presented X county is liable for any medical care supplied A through the regular relief channels as A has not gained a settlement in Y county or lost his settlement in X county.

LEV

Bridges and Highways — Cost of rebuilding bridge on highway between town of Dovre, Barron county, and town of Auburn, Chippewa county, should be apportioned between respective towns and counties pursuant to secs. 80.11 and 87.01, Stats.

January 26, 1938.

INGOLF E. RASMUS,

District Attorney,

Chippewa Falls, Wisconsin.

You state that in May, 1882, the supervisors of the town of Chetek (which then included the present towns of Chetek and Dovre) in Barron county and the supervisors of the town of Auburn (which then included the present towns of Auburn and Cooks Valley) in Chippewa county, at a joint meeting passed a resolution and order pursuant to statute for the construction of a road along the boundary between the two towns, which is also the county line.

The last paragraph of the order signed by the supervisors from both towns is as follows:

“We do further order and determine that the following part of said described highway as follows: to wit: The west one mile being on Section 4 Town 31, Range 10 West in the Town of Auburn County of Chippewa and also situated on Section 33 Town 32 Range 10 West in the Town of Chetek, County of Barron, shall be made and kept in repair by the Town of Auburn Chippewa County and the East one mile or residue thereof lying between Section 3 Town 31 Range 10 West, Town of Auburn, County of Chippewa and Section 34 Town 32 Range 10 West, Town of Chetek County of Barron, be made and kept in repair by said Town of Chetek, but in opening said highway and bridging all necessary streams, the said Towns of Auburn and Chetek are each to bear one half of the expense, or furnish one half of the necessary plank for bridging the same.”

For the sake of convenience a bridge in the west half of this road was constructed north of the actual line, the road deviating slightly to the north for a short distance at this point.

Subsequently to 1882 the town of Chetek was divided up, the lower portion becoming the present town of Dovre, so that the county line road involved is now along the south boundary line of the town of Dovre, in Barron county, and north line of the town of Auburn, in Chippewa county. Similarly the town of Auburn has been divided up, the upper half remaining as the town of Auburn. The boundary line road has remained of the same length all through these changes. The bridge was maintained as originally located until in 1926 when the town of Auburn relocated it by straightening the road and at its own expense building a new bridge on the actual town line.

In August, 1936, the bridge having been washed out, a joint meeting was held of the town boards of the towns of Dovre and Auburn, at which it was voted that the town of Auburn should rebuild the bridge and if legally entitled to any reimbursement from the town of Dovre the same would be paid as soon as possible after the completion of the bridge. The Chippewa county highway department thereupon constructed this new bridge and paid all of the expense thereof except that some steel was furnished by the town of Dovre. Question has now arisen as to who should bear the expense of the building of this bridge. The town of Auburn

and Chippewa county are each willing to pay one-fourth of the cost pursuant to sec. 87.01, Stats., but the town of Dovre and Barron county deny any liability arising out of the construction of this bridge.

You ask if the resolution and order of May 18, 1882 is binding on the town of Auburn and Dovre, and if the town of Dovre and Barron county are liable for one-half of the cost of the construction of the bridge in question.

The resolution and order of May 18, 1882, was made by the town boards acting pursuant to the provisions of secs. 1272 and 1273, Rev. Stats. 1878, which provided that the laying out, altering, widening or discontinuing of a highway on the line between the two towns should be done by an order of the supervisors of the two towns acting jointly, which should determine "what part of such highway shall be made and kept in repair by each town." These statutes further provided that "each such town shall have all the rights and be subject to all the liabilities in relation to the part of such highway to be made or repaired by such town, as if it were wholly located in such town." Such provisions of secs. 1272 and 1273, Rev. Stats. 1878, have remained continuously on the statute books, and with only minor changes which are not here material, are now subsecs. (1), (2) and (3) of sec. 80.11, Stats. 1937.

By ch. 126, Laws 1893, sec. 1273 of the revised statutes was amended to provide that in the case the alteration of the boundaries of either or both of the towns bound to maintain said highway results in a diminution of the territory of either or both thereof, then the order apportioning said highway should be thereby vacated and a new proceeding taken for the apportionment of the expense of maintaining the highway. The provisions of this amendment are substantially the same as the present provisions of subsec. (4), sec. 80.11 Stats. 1937.

Thus, upon either the town of Auburn or the town of Chetek being divided up, such change in territory thereof immediately operated to effect a vacation of so much of the order of 1882 as established the liabilities of the respective towns in the maintenance of said highway. Thereafter such order would be of no effect in determining the responsibility for the town line road in question.

There being no agreement in respect thereto and no new apportionment having been made pursuant to such statute, the provisions of sec. 80.11 (8), Stats., would be applicable and controlling as to the payment of the cost of constructing the bridge. This statute provides that unless otherwise provided by statute or agreement every bridge on a town, city or village boundary shall be maintained by the municipalities within which the bridge is located, each contributing to the expense in proportion to the last assessment of taxable property therein. However, inasmuch as the bridge is on a town line which is also the line between two counties, then the procedure prescribed by sec. 81.14 (3), Stats., would be applicable so as to divide the expense between the counties. Subsecs. (1) and (2), sec. 87.01, Stats., provide for the sharing of the expense by the county and the town. See XXVI Op. Atty. Gen. 234.

It is therefore our opinion that the resolution and order of May, 1882, is not binding on the present towns of Auburn and Dover, and that the expense of building the bridge upon the county line between them should be apportioned between the two towns pursuant to sec. 80.11, Stats., and then between the respective county and town as provided in sec. 87.01, Stats.

HHP

Bankruptcy — Building and Loan Associations — Deposit with state treasurer by foreign building and loan association pursuant to sec. 215.38, Stats., may be held for exclusive benefit of Wisconsin creditors in event of federal receivership.

January 28, 1938.

BANKING COMMISSION.

You have called our attention to sec. 215.38, Stats., providing that a foreign building and loan association shall not issue its shares, receive moneys or transact any business in

this state unless it shall deposit and keep with the state treasurer five hundred thousand dollars to be held in trust for the benefit and security of all its members in this state until all shares of such association held by the residents of this state shall have been fully redeemed and paid off and its contracts and obligations to persons residing in this state fully performed and discharged. You ask whether the funds so deposited could be held for the exclusive benefit of the Wisconsin contract holders in the event of bankruptcy or insolvency of the issuing company or whether a federal receiver or referee would have the power to seize such fund as general assets of the company.

In 1932 the provisions of the bankruptcy act, Title 11, U. S. C. A., sec. 22 (a) was amended to read:

“Any person, except * * * a building and loan association, shall be entitled to the benefits of this title * * *.”

Thus, unless the association does carry on business other than usually conducted by a building and loan association it is specifically exempted from the operation of the bankruptcy act. See *Clemons v. Liberty Sales & Realty Corp.*, (1932) 61 Fed. (2d) 448, 21 American Bankruptcy Reports (N. S.) 752.

That congress contemplated such security provisions as sec. 215.38, Stats., and recognized the necessity for such state regulation is evidenced by the decision of the United States circuit court of appeals in *Security Building & Loan Assn. v. Spurlock*, (1933) 65 Fed. (2d) 768. The court there said that in determining whether the organization is a “building and loan association” within the provision of the bankruptcy act exempting such associations from its operation, the court must look to the state law and, the association being a creature of the state statutes, the purpose of such provision of the bankruptcy act was to allow its affairs to be administered and its assets distributed under state laws and supervision.

However, even though such associations were subject to the provisions of the bankruptcy act the priorities accorded the Wisconsin stockholders by sec. 215.38, Stats., would be

recognized under the express provisions of Title 11, U. S. C. A., sec. 104 (b) (7), which provides:

“Debts which have priority
 “* * *
 “* * * (7) Debts owing to any person who by the laws of the states or the United States is entitled to priority:
 * * *”

The court in *In re Bennett*, (1907) 153 Fed. 673, stated that while a state law cannot of its own force determine priorities under the national bankruptcy act, the above quoted provision of the bankruptcy act in effect adopts the law of the state and makes it the applicable federal law in determining priorities. The court said, p. 674:

“* * * The Congress might have dictated a single and uniform rule of distribution. If it had, that would have been the absolute law, notwithstanding state laws prescribing a different rule. But Congress has elected to prescribe as one rule of distribution that debts entitled to priority under any state law or law of the United States shall be accorded a like priority in the distribution of the bankrupt's estate. The law which we administer is thus the national bankruptcy law; that is, the preference in bankruptcy thus accorded, is a preference prescribed by the bankrupt law which for this purpose adopts the law of the state as the applicable federal law.”

The act of depositing the prescribed sum with the state treasurer pursuant to the statute mentioned constitutes a pledge so that were such building and loan association not exempted from the operation of the bankruptcy law, it would become necessary to determine the rights of the pledgee to the fund as against a trustee in bankruptcy. The authorities upon this situation are divided as is shown by a discussion in a note 29 A. L. R. 409. Some courts have held that the trustee must redeem the pledge before acquiring the property. Since the right to priority in this case would be undisputed by virtue of the express provisions of the statutes, there should be no objection to permitting the pledgee to retain the fund necessary to satisfy the Wisconsin creditors.

If no trustee could be appointed because the bankruptcy act was not applicable, then the only other possibility would be the appointment of a receiver in federal court upon liquidation proceedings taken in that court, in which event it would be necessary to consider the right of the pledgee of the fund in reference to such receivership. Though it seems undisputed that the federal court can acquire original jurisdiction the general tenor of the opinions, as noted in 96 A. L. R. 1173, is that the federal courts should permit the state courts to handle the receivership pursuant to state statute. However, even though the federal court did take jurisdiction the receiver would not be entitled to possession of the collateral pledged where none of the collateral pledged would be lost by remaining in the hands of the pledgee and the receiver could not realize on it more effectively than the creditors. See 28 A. L. R. 409.

Wisconsin's position on this question was clearly set forth in an early decision. In *Lewis v. American Savings and Loan Assn.*, (1898) 98 Wis. 203, 73 N. W. 793 (writ of error dismissed in 1901, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. 677) our court was called upon to pass upon the validity of a statute which for all present purposes was identical with sec. 215.38, Stats. A receiver, appointed in Minnesota, the home state of the corporation involved, attempted to acquire the fund deposited with the state treasurer of Wisconsin in order that such receiver might distribute the funds pro rata among all the creditors. It was held that the purpose of the law requiring such deposit was to protect the citizens of this state in their contracts with such foreign corporation and that therefore a receiver appointed in Wisconsin was entitled to retain the securities, convert them into money and apply the proceeds to the redemption in full of all shares held by Wisconsin residents and the performance and discharge of all of the association's contracts and obligations to members and persons residing in Wisconsin, leaving only the residue thereafter that could be taken by the receiver appointed in the state of the corporation's creation. The court pointed out that the fact that such pledged securities operated as a preference to Wisconsin residents would not constitute a violation of the contract clause of the constitution.

Under the recognized rule that since states may exclude foreign corporations they may "exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest." *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 181, the validity of the pledge of securities here in question and the trusts therein specified is clearly established. See *Maynard v. Granite State Provident Assn.*, (1899) 92 Fed. 435, citing *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165.

Since both our court and the supreme court of the United States have recognized the constitutionality of a statute practically identical with sec. 215.38, Stats., it would seem that in any event if a federal receiver were entitled to the possession of the fund certainly the priorities given by the statute to Wisconsin residents in the fund in question, would be maintained. In *Lewis v. American Savings & Loan Assn.*, cited above, the court, at page 228, said:

"* * * We cannot assent to the position that the security afforded by the deposit required by the act, and thus consented to and made by the corporation through its directors, may be avoided and nullified at the instant when the necessity for retaining and enforcing it becomes imperative * * * insolvency of the corporation will not release the trust or discharge it."

This language would clearly establish the funds in the hands of the state treasurer as a trust fund for Wisconsin creditors who would be classified as preferred creditors as to that fund.

It is therefore our opinion that the fund deposited with the state treasurer of Wisconsin by a foreign building and loan association pursuant to sec. 215.38, Stats., could be held for the exclusive benefit of Wisconsin creditors in the event of insolvency of the issuing company and that a federal receiver or trustee in bankruptcy would not be entitled to receive such funds until after the claims of all Wisconsin creditors had been satisfied in full.

HHP

Fish and Game — Bird Farms — Under sec. 29.574, subsec. (3), Stats., title to game birds on licensed game farm passes to licensee by operation of law, and conservation commission may not require him to pay state for reasonable value of such birds.

January 28, 1938.

CONSERVATION DEPARTMENT.

You state that the conservation commission has before it for consideration an application for the establishment of a game bird farm under the provisions of sec. 29.574, Stats., and it appears that all of the provisions of the statute have been duly complied with by the applicant.

In this connection you inquire whether the commission has authority under the provisions of sec. 29.574 to transfer title to the applicant of wild game birds on the lands that are to be used for the game bird farm.

In our opinion this takes place automatically by the operation of subsec. (3), sec. 29.574, which provides in part:

“* * * When such license has been granted the licensee shall become the owner of all such game birds on said lands and of all their offspring.”

This language is plain and unambiguous, and under familiar principles calls for no construction.

You also inquire whether the applicant must pay the state for the reasonable value of such birds before title passes, using the table of values set up in sec. 29.65, Stats.

Sec. 29.65 has no application to the establishment of bird farms under sec. 29.574. Sec. 29.65 provides that the state conservation commission may bring action in the name of the state for the recovery of damages against any person unlawfully killing, wounding, catching, taking, trapping, or having unlawfully in possession certain protected game, and a table of damages is set up for various wild animals, birds and fish.

No question of unlawful taking or possession is involved here and consequently no question of damages arises. Sec. 29.574 is exclusive as to matters of procedure and property

rights arising under the establishment of a licensed bird farm. It is well settled that a special statute covering a specific subject is controlling over a general statute, especially where, as in this instance, the provisions of the general statute were clearly intended to apply to an entirely different situation than that covered by the special statute.

The authority of the conservation commission is confined to the administration of powers specifically conferred upon the commission and to the enforcement of statutes under its jurisdiction. XXI Op. Atty. Gen. 606; XXIV Op. Atty. Gen. 242.

If the legislature in the enactment of sec. 29.574, subsec. (3), had considered that the transfer of title to the licensee of game birds on a licensed bird farm should be contingent upon payment to the state of the reasonable value of such birds, it undoubtedly would have said so. Its failure to do so is significant, and the conditions it has set up for such transfer must be considered as exclusive. Where the legislature has specified certain conditions, no others may be required by implication under the rule that the expression of one results in the exclusion of others, *expressio unius est exclusio alterius*.

WHR

Insurance — Town Mutuals — While town mutual insurance companies may no longer issue windstorm policies by virtue of operation of ch. 226, Laws 1937, they nevertheless continue to be liable on unexpired windstorm policies, and surplus in windstorm department of such companies should be preserved for purpose of paying claims arising under unexpired policies.

January 31, 1938.

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

Our attention is called to ch. 226, Laws 1937, repealing sec. 202.06, subsec. (3), Stats., under which town mutual insurance companies were formerly permitted to write windstorm and tornado insurance. A certain town mutual insurance company is contemplating a reorganization so as to conform to the requirements of sec. 202.01, Stats., and the question arises as to whether the surplus funds in its windstorm insurance department are to be paid into the state school fund under sec. 201.13, subsec. (2), Stats.

Ch. 226, Laws 1937, which repealed the statutory authority whereby town mutuals formerly wrote windstorm insurance, also required existing town mutuals to amend their articles so as to conform to sec. 202.01, subsec. (2), Stats. 1937, thereby limiting the business of such companies to fire and lightning insurance.

In an opinion to the commissioner of insurance under date of January 11, 1938,* this department ruled that by virtue of ch. 226, Laws 1937, town mutual insurance companies may no longer issue windstorm policies but that ch. 226 is prospective in operation only and does not disturb vested rights arising under policies issued prior to its effective date.

This being true, the question does not now arise as to what disposition is to be made of surplus funds in the windstorm department of a town mutual insurance company.

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Such surplus should be kept intact for the purpose of paying claims on unexpired windstorm policies.

WHR

Taxation — Income Taxes — Provisions of sec. 71.19, subsec. (1), Stats., limiting amount of income taxes apportioned to municipality to percentage of assessed valuation, applies to year in which taxes are collected.

January 31, 1938.

HAROLD M. DAKIN,

District Attorney,

Watertown, Wisconsin.

You have requested an opinion as to the validity of a claim filed against Jefferson county by the town of Aztalan, a municipality in said Jefferson county, in respect to apportionment of income taxes. The Laddish-Stoppenbach Company, which operates a malt plant in the town of Aztalan, reports its income on the basis of a fiscal year ending July 31 of each year. For several years this company has paid its income taxes on an instalment basis pursuant to sec. 71.10, subsec. (3), par. (b), Stats. For the year ending July 31, 1934, its return was filed and the first instalment of its income tax paid October, 1934. The remainder of the tax was paid in the sum of \$15,813.97 on March 2, 1935. For the year ending July 31, 1935, the company filed its income tax report in October, 1935, and paid the tax in the amount of \$24,959.29 in full for that period on October 15, 1935. Thus, during the calendar year 1935 the total income taxes paid by and collected from this corporation amounted to \$40,773.24. The share of the town of Aztalan in income taxes paid during the year 1935 amounted to \$18,192.44. However, the assessed valuation of said town being \$1,911,722.00 the town was limited to receiving \$13,382.00 as seven tenths of one per cent of the assessed valuation. This left an overrun of

\$4,810.44, which was apportioned by the Wisconsin tax commission to Jefferson county and distributed by it in accordance with the provisions of sec. 71.19, subsec. (1), Stats. It is for this \$4,810.44 that the town of Aztalan has filed a claim with Jefferson county, basing such claim on the contention that there was paid in the calendar year 1935 income taxes covering eighteen months of operation by the Laddish-Stoppenbach Company and therefore the town is entitled to an apportionment as though the payment in 1935 of the second instalment of income taxes for the fiscal year ending July 31, 1934, by the Laddish-Stoppenbach Company had been paid in the calendar year 1934.

Sec. 71.19 (1), Stats. 1935, provided as follows:

“All income taxes collected in cash shall be divided as follows, to wit: Forty per cent to the state, ten per cent to the county, and the balance to the town, city or village from which the income was derived as provided in section 71.18, except that when such balance exceeds seven-tenths of one per cent of the equalized value of all taxable property in such town, city or village under section 70.61, such excess shall be paid to the county to be distributed and paid to all of the several towns, cities and villages of the county, according to the school population therein. If, subsequent to July, 1931, there shall be paid over to any town, city or village any amount in excess of seven-tenths of one per cent of the equalized value of all taxable property therein, such excess payment shall be recoverable by the county.”

Sec. 71.10 (4m) (b), 1935 Stats., provided as follows:

“Within fifteen days after receipt of any income tax payments the tax commission shall transmit the same to the state treasurer. Upon the first day of March, June, September and December of each year the state treasurer shall apportion and pay income taxes collected and transmitted to him to the county and local treasurers in the manner provided by section 71.19.”

Both of these statutes use the words “taxes collected” in specifying the apportionment and division that shall be made. Under sec. 71.10 (4m) (b) the tax commission is required to transmit to the state treasurer all income taxes collected within fifteen days after the tax commission re-

ceives them. The statute then specifies that the state treasurer on the first day of the designated months in each year shall make the apportionment and pay to the county and local treasurers the tax so collected and transmitted to him. The apportionment and payment by the state treasurer of such income taxes collected is in the manner provided by sec. 71.19.

Sec. 71.19 (1), Stats., uses the words "income taxes collected in cash shall be divided." This language very clearly places the emphasis upon the fact of collection rather than upon the time of accrual. In effect, sec. 71.19 (1) says that when taxes are collected they shall be divided in the manner therein specified. Sec. 71.10 (4m) (b) says that the remittance of such division of taxes collected shall be made in each year on the first day of the four specified months. The language of these two sections taken together indicates an intention that the division shall be made in the calendar year in which the taxes are collected. In addition to prescribing the time when the division shall be made these statutes must be interpreted as using the year of collection as the unit of division in the determination of the amount to be received by a municipality in any calendar year from the taxes collected in that year.

If the calendar year in which the taxes are collected is not taken as the unit of time during which to apply the seven tenths of one per cent of assessed valuation limitation it would be necessary in every case of collection of delinquent income taxes to examine the records to ascertain whether the municipality had received an apportioned amount in the year of accrual of the tax in excess of the seven tenths of one per cent limitation. The use of the year of accrual as determinative of whether the municipality was entitled to receive a share of the income taxes collected in later years would not only have possibilities of effecting unfair results but would lead to an enormous amount of detailed administrative computation in reference to each tax as collected.

Since the enactment of ch. 448, Laws 1931, which effected the pertinent provisions of sec. 71.19 (1), 1935 Stats., the Wisconsin tax commission has had in effect an administrative interpretation that the limitation as to the amount a

municipality may receive applies to the total collections during the calendar year, which administrative ruling has been followed to date.

It is therefore our opinion that the provision of sec 71.19 (1), Stats., limiting the amount that a municipality may receive of income tax collected to a percentage of its assessed valuation applies to all taxes collected in the calendar year irrespective of when the taxes accrued, and that the claim of the town of Aztalan filed with Jefferson county is not a valid claim.

HHP

Taxation — Tax Sales — In case where single tax deed only has been issued and former owner before issuance thereof paid all taxes levied against land for three years ensuing after year for which land was returned delinquent and sold, limitation provided by sec. 75.27, Stats., upon commencement of action by former owner to recover land sold on tax deed applies only where such owner has been served with notice mentioned in sec. 75.28, Stats.

January 31, 1938.

CHARLES D. MADSEN,
District Attorney,
Luck, Wisconsin.

Our attention is called to sec. 75.27, Wis. Stats., providing for a three year limitation on actions brought to set aside a tax deed, and to sec. 75.28, Stats., providing certain exceptions to the application of sec. 75.27. You inquire whether, after the three year period mentioned in sec. 75.27 has expired and the notice mentioned in sec. 75.28, subsecs. (2) and (3) has not been given, the original owner may bring an action to set aside a tax deed good on its face.

Sec. 75.27, Stats., reads as follows:

“No action shall be maintained by the former owner or any person claiming under him to recover the possession of any land or any interest therein which shall have been conveyed by deed for the nonpayment of taxes or to avoid such deed against any person claiming under such deed unless such action shall be brought within three years next after the recording of such deed. Whenever any such action shall be commenced upon any tax deed heretofore or hereafter issued after the expiration of three years from the date of the recording of such deed, unless such action shall be brought by a person who was a minor at the time the right of action shall accrue as aforesaid, such deed, if executed substantially in the form prescribed by law for the execution of tax deeds, shall be conclusive evidence of the existence and legality of all proceedings from and including the assessment of the property for taxation up to and including the execution of such deed.”

Sec. 75.28, subsec. (1), enumerates certain instances when the three year period mentioned in sec. 75.27 does not apply. These situations are as follows: (1) where the original owner was a minor at the time the cause of action accrued; (2) where the taxes were paid prior to sale; (3) where the land was redeemed from the operation of such sale as provided by law; (4) where the land was not liable for taxation; (5) where a single tax deed only has been issued and the original owner has, before the issuance of such tax deed, paid all taxes levied against the land for the three years ensuing after the year for which the land was returned delinquent and sold.

Sec. 75.28, subsec. (2), makes provision for the service of a notice on the former owner of record stating certain facts.

Subsec. (3), sec. 75.28 provides, among other things, that if the notice mentioned in subsec. (2) is served and filed, the limitation provided by sec. 75.27 upon the former owner shall apply, but that if such notice is not so served and filed or published, the limitation provided by sec. 75.27 shall be extended until the expiration of thirty days from and after the date of serving such a notice or publishing and filing proof of publication.

It was held in the case of *Hobe v. Rudd*, 165 Wis. 152, that sec. 75.28, subssecs. (2) and (3) (formerly sec. 1189), dealing with notice, apply only to the fifth exception set out above. In other words, if the original owner has paid the

taxes for the three years ensuing after the year for which the land was returned delinquent and sold, the holder of the tax deed can make the three year limitation provided in sec. 75.27 operative only by giving statutory notice at least thirty days before the expiration of three years from the date of the recording of the deed. Under sec. 75.28, subsec. (3), if such notice is not filed at least thirty days prior to the expiration of three years from the recording of the deed, then the limitation provided by sec. 75.27 is extended until the expiration of thirty days from and after the day such notice is served and filed or published and proof filed.

Consequently, it must be concluded that the requirements as to notice mentioned in sec. 75.28, subsecs. (2) and (3) apply only to the peculiar situation set out in the fifth exception above, and that the limitation specified in sec. 75.27 will run against actions to set aside tax deeds in all other cases other than those mentioned in sec. 75.28, subsec. (1) where the deed is good on its face without complying with the requirements relating to notice.

WHR

Social Security Law — Old-age Assistance — Personal notice need not be given old-age assistance beneficiary when lien required by ch. 7, Laws Special Session 1937, is filed against real estate owned by him. State pension department may so advise county pension departments.

January 31, 1938.

PENSION DEPARTMENT.

You direct our attention to sec. 49.26, subsec. (4), Stats., created by ch. 7, Laws Special Session 1937, and in connection therewith, submit two questions, which will be stated and considered separately.

1. Does the lien provided for by sec. 49.26, (4), Stats., attach at the time the certificate is filed, or must the beneficiary of old-age assistance first be given notice?

Sec. 49.26, (4), Stats., as created by ch. 7, Laws Special Session 1937, reads in part as follows:

“All old-age assistance paid to any beneficiary under sections 49.20 to 49.51, including medical and funeral expense paid as old-age assistance, shall become and constitute a lien as hereafter provided and shall remain a lien until it is satisfied. When old-age assistance is granted to any person under sections 49.20 to 49.51, the name and residence of the beneficiary, the amount of assistance so granted, the date when such assistance is granted, the name of the county granting the assistance, and such other information as the state pension department shall require, shall be entered upon a certificate, the form of which shall be prescribed by the state pension department. The county judge of the county granting old-age assistance shall cause such certificate, or a copy thereof, to be filed in the office of the register of deeds of every county in the state in which real property of the beneficiary may be situated. 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. The certificate herein provided need not be recorded at length by the register of deeds, but upon the filing thereof all persons shall thereby be charged with due notice of the lien and of the rights of the county thereunder
* * *”

Under this section all old-age assistance granted a beneficiary constitutes a lien upon any real estate owned by such beneficiary. The statement mentioned in this section must be filed in all cases where a beneficiary owns any real estate in this state and, once it is filed, gives the public notice that the amount of any assistance granted constitutes a lien thereon. There is no requirement that notice shall be given any person other than that given by filing the statement referred to above. In the absence of such requirement, no notice need be given the beneficiary.

2. Is it proper for the state pension department to notify counties not heretofore requiring the transfer of property to file the lien required by sec. 49.26 (4), Stats., without notifying the beneficiary that said lien attaches to his property for all aid heretofore or hereafter granted him?

As pointed out in our answer to question 1, no notice need be given a person receiving old-age assistance when filing a lien against his property. It would therefore be proper for your department to notify counties not previously requiring the transfer of property that they may file the lien set out in subsec. (4) of sec. 49.26, Stats., created by ch. 7, Laws Special Session of 1937, without giving personal notice thereof to the owner of the property.

WHR

Corporations — Municipal Power Districts — Provisions of sec. 198.06, subsec. (5), Stats., respecting approval or disapproval by public service commission of formation of municipal power district, are directory.

February 1, 1938.

PUBLIC SERVICE COMMISSION.

You have inquired whether you may still proceed with further hearing in the matter of the inter-county municipal power district of Polk and Burnett counties, the Wisconsin supreme court in *Clam River Electric Co. v. Public Service Comm.*, 274 N. W. 140 (June 8, 1937), having held invalid your order dated September 12, 1935, approving the formation of such municipal power district.

In July, 1935, proceedings were taken by certain towns and villages in Polk and Burnett counties for the formation of a municipal power district pursuant to ch. 198, Stats. Thereupon, your commission, after investigation, made a report pursuant to sec. 198.04, Stats., of its recommendations as to the feasibility of the formation of such municipal power district. At an election thereafter held to determine whether such district should be created some of the municipalities within the boundaries of the proposed district did not vote favorably. Subsequently on September 12, 1935, your commission made an order approving the formation of the inter-county municipal power district as composed of only those municipalities which voted favorably at such election. In an action commenced in November, 1935, by the Clam River Electric Company to review this order our court rendered the decision referred to above.

In this decision the court held that where less than all of the municipalities in a proposed municipal power district voted in favor of the formation thereof the order pursuant to sec. 198.06, subsec. (5), Stats., approving the formation of such district must be based on a positive finding by the commission of feasibility of said district in order to be valid. Because no such finding was made as the basis of said order of September 12, 1935, it was held invalid.

The problem raised by your inquiry is whether the provision of sec. 198.06 (5) that such approval or disapproval be

made within ten days after the filing with the commission of a certified copy of the order of the board of canvassers declaring the result of the election has the effect that if the approval or disapproval is not made within such ten day period the commission then loses jurisdiction.

Whether or not a statute is directory or mandatory is to be determined from an application of the rules of statutory construction. Our court in *Appleton v. Outagamie Co.*, (1928) 197 Wis. 4, 220 N. W. 393, held that sec. 70.62, Stats., providing that the county board "shall" at the annual meeting determine the amount of taxes to be levied for the year, was directory only and that the county board might take action in reference to such taxes at a special meeting subsequent to the November annual meeting. In that case the court laid down a rule of statutory construction at pages 9-10 as follows:

"* * * When there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be so done it may work an injury or wrong; nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all,—the courts will deem the statute directory merely. *State ex rel. Cothren v. Lean*, 9 Wis. 279. *Vide Mills v. Johnson*, 17 Wis. 598; *Burlingame v. Burlingame*, 18 Wis. 285; *Application of Clark*, 135 Wis. 437, 115 N. W. 387."

The language there used by the court would seem to be applicable to the situation at present being considered and we do not believe that it was the intention of the legislature that if the public service commission did not give its approval within such ten day period the effect of allowing such ten day period to elapse should have the effect of a disapproval. It is to be noted that sec. 198.06 (5) does not say that if the commission does not give its approval within the ten day period then the failure so to do shall operate as a disapproval. In those instances in the statutes where it is the intention of the legislature that the failure to do an act within the specified length of time shall be effective as a denial thereof there are express provisions so provided. The

words in sec. 198.06 (5) are that the commission shall approve or disapprove within the ten day period. This language requires positive action one way or the other. It does not say that a failure to approve shall be a disapproval. It requires positive action of disapproval. We believe that the intention of the legislature in using this language was to provide for such ten day period as an indication of its direction to the public service commission that it act promptly and without delay.

A situation might exist where at the time of the filing of said order of the board of canvassers with the commission the calendar of the commission made up prior thereto was so completely filled and the requirements of business and matters theretofore before the commission were such that the demands upon the time and facilities of the commission, its agents and employees would make it impossible for the commission to take any action in reference to such power district or give consideration to the approval or disapproval of such power district until after the expiration of such ten day period. In that situation we do not believe the legislature intended such circumstances to defeat the formation of a power district. If, in such a situation, the commission would have power to act after the ten day period, then it necessarily follows that the language of the statute is directory only.

While it is true that the court in the decision said that the failure of the commission to find that the district as fixed by the election was feasible was in effect a finding that it was nonfeasible, we believe that the court meant that language to apply only in so far as it was necessary to a decision of the case. The court did not say that the failure to make a finding of feasibility is in fact a finding of nonfeasibility, but said that the failure to make such finding a feasibility in so far as the validity of the order in question was concerned had the same effect as a finding of nonfeasibility. Had the commission found the formation of such district nonfeasible then an order approving the district would likewise be invalid because it did not have a proper formation. The invalidity arises out of the lack of proper basis. So here, there being no finding of feasibility, the order is invalid as lacking proper formation and the effect of such omission is the same as if there had been a finding of nonfeasibility.

The language used in the order of the commission unequivocally states that it is making no finding in respect to either feasibility or nonfeasibility. The court does not deny this language but merely says that upon a consideration of the validity of the order the effect of such failure to make any finding is the same as a finding of nonfeasibility. The commission has not as yet found that the district as fixed by the election is nonfeasible. In fact it has not as yet passed upon the question.

As stated by the court:

“* * * So under the provisions of section 198.06 (5) when the *ultimate fact of feasibility or nonfeasibility* is found and the district approved or disapproved accordingly, the statute itself *incorporates or denies incorporation* as the case may be.” (Emphasis supplied.) P. 146.

This language shows that the court reached its decision upon the premise that until feasibility has been found as a fact the creative force of the statute to incorporate the district does not become operative. Then, by the same reasoning, until the fact of nonfeasibility has been found and a disapproval made based thereon the force of the statute to deny incorporation would not be operative so long as the commission retained jurisdiction. The commission has not as yet found as a fact that the district is not feasible nor has it found that it is feasible. If the matter is still within its jurisdiction then it may make any determination.

It is therefore our opinion that sec. 198.06 (5), Stats., is directory and that even if the ten day period has passed the commission retains jurisdiction thereunder until it makes a finding of feasibility or nonfeasibility and gives its approval or disapproval accordingly.

HHP

Appropriations and Expenditures — Municipal Corporations — Municipal Law — Under sec. 66.04, subsec. (8), Stats., all disbursements from city and village treasury must be made upon written order of city or village clerk after proper vouchers have been filed in office of clerk. This statute supersedes all prior legislation inconsistent therewith but leaves unchanged any statutory provisions not inconsistent therewith.

February 1, 1938.

TAX COMMISSION.

Attention R. S. Mallow, Municipal Accounting Division.

You call our attention to subsec. (8), sec. 66.04, Stats., as created by ch. 432, Laws 1937, which reads as follows:

“In every city and village all disbursements from the treasury shall be made by the city or village treasurer upon the written order of the city or village clerk after proper vouchers have been filed in the office of the clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the clerk, it shall hereafter be the duty of the 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 city or village treasury.”

The provisions of this section correspond with those of sec. 59.81, subsec. (2), relating to counties, which section has been construed in the following opinions: XIII Op. Atty. Gen. 6, 10, 97, 196, and XVI Op. Atty. Gen. 666.

In view of the similarity of the above statutes you inquire if sec. 66.04, subsec. (8) should not receive a like construction so as to require that the disbursement of all funds held by the city and village treasurers in their official capacities be made only on orders issued by the city or village clerks. You inquire as to the effect of sec. 66.04, subsec. (8) upon secs. 41.16 (5), 66.06 (10) (d), 62.13, (9) (b), 62.13 (10) (e), and 66.50, and in connection therewith you ask the following four questions:

“a. If the city or village clerk must now issue the individual orders upon the local treasurer by which such funds are disbursed to the ultimate payees?”

“b. What constitutes ‘proper vouchers’ within the meaning of sec. 66.04 (8)? Would a schedule of the individual allowances directed to the clerk and signed by the president and secretary of the respective boards suffice, such as is indicated for boards of education by sec. 40.57?”

“c. Must the clerk’s order be signed by the mayor in cities and the village president in villages?”

“d. Must the city clerk’s order be countersigned by the comptroller, if there be one?”

The general intent and purpose of sec. 66.04 (8) is quite clear. It is designed to effectuate uniformity in municipal disbursements. All disbursements from the treasury must be made by the city or village treasurer upon the written order of the city or village clerk after proper vouchers have been filed with the clerk. It is also apparent from the wording of the statute that such mandate supersedes anything in previous statutory provisions inconsistent therewith regardless of whether such inconsistent provisions are contained in special or general statutes. This of course would be true of the five statutes which you specifically mention.

In view of the foregoing our answer to question a. is that the city or village clerk must now issue the individual orders upon the local treasurer by which funds are disbursed to the ultimate payees.

In question b., above quoted, you have referred to sec. 40.57, relating to disbursement of city school funds. This section provides:

“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.”

What constitutes “proper vouchers” depends upon the requirements of the statute in each case and while “proper

vouchers" are required under sec. 66.04 (8), it is not the purpose of that section to define the term. Consequently where other provisions of the statutes, such as sec. 40.57, above quoted, provide for a voucher or schedule of individual claimants signed by the president and secretary of the school board, such voucher or schedule when filed with the city clerk pursuant to sec. 66.04 (8) would undoubtedly constitute a "proper voucher" within the meaning of the statute. In fact sec. 40.57, if followed explicitly, would result in an exact compliance with the requirements of sec. 66.04, (8), since there is nothing inconsistent in the two provisions.

Answering questions c. and d., it is our opinion that there is nothing in sec. 66.04, (8) which would require the clerk's order to be signed by the mayor, village president or comptroller, nor is there anything in said section which would excuse the failure to provide such signatures if otherwise required by statute. In other words, the statutes, if any, as to such signatures, remain unchanged by the operation of sec. 66.04 (8), Stats.

WHR

School Districts — Tuition — Under sec. 40.535, subsec. (2), Stats., tuition is to be computed on expenditure basis but is not to exceed three dollars per pupil per week nor to be less than two dollars per pupil per week.

Excessive payments made under mistake of law by town may be recovered from school district if not barred by statute of limitations.

February 4, 1938.

CHARLES L. LARSON,

District Attorney,

Port Washington, Wisconsin.

Our attention is called to sec. 40.535, Stats., which reads in part:

“(1) 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 one of the methods provided in subsection (2).

“(2) Such tuition shall be determined by dividing the total salaries paid the teachers and principals and the high school cost of textbooks, supplies used in high school instruction, manual training and domestic science by the total enrollment for the year, but not to exceed the sum of three dollars per pupil per week, nor to be less than two dollars per pupil per week.”

You inquire whether, in the absence of an agreement, the district collecting tuition may arbitrarily set the tuition at the maximum allowable, or whether in such case the tuition must be computed in accordance with the provisions of subsec. (2).

Subsec. (1) of sec. 40.535 provides that the tuition shall be computed by one of the methods provided in subsec. (2). Subsec. (2) sets up two methods for determining the amount of tuition to be charged. The first method is by computing the charge on the basis of the items of expenditure enumerated in subsec. (2) but not to exceed three dollars per pupil per week. The second method consists of charging an arbitrary amount of two dollars per week per pupil in the event the sum arrived at by computing the various items of expenditure does not equal the sum of two dollars per pupil per week. These are the only possible methods of computation under the statute.

You also inquire if the township may recover tuition paid at the rate of three dollars per week per pupil in the absence of an agreement and where the actual cost computed pursuant to subsec. (2) would be two dollars and twenty-five cents per week, such payments not having been made under protest.

Ordinarily, money paid voluntarily under a mistake of law, or in ignorance of the law, but with full knowledge of all the facts, and in the absence of fraud by the payee, cannot be recovered. 48 C. J. 755; 21 R. C. L. 171; *Gage v. Allen*, 89 Wis. 98; *Birkhauser v. Schmitt*, 45 Wis. 316.

However, according to the weight of authority the rule that money voluntarily paid under a mistake of law cannot be recovered is not applied to payments made by municipal officers. See 21 R. C. L. 174; 48 C. J. 757. There may be some doubt as to whether the exception in the case of municipalities prevails in Wisconsin by virtue of the decision in the case of *Town of Milwaukee v. Village of Whitefish Bay*, 106 Wis. 25, although that case involved a somewhat different point, and, construing the decision in the light of the facts there presented, it can hardly be said to be out of line with the majority view.

You are therefore advised that the town in question may maintain an action to recover the public funds which its officers paid without authority to the school district in question, except to the extent that recovery may be barred by the statute of limitations.

WHR

Taxation — Tax Collection — Under provisions of sec. 74.73, Stats., where no refund has been made to individual taxpayer pursuant to said section of taxes illegally assessed by county on property within city, city has no claim for such taxes against county.

February 5, 1938.

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

You state that the city of Hayward has filed three claims against Sawyer county for the recovery of taxes illegally as-

sessed by the county against property in the city for bridge aid to towns under sec. 87.01. These claims, of which you submit copies, are for the years 1919 to 1936, inclusive, and aggregate \$3,299.20. You also state that the amounts thereby claimed by the city of Hayward do not represent amounts which the city has refunded to individual taxpayers pursuant to the provisions of sec. 74.73, Stats. You request an opinion whether the county should pay the claims so filed.

Sec. 74.73, Stats., provides: (1) that a taxpayer may file a claim with a town, city or village for any amount paid by him as taxes which were illegally assessed and that the town, city or village shall pay the same, providing such claim is filed within one year; and (2) that where any town, city or village shall have paid such claim it shall be credited by the county treasurer with the whole amount of such state or county taxes so refunded which have been paid to the county treasurer.

This section of the statutes was construed by the court in *State ex rel. Sheboygan v. Sheboygan County*, (1927) 194 Wis. 456, 458-459, 461, where the court said:

“The city was only one of the agencies through which the county collected the tax from the individual taxpayer resident of the city. The city had no such interest in the validity of this tax as to authorize it to maintain an action to set it aside. The tax does not affect the revenues of the city in the least. The city’s property is not subject to taxation. But the tax does, immediately and directly, affect each taxpayer to the amount of his tax. The general tax is not a debt against the city, but is a direct charge upon the taxpayer. The city was not the real party in interest. The relation should therefore not have been in its name nor on its behalf

* * *

“* * *

“The fact that sec. 62.11, sub. (5), of the Statutes gives the common council the power to act for the ‘welfare of the public’ does not authorize the city to expend public funds to conduct litigation which does not affect the municipality directly, where the fruits of the litigation inure to the benefit of the individual taxpayers resident within the city.

* * *

“* * *

“The legislature has prescribed the remedy of the taxpayer who is compelled to pay a tax which is claimed by

him to be unlawful. Under sec. 74.73 of the Statutes it is the duty of the taxpayer questioning the tax to pay the same under protest and then file a claim for a refund with the municipality to which the tax was paid."

See also *Welch v. Oconomowoc*, 197 Wis. 173, 179.

Inasmuch as the illegally assessed taxes, which are made the basis of the claims, have not been refunded by the city to the individual taxpayers pursuant to sec. 74.73, the city has no claim therefor. It is only where the city, pursuant to sec. 74.73, Stats., has made a refund to the individual taxpayer of the illegally assessed taxes that the city has any right of recovery under the terms of said section.

It is therefore our opinion that the county of Sawyer should not pay the said claims filed by the city of Hayward.

HHP

AGH

School Districts — State Aid — State superintendent of public instruction may refuse to certify state aid to school district whose treasurer fails to furnish bond required by sec. 40.10, subsec. (1), Stats.

City treasurer who fails to keep separate accounts of school funds as required by sec. 40.57, Stats., may be punished for malfeasance under sec. 348.28 but state aid may not be withheld because of violation of sec. 40.57.

February 7, 1938.

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

You inquire whether the state superintendent of public instruction may withhold state aid for elementary and high schools in school districts where the treasurer has failed to furnish a satisfactory bond as required by statute.

Sec. 40.10, subsec. (1), Stats., requires every school district treasurer to execute and file an official bond at least

equal to the amount of all the moneys to come to his hands, such bond to be filed within fifteen days after his election or appointment. He may be required to file an additional bond in such sum as the director and clerk shall demand within fifteen days after demand. Failure to file such additional bond results in vacation of the office under sec. 17.03, subsec. (8), Stats.

In the case of *State ex rel. Wheeler v. Nobles*, 109 Wis. 202, it was pointed out that a school treasurer holds his office until his successor qualifies. If the successor fails to qualify by filing the requisite bond, his predecessor is justified in refusing to turn over the school district money to the new school treasurer. XXIV Op. Atty. Gen. 640. If a person assumes to perform the duties of an office without filing a required bond, he is, nevertheless, a *de facto* officer whose acts cannot be questioned collaterally. *State ex rel. Schneider v. Darby*, 179 Wis. 147; XV Op. Atty. Gen. 80. However, such *de facto* officer would be without standing in court should he demand that school district moneys be turned over to him. Throop, Public Officers, secs. 659, 662; 22 R. C. L. 601. See also XXIV Op. Atty. Gen. 640, where it is stated that a school treasurer who has failed to file the necessary bond cannot by mandamus compel his predecessor to turn school funds over to him.

By sec. 40.10, subsec. (2) par. (a), Stats., it is the duty of the district treasurer to apply for and receive and, if necessary, sue for all money appropriated to or collected for the district. However, in view of the foregoing authorities he would be unable to successfully sue for funds due the district in the absence of a satisfactory bond.

You are therefore advised that the state superintendent may, and, as a matter of sound public policy in protecting public funds, should refuse to certify payments of state aid to districts where the treasurer has failed to file the bond required by statute.

You also inquire whether the state superintendent may withhold state aid for elementary and high schools from city school boards because of the failure or refusal of the city treasurers to keep separate accounts of all moneys raised and apportioned for school purposes.

Sec. 40.57, Stats., provides in part that the city treasurer shall keep separate accounts of all moneys raised and apportioned for city school purposes. The object of keeping separate accounts is evidently to insure that school funds are actually used for schools. However, it does not necessarily follow that the funds are misused because of failure to keep separate accounts, and it is doubtful that such failure could be successfully asserted as a defense in a mandamus action to compel the state superintendent to certify state aid under secs. 40.39, subsec. (4), and 40.87, subsec. (5), Stats.

Compliance with sec. 40.57 is not set up among the conditions precedent to state aid specified in sec. 40.87, nor are there any general penalty provisions in chapter 40 to cover violations of sec. 40.57. Nevertheless, it would appear that a city treasurer by keeping unsegregated accounts in violation of sec. 40.57 subjects himself to criminal prosecution for malfeasance under sec. 348.28 by doing an act in his official capacity not authorized by law.

We therefore advise that the malfeasance statute be invoked to insure compliance with sec. 40.57, but that state aid may not be withheld because of failure to comply with said section.

WHR

Courts — Taxation — State tax of one dollar for commencing civil action provided for in secs. 262.04 and 271.21, Stats., is collectible in civil actions but not in special proceedings and is not collectible from state or federal government or their instrumentalities. Civil actions and special proceedings are distinguished.

February 7, 1938.

INGOLF E. RASMUS,
District Attorney,
Chippewa Falls, Wisconsin.

You have requested an opinion as to the kind of proceedings and actions in which the clerk of court may collect the state tax provided for in sec. 262.04, Stats.

Sec. 262.04 provides in part:

“The summons must be filed with the clerk, and a state tax on the action of one dollar paid within ten days after the service of an answer or demurrer * * *.”

Sec. 271.21, Stats., also provides:

“In each action in a court of record having civil jurisdiction there shall be levied a tax of one dollar which shall be paid to the clerk at the time of the commencement thereof, which tax on suits in the circuit court shall be paid into the state treasury and form a separate fund to be applied to the payment of the salaries of the circuit judges; and which tax in other courts of record the salaries of the judge of which are wholly paid by the counties or by any county and city jointly shall be paid to the county treasurer to create a fund to be applied to the payment of the salaries of such judges.”

Sec. 260.03, Stats., defines an “action” 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.”

In a number of opinions this department has ruled that the word “action” contained in sec. 271.21, means “civil action” as contrasted with “special proceeding.” Op. Atty. Gen. for 1912, 591, 638; IX Op. Atty. Gen. 432; XI Op. Atty. Gen. 817.

Sec. 260.05, Stats., provides:

“Actions are of two kinds, civil and criminal. A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action.”

It is not always easy to distinguish between a civil action and a special proceeding. In general it might be said that an action commenced with a summons or original writ is a civil action and subject to the state tax.

Thus a proceeding by writ of certiorari from justice court is an action and not a special proceeding. Op. Atty. Gen. for

1912, 638. Any independent proceeding, such as mandamus, quo warranto, certiorari, or prohibition is a "civil action," although not commenced by the service of a summons, and is subject to the state tax. See XI Op. Atty. Gen. 817; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468; *State ex rel. Risch v. Trustees*, 121 Wis. 44; *State ex rel. Durner v. Huegin*, 110 Wis. 189.

The following are special proceedings and are not subject to tax:

A proceeding in circuit court to discharge a mortgage under sec. 235.60, or to dissolve a corporation, or to prove a will, or to condemn land for public purposes, or to change the name of a resident, or to appoint a guardian. IX Op. Atty. Gen. 432; *Wisconsin Central Co. v. Kneale*, 79 Wis. 89; *In re Guardianship of Welch*, 108 Wis. 387; *Meier v. Kornahrens*, (S. C.) 102 S. E. 285.

Delinquent income tax warrants are neither actions nor special proceedings. XXV Op. Atty. Gen. 246. Hence they are not subject to state tax, although a statement of clerk's fees was recently provided for in ch. 1, Laws Special Session 1937.

It should be noted that the required payment of one dollar is not a filing fee, but is a state tax. Since it is a state tax neither the state nor its instrumentalities are subject to the tax. We wish to particularly emphasize this point, because of the misunderstanding that apparently exists in the minds of some clerks. The state does not pay taxes to itself although a few of the clerks in this state in billing the state for the one dollar tax in state cases even insist that it be paid with the filing fees in advance of filing, in spite of the fact that the state cannot advance fees, to say nothing of taxes. Under sec. 14.31 the service must be rendered to the state before the claim can be allowed.

The exemption from the state tax of one dollar also extends to the federal government and its instrumentalities. See XXV Op. Atty. Gen. 401 and 495.

WHR

Fish and Game — Conservation commission order M-40, prohibiting carrying of gun more powerful than .22 calibre rifle at any time prior to five days before deer hunting season, is valid order and can be questioned only in manner provided by sec. 29.174, subsecs. (7) and (8), par. (a), Stats.

February 9, 1938.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

You call our attention to conservation commission order No. M-40, which prohibits the carrying of any gun more powerful than a .22 calibre rifle at any time prior to five days before the deer hunting season.

Reference is also made to sec. 29.22, subsec. (1), Stats., which reads in part as follows:

“* * * nor shall any person have in possession any firearms in territory wherein there is an open season for deer for a period of five days prior to the opening date for deer hunting unless in either case the game gun or rifle is unloaded or knocked down, or unloaded and within a carrying case.”

We are asked whether order No. M-40 is invalid as being in conflict with sec. 29.22, (1), Stats., and whether such order constitutes the exercise of power unlawfully delegated by the legislature.

Sec. 23.09, subsec. (7), Stats., provides in part:

“The commission is hereby authorized to make such rules and regulations, inaugurate such studies, investigations and surveys, and establish such services as they may deem necessary to carry out the provisions and purposes of this act, and any violation of any provisions of this act, or of any rules or regulation promulgated by the commission, shall constitute a misdemeanor and be punished as hereinafter provided. * * *.”

The purpose of sec. 23.09 is expressed in subsec. (1) thereof as follows:

"The purpose of this section is to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in the state of Wisconsin."

We also call attention to sec. 29.174, and particularly subsecs. (1), (2) and (9), the material portions of which read as follows:

"(1) There shall be established and maintained, as hereinafter provided, such open and close seasons for the several species of fish and game, and such bag limits, size limits, rest days and conditions governing the taking of fish and game as will conserve the fish and game supply and insure to the citizens of this state continued opportunities for good fishing, hunting, and trapping.

"(2) It shall be the duty of the conservation commission and it shall have power and authority to establish open and close seasons, bag limits, size limits, rest days *and other conditions governing the taking of fish or game, in accordance with the public policy declared in subsection (1)*. Such authority may be exercised either with reference to the state as a whole, or for any specified county or part of a county, or for any lake or stream or part thereof.

"* * *

"(9) The present statutes regulating open and close seasons, bag limits, size limits, rest days and *other conditions governing the taking of fish or game* shall continue in full force and effect *until modified by orders of the conservation commission*, as provided in this section, or by subsequent acts of the legislature."

Chapters 23 and 29, Stats., are to be construed together. *State v. Sorenson*, 218 Wis. 295. Also, the court said at p. 298 in that case:

"The powers of the commission were greatly enlarged and the exercise of its powers with respect to the conservation of fish and game regulated by ch. 152, Laws of 1933, now sec. 29.174."

The court was there of the opinion that the power delegated to the conservation commission is analogous to the power conferred upon the supreme court to modify statutory rules of procedure, such power being specifically upheld and approved. The court said at p. 299:

“* * * Thirdly, the whole purpose to be achieved by the rules and regulations is declared by sec. 23.09 to be the protection, development, and use of fish and game. Certainly, this declaration contained in the law creating the conservation commission sets up a standard which is to govern the exercise of the powers conferred upon the conservation commission, for they are authorized to make such rules and regulations as carry out the provisions and purposes of the act. * * *”

We believe that the statutes above quoted and the decision in the *Sorenson* case amply sustain the validity of order No. M-40. This view is in line with the authorities generally, since it has been held a number of times that the delegation by the legislature of the power to regulate the taking of fish and game is valid, even where such authority includes power to change existing statutes. *People v. Soule*, 238 Mich. 130, 213 N. W. 195 (1927); *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922); *State v. Nelson*, 146 Wash. 17, 261 Pac. 796 (1927).

You have also mentioned the fact that it is your position that the objections suggested must be taken advantage of by a defendant in accordance with the provisions of sec. 29.174, subsecs. (7) and (8) par. (a), Stats., which read:

“(7) Every order in conformity with law, made under authority of this section, shall in every prosecution for violation thereof be conclusively presumed to be just, reasonable and lawful, unless prior to the institution of prosecution for such violation the person charged with such violation shall have brought an action to vacate and set aside such order, as provided in this section.

“(8) (a) Any person being dissatisfied with any order of the commission affecting the county in which such person resides may commence an action in the circuit court of any county affected by such order, or if the order sought to be reviewed is a state-wide order then in the circuit court of Dane county, against the commission as defendant, within thirty days after such order has been published, to vacate and set aside any such order on the ground that the order is unlawful, or that any such order is unjust and unreasonable, in which action the complaint shall be served with the summons.”

We believe your position is well taken and that as to a person violating order No. M-40 such order must be “conclu-

sively presumed to be just, reasonable and lawful" in the absence of the commencement of an action for the purpose of testing the validity of the same.

WHR

Corporations — Auto Dealers and Finance Companies —
Persons who make complaint in criminal proceedings for violation of sec. 218.01, Stats., are not limited to banking commission, its members, agents or employees.

February 11, 1938.

BANKING DEPARTMENT,

Division of Consumer Credit.

You have requested an opinion as to who may make the complaint in the institution of criminal proceedings pursuant to sec. 218.01, subsec. (8), Stats.

Sec. 218.01 (8), Stats., provides as follows:

"(8) Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of misdemeanor and upon conviction thereof shall be punished as follows:

"1. For violation of any provision of subsection (7) of this section, by a fine of not exceeding ten thousand dollars or by imprisonment in the county jail for not to exceed one year or by both such fine and imprisonment.

"2. For violation of subsection (2) of this section, by a fine not exceeding five hundred dollars or by imprisonment in the county jail for a period not to exceed ninety days, or by both such fine and imprisonment."

By the provisions of the above subsection a violation of sec. 218.01, Stats., is made a misdemeanor, which is a crime against the state. The offense committed which may be prosecuted under this subsection is the violation of a state statute. A criminal proceeding commenced to punish such a violation is no different than any other criminal proceeding

for the violation of a statute. There is nothing in sec. 218.01 that would make the manner of starting criminal proceedings for the violation thereof different from the procedure followed in other criminal proceedings of similar nature.

Criminal proceedings for the punishment of a misdemeanor are commenced by some person making a complaint to the proper court. Such complaint may be signed by any person who has sufficient knowledge of the facts. There being nothing in section 218.01 that in any way limits the persons who may complain of violations of said section, it follows that any person who has knowledge of a violation of said section may complain thereof to a proper court for the purpose of commencing criminal proceedings.

It is therefore our opinion that there is nothing in sec. 218.01 which limits the persons who may make a complaint in the institution of criminal proceedings for the punishment of a violation of said section to the banking commission, the members thereof, its agents or employees, but that any person having sufficient knowledge of the facts relating thereto may make such complaint to the proper court.

HHP

Prisons — Prisoners — Parole — Public Officers — Governor has power to commute life sentence to indeterminate sentence of one to twenty years.

First offender whose sentence is so commuted is eligible for parole under sec. 57.06, subsec. (1), Stats., after serving minimum of one year.

February 11, 1938.

PARDON BOARD,

Executive Office.

You ask whether the governor has the power to commute a life sentence to an indeterminate term of one to twenty years, and if so whether a first offender whose sentence is so commuted will be eligible for parole after serving the minimum sentence.

By art. V, sec. 6, Wisconsin constitution, the governor is expressly given the power to grant "commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, * * *." This grant of power was held in an opinion, XX Op. Atty. Gen. 1050, to be sufficiently broad to authorize the governor to commute a definite sentence to an indeterminate sentence even though the offense was one specifically excepted from the indeterminate sentence law.

The opinion referred to also stated that where the governor commutes a definite sentence to an indeterminate sentence then the provisions of the statutes respecting parole in cases of indeterminate sentences are applicable to the sentence so resulting. See also XXIV Op. Atty. Gen. 513.

Sec. 57.06, subsec. (1), Stats., provides that parole may be granted in cases where the offender "if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum or one-half the maximum, whichever shall be less, for which he was sentenced not deducting any allowance for time for good behavior * * *"

It is therefore our opinion that the governor has the power to commute a life sentence to an indeterminate term of one to twenty years and under such commutation if the prisoner is a first offender he will, under sec. 57.06 (1), be eligible for parole after serving the minimum of one year.

HHP

JEM

Counties — Forest Reserves — Taxation — Forest Crop Lands — Forest crop money received by county under sec. 59.98, subsec. (5), Stats., may be expended by county in surfacing fire trail through county forest reserve lands which have been withdrawn from forest crop lands.

February 12, 1938.

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

You advise that in 1935 the land committee of the county board of supervisors of Juneau county entered into an agreement with a representative of the Wisconsin conservation commission whereby two thousand dollars was to be taken from the forest crop money received from the state by Juneau county and used for the purpose of surfacing a fire trail through land that was entered under the forest crop law. The two thousand dollars was not used on the designated road in that year and since that time the land through which the fire trail passed has been withdrawn from the forest crop lands. The question now arises as to whether the money may now be expended for the surfacing of the fire trail.

Inasmuch as Juneau county received forest crop money directly from the state of Wisconsin, it must have been by virtue of the provisions of section 59.98, subsec. (5) of the statutes, which provides as follows:

“Any county having established and maintaining a county forest reserve under the provisions of this section and having entered the same under the forest crop law shall receive from the state an amount equal to ten cents for each acre of land within such forest reserve, to be used for the purchase, development, preservation and maintenance of such forest reserve * * *.”

It is assumed that although the above lands were withdrawn as a part of the forest crop lands, no attempt was made to withdraw them from the county forest reserve. Sec. 59.98, subsec. (5), quoted above, provides in part that the

ten cents per acre which the state pays to the county shall be used "for the purchase, development, preservation and maintenance of such forest reserve."

The surfacing of the fire trail should facilitate the preservation of the forest reserve by making such forest reserve more accessible to persons desiring to fight forest fires and plant trees therein and remove dead wood and underbrush therefrom.

A surfaced road should likewise facilitate the patrol of the forest reserve for the purpose of guarding against fire hazards and timber trespass. Sec. 59.98 (5) does not limit the expenditures of forest crop money received by a county to lands entered under the forest crop law. A county is authorized to spend forest crop money on the lands which are a part of the county forest reserve even though such lands which occasioned the payment of the forest crop money have since been withdrawn from the forest crop lands. The law does not require that the money be spent in the year in which it is received, nor does the law require the county to refund the forest crop money in a situation such as you present.

In XX Op. Atty. Gen. 1150, it was held that county lands entered under the forest crop law may be withdrawn without a refund by the county of the acreage aid paid by the state.

In XXIV Op. Atty. Gen. 689 it was held that money appropriated to the county under sec. 59.98 (5) for the purchase, development, preservation and maintenance of forest reserves, may be expended for the purposes enumerated in sec. 59.98, subsec. (2). Sec. 59.98, subsec. (2), par. (g), Stats., provides that the county board shall have power

"To establish and maintain an efficient fire fighting system for the protection of forests on its reserve."

The surfacing of the fire trail would constitute maintenance of a part of the fire fighting system for the protection of the forests of the county forest reserve.

It is our opinion that Juneau county may use the two thousand dollars for the purpose of surfacing the fire trail.
JRW

Recovery Act — Trade Practice Department — Ch. 110, Stats., as re-enacted by ch. 3, Laws 1937 (Special Session), does not apply to manufacturing industries.

February 12, 1938.

TRADE PRACTICE DEPARTMENT.

You have requested an opinion as to whether the phrase "except manufacturing industries" as used in sec. 110.04, Stats., means all manufacturing industries in the state or only those manufacturing industries in the state which are engaged in interstate commerce.

Sec. 110.04, subsec. (1), par. (c), Stats., as created by ch. 3 of the laws of the Special Session of 1937, which re-enacted the trade practice act of 1935, provides as follows:

"All persons, things, and transactions within the borders of this state, including those in interstate commerce, in so far as within the power of the state, by virtue of act of congress or of the police power of the state, except manufacturing industries, shall be subject to this chapter and applicable codes under this chapter."

If the words "except manufacturing industries" refer only to manufacturing industries in the state which are engaged in interstate commerce, then your department will have jurisdiction over manufacturing industries in the state which are not engaged in interstate commerce. However, if these words refer to all manufacturing industries in the state the effect of such interpretation is that no manufacturing industry in the state is subject to ch. 110, Stats.

The words "all persons, things, and transactions within the borders of this state," are words of inclusion and express the general scope of ch. 110, Stats. The words "including those in interstate commerce so far as within the power of the state, by virtue of act of congress or of the police power of the state," which immediately follow, express an additional idea that the things covered thereby are to be specifically included in the words of general inclusion used previously. Then the words "except manufacturing industries" set out a third proposition and should be read as ex-

pressing an exclusion from the operative effect of the act. When thus read it appears that the words "except manufacturing industries" refer to the language first used in the section where the general scope of the act is set out and so exclude all manufacturing industries in the state from being within the scope of the law.

Had the legislature intended that the words "except manufacturing industries" should refer only to those manufacturing industries in interstate commerce the section would have been worded as follows: "including those in interstate commerce, *except manufacturing industries*, in so far as within the power," etc.

The legislative history of ch. 3 of the laws of the Special Session of 1937 confirms this interpretation of the provisions of this section. The provisions of sec. 110.04 (1) (c), Stats., were not contained in the bill as introduced but were inserted by an amendment. As originally drawn this amendment did not contain the words "except manufacturing industries." These words were inserted later, when it was pointed out that the trade practice act was intended to apply only to trades and industries of the service type as distinguished from those engaged in manufacturing.

It is, therefore, our opinion that by virtue of the language used in sec. 110.04 (1) (c), Wis. Stats., all manufacturing industries in the state of Wisconsin are excluded from the operation of the trade practice act as contained in ch. 110, Stats.

HHP

Public Officers — School Districts — Board of Education
— Under sec. 40.54, Stats., board of education has authority to let contracts for school construction and to supervise work.

February 15, 1938.

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

You have requested a reconsideration of that part of the opinion rendered to you by a former attorney general on September 23, 1936, XXV Op. Atty. Gen. 617, which held as follows, p. 620:

“* * * although the plans for the school building must be adopted by, and be satisfactory to the board of education, the actual construction of the school building, that is, the letting of the contract and supervision, should be handled by the board of public works. We believe the statutes contemplate that the board of public works and the board of education should work together in planning and constructing school buildings.”

You suggest that to require that construction work be supervised by the board of public works is in direct conflict with sec. 40.54, Stats., which provides as follows:

“(1) All money appropriated for school purposes shall be under the direction of and shall be expended by the school board.

“(2) The erection, alteration or repair of buildings or other construction work (the estimated cost of which exceeds one thousand dollars) shall be let by the school board to the lowest responsible bidder, as provided in section 62.15, and the school board shall, *for that purpose*, possess the powers conferred by that section on the board of public works.”

Subsec. (2) of sec. 40.54 plainly authorizes the school board to let contracts, so that the former opinion is plainly erroneous in requiring that contracts be let by the board of public works.

The question remains whether the board of education or the board of public works is required to supervise the con-

struction after the contracts are let. Subsec. (2) of sec. 40.54 confers upon the board of education the powers vested in the board of public works by sec. 62.15, but the grant to the board of education is limited by the phrase, "for that purpose." It is arguable that the purpose referred to is the letting of the contract rather than "the erection, alteration or repair of buildings or other construction work." The statute being ambiguous in terms, its meaning must be sought in its legislative history.

Sec. 925-87, Stats. 1898, which was a part of the general city charter law, provided that in cities of the first and second classes "all repairs and alterations of school buildings and premises" should "be under the charge of the board of public works, and in other cities under the charge of the board of education." Sec. 925-118, Stats. 1898, provided that it should be the duty of the board of public works, except as provided in sec. 925-87, "to erect and keep in repair all school buildings."

Ch. 127 of the laws of 1903, creating sec. 925-118a, was entitled:

"AN ACT to amend subsection 118, section 925, chapter 40a, of the statutes of 1898, to be designated subsection 118a, authorizing the board of education in cities of the third class to have charge of erecting school buildings in such cities."

This subsection provided in part as follows:

"In all cities of the third class, the expenditure of all sums of money appropriated * * * for the erection, enlargement, alteration or repair of school buildings * * * shall be under the direction and authority of the board of education."

The subsection then provided that the board should make plans and specifications and submit them to the common council for approval, advertise for bids, enter into contracts, make partial payments, etc., following a procedure similar to that now provided by sec. 62.15. The intent and purpose of the subsection to vest in the board of education the right to supervise construction, as well as to let the contracts, was made plain by the following language of the act:

"The said board shall reserve in every contract the right to determine finally the performance of such contract, or doing of the work specified therein; * * *.

"And power is hereby given to the said board to adjust and determine all questions as to the amount earned under any contract by the contractor or contractors, according to the true intent and meaning of the contract; * * *.

"* * *

"The board of education shall have authority to employ a competent person, or persons, for the supervision of the work."

Ch. 194, laws of 1909, extended the provisions of subsec. 118a to include cities of the fourth class. Ch. 242, sec. 288, laws of 1921, a revisor's bill, renumbered subsec. 118a to be subsec. (6) of sec. 40.64 and revised it to read as follows:

"In cities of the third and fourth class the expenditure of all money appropriated for the purchase of a school site, or sites, or for the erection, alteration or repair of school buildings, and for the maintenance of schools, shall be under the direction and authority of the board of education. All work for the erection, alteration or repair of school buildings, the estimated cost of which shall exceed one thousand dollars, shall be let by the board of education to the lowest responsible bidder, in the manner provided by section 62.15, and subject to the provisions of said section, and the board of education shall, for that purpose, exercise the power conferred by said section on the board of public works. *The board of education is authorized to provide the necessary plans and specifications, and competent supervision of the work.*"

The present statute, sec. 40.54, was enacted by ch. 425, sec. 87, laws of 1927, also a revisor's bill. The revisor's note states merely that "Section 40.54 is derived from section 40.64 (6)." The last sentence of sec. 40.64 (6), above quoted, which specifically conferred upon the board authority to provide competent supervision of the work, was struck out and the limitation of the section to cities of the third and fourth classes was eliminated.

It appears from the foregoing survey that following the year 1898 the board of public works was, by degrees, completely deprived of its authority over school buildings in cities of the third and fourth classes, and that such author-

ity was conferred upon the school board. It would be unreasonable to hold that by striking the provision expressly authorizing the board of education to provide competent supervision of construction work, the legislature in 1927 intended to return that power to the board of public works, particularly when no such intention is manifested by the revisor's note accompanying the bill.

It follows that the board of education has authority not only to let contracts for school construction, but also to supervise the work, under sec. 40.54, Stats.

ML

Taxation — Tax Collection — Under sec. 74.06, Stats., taxpayer may not pay part of his tax but local treasurer has discretion to accept part payment of tax.

February 15, 1938.

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

You have asked whether the treasurer of a municipality may accept from a taxpayer a part payment of the taxpayer's tax and declare the part payment to be applied upon the whole of the tax or must such part payment be specifically applied to a certain part of the taxpayer's entire property as set forth in sec. 74.06, Stats.

Sec. 74.06, Stats., applies to cases where a parcel of land was assessed as a whole and the tax so levied but parts or portions thereof were owned in severalty or by persons having undivided shares or interests in the property. The owner of any of the parts or portions owned in severalty is by this section given the right to pay the proportion of the taxes on the whole that should be chargeable to the part he owns. Likewise the owner of the undivided interest may pay his share of the tax upon the whole property. Thus

the purpose of this section is to give to an individual the right to pay the taxes on his interest in a piece of land and thereby protect his interest against the tax delinquency of the others who own or have an interest in the land. There is nothing in this section concerning the right of an individual taxpayer to pay a part of the taxes that are assessed against his interest in a piece of land.

The question of the right of an individual taxpayer to pay part of his tax is discussed in an opinion in XXIV Op. Atty. Gen. 61, which refers to a previous opinion in XXI Op. Atty. Gen. 698. These two opinions point out that while the taxpayer may not as a matter of right pay a part of his taxes, yet that the treasurer may in his discretion accept payment of less than the whole of the tax and apply it thereon, returning the unpaid portion as delinquent. By the payment of less than the whole the taxpayer merely gets credit on the total owing and the balance remains delinquent, the same as any other unpaid tax.

It is therefore our opinion that the provisions of sec. 74.06, Stats., do not give a taxpayer the right to pay a part of a tax but that a local treasurer in his discretion may accept payment of a part of a tax to be applied upon the whole, after which the rest of the tax remains unpaid and subject to the same provisions of law as other taxes.

HHP

Appropriations and Expenditures — University — Salary Waivers — Funds appropriated by sec. 10a, subsec. (1), ch. 6, Laws 1937, must be prorated among beneficiaries of that section.

February 16, 1938.

CLARENCE A. DYKSTRA, *President,*
University of Wisconsin,
J. D. PHILLIPS, *Business Manager,*
University of Wisconsin.

You have requested advice as to the manner of payment of waivers under sec. 10a, subsec. (1) of ch. 6, laws 1937, as interpreted by Judge Reis in his decision dated December 30, 1937. You invite attention to the fact that the appropriation made by that section is insufficient to pay the full waivers applied to salaries 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.

Subsec. (1) of sec. 10a, ch. 6, laws 1937, provides as follows:

“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.”

Of paramount importance in any question concerning the payment of money from the state treasury is the constitutional mandate that “No money shall be paid out of the treasury except in pursuance of an appropriation by law” (art. VIII, sec. 2, Wis. Const.) Notwithstanding the legislative intent to appropriate sufficient funds to repay in full the salary waivers to a designated class of university employees, the amount actually appropriated by the legislature is \$4,222.67 short of the amount necessary. It was in antici-

pation of precisely such situations that the legislatures have from time to time made appropriations to the emergency board. For instance, sec. 20.74, Stats. 1935, appropriated to the emergency board annually, beginning July 1, 1935, \$250,000 "to be used to supplement appropriations which shall prove insufficient because of unforeseen emergencies, or to supplement appropriations which shall prove insufficient to accomplish the purposes for which made."

The unexpended and unencumbered balances in the emergency appropriation lapse at the end of the fiscal year for which they are made (subsec. (8), sec. 20.77, Stats.). This means, of course, that no funds may be allotted by the emergency board from any appropriation prior to the fiscal year in which ch. 6, laws 1937, was enacted. That chapter was published on February 11, 1937, and took effect upon passage and publication. The emergency appropriation which went into effect on July 1, 1937, cannot be used to supplement a deficiency in the appropriation contained in ch. 6, Laws 1937, because that emergency appropriation was to supplement appropriations which should prove insufficient after the commencement of the 1937 fiscal year and not appropriations which were supposed to have been expended in a prior fiscal year. The only possible emergency appropriation from which funds could be allotted to supplement the appropriation in sec. 10a (1) of ch. 6, laws 1937, would be the emergency appropriation for the fiscal year of 1936-1937, and the unexpended balance in that appropriation is about \$14. Since no funds can be obtained from the emergency appropriations to supplement the appropriation in sec. 10a (1) of ch. 6, laws of 1937, there is no alternative but to prorate the money available among those entitled to share in the benefits of that section.

ML

Criminal Law — Gambling — Lotteries — Trade Regulation — Sale of safety matches containing questions which when correctly answered entitle contestant to prize, which may be anywhere from one cent to one dollar, constitutes gambling device under sec. 348.085, Stats., and violates sec. 100.16, Stats.

February 16, 1938.

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

You have inquired whether the following plan violates the lottery or gambling statutes.

Books of safety matches are distributed either with merchandise or in exchange for five cents in stamps to cover costs of mailing and handling or by calling for them at a given address. Each match book contains a question relating to safe driving. The question can be answered "Yes" or "No," and the answer is given by breaking one of two seals. If the proper seal is broken, the amount of the contestant's prize will appear underneath. These prizes range from one cent to one dollar.

Sec. 348.01, Stats., the lottery statute, does not define the term. However, it appears to be well settled that the three elements which must concur to constitute a lottery are prize, chance, and consideration. 17 R. C. L. 1222; 38 C. J. 289.

The element of prize in the instant case is too evident to require discussion.

The sale of merchandise plus lottery tickets or chances is sufficient consideration even though no extra charge is made for the ticket. *State v. Powell*, (Minn.) 212 N. W. 169; *Retail Section of Chamber of Commerce v. Kieck*, (Neb) 257 N. W. 493; *Davenport v. City of Ottawa*, 54 Kans. 711, 39 Pac. 708; *Hull v. Ruggles*, 56 N. Y. 424.

Some courts have held that the existence of free chances removes a scheme from the lottery classification. *Cross v. The People, etc.*, 18 Colo. 321, 32 Pac. 821; *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *Roswell v. Jones*, (N. M.) 67 Pac. (2d) 286.

The better reasoned opinions, however, have gone the other way on this point. *Commonwealth v. Wall*, (Mass.) 3 N. E. (2d) 28; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107; *State v. Danz*, 140 Wash. 546, 250 Pac. 37, 48 A. L. R. 1109; *Iris Amusement Corp. v. Kelly*, (Ill.) 8 N. E. (2d) 648; *Central States Theatre Corp. v. Patz*, 11 Fed. Supp. 566. These cases are more in line with the principle that lottery statutes are to be construed broadly with a view to preventing the mischief which they are designed to prevent. 38 C. J. 306.

As to the element of chance, it is said in 17 R. C. L. 1223—1224:

“* * * In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance should be pure chance, but it may be accompanied by an element of calculation or even of certainty.”

It may be pointed out that in the present instance the contestant has at least an even chance of getting a prize, so that to that extent it is a matter of pure chance. Moreover, even as to the most skilful contestant the amount of the prize is a pure chance and this is sufficient to constitute a lottery. *Horner v. United States*, 147 U. S. 449. The amount of the prize is clearly beyond the influence or foreknowledge of the player, however, skilful. *Public Clearing House v. Coyne*, 194 U. S. 497.

Sec. 348.085, Stats., reads in part:

“(1) All devices or things whatever, whereby any person shall or may be induced to believe that he will or may receive any money, thing or consideration whatever as the result, in whole or part, of any contest of skill, speed or power of endurance of man or beast, are hereby declared to be gambling devices * * *.”

On the contest form appears the following: “You Can’t Lose.” And on the back: “Do you know the rules on Highway Safety?—It Pays.”

Whether or not this constitutes a contest of skill is immaterial. The language used on the match folders is clearly calculated to induce the contestants to believe that there is

a prize in store for one conversant with the rules on highway safety. We therefore conclude that these folders are gambling devices within the meaning of sec. 348.085, Stats.

We note also that in so far as these match folders may be distributed in connection with the sale of merchandise, they clearly violate sec. 100.16, Stats., which reads:

“No person shall sell or offer to sell anything whatever, by the representation or pretense that a sum of money or something of value, which is uncertain or concealed, is enclosed within or may be found with or named upon the thing sold, or that will be given to the purchaser in addition to the thing sold, or by any representation, pretense or device, by which the purchaser is informed or induced to believe that money or something else of value may be won or drawn by chance by reason of such sale.”

WHR

Taxation — Tax Collection — County board has no power to prescribe that tax deeds shall contain provisions restricting cutting of timber on property thereby conveyed.

February 16, 1938.

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

You ask whether the county board has power to provide that tax deeds shall contain provisions restricting the cutting of green timber for the period of ten years upon the property so sold and that in the event timber is cut during said period the lands shall revert to the county.

It has been frequently pointed out that a county has only such powers as are conferred upon it by statute or necessarily implied from the powers conferred. *Becker v. La Crosse*, (1898) 99 Wis. 414, 75 N. W. 84; *City of Superior v. Roemer*, (1913) 154 Wis. 345, 141 N. W. 250; *Spaulding v. Wood County*, (1935) 218 Wis. 224, 260 N. W. 473.

Therefore, for the county to have the power to insert such restrictions and provisions in tax deeds some authority therefor must be found in the statutes. We find no provision of the statute containing a grant of such power, expressly or by implication. The statutes which deal with the issuance of tax deeds on the other hand negative the existence of such power in the county board.

Sec. 75.14, subsec. (1), Stats., provides that if land sold for taxes is not redeemed the county clerk shall execute in the name of the state and the county "to the purchaser, his heirs or assigns a deed of the land so remaining unredeemed, * * *, which shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all unpaid taxes and charges which are a lien thereon and to redemption as provided in this chapter." Not only does the use of the words "absolute estate in fee simple" preclude the placing of any restrictions upon the title so conveyed except as specified in the statute, but the specific enumeration of some limitations of title operates to exclude others not mentioned. "Expressio unius est exclusio alterius."

So also sec. 75.16, Stats., provides that tax deeds shall be substantially in the form there set out or its equivalent, which statutory form contains no provision respecting restrictions upon the title conveyed. Had the legislature intended that the estate in the land so conveyed to the grantee by a tax deed should be subject not only to unpaid taxes and charges, but also to any other covenants or restrictions that the county might see fit to impose, the provisions of the statute would have so provided.

In *Smith v. The Board of Supervisors of Barron County*, (1878) 44 Wis. 686, it was held that a provision of the statutes substantially the same as the present sec. 75.35, Stats., giving the county board the power to "prescribe the terms of sale" of tax certificates held by the county referred solely to the amount or sum to be paid on principal and did not empower the board to authorize a sale of such certificates on credit or for anything else than money or to enter into an executory contract of sale or make a conditional sale.

In XXV Op. Atty. Gen. 216, relying upon *Smith v. The Board of Supervisors of Barron County, supra*, it was held that the county board does not have power to authorize the

sale of tax certificates held by the county upon condition that certain outstanding drainage district bonds on the lands be surrendered and canceled. The basis for such holding was that there was no provision in the statute authorizing the same.

If the county is thus so restricted in the sale of tax certificates which it holds, certainly the same argument would apply more forcibly against permitting the insertion of restrictive covenants in tax deeds.

Furthermore, the insertion of such restrictions in tax deeds would interfere with the vested property rights of the persons who had previously purchased the tax certificates at the sale. Such certificates were bought upon the assumption that if the lands were not redeemed the purchaser would be entitled to receive tax deeds conveying to them an absolute title in fee simple as prescribed by the statute. The imposition of such restrictions would be a cutting down or lessening of the title or estate which the purchaser at the tax sale had contracted for in purchasing the tax certificate.

It is therefore our opinion that the county board is without power to provide that tax deeds shall contain provisions restricting the cutting of timber upon the property thereby conveyed.

HHP

Counties — Education — Memorials — Sec. 45.055, Stats., does not limit county board to establishment of war memorials in one location, discretion as to location or locations and other details being vested in county boards within tax limitation provided by such section.

February 23, 1938.

OLIVER L. O'BOYLE,
Corporation Counsel,
Milwaukee, Wisconsin.

Our attention is directed to sec. 45.055, Stats., which provides as follows:

“County boards are empowered to provide for the erection or establishment of suitable memorials to the soldiers, sailors and marines of the respective counties of this state who served the nation during the Spanish-American war or the late war against Germany and its allies, or to contribute funds to corporations of the respective counties organized without capital stock for the purpose of erecting and completing such memorials; and for the purpose of raising funds for such memorial purposes or contributions to levy taxes upon the taxable property of the county not exceeding five mills on the dollar in all, which said taxes may be spread over a period of five years or to borrow money and issue the bonds of the respective counties therefor in the manner and under the regulations provided by chapter 67 of the statutes; also to take by condemnation, lands necessary for a site for such memorials when the county board shall so order, by a two-thirds vote.”

You state that some months ago Milwaukee county requested a PWA loan for the purpose of remodeling the old abandoned courthouse for use as a war memorial for the various veterans' organizations in the holding of their meetings, etc.

A movement is now under way for the construction of a large memorial stadium by the county, and you inquire whether the county board, having voted to constitute the old courthouse property a war memorial, will be estopped from constructing a stadium for the same purpose.

There is no language in the statute which would limit the county to one memorial. Throughout the statute the legislature speaks of "memorials," using the plural number, although this is doubtless done for grammatical purposes so as to agree with the plural subject, which is "county boards." In one place the legislature falls into the use of the singular form when it speaks of "a site" for such memorials.

However, it is immaterial whether the words used import the plural or singular number in view of sec. 370.01, subsec. (2), relating to construction of statutes. This section provides in part:

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

Also, it is to be noted that the purpose of such memorials is to commemorate two different wars, and it might well be that the county board would feel that this can be done more appropriately through separate memorials than through one memorial. It would appear that the legislature was interested more in what might be done than how it should be done. The authorization is to provide for "suitable memorials." The legislature has not attempted to prescribe limitations as to what might constitute "suitable memorials." Discretion must, therefore, rest in the county board in this particular, and we conclude that the memorial or memorials may be located in one place or several places as the county board thinks best within the cost range provided by the tax limitation set up in the statute.

WHR

Copyright—Phonograph record manufacturer has no interest in its records which would enable it by device of restricted use notice to control such use in hands of ultimate purchasers.

Recording artist may not through restricted use notice legally prevent noncommercial broadcast of record; same is true of copyright owner.

February 24, 1938.

STATE BROADCASTING STATION,
University of Wisconsin,
Madison, Wisconsin.

Attention H. B. McCarty, *Program Director.*

You have inquired as to the rights of phonograph record manufacturers, recording artists, and copyright owners in phonograph records used for broadcasting after such records have been sold and are on the market.

This question arises by virtue of a notice printed on each record which reads: "Not licensed for radio broadcast."

The common law rule is that the manufacturer of an article cannot impose restrictions on its use in the hands of a purchaser. *Straus v. Victor Talking Mach. Co.*, 243 U. S. 490. An exception to this rule has been recognized in the lower federal courts and formerly in the supreme court in the case of patented articles. *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *Edison, Inc. v. Smith*, 188 Fed. 925; *Victor Talking Mach. v. The Fair*, 123 Fed. 424; *Mitchell v. Hawley*, 83 U. S. (16 Wall.) 544; *Henry v. A. B. Dick Co.*, 224 U. S. 1.

The supreme court subsequently rejected this doctrine, however, in cases involving resale price maintenance contracts and tying clauses. *Straus v. Victor Talking Mach. Co.*, *supra*; *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502.

In *United States v. United Shoe Mach. Co.*, 247 U. S. 32, the court said, in referring to a patentee, at p. 58:

"* * * There is, however, a limitation upon him; he cannot grant the title and retain the incidents of it.
* * *"

The court in referring to cases on the subject further said, p. 58:

“* * * The principle of them was expressed to be that where an article has been sold it passes beyond the monopoly given by the patent and conditions cannot be imposed upon it. * * *.”

This is a return to the common law rule, which cannot be avoided by disguising sales under a system of “license contracts” with dealers and “license notices” attached to the article, as was done in the case of *Straus v. Victor Talking Mach. Co.*, *supra*.

Recently, the circuit court of appeals for the second circuit has seen fit to depart from the broad rule laid down by the supreme court, and in *Radio Corp. of America v. Andrea*, 90 Fed. (2d) 612, and *Western Elec. Co. v. General Talking Pictures Corp.*, 91 Fed. (2d) 922, enjoined as infringement of patent rights the commercial use of patented articles sold under notice of restricted use, in competition with the patentees.

It should be noted, however, that in both of these cases the patented article itself was the thing sold. The cases can be justified on the theory that the incorporeal right granted by the patent law can be separated from title to the physical thing itself. *In re Dann*, 129 Fed. 495. The doctrine would not apply where, as here, the manufacturer has no patent in the article sold but only in the process of manufacture. The statutory monopoly of the patent cannot be extended to cover articles not within the patent grant. *Motion Picture Co. v. Universal Film Co.*, *supra*.

We are therefore of the opinion that the phonograph record manufacturer has no interest in its phonograph records which will enable it by the device of a restricted use notice to control its use in the hands of the ultimate purchasers.

The law as to a recording artist is found in the case of *Waring v. WDAS Broadcasting Station*, 194 Atl. 631 (Pa. 1937).

This case holds that a performer has a common law property right in his performance; that a notice “Not licensed for radio broadcast” on records made by him is sufficient to negate an intent to dedicate the performance to the public;

that the validity of the restriction on the use of the performance depends upon whether it serves a useful commercial purpose; that a use of plaintiff's performance in competition with himself is unfair competition because, as the court pointed out, p. 641:

“* * * It probably must become increasingly difficult for them to demand and obtain \$13,500 for a single performance over the radio if innumerable reiterations of their renditions can be furnished at a cost of 75 cents.”

The court considered that such competition amounts to a diversion “of a material portion of the profit from those who have earned it to those who have not.”

Consequently an injunction was granted against Station WDAS, which is a commercial station.

Again the departure from the common law rule can be explained on the ground of severability of property interests. At p. 638 the court said:

“* * * in a sense plaintiff was not imposing a restriction in connection with a sale by him of a chattel. The chattel here consisted of the phonograph record. This the plaintiff never owned. What he granted was merely the incorporeal privilege of reproducing the rendition of the song indented upon the chattel sold by the Talking Machine Company.”

In view of the requirement that the restriction serve a useful commercial purpose it is clear that, although the restricted use notice will bind a purchaser to refrain from a commercial use of the record, the principles laid down have no application to noncommercial broadcasting stations whether publicly or privately owned.

Such stations, which engage in no advertising, cannot be said to be competitors of the performer or to divert the commercial benefits of the performance from the performer to themselves. Nor can it be said that the rendition of phonograph records by a noncommercial station injures the performer in the respect dwelt upon by the Pennsylvania court, viz., that no advertiser will pay the performer \$13,500 per performance when he can present it at 75¢ per record.

We conclude, therefore, that as such a restriction applied to a noncommercial station serves no apparent useful commercial purpose it is ineffective and inapplicable and that the attempt to bind such a station by notice is invalid under the common law rule.

As to copyright proprietors, 17 U. S. C. A. sec. 1 provides:

“Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

“* * *

“(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced:
* * *”

The performance need not be directly for profit, to constitute infringement, if the ultimate purpose is profit. *Herbert v. Shanley Co.*, 242 U. S. 591; *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191; *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776.

There is nothing in the above quoted section that can be given the effect of excepting a public performance for profit by means of a phonograph record. *Irving Berlin, Inc. v. Daigle*, 31 Fed. (2d) 832. “A private performance for profit is not within the act, nor is a public performance not for profit.” *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 298 Fed. 628, 632.

“* * * the most * * * that the section amounts to is a protection in favor of those persons who do not perform publicly for profit the musical composition—as in the case of street parades, school, educational, or similar public occasions and exhibitions.” *Hubbell et al. v. Royal Pastime Amusement Co.*, 242 Fed. 1002, 1003.

While a copyright proprietor can reserve to himself any right granted by the copyright laws, an attempt to go beyond the act and reserve to himself rights merely incidental to ownership is void, and if this is attempted by means of

contract and notice, the contract is ineffective. *Bobbs-Merrill v. Straus*, 210 U. S. 339.

Therefore we conclude that in so far as the notice given purports to reserve the exclusive right to perform publicly for profit, it is binding on all commercial broadcasters, but in so far as it attempts to go beyond the statutes and reserve all right of public performance, irrespective of profit, it is ineffective as to noncommercial broadcasters.

We believe that this discussion disposes of the several questions raised in your request.

WHR

Municipal Corporations — Municipal Law — Municipal Utilities — Sec. 66.06, subsec. (13), Stats., does not apply to disposition of old, inadequate or obsolete equipment of municipality owned utility in replacement thereof by modern and adequate equipment.

February 25, 1938.

PUBLIC SERVICE COMMISSION.

You have requested an opinion whether the provisions of sec. 66.06, subsec. (13), Stats., are applicable to the sale or disposal by a municipality of an old and inadequate Diesel engine which the municipality desires to replace with modern and adequate equipment.

Sec. 66.06 (13) provides that a town, village or city "may sell or lease any public utility equipment owned by it" upon following the procedure therein specified. The section then provides that a preliminary agreement shall be entered into with the prospective purchaser pursuant to a resolution or ordinance authorizing the same, adopted after publication and that such preliminary agreement shall then be submitted to the public service commission for approval. After the public service commission has approved it then the matter of sale pursuant to the agreement shall be submitted to the electors of the municipality at a referendum election.

The purpose of this statute was to prevent the municipality from making disposition of its municipal utility to private interests without the electors having had an opportunity to decide that municipal ownership and operation of the utility should be thereby abandoned. The words "any public utility equipment," as used in the statute in setting out its applicability, were intended to mean property in a collective sense rather than each individual item of property of the utility.

This subsection was not intended to apply to every disposition of each item of property composing the public utility owned and operated by a municipality. For instance, where a transformer had become worn out and useless so as to need replacement by a new transformer that would be of service, it would be absurd to require that the provisions of sec. 66.06 (13) be compiled with and followed. The old transformer would have only trade-in or junk value and the cost of submitting the question of disposition thereof to a referendum vote would far exceed, not only the value of the old transformer, but the cost of the new one. This would be true in a village, but even more so in a large city. It is apparent that the cost of the election would be prohibitive.

To require that the municipality follow the procedure of this subsection every time it desired to replace a worn out, obsolete or inadequate piece of equipment or property used by it as a part of its utility equipment, would deter the successful operation of the utility by the municipality. The practical result thereof would be to prevent the municipality from maintaining utility facilities that would be adequate to meet the demands of the consumer and to furnish services at a reasonable cost. The imposition of such restrictions would place municipal ownership of utilities at a decided disadvantage as compared with private ownership.

There may be instances where the disposition of a substantial part of the utility's property would effect such a basic change in the character of the utility that it would be necessary to comply with the provisions of this subsection in order to prevent endangering the future successful operation of the utility as a municipality owned enterprise. We feel certain, however, that the statute was not intended to apply to the disposition of a piece of equipment of the utility

for the purpose of being replaced by property of the same character which is later in design, has a larger capacity or will render better service in order to promote the efficient operation of the utility.

It is therefore our opinion that a municipality which owns an electric utility may sell or dispose of a piece of old, inadequate or obsolete equipment in the replacement thereof by modern and adequate equipment without following the procedure set out in sec. 66.06 (13), Stats.

HHP

Charitable and Penal Institutions — Feeble-minded —
Under sec. 51.01, subsec. (1), and sec. 52.02, subsec. (3), Stats., application for judicial inquiry into mental condition of alleged feeble-minded person may be made upon application of any three citizens, including as one of these citizens local supervisor, where nearest relative or friend or person with whom alleged feeble-minded person resides refuses to join in such application.

February 26, 1938.

LYALL T. BEGGS,

District Attorney,

Madison, Wisconsin.

You state that it is deemed necessary to commit a certain woman to a home for the feeble-minded and that the woman's husband refuses to sign a petition asking for a judicial inquiry as to her mental condition. There is no other nearest relative or friend available to sign such petition in accordance with sec. 51.01, subsec. (1), Stats., and you inquire whether a petition signed by two citizens and the town supervisor would constitute sufficient compliance with the law.

Under the provisions of sec. 52.02, subsec. (1), Stats., the procedure to be followed in commitments to homes for the feeble-minded is the same as that followed in commitments to hospitals for the insane. By the provisions of sec. 51.01,

subsec. (1), application for a judicial inquiry into the mental condition of any person believed to be insane must be signed by any three citizens, one of whom is the nearest relative or friend available or a person with whom such person resides or at whose house he may be.

There is, however, a provision in ch. 52 which varies the procedure to be followed in securing a commitment to the home for the feeble-minded. Sec. 52.02, subsec. (3), Stats., reads as follows:

“Whenever it shall reasonably appear to the supervisor of any town, city, village or ward in which any mentally deficient or epileptic person resides that the welfare of said person, or of society, requires the commitment of such person as mentally deficient or epileptic, such supervisor shall take measures to have such person brought before the county judge for examination according to law.”

It would appear that the purpose underlying the enactment of sec. 52.02 (3) was to protect the public. In other words, when an insane, epileptic or idiotic person is engaged in antisocial conduct, the duty devolves upon the supervisor to see that such person is brought before the county judge for an examination according to law. This purpose is clearly discernible from the wording of the statute as originally enacted. Sec. 1, ch. 360, Laws 1897, read as follows:

“Whenever it shall appear that any feeble-minded epileptic or idiotic person is dangerous to be at large because of his or her vicious and demoralizing acts or tendencies, or whenever it shall appear that any feeble-minded female of child-bearing age, is by reason of her condition, a menace to society, it shall be the duty of any supervisor of the town, city, village or ward in which such person may reside, to take measures to have such person brought before the county judge, pursuant to law.”

Ch. 178, Laws of 1927, changed sec. 52.02 (3) to its present form. Under sec. 52.02 (3) there is still the duty resting upon the supervisor to take measures to see that a mentally deficient or epileptic person is brought before the county judge for an examination when the welfare of the individual or of society requires it.

This duty imposed on the supervisor to protect the public from mentally deficient individuals would be substantially nullified if the commitment of a mentally deficient person engaged in conduct detrimental to the public must await the signing of the petition by the nearest relative or friend available.

We are therefore of the opinion that a petition signed by two citizens and a supervisor of the town, city or ward is sufficient to secure an adjudication of the mental condition of a person whose commitment to a home for the feeble-minded is sought.

WHR

Education — School Administration — Teacher tenure rights under sec. 39.40, subsec. (2), Stats., accrue by virtue of five years' continuous service in same school system. Statute is retroactive and applies to teachers employed under contracts entered into prior to effective date of act.

February 26, 1938.

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

You state that a certain city superintendent of schools will have completed, by the first of August, 1938 six years of continuous service as superintendent of one school system. Also at that time he will have completed a three year contract entered into in 1935. The school board which made this contract contends that the superintendent has not acquired tenure for the reason that the contract was entered into before the new tenure law became operative:

Sec. 39.40 became effective August 1, 1937. Generally a statute will not be given retroactive effect unless the legislative intent that it shall have such effect clearly appears. However, where that intent does appear, and the statute is clear and unambiguous, it must be given effect according to the plain and literal meaning of the language used. *Town of Bell v. Bayfield County*, 206 Wis. 297.

Sec. 39.40, subsec. (2), Stats., provides in part:

“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.
* * *”

This provision plainly indicates that the tenure law was intended to apply to periods of service occurring before the law took effect, and it is consequently our opinion that the law applies to the superintendent in question.

WHR

Taxation — Gift Taxes — Changes of exemptions and rate of tax in gift tax law effected by ch. 308, Laws 1937, and ch. 14, Laws 1937 (Special Session) are applicable to all gifts made during year 1937.

February 26, 1938.

TAX COMMISSION.

Attention Neil Conway, *Inheritance Tax Counsel*.

Ch. 308, Laws 1937, published June 30, 1937, in repealing and recreating subsec. (6), sec. 4, ch. 363, Laws 1933, effected changes in the gift tax exemptions. Likewise, ch. 14, Laws of the Special Session of 1937, published October 20, 1937, in repealing and recreating par. (f), subsec. (4), sec. 4, ch. 363, Laws 1933, made a change in the rate of the gift tax. Both of these acts by their terms took effect upon publication. The gift tax law, which is ch. 363, Laws 1933, with the amendments to date, has been set out by the revisor of statutes in the 1937 statutes as sec. 72.75 and will be herein-after referred to by such section number.

You ask whether the exemptions and rate of tax as prescribed by the above amendments to the gift tax law apply

to all gifts made during the calendar year 1937 or just to those gifts made subsequent to the effective date of the respective enactments.

Sec. 4 (2) (b) of sec. 72.75, Stats., provides :

“All transfers to the same donee by the same donor within the same calendar year shall be added together and the aggregate of such transfers shall be considered as one transfer for the purposes of taxation under this chapter, and the rates of tax hereinafter prescribed shall be applied to the aggregate of such transfers made within the same calendar year.”

Sec. 4 (7) (b) and (c) provide that on or before March fifteenth in each year the donor and the donee shall report “any transfer during the preceding year” to the assessor of incomes or the tax commission. These reports are required to be made on the same date and to the same tax authority as is prescribed in the income tax law for the filing of income tax returns each year.

Sec. 4 (7) (f) of sec. 72.75, Stats., provides :

“All provisions of the income tax law, not in conflict with the provisions of this section, relating to the assessment of income taxes and hearing and appeal thereon, the preparation of assessment and tax rolls, the certification of taxes due, the correction thereof, and the collection and refund of income taxes, shall govern the assessment of taxes due under this section.”

Sec. 4 (6) (a) and (b), sec. 72.75, Stats., provide as follows :

“The following personal exemptions from such tax to be taken out of the first twenty-five thousand dollars transferred are hereby allowed :

“(a) Property of the clear value of one thousand dollars transferred in any calendar year by any donor to any donee shall be exempt.

“(b) In addition to the exemption provided by paragraph (a) of this subsection, property of the clear value of fifteen thousand dollars transferred by the donor to his wife, but such additional exemption shall be allowed but once. The clear value of property transferred by a donor to his wife, in excess of the one thousand dollars annual exemption pro-

vided by said paragraph (a), shall be aggregated from year to year and the additional exemption applied thereto until such clear value equals such fifteen thousand dollar exemption."

Then par. (c) of sec. 4 (6), sec. 72.75, Stats., uses the same language as par. (b), quoted above, in providing a \$5,000 exemption as to transfers by a donor to her husband. So, also, par. (d) of the same subsection in the same language provides for an exemption of \$2,000 upon a transfer to a lineal descendant of the donor. Thus pars. (b), (c) and (d) of subsec. (6) all contain the words "annual exemption."

From these provisions it is apparent that the legislature intended that donative transfers received during the year are to be treated and taxed on an annual basis using the year as the unit of measure and in the same manner as income received during the year is taxed. The tax is imposed on the aggregate received from the donor in the year. The year is the unit used in determining the amount upon which the tax is computed and is also the unit for the allowance of exemptions. This is the same method as is used in the income tax law.

Thus the rates of tax and exemptions effected by the amendments hereinbefore referred to, being those which will be in effect at the time the law requires the return to be filed, which under the present law is when the assessment is made, will be controlling. *State ex rel. Kieckhefer v. Cary*, (1925) 186 Wis. 613, 203 N. W. 397.

In *Fitch v. Wisconsin Tax Comm.*, (1930) 201 Wis. 383, 230 N. W. 37, at page 391, the court in referring to the three year average income tax law said:

"* * * While formerly the specific income for a given year was made the basis for determining the amount which the taxpayer was able to pay [the income tax], the legislature has now made the average income for three years the basis for the state's annual imposition upon the taxpayer. * * * The tax, however, is an annual tax. The amount of that annual tax is determined in the manner provided by the statute. * * *"

The court in *State ex rel. Kieckhefer v. Cary*, (1925) 186 Wis. 613, 203 N. W. 397, at page 617, said:

"We think that this section, taken in connection with all the statutes relating to the assessment of incomes, clearly evinces the intent that the income for any one year shall be subject to the same rate and to the same deduction. That is to say, that incomes of all persons for any one year are treated alike, subject to the same deductions and to the same rate in the class in which they occur. * * *"

It is, therefore, our opinion that the changes in the gift tax law as to exemptions and rates of tax effected by the enactment of ch. 308, Laws 1937 and ch. 14 of the laws of the Special Session of 1937 apply to all gifts made during the calendar year 1937 and do not apply just to those gifts made subsequent to the effective date of the respective amendments.

HHP

Elections — Intoxicating Liquors — Petition for referendum on question of granting intoxicating liquor licenses filed prior to April 1937 election but not filed at least thirty days prior thereto as required by sec. 176.38, Stats., may not be made basis of submission of said question at spring election in 1938.

Vote at referendum election against granting of intoxicating liquor licenses does not terminate intoxicating liquor licenses then in force.

February 28, 1938.

TAX COMMISSION,

Beverage Tax Division.

You state that a petition was circulated in a certain town in February, 1937, and the required number of signatures obtained thereon for the submission to the voters of the question whether or not any person should be licensed to deal or traffic in intoxicating liquors. The petition asked that the question be submitted at the election to be held the first Tuesday of April, 1937, but was not filed at least thirty

days prior thereto. You ask whether this petition is sufficient basis for the submission of said question at the spring election in 1938 or it is necessary that a new petition be filed.

Sec. 176.38, Stats., provides as follows :

“(1) Whenever a number of the qualified electors of any town, village, or city equal to, or more than, fifteen per centum of the number of votes cast therein for governor at the last general election shall present to the clerk thereof a petition in writing, signed by them, praying that the electors thereof may have submitted to them the question whether or not any person shall be licensed to deal or traffic in any intoxicating liquors as a beverage, * * *, and shall file such petition with the clerk at least thirty days prior to the first Tuesday of April *next succeeding*, such clerk shall forthwith make an order providing that such question * * * shall be submitted on the first Tuesday of April *next succeeding* the date of such order.”

The petition in question, not having been filed “at least thirty days prior to the first Tuesday of April” of 1937, did not meet the statutory requirement so the question could be submitted at the April 1937 election. The statute expressly requires that the question be submitted at the election held on “the first Tuesday of April next succeeding” the filing of the petition. Assuming the petition was filed prior to the April 1937 election, then “the first Tuesday of April next succeeding” the filing of the petition would be the first Tuesday of April which occurred next following such filing. This was the first Tuesday of April 1937. The words “next succeeding” refer to the whole subject matter, the “first Tuesday of April,” rather than just to the month of April. The reference is in reality to the election which next follows the filing of the petition.

The election to be held on the first Tuesday of April, 1938, is not the one “next succeeding” the filing of the petition but is the second succeeding election thereafter. There is thus a period in each year, commencing thirty days prior to and ending on the first Tuesday of April, during which the filing of a petition would be ineffective.

It is therefore our opinion that a petition filed before the first Tuesday of April, 1937, but not filed at least thirty

days prior thereto, is not sufficient under sec. 176.38, Stats., for the submission at a town election to be held the first Tuesday of April, 1938, of the question of whether license for the sale of intoxicating liquor shall be granted in said town. In order that the question may be legally submitted at the 1938 spring election it is our opinion that a new petition conforming to the requirements of sec. 176.38, Stats., would be necessary.

You also inquire whether licenses for the sale of intoxicating liquors in effect at the time of a referendum election at which the majority vote was against the issuance of licenses for the sale of intoxicating liquors, would thereupon immediately terminate or would run to June 30 following, the date when such licenses would expire by their terms.

Sec. 176.05 (5), Stats., provides that licenses to sell or deal in intoxicating liquor "shall remain in force until the first day of July next after the granting thereof, unless sooner revoked." Such licenses when granted continue in full force and effect until terminated by revocation as provided in the statutes. The question which sec. 176.38 (1) Stats., provides may be submitted to the electors is not whether intoxicating liquor shall be sold in the municipality but "whether or not any person shall be licensed to deal or traffic in any intoxicating liquors as a beverage." The determination which voters make at the election is that licenses shall not thereafter be granted. There is nothing in the question submitted that relates to the termination of then existing licenses.

It is therefore our opinion that the vote at a referendum election pursuant to sec. 176.38, Stats., against the granting of intoxicating liquor licenses does not revoke or terminate licenses then existing but that such licenses remain in force until the succeeding June 30.

HHP

Bonds — Municipal Borrowing — Bridges and Highways — Trunk Highways — Allotment provisions of sec. 84.03, subsec. (4), Stats., are not irrevocable as to county issuing bonds thereunder.

March 2, 1938.

CHARLES D. MADSEN,
District Attorney,
Luck, Wisconsin.

You direct our attention to sec. 84.03, subsec. (4), Stats., which provides as follows:

“No county shall be allotted less than forty thousand dollars under subsection (3) of this section nor shall any county that has constructed portions of its state trunk highway system with the proceeds of bonds issued and expended with the approval of the state highway commission, be allotted a lesser amount as state aid for state trunk highways in any year than the amount necessary to meet its obligations on account of such bonds until the total amount to which such allotments may lawfully be applied, is paid. If the allotment to any county shall be less than the minimum amounts hereinbefore stated, such allotment shall be increased to the minimum amount with money from the amount available under subsection (9) of this section. All allotments under subsection (3) of this section to counties having bonds outstanding which have been issued under section 67.13 or 67.14, and expended for construction on the state trunk highway system, shall be used exclusively to retire such bonds to such extent as shall be necessary each year.”

You ask whether, during the time that a county has outstanding bonds issued under sec. 67.13 or 67.14, Stats., the proceeds of which were expended in the construction of state highways, the legislature could repeal the provisions of sec. 84.03 (4), Stats., and thereby deprive the county of the benefits thereof. In other words does a county by the issuance of such bonds and the provisions of sec. 84.03 (4) have a contract with the state within the meaning of the 14th Amendment of the United States constitution?

The legislature could, at any time it sees fit, repeal the above quoted subsection of the statutes and thus deprive counties of any benefits which they would have received had said subsection remained in force. It has been held in decisions by the United States courts that no right, power or property of a city or other political subdivision of the state can be held to be protected by the contract clause of the federal constitution as against the state. The courts have never held that such subdivisions may invoke such restraint upon the power of the state. The courts have in effect held that such subdivisions cannot possess a contract with the state which may not be changed or regulated by state legislation, and such courts have expressly stated that any pretension of such subdivision to sustain their privileges or their existence upon anything like a contract between them and the state is erroneous, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are entirely incompatible with everything of the nature of a compact. See *Laramie County v. Albany County, et al.*, 92 U. S. 307 and the authorities therein cited.

In the case of *State ex rel. Bell v. Cummings*, (1914) 130 Tenn. 566, 172 S. W. 290, where bonds had been issued by the county to build certain roads pursuant to a specific statutory provision and the money had been raised, the court held that the proceeds thereof did not constitute property of the county and that the legislature could order the money used for other purposes. The court said, pp. 569-570, that a county as "a mere arm of the sovereign power can have, as against the legislative power of the sovereign, no vested rights in the powers conferred upon it for governmental purposes, and that the legislature has plenary power to make provision respecting and to direct the expenditure of the funds of a county raised and held by it under or based upon the taxing power delegated to it."

Again in *Scott County v. Johnson*, (1928) 209 Iowa 213, 222 N. W. 378, the court went so far as to hold that the legislature could take away money formerly granted to the county. In denying the county the right to maintain the action the court pointed out that since it can have no vested rights from executory contracts with the state or from provisions concerning funds or revenues, the county itself can-

not complain of any act of the legislature diminishing its revenues. It was there held that since the county was a subdivision of the state, owing its creation to the state, and because all of its rights, privileges and powers are governmental and conferred upon it by the legislature

“* * * It is, therefore, the generally accepted rule that a political subdivision of the state, as such, may not invoke the constitutional inhibition against legislative impairment of vested rights, * * * within the meaning of the Constitution.” (P. 221.)

It is therefore our opinion that the provisions of sec. 84.03 (4), Stats., may be repealed by the legislature at any time and that the issuance of bonds by a county pursuant thereto would not give such county the right to have the allotments therein specified continued until said bonds are retired.

HHP

AGH

School Districts — Transportation of School Children — State aid for transportation of school children provided by sec. 40.34, subsec. (1), Stats., is now extended by sec. 40.34 (6), as amended in 1937, to children residing in cities where city desires to furnish transportation in class of cases mentioned in sec. 40.34 (1).

March 3, 1938.

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

You inquire whether the state superintendent of public instruction is authorized by sec. 40.34, subsec. (6), Stats., to apportion money for transportation of high school pupils who are residents of the city school systems and who reside four miles or more from the schoolhouse.

Sec. 40.34, subsec. (6), Stats., as amended by ch. 110, Laws 1937, limits the application of sec. 40.34 so that it does not apply to children who reside in cities, "except that where a city determines to furnish transportation for such school children, the same state aid shall be allowed as is provided by this section." The exception here quoted was added by the amendment.

These words are clear and unambiguous. They mean that the same state aid shall be allowed as is otherwise provided by sec. 40.34 where the city determines to furnish transportation. In the absence of proper action by the city, state aid, of course, would be denied, the same as it was prior to the amendment of sec. 40.34 (6) by the 1937 legislature. Therefore the provisions of sec. 40.34 (1), for transportation aid where high school pupils reside over four miles from school now apply to cities in view of the 1937 amendment to sec. 40.34 (6) above quoted.

WHR

Civil Service — Reinstatements — Eligibility of persons on reinstatement lists under sec. 16.23, subsec. (2), Stats., dates from time of separation from service.

Sec. 16.17, subsec. (2), Stats., relating to extended eligibility under civil service law, does not apply to person on leave of absence except where tenure is terminated by abolishing position during leave, in which case reinstatement rights begin to run as of date of separation from service rather than from expiration of time set in leave of absence.

Bureau of personnel is not obligated to return employee to analogous position where his classification has been abolished while he was on leave of absence.

March 3, 1938.

A. E. GAREY, *Director,*
Bureau of Personnel.

The bureau of personnel has requested our opinion upon three questions relating to administration of the civil service law and rules. In discussing these questions we have taken

the liberty of reversing the order of the first and second questions as they appear in the request, for the reason that such arrangement permits of a more concise and orderly discussion with less repetition than would have been required in their original order. For purposes of convenience the questions are stated separately, with the answer following each question.

The first question reads as follows:

“Does the year of automatic eligibility which one who has been a permanent employee has under rule 2, subsection 1, begin at the expiration of the leave of absence or at the time that the employee actually stops work?”

Rule 2, subsec. 1 provides in part:

“* * * The term of eligibility of individuals on reinstatement lists shall begin upon termination of permanent service as defined in subsection 2, section 16.23, and shall last for a period of one year therefrom and may be extended in the same manner as the eligibility of applicants on original entrance and promotional lists.”

We assume that in the phrasing of this question you use the words “one who has been a permanent employee” advisedly, and that you mean by such words a person with reinstatement rights as defined in sec. 16.23, subsec. (2), Stats., the material part of which reads:

“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; * * *.”

It is probably incorrect technically to refer to such a person as being on a leave of absence. However, both sec. 16.23, subsec. (2), Stats., and Rule 5, which reads substantially the same as that portion of sec. 16.23, subsec. (2) quoted above, are clear on the point that the eligibility rights of such a person start to run from the date of separation from the

service, which you referred to as the "time that the employee actually stops work."

This period of eligibility automatically continues for a period of one year from the date of separation from the service by virtue of the operation of sec. 16.23, subsec. (2) and rule 2, subsec. 1. Such term of eligibility may be extended under sec. 16.17, subsec. (2), but in no event may the maximum period of eligibility extend beyond three years from the date of separation from the service.

The second question reads :

"Does the three year period during which the bureau of personnel has the right to extend eligibility under section 16.17, subsection (2), begin at the expiration of a leave of absence or at the time the employee actually stops work?"

We assume that you refer to leaves of absence without pay, which are provided for in civil service rule No. 12, subsec. 1, as follows :

"1. With the consent of the bureau of personnel, appointing officers may grant leaves of absence without pay to employes or subordinates for periods not to exceed one year, and upon the expiration of such leaves of absence such employes or subordinates shall be reinstated. Failure to report after leaves have been revoked or cancelled by the bureau, or after expiration thereof, shall be cause for separation from the service, unless the persons so separated shall show to the satisfaction of the bureau and the employing officers that failure to report was excusable. All such leaves of absence granted by appointing officers shall be in writing and copies shall be filed in the office of the bureau for approval in order that the civil service status of such absentees may be protected."

In answering this question it must be kept in mind that the rights of persons on reinstatement lists, discussed in the answer to the first question, are entirely separate and distinct from the rights of persons on leaves of absence with the exception of the case where a person becomes separated from the service within the purview of sec. 16.23, subsec. (2), Stats., while he is on leave of absence.

It is apparent from reading rule 12, subsec. 1, above quoted, that an employee is not regarded as being separated from the service during his leave of absence; otherwise the provision making failure to report after leave a cause for separation would be meaningless, since it is idle to talk about separating anybody from the service who is already separated therefrom. Also, the last sentence in the above rule makes it clear that the civil service status of an employee on leave of absence is to be fully protected during the leave.

In other words, an employee has full tenure during his leave of absence, and normally enjoys all rights appertaining thereto except that he waives his right to pay by his absence from work. This necessarily means that he has full eligibility within the meaning of sec. 16.17, subsec. (2), Stats., during his leave of absence. Thus there is no need of extending eligibility to him for any portion of the period during which he already enjoys such eligibility. The rights of a person on a leave of absence as regards reassignment to duties are governed entirely by the terms of his leave under rule 12, subsec. 1. Such leave must be limited to periods of one year at a time, although there is nothing in the rule which precludes the granting of a subsequent leave upon reporting for duty. Presumably such leaves might be granted indefinitely by an appointing officer if the bureau were willing and provided the employee reported back for work at the end of each year's leave. Normally at the end of a year's leave of absence the employee reports back for duty, at which time he enjoys all of the rights of any other regular, permanent employee. Or, failing to return, he would become separated from the service but without reinstatement rights under sec. 16.23, subsec. (2) or extended reinstatement rights under sec. 16.17, subsec. (2), Stats., since he became separated from the service through his own delinquency in not reporting back for duty.

Sec. 16.17, subsec. (2), to which you refer in asking this question, reads:

"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 individ-

uals 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."

This section has no application to leaves of absence. It refers entirely to terms of eligibility on original entrance and promotional lists and to individuals on reinstatement lists. As already pointed out, no question of eligibility is presented in the case of one on a leave of absence. He has a tenure while on leave subject to the terms and conditions of such leave. However, if his position were abolished without any fault on his part while on leave of absence, he would then be separated from the service within the meaning of sec. 16.23, subsec. (2), but he would no longer be regarded as on leave of absence, since no one can very well be on a leave of absence from a nonexistent position. This, again, illustrates the distinction between being on a leave of absence and being on a reinstatement list. An employee can be on one or the other but not on both.

Such being true, it follows that where one ceases to be on a leave of absence through abolition of his position and acquires reinstatement rights under sec. 16.23, subsec. (2), Stats., such rights date from the time of separation from the service, as pointed out in the answer to the first question.

The third question reads:

"If the classification of an employee who has obtained a leave of absence is abolished during his leave, must he be returned to an analogous position?"

His rights in this respect are exactly the same whether or not he is on leave of absence, in view of our answer to your second question. If the classification is abolished in good faith, there is no duty upon your bureau to find suitable employment for such employee elsewhere in the state service in an analogous position. In the case of *Berg v. Seaman*, 271 N. W. 924, our supreme court pointed out that the power to appoint is the power to employ and that the personnel board has no such power. If the board had power to make a place for a former employee in the same department or in a similar department to that in which he formerly worked, it

might result in demotion or discharge of other employes, and, as the court said at p. 926 in the *Seaman* case:

“* * * Power so to disrupt the service of a state institution by the bureau of personnel is nowhere expressly given by the statutes, and cannot be implied.”

WHR

Education — School Administration — Teacher Tenure
— Supervising teacher has tenure rights under sec. 39.40, Stats. Refusal of such teacher to accept less than minimum salary to which she is entitled under sec. 39.14, subsec. (2), Stats., is not cause for discharge under tenure law.

March 5, 1938.

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

You have inquired whether the teacher tenure law, sec. 39.40, Stats., applies to supervising teachers, and you also inquire, in the event the tenure law applies, whether such supervising teachers may be discharged merely because the county superintendent desires to hire other teachers having lower qualifications and hence subject to lower salary provisions under the schedule set up by the state superintendent pursuant to sec. 39.14, (2) as amended by ch. 277, Laws 1937.

Under the provisions of sec. 39.40, subsec. (1), Stats., the term “teacher” is so defined as to specifically apply to a supervising teacher employed by a county superintendent under sec. 39.14, Stats. After five years’ probation such a teacher may continue in service “during efficiency and good behavior and until discharge for cause.” Sec. 39.40, subsec. (2), Stats.

Furthermore, sec. 39.14, subsec. (5), Stats., permits of removal of a supervising teacher for "cause" after opportunity for a hearing.

It would, therefore, appear that the teachers in question have tenure until removed for cause and that they may not be discharged merely because the superintendent desires to hire other teachers having lower qualifications, and hence subject to lower salary provisions.

In this connection you have also inquired whether refusal to accept the salary fixed by the county board would constitute "cause" for discharge.

Dismissal "for cause" is based upon a failure to adequately perform teaching duties. 56 C. J. 401; 24 R. C. L. 618; *State ex rel. Thompson v. School Directors*, 179 Wis. 284.

If refusal on the part of a supervising teacher to accept less salary than that provided by the schedule fixed by the state superintendent constitutes "cause" for dismissal, the door would be opened wide for evasion of ch. 277, Laws 1937, which places the salary fixing power in the hands of the state superintendent and the tenure statute would also become meaningless as far as supervising teachers are concerned, since salaries might be unreasonably reduced by subterfuge so as to force the resignation of a particular teacher or teachers. This department has heretofore ruled that the tenure statute cannot thus be avoided. See opinion to Mr. Callahan, state superintendent of public instruction under date of January 26, 1938.*

We therefore conclude that a refusal on the part of a supervising teacher to accept less salary than that provided by the schedule fixed by the state superintendent does not constitute "cause" for dismissal as this term is used in the tenure statute.

OSL

*Page 48 of this volume.

Education — School Administration — Supervising Teachers — Salaries for supervising teachers set up by state superintendent of public instruction under sec. 39.14, subsec. (2), Stats., are to be followed rather than salaries provided by county board.

County superintendent has discretion in employing supervising teachers, and this discretion may not be interfered with by county board in providing salaries which meet minimum requirements only in schedule set up under sec. 39.14, subsec. (2), Stats., where county superintendent desires to hire teachers whose qualifications entitle them to higher salaries under schedule.

March 5, 1938.

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

You inform us that Grant county hires two supervising teachers. These teachers are usually hired in March or April of each year and commence work on or about August 15. Both of the teachers in question have been employed more than five years. At the meeting of the county board of supervisors in November, 1936, the salary of these supervising teachers was fixed at \$1,250.00 per annum for each teacher, such salary at that time being in compliance with sec. 39.14, subsec. (2), Stats. On June 26, 1937, ch. 277, Laws 1937, became effective. This chapter provides among other things:

“The county board shall fix the salary of such teacher which shall be not less than the amount each supervisor is entitled to under a schedule set up by the state superintendent of public instruction for ten months in each year.
* * *

Under the schedule set up by the state superintendent of public instruction, both the supervising teachers are entitled to more salary than the foregoing resolution of the county board provides.

You have inquired what salary should be paid to each of these supervising teachers for the school year commencing August 15, 1937, and terminating June 15, 1938.

XXV Op. Atty. Gen. 67, to which you call our attention, answers this question. This opinion held that supervising teachers are entitled to the minimum salary prescribed by the legislature regardless of the action of the county board.

It was pointed out in that opinion that the counties are purely auxiliaries of the state and can exercise only the powers conferred upon them by statute or necessarily implied therefrom. They cannot have any private powers or rights against the state. *State ex rel. Bare v. Schinz*, 194 Wis. 397; *Richland County v. Village of Richland Center*, 59 Wis. 591.

Consequently, all actions of the county board are subject to being superseded by acts of the legislature, and the action of the legislature respecting minimum salary of supervising teachers is binding on the county board.

Secondly, you inquire whether the county board may set up a salary schedule for supervising teachers which will have the effect of requiring the county superintendent to employ supervisors whose qualifications entitle them to the minimum salary only, or whether the county superintendent has the power to employ any person he desires as supervising teacher so that the county board will be required to pay the salary fixed by the state superintendent for a teacher with the qualifications of the person so hired by the county superintendent.

It is our opinion that the county superintendent has the power to employ any properly qualified person as supervising teacher, and that it is then the duty of the county board to pay the salary of that teacher in accordance with the salary schedule set up by the state superintendent.

The county superintendent of schools is an elective officer under sec. 39.01, Stats. In the selection of teachers his responsibility is to the electorate rather than to the county board, and there are no provisions in ch. 39 which permit the county board to limit the powers of the county superintendent in the selection of teachers.

WHR

Marriage — Public Health — Vital Statistics — Violation of sec. 69.48, Stats., relating to filing of marriage certificates with registrar of vital statistics where Wisconsin residents are married outside state, may be punished under sec. 352.52 in county where couple resides after such marriage. Sec. 245.04, relating to marriage outside state to circumvent our laws, applies only to marriages prohibited by sec. 245.03.

March 7, 1938,

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You state that in December, 1937, a couple applied to the county clerk of Fond du Lac county for a marriage license. The license was never issued, since several blood tests indicated that the prospective husband was suffering from syphilis.

The couple then left the state of Wisconsin and were married in Indiana. After their marriage they returned to Jefferson county, where the husband formerly resided, and where they are now living together as husband and wife. They have failed to file a certificate of marriage either in Jefferson county or in Fond du Lac county, where the wife formerly resided, in violation of sec. 69.48, Stats., which provides:

“When parties living in this state shall go out of it to be married, and shall return to it to reside, they shall obtain from the county clerk of the county in which either of them resided prior to their marriage, a blank certificate of marriage which they shall cause to be properly filled out and filed with the local registrar of vital statistics of the city, incorporated village or town wherein they reside, within ten days after their return.”

Under these circumstances you have asked our advice as to how these parties may be proceeded against criminally.

Sec. 143.07, Stats., declares that any person afflicted with gonorrhoea, chancroid or syphilis in its communicable stage is a menace to the public health and failure to submit to treatment constitutes grounds under sec. 143.07, subsec. (5),

for commitment to a county or state institution where proper care can be provided. A violation of sec. 143.07 subjects the violator to a fine of not more than five hundred dollars or imprisonment in the county jail, or both. See sec. 143.09 and XVIII Op. Atty. Gen. 299.

Sec. 245.04, subsec. (1), Stats., provides :

“If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.”

In the case of *Lyannes v. Lyannes*, 171 Wis, 381, the court held that sec. 245.04 applied only to those marriages forbidden by sec. 245.03. Unfortunately, there is nothing in sec. 245.03 which forbids the marriage of a person afflicted with a venereal disease. Hence there could be no prosecution for unlawful cohabitation predicated upon the theory that the marriage is void under sec. 245.04, nor do the statutes provide any penalty for marriage elsewhere to circumvent the Wisconsin marriage laws.

Sec. 245.04 was not violated in view of the *Lyannes* decision. Neither sec. 245.10, relating to antenuptial physical examinations and the Wasserman test, nor sec. 245.11, relating to the marriage of persons who have had a venereal disease, applies since these statutes are limited to the issuance of marriage licenses in this state.

Sec. 69.48, Stats., was violated, as we have already indicated. This section carries no penalty within its own phraseology, nor are there any general penalty provisions anywhere in chapter 69. However, sec. 352.52, Stats., provides :

“Any person who shall wilfully violate any of the provisions of chapter 69, or who shall neglect or refuse to perform any duty or do any act imposed upon him as required by said chapter, or who shall neglect or refuse to make any certificate required by said sections to be made, or falsely make any such certificate, or knowingly make any false statement in any such certificate, or who shall alter any certificate or report provided for as required by said chapter

shall be punished by a fine of not less than twenty dollars or more than two hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than thirty days or more than sixty days, or by both such fine and imprisonment."

The only other general penalty provision that might be applied is sec. 353.27, Stats., which reads:

"Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding two hundred and fifty dollars."

However, as between a general penalty statute relating to violation of statutes generally and a specific penalty provision relating to the violation of a particular chapter of the statutes, such as sec. 352.52, the specific statute should control, and you are, therefore, advised to prosecute under sec. 352.52, Stats.

Lastly, you have inquired as to the proper county for prosecution.

It would seem that a prosecution for violation of sec. 69.48 under sec. 352.52 should be in Jefferson county, since the statute provides that the certificate of marriage is to be "filed with the local registrar of vital statistics of the city, incorporated village or town wherein they reside, within ten days after their return."

WHR

Social Security Law — Blind Pensions — XXI Op. Atty. Gen. 791, holding that recovery may not be had from estate of person receiving blind pension, is reviewed and followed.

March 9, 1938.

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

You ask if recovery may be had from the estate of a person of money paid him as a blind pension, under sec. 47.08, Stats.

In connection with this question reference is made to an opinion in XXI Op. Atty. Gen. 791, where this department held that recovery may not be had from the estate of a person receiving a blind pension.

Since that opinion was rendered, the legislature, by ch. 554, Laws 1935, created sec. 49.50, Stats., which provides that the administration of old-age assistance, aid to dependent children and blind pensions shall be under the supervision of the state pension department.

Recovery is allowed against the estate of an old-age assistance pensioner, and it is urged that the same rule should apply to blind pensioners by reason of ch. 554, Laws 1935.

It is true that sec. 49.50 (1m) provides that the state pension department shall have supervision over the granting of blind pensions. This section was created in order to comply with federal requirements under the social security act. It does not follow that the substantive law relating to the granting of blind pensions was intended to be changed merely because the legislature placed the supervision of such pensions with the state pension department. Thus sec. 47.08 remains in full force and effect, and there is no new law on the matter of recovery of blind pensions.

Recovery may be had from the estate of a person receiving a blind pension only if some statute authorizes such recovery. See 48 C. J. 519; *In re Hecks' Guardianship*, 275 N. W. 520; *Palmisano v. Century Indemnity Co.*, 275 N. W. 525. The only statute that might authorize a recovery is sec. 49.25, Stats., which, as amended by the special session of 1937, provides:

“On the death of a person who has been assisted under sections 49.20 to 49.51, the total amount of assistance paid, including medical and funeral expense paid as old-age assistance, but without any interest, shall be allowed as a claim against the estate of such person by the court having jurisdiction to settle the estate; provided, however, that such claim shall not take precedence over the allowances under section 313.15; and provided, also, that such court may disallow such claim or any part thereof if it is satisfied that the amount of such disallowance is necessary to provide for the maintenance or support of a surviving spouse or surviving minor children, and thereupon the claim shall be deemed waived to the extent of the amount thus disallowed and assigned to such spouse or minor children for maintenance or support. 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, and the remainder shall be paid into the treasuries of the state and its political subdivisions, in the proportion in which they respectively contributed to the old-age assistance recovered. It shall be the duty of the county judge of the county from which the deceased beneficiary has received old-age assistance to file the claim herein provided.”

Recovery under this statute may be had only where public assistance is granted under secs. 49.20 to 49.51, inclusive.

As pointed out above, blind pensions are granted pursuant to sec. 47.08, Stats., and not pursuant to ch. 49. Consequently, it seems clear that sec. 49.25, Stats., is not broad enough to permit the recovery of blind pensions. The supervisory power given the state pension department over blind pensions was not intended, in our opinion, to bring such pensions within the purview of sec. 49.25, Stats. This construction has been given that statute by the state pension department. The construction given to a statute by the officers who are charged with its administration is entitled to weight, and should not be overruled unless contrary to the clearly expressed meaning of the law. *Wright v. Forrestal*, 65 Wis. 341; *State v. Johnson*, 186 Wis. 59; XXIII Op. Atty. Gen. 304 306.

We do not believe that such construction is contrary to the expressed intention of the law, and therefore approve the same.

In view of the foregoing, this department adheres to the opinion reported in XXI Op. Atty. Gen. 791.

WHR

Indigent, Insane, etc. — Public Health — Wisconsin General Hospital — Order of county judge certifying indigent patient for treatment at local hospital constitutes finding that expense to county will be less than if patient is sent to Wisconsin general hospital.

After treatment court must determine and certify to county treasurer correct and reasonable charges therefor.

March 10, 1938.

RAYMOND P. DOHR,

District Attorney,

Appleton, Wisconsin.

You request an opinion interpreting certain provisions of ch. 142 of the statutes, relating to hospital and home treatment of needy persons at state and county expense.

You state that disputes have arisen between doctors and hospitals on the one side and the county judge on the other, and you set forth the subject of dispute as follows: Application for hospital treatment is made in proper form as set forth in sec. 142.02, Stats. The county judge makes an investigation as required by sec. 142.03, Stats., and concludes that the applicant is entitled to treatment. The county quota of two persons per one thousand of the population, as provided in sec. 142.04, has not yet been filled. Your letter continues as follows:

“The county judge thereupon approves the application and certifies the applicant for admission to the local hospital on form 4a-3-36-10M making the required findings but striking out ‘State of Wisconsin General Hospital’ and substituting the name of the local hospital and adding the following: ‘Provided that the case can be treated there at no greater cost to the county than if the case were certified and transported to Madison.’ (Transportation cost to and returning from Madison estimated at \$7.50.)

“The patient then goes to the local hospital and is operated and hospitalized for a period of twenty days and is then discharged. In due time the local hospital submits a bill for \$73.00 and the operating surgeon submits a bill for \$75.00. Liability to both is incurred pursuant to said chapter 142 with the order approving and certifying distinctly calling attention to the condition under which this patient is permitted the benefit of the act.

“Question: How much is the county judge authorized by chapter 142 to pay or order paid out of the county treasury and to whom?”

Your attention is first invited to the following official opinions construing portions of ch. 142: XXI Op. Atty. Gen. 240, XXII 408, 463 and 875.

It may be presumed that your real question is whether the form of the order is adequate.

The latter part of sec. 142.04, Stats., provides as follows:

“* * * If he [the county judge] find the required facts and that the person can receive adequate treatment at home or in a hospital, at the same or less expense to the county, and the person to be treated shall not make the selection aforesaid, he shall enter an order directing such treatment, the place thereof, and the physician or physicians. If the court is not so satisfied, he may make further investigation. If the court does not find the required facts, he shall enter an order denying the application. Upon granting the application, he shall ascertain from the superintendent of the hospital whether the person can be received as a patient, and if he can the court shall certify his order to the hospital and to the county clerk.”

This section requires the county judge to determine the facts regarding expense of treatment before making any order. If he does not find that the applicant can receive adequate treatment at home or in a hospital at the same or less expense to the county, he must either order treatment at the Wisconsin general hospital or deny the application altogether, except in emergency cases. XXII Op. Atty. Gen. 463. Issuance of an order for treatment at a local hospital is equivalent to a finding that if the case is treated there, the cost to the county will be no greater than it would be if the patient were sent to Madison.

In the case which you suggest, in which the county quota has not yet been filled, before making an order the judge must find that the expense of local treatment will be not more than the expense to the county of treatment at the Wisconsin general hospital, taking into account the cost of both treatment and transportation (which latter must in either case be paid by the county, under sec. 142.05). XXI

Op. Atty. Gen. 240. It is obvious that such a determination cannot be made with absolute accuracy, but, as was stated in a former opinion, the discretionary power of the court is broad and his order cannot be attacked unless manifestly unreasonable. XXII Op. Atty. Gen. 875, 877.

You are advised that the county judge, having ordered hospitalization, has in effect found that the charges of \$73.00 and \$75.00 are less than it would have cost the county for transportation to and treatment at Madison. He must therefore proceed under subsec. (5) of sec. 142.08, Stats., to determine and certify to the county treasurer the correct and reasonable charges.

ML

Banks and Banking — Corporations — Credit union may borrow surplus funds of another credit union subject to restrictions contained in sec. 186.11, Stats. Such loan must have approval of banking commission.

March 11, 1938.

BANKING COMMISSION.

You have inquired whether one credit union may loan its surplus funds to another credit union under sec. 186.11, Stats., subject to the approval of the banking commission.

To answer this question it becomes necessary to consider not only the power of the one credit union to lend its surplus funds to a second credit union but also the extent of the power of the second credit union to borrow such funds.

Sec. 186.11, subsec. (1), Stats., provides in part:

“* * * Any funds not required for purposes of loans may be deposited to the credit of the corporation in banks or trust companies incorporated under the laws of this state, or in national banks located therein, or may be invested in United States government securities, or municipal bonds issued by municipalities of this state, and may, *with the approval of the banking commission*, make first mortgages to

members on real estate and *purchase securities other than those hereinbefore specified*. It shall be lawful for the board of directors to borrow money not to exceed twenty-five per cent of the total assets but not for a longer period than ninety days, except that such period may be extended when approved by the banking commission under the following conditions:

“(a) If the cash available be insufficient to make the loans approved by the credit committee.

“(b) If the request for withdrawal exceed available cash.”

It should first be noted that the purchase of securities “other than those hereinbefore specified” is conditioned upon the approval of the banking commission.

Presumably the lending credit union would accept the promissory note or some like evidence of indebtedness from the borrowing union, and it therefore is necessary to determine whether this falls within the meaning of the word “security” as used in the above statute.

Sec. 370.01, subsec. (1), Stats., provides:

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

Webster's New International Dictionary, among other definitions for the word “security,” gives the following:

“An evidence of debt or of property, as a bond, stock certificate, or other instrument, etc.; a document giving the holder the right to demand and receive property not in his possession.”

The word “security” is given a more technical definition in the Wisconsin securities law, in 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 certifi-

cates, 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.”

You will observe that both of these definitions include “evidences of debt” and that sec. 189.02 (7) also includes “notes.”

Thus it would appear that a credit union, with the approval of the banking commission, may loan surplus funds to a second credit union and accept its notes or other evidences of indebtedness therefor.

It should be remembered, however, that the powers of the borrowing union are restricted under the statute to loans not to exceed twenty-five per cent of its total assets and for no longer period than ninety days, except that such period may be extended with the approval of the banking commission where the cash available is insufficient to make the loans approved by the credit committee and where a request for withdrawal exceeds available cash.

WHR

School Districts — Vocational school district must be confined to one town, village or city.

March 12, 1938.

GEORGE P. HAMBRECHT, *State Director,*
Vocational and Adult Education.

You state that the city of Oconomowoc and outlying towns, which constitute a joint school district, desire to appoint a board of vocational and adult education in order to receive the benefits of the Wisconsin vocational school act, and you inquire whether a vocational school district may include all of the territory in a joint school district.

It is necessary to examine first secs. 41.13, 41.15 and 41.16 of the statutes, which provide for vocational and adult education.

Sec. 41.13 creates a state board, and has no direct bearing upon the present question.

Sec. 41.15 provides for the creation of local vocational boards. Subsec. (1) follows.

"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."

The legislature evidently contemplated that the unit for vocational school purposes should be a town, village or city. The words "town, village or city" are used repeatedly, and where the expression "municipality" is used, as in subsec. (7), it is clearly a substitute for "town, village or city."

You direct attention to sec. 67.01, which defines "municipality" to include joint school districts. This definition applies only to the use of that word in ch. 67, which relates to municipal borrowing and municipal bonds.

Sec. 41.16 provides for raising money for vocational school purposes. Subsecs. (2), (5) and (6) are as follows:

"(2) The *municipality* shall levy and collect and the clerk shall spread on the roll a tax, which together with the other funds provided for the same purpose, shall be equal to the amount so required by said local board, but such tax shall not exceed one and one-half mills on the dollar."

"(5) The *municipal treasurer* shall keep such money separate from all other money. All moneys appropriated or otherwise provided for vocational and adult education shall be expended by the local board of vocational and adult education, and shall be paid by the town, village or city treasurer on orders issued by said board and signed by its president and secretary."

“(6) All moneys received by said board shall be paid to the *town, village or city treasurer* and are appropriated to the vocational and adult education fund.”

Here again it is evident that the legislature contemplated a town, village or city unit.

The question remains whether the procedure in sec. 41.16, Stats., can be adapted to a joint school district.

Joint common school districts are authorized by sec. 40.30, Stats., which differs from sec. 41.15 in that provision is made for districts which include more than one municipality. There is no reference in sec. 40.30 or the following sections to indicate that the procedure there provided is applicable to vocational school districts. Sec. 40.32 provides a procedure for equalizing school tax assessments in joint school districts, initiated by a petition filed with the *clerk* of the district. Sec. 41.15, Stats., provides that vocational boards shall elect a chairman and secretary, but does not create the office of clerk. The two sections being thus inconsistent, it cannot be supposed that the legislature intended the provisions of sec. 40.30 or sec. 40.32 to be applicable to vocational school districts.

Vocational school education may be thought to resemble high school more closely than common school education. Secs. 40.40 to 40.48, Stats., provide for joint high school districts. Sec. 40.42 provides for the election of officers, again including a clerk. By sec. 40.48 high school taxes are to be levied and paid over to the district treasurer. Since sec. 41.16, Stats., provides that vocational school funds shall be kept by the town, village or city treasurer, it is apparent that the legislature did not mean to establish a special form of high school when it planned a system of vocational and adult education. Entirely separate and different systems were set up and it is impossible to assimilate one to the other.

A further difficulty in the way of a joint vocational school is the problem of transportation. Sec. 40.34, Stats., which requires school districts to provide transportation to and from *common* and *high schools* in certain cases, would not apply to vocational schools. Furthermore, it contemplates the existence of a district clerk, not provided for in the vocational school act.

It follows that a vocational school district must be confined to one town, village or city. However, your attention is invited to sec. 41.19, Stats., which provides for attendance by pupils from without the district and for the payment of their nonresident tuition by the municipalities in which they reside.

ML

Elections — Village Trustee — Village election ballot should contain names of all candidates for office of trustee arranged in alphabetical order pursuant to sec. 10.48, Stats., rather than in pairs.

March 14, 1938.

DEPARTMENT OF STATE.

You have requested our opinion as to the form of ballot to be used by a village in the election of officers. Particularly your inquiry is whether the names of the six candidates for trustee from which three are to be elected should be arranged on the ballot in pairs or should be placed thereon in alphabetical order.

Sec. 10.48, Stats., provides:

“Ballots for village elections; form and printing. (1)
* * * The offices to be filled shall be arranged on the
ballot in the order in which they are named in the statutes
creating them, and the names of the candidates arranged in
alphabetical order under their respective office designations.
* * *”

Our attention is directed to sec. 10.52, Stats., which provides two forms for ballots in the election of town officers, one placing the names of the candidates on the ballot in pairs and the other arranging the names jointly in alphabetical order. It has been suggested that the provisions of sec. 10.52 as to the ballot form should also apply to villages.

No reason appears for applying sec. 10.52 to village ballots since that statute specifically applies only to town elections, while sec. 10.48 expressly applies to village elections. Sec. 10.48, Stats., in our opinion, is susceptible of only one interpretation, which is that the names of all six candidates for trustee should be placed on the ballot in alphabetical order with instructions to vote for three. No other alternative is provided for by this statute, which is the only one that by its terms applies to the form of ballot to be used at a village election. The same conclusion was reached in a former opinion, XX Op. Atty. Gen. 159. The provision of sec. 10.48 specifying a form of ballot for village elections, operates to exclude the use of all other forms under the familiar rule of statutory construction, "*expressio unius est exclusio alterius.*"

Sec. 10.52, Stats., not only says that it applies to towns but makes no mention of villages. Had the legislature intended that the ballots used in both village and town elections should be similar in form it would have been easy for it to so provide by revising sec. 10.48 so that it reads similarly to sec. 10.52 or by making sec. 10.52 specifically applicable to both towns and villages.

It is therefore our opinion that the form of ballot at a village election should contain the names of all candidates for trustee arranged in alphabetical order pursuant to sec. 10.48, Stats., rather than in pairs.

HHP

Elections — Nominations — Public Officers — Constable — Justice of Peace — Police Judge — Primary election for offices of police judge, justice of peace and constable is not to be held in Milwaukee county in view of limitations contained in sec. 5.02, subsec. (4), and sec. 5.26, subsec. (8), par. (a), Stats.

March 14, 1938.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You have inquired whether primary elections are to be held in Milwaukee county for the offices of police judge, justice of the peace and constable.

Sec. 5.02, subsec. (4), Stats., provides:

“Except as otherwise specially provided in this chapter, there shall be no nomination by primary election of any candidate for the office of state superintendent, or county or district superintendent of schools, or board of education by whatever name designated, or constable or justice of the peace, or for any school district or judicial office.”

Sec. 5.26, subsec. (8), par. (a), Stats., which is applicable to Milwaukee county, reads in part:

“Whenever such nomination papers propose three or more candidates * * * for any judicial office, except the office of police justice or justice of the peace and constable, in any county having a population of three hundred thousand or more * * * neither of the persons whose name is so presented shall become nominated as a candidate until nominated at a primary election * * *.”

This latter section, referring to Milwaukee county, expresses a clear legislative intent that primaries are to be held where more than two candidates are nominated for one position, except where the office involved is that of police justice, justice of the peace or constable. Just why these offices were excepted from the primary requirements is not apparent from the statute, although there can be no question that such exceptions exist under its plain wording.

It is our opinion that a "police justice," as that word is used in sec. 5.26 (8) (a), Stats., comes within the purview of the term "judicial office," as used in sec. 5.02, subsec. (4), quoted above. A judicial office is one which relates to the administration of justice, and the term includes courts not of record as well as courts of record. 34 C. J. 1183. It has been held that a police judge is undoubtedly a judicial officer. *People v. Henry*, 62 Cal. 557.

You are therefore advised that a primary election is not to be held in Milwaukee county for the offices of police judge, justice of the peace and constable.

WHR

Education — School Administration — Teacher Tenure
— Circuit teachers employed by several different boards of vocational and adult education do not acquire tenure under sec. 39.40, Stats.

March 16, 1938.

BOARD OF VOCATIONAL AND ADULT EDUCATION.

Our attention is called to that portion of sec. 39.40, subsec. (1), Stats., which provides:

"The term 'teacher' as used in this section shall mean and include * * * (c) * * * only full-time employes who meet, respectively, at least the minimum requirement prescribed, respectively, by the board of trustees of the Stout institute, Wisconsin mining school board and the state board of vocational and adult education."

You state that in the Wisconsin system of vocational and adult education circuit teachers are employed. These teachers meet the minimum requirements prescribed by the state board of vocational and adult education and are employed by two or more local boards during a school year. These local boards may be different from year to year according

to the needs for particular types of teaching services in the various communities. Our opinion is requested on the question of whether the word "teacher" as defined in the above quoted statute applies to these circuit teachers employed by two or more local boards of vocational and adult education.

By the provisions of sec. 39.40, subsec. (1) (c), above quoted, part-time teachers are not included within the meaning of the term "teacher" as used in the tenure law. While such teachers may have full-time employment, such employment is distributed ordinarily among several local boards, so that no single board employs a circuit teacher on a full-time basis.

Furthermore, in order to acquire tenure it is necessary that a teacher serve a "continuous and successful probation for five years in the same school system or school * * *." Sec. 39.40, subsec. (2), Stats.

We do not see how it would be possible for circuit teachers to satisfy this probationary requirement of five years' continuous service in the same school or school system, since, from the facts stated, such a teacher may be employed by a local board one year and not the next, all depending on the demands for instruction in particular subjects.

You are therefore advised that such circuit teachers are part-time teachers in any particular vocational education system and that they do not come within the terms of the teacher tenure law.

WHR

Public Officers — Appeal Board — School Districts — Detached Territory — Members of appeal board pursuant to sec. 40.85, subsec. (10), Stats., should be compensated as county and town officers by respective county and town.

Administrative expenses of appeal board provided for in sec. 40.85 (10) should be paid by town or towns in which detached territory lies.

Under provisions of sec. 40.85 (11) appellant should file appeal with county clerk and deliver copy thereof to chairman of county board.

March 17, 1938.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You have requested an interpretation of the provisions of sec. 40.85, Stats., relating to the detachment of territory from a school district. You first ask how the members of the appeal board provided for in subsec. (10), sec. 40.85, shall be compensated.

Subsec. (10), sec. 40.85, Stats., provides that the appeal board shall be composed of a member of the county board and the chairman and town clerk of each township containing any of the territory to be detached. The statute provides that the member of the county board who shall serve on said appeal board shall be appointed by the chairman of the county board from a township not containing any of the territory to be detached. The member of the county board so chosen to act on the appeal board is performing a duty delegated to him as a member of the county board. He is not selected because he is a town officer but because he is a member of the county board. He would thus be acting in a similar capacity to a member of the county board who was serving on a committee thereof and would accordingly be entitled to compensation from the county at the per diem and mileage allowed to committee members of the county board. The chairman and town clerk of each township containing any of the land detached who are members of the appeal board serve thereon by virtue of being town officers. Therefore, they should receive from the town such compensation

for acting on the appeal board as they are entitled to as such town officers under sec. 60.60, Stats.

You next ask how the administration expenses of the appeal board such as expenses in connection with posting of notices should be paid. The function performed by this appeal board does not relate to county affairs but solely to matters within the territorial limits of the towns in which the territory to be detached is located. Sec. 40.85 (5) (a) and (b) provide that the school district shall make the order of detachment and the town board or boards shall make the order creating the new district or attaching it to an adjacent district. Sec. 40.85 (5) (c) then provides that the town clerk or clerks of the towns in which a district is created shall call a meeting of the electors of such district. All of this shows that the matter is one which pertains to the local affairs of the towns rather than the affairs of the counties. It is therefore our opinion that any administration expenses of the appeal board should be paid by the town or towns in which the detached territory is located.

You also ask whether the provisions of sec. 40.85 (11), Stats., providing that in taking the appeal "a copy of the same, * * * shall be filed with the county clerk and delivered to the chairman of the county board" contemplates that the notice of appeal shall be served on the county clerk and by him in turn delivered to the chairman of the county board. This provision of the statute in our opinion contemplates filing one copy of the notice of appeal with the county clerk and the delivery of another copy thereof to the chairman of the county board. The provision that a document shall be filed with an officer is for the purpose of having the document remain in his office. Had the legislature intended that a copy of the notice of appeal should be first recorded by the county clerk and then delivered to the chairman of the county board appropriate language so providing would have been used instead of the provision that the copy shall be filed with the county clerk. It is therefore our opinion that the appellant should file the appeal with the county clerk and also deliver a copy thereof to the chairman of the county board.

HHP

Normal Schools — Normal schools may grant no professional degrees excepting those of bachelor of education and bachelor of science. Prior to amendment of sec. 37.11, subsec. (5), Stats., by ch. 215, Laws 1937, this power was restricted to granting of degree of bachelor of education.

March 17, 1938.

C. M. YODER, *President*,
State Teachers College,
Whitewater, Wisconsin.

You have asked for an interpretation of sec. 37.11, subsec. (5), Stats., regulating the granting of degrees by normal schools. Specifically you inquire whether prior to the amendment of that section by ch. 215, Laws 1937, the normal school at Whitewater could grant the degrees of "bachelor of arts in education," "bachelor of science in education," and "bachelor of commerce in education." Also, you inquire whether after the amendment the degrees of "bachelor of science in commerce," "bachelor of science in commercial education," "bachelor of science in social studies," and "bachelor of science in education" may be granted.

There are very few cases construing questions of this sort.

In the case of *Kerr v. Shurtleff*, (1914) 218 Mass. 167, 105 N. E. 871, the court was faced with a somewhat similar situation. The Massachusetts statute limited the granting of degrees and the issuing of diplomas or certificates conferring or purporting to confer degrees to instances specifically authorized by the legislature. The school in question had been authorized to confer the degree of doctor of medicine, and the court held it did not have the authority of conferring the degree of D. M. D. (*dentariae medicinae doctor*).

Sec. 37.11, subsec. (5), prior to its amendment by ch. 215, Laws 1937, provided that "no professional degree shall be conferred excepting that of bachelor of education." This quite clearly denied to normal schools the privilege of issuing any other professional degrees.

Furthermore, regents' resolution No. 66, to which you call our attention, authorized a four year course, for training in commercial subjects leading to a bachelor's degree in educa-

tion. This specified the degree to be granted and negatives the idea that any other degree might be granted.

Sec. 37.11, subsec. (5), as amended by ch. 215, Laws 1937, now provides that "no professional degree shall be conferred excepting that of bachelor of education and bachelor of science."

These words are clear and express and cannot be extended by interpretation so as to include other terms under well settled rules of statutory construction. If the legislature had intended to authorize the granting of degrees in any other terminology than that used in the statute it could have said so. Its failure to do so raises the presumption that it intended to grant only the powers specifically expressed under the doctrine of *expressio unius est exclusio alterius*, that is, the expression of one results in the exclusion of the other.

You are therefore advised that normal schools may grant only the degrees of bachelor of education and bachelor of science.

WHR

Appropriations and Expenditures — Courts — Public Officers — Jury Commissioners — Sec. 255.03, subsec. (3), Stats., is governing statute and under it jury commissioners are entitled to mileage only for one round trip in attending meeting. Sec. 14.71, subsec. (6), par. (f), Stats., is inapplicable.

March 18, 1938.

RAYMOND P. DOHR,

District Attorney,

Appleton, Wisconsin.

You refer to sec. 255.03, subsec. (3), of the Wisconsin statutes relating to jury commissioners, which provides in part that said commissioners shall receive "ten cents for each mile actually traveled in attending any and all meetings of the commissioners in the discharge of their duties."

You then refer to sec. 14.71, subsec. (6), par. (b), which provides as follows:

"If the officer or employe travels less than six hundred miles in any month he may receive an allowance of not to exceed seven cents for each mile traveled."

You refer also to par. (f), which you quote as follows:

"The provisions of this section relate to allowance for the use of a personal automobile which applies to members of county board and to county employees *and to any part of those whose salary or expenses are paid directly or indirectly by the state.*"

You then inquire whether sec. 14.71, subsec. (6) pars. (b) and (f), or sec. 255.03, subsec. (3), is controlling in paying mileage to jury commissioners. We believe that your question is prompted by a misreading of sec. 14.71, subsec. (6), par. (f), which actually reads as follows:

"The provisions of this section relating to the allowance for the use of a personal automobile shall apply also to members of county boards and to county employes, any part of whose salary or expenses are paid, directly or indirectly, by the state."

Under your reading of the statute, this section makes three classifications:

- (a) Members of county boards
- (b) County employees
- (c) Others, any part of whose salary or expenses is paid directly or indirectly by the state.

The statute, however, makes only two classifications, that is:

- (a) Members of county boards
- (b) County employees, any part of whose salary or expenses is paid directly or indirectly by the state.

Jury commissioners, obviously, would not be classified as county board members. Since the county pays all of the salary and expenses of jury commissioners, (sec. 255.03 (3)), and is not reimbursed by the state for any part of this expenditure, a jury commissioner is not one of those county employes, "any part of whose salary or expenses are paid, directly or indirectly, by the state." Therefore, sec. 255.03, subsec. (3), controls the matter of the mileage payable to jury commissioners.

You have referred also to a meeting of jury commissioners which covers three consecutive days and inquire whether the commissioners may receive mileage for one round trip in attending this meeting, or whether they may receive mileage for each day that they come and go.

Sec. 59.03 (2) (f) provides that each member of a county board of each county to which the section is applicable shall be allowed mileage for each mile traveled in going to and returning from the place of meeting by the most usual traveled route."

In XXIV Op. Atty. Gen. 805 it was held that this section did not entitle county board members to mileage for each day while attending the annual meeting of the board; it was stated that the word "meetings" applies to annual and special meetings and not to each daily meeting of an annual or special meeting. While sec. 255.03, subsec. (3), provides for mileage for each mile actually traveled in attending "all meetings" of the commissioners, and sec. 59.03, subsec. (2), par. (f), permits mileage for each mile traveled in going to and returning from the "place of meeting," it is our opinion that these statutes should receive a similar construction. Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law. 46 C. J. 1019, sec. 250.

It is our opinion that jury commissioners, under sec. 255.03, subsec. (3), Stats., are entitled to mileage in going to the meeting and returning therefrom and are not entitled to mileage for each day during the meeting that they come to the meeting and return home therefrom.

NSB

JRW

Counties — Elections — Referendum — County board may not submit questions to referendum except as it takes definite action itself thereon and makes taking effect of such action contingent upon approval of electors.

March 19, 1938.

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

You ask whether the county board by resolution can refer the question of building an addition to the courthouse to the people for referendum vote and whether the result of such referendum vote would be binding upon the county board.

In an early opinion, IX Op. Atty. Gen. 66, it was held that direct legislation in counties by the electors is not permitted by the constitution. To the same effect see XI Op. Atty. Gen. 106; XXI Op. Atty. Gen. 207; XXII Op. Atty. Gen. 785. The principles upon which these decisions were founded are the basis of the decision in *Meade v. Dane Co.*, (1914) 155 Wis. 632, 145 N. W. 239. The court there held that art. IV, sec. 22 of the Wisconsin constitution empowered the legislature to confer upon the county boards the legislative power for the county and that therefore a statute providing for direct legislation in counties was unconstitutional because it attempted to confer legislative power upon the electors.

In other opinions in XI Op. Atty. Gen. 106 and XVI Op. Atty. Gen. 117, it was held that the question of employing a county agent could not be lawfully determined by a referendum of the voters of the county as the constitution vested the legislative power of the county in the county board and such power may not be delegated to the electors of the county to be exercised by referendum. To the same effect see XXI Op. Atty. Gen. 146.

In an opinion, XXI Op. Atty. Gen. 207, it was held that the county board may not submit questions to a referendum vote except as the county board takes definite action itself and makes the taking of effect of such action contingent upon approval by the electors. To the same effect is XXI Op. Atty. Gen. 317. These decisions are based upon the recognition by the court in *State ex rel. Van Alstine v. Freear*,

(1910) 142 Wis. 320, 125 N. W. 961, of the principle that a legislative body may not delegate its power to make a law to the electorate, but may pass a law which, by its terms, shall become operative upon the happening of a future contingency, to wit, the approval by a majority of the electorate at a referendum election. See *Smith v. Janesville*, (1870) 26 Wis. 291; *State ex rel. Mueller v. Thompson*, (1912) 149 Wis. 488. XXV Op. Atty. Gen. 533.

It is therefore our opinion that the county board may not refer questions to the electorate for a referendum vote, except as the board takes definite action and makes the taking effect of such action contingent upon approval thereof by the electors at a referendum thereon.

HHP

Appropriations and Expenditures — Counties — County Board — Railroads — Appropriation by county to employ private attorney to resist application by railroad before interstate commerce commission for permission to abandon branch running through county is within power of county board under sec. 59.07, subsec. (6), and sec. 59.08, subsec. (28), Stats.

March 21, 1938.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

The county board of your county adopted a resolution which, after reciting that the C. M. & St. P. Ry. Co. had made application to the interstate commerce commission for authority to abandon that portion of its railroad known as the Kickapoo Valley Branch Line extending from Wauzeka to La Farge, Wisconsin, states that the abandonment of such railroad line will be highly detrimental to the citizens, communities and counties in the Kickapoo Valley, result in ir-

reparable damage to the counties and communities located adjacent thereto and to citizens residing therein, the continuation of such railroad facilities is indispensable to the continued economic existence and future prosperity thereof and therefore the county board thereby went on record as vigorously and unalterably opposed to the abandonment of said railroad line. Immediately another resolution was unanimously adopted which recited that the county board had recorded its opposition to the abandonment of such branch line and funds will be necessary to carry out such opposition and then appropriated the sum of one thousand dollars "to be used and disbursed in opposition to the proposed abandonment of the C. M. St. P. & P. Ry. Company's trackage from Wauzeka to La Farge, Wisconsin by the employment of counsel and the payment of expenses and disbursements in connection therewith, such counsel fees, expenses and disbursements to be approved and disbursed under the direction of the chairman of the county board." You ask our opinion whether the above appropriation is within the power of the county board and the funds may be lawfully expended for such purpose.

It is well settled that a county can exercise only such powers as are conferred upon it by statute or are necessarily implied from the powers conferred. *Spaulding v. Wood County*, 218 Wis. 224, 260 N. W. 473.

Sec. 59.07, Stats., provides:

"The county board of each county is empowered at any legal meeting to:

"* * *

"(6) Represent the county and have 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. 59.08, Stats., in reference to special powers of the board, provides:

"In addition to the general powers and duties of the several county boards enumerated in section 59.07 special powers are conferred on them, subject to such regulations and restrictions as the legislature shall from time to time prescribe, to:

"* * *

“(28) Appropriate not to exceed five thousand dollars in any year to advertise the advantages, attractions and natural resources of the county and to conserve, develop and improve the same. The county, or any authorized agent thereof, may co-operate with any private agency or organization in such work. Appropriations heretofore made by counties, pursuant to authorization in this chapter, and heretofore or hereafter expended in whole or in part for the purposes stated in this subsection are validated.”

Whether the county has the power to appropriate a sum of money for the employment of counsel to resist the abandonment of a railroad serving that area thus requires a determination of whether the proposed abandonment involves “the business and concerns of the county” or the conservation, development and improvement of “the advantages, attractions and natural resources of the county.”

The resolution of the county board recording its opposition recites that such abandonment will have a detrimental effect upon industries in the county, cause additional expense for highway construction and maintenance, make transportation facilities uncertain, irregular, inadequate and expensive, effect a decrease in property values, deter new industries or people coming into the county, cause industries and persons to leave the county and have a serious effect upon the commerce and agriculture of the county and that the continuation of the railroad is indispensable to the continued economic existence and future prosperity of the county and the communities and persons therein. It seems maintainable that the abandonment of such transportation facilities may have a very substantial deterring effect upon the business enterprises, industries, and farming pursuits in the county. The operation of businesses and farms probably would become less profitable and attractive commercially, with the result that the value of all property in the area served by this railroad would decrease because transportation is the lifeblood of commerce and industry. If the area does not have adequate facilities then persons now engaged in business, industries and farming will not be able in the future to operate as productively as in the past and the operation of present businesses, industries, and farms in the county will thus become less attractive. It is obvious that if commercial ventures at present in the county cannot in the

future continue to operate profitably there will be a tendency for the owners thereof to go to other localities where the prospects may appear to be better.

Historically the economic development of many territories or areas commenced with the acquisition of adequate transportation facilities. Thereafter they became prosperous communities. There are instances where the lack of adequate transportation facilities or their abandonment have been the factor which has deterred districts from developing to the extent that their natural resources would indicate might be expected. Adequate transportation facilities have throughout the history of our country been the medium through which and by reason whereof the areas served thereby have had economic development and prosperity.

Upon the foregoing considerations it would seem that the proposed abandonment of the railroad would have a direct bearing upon "the business and concerns of the county."

In addition to the detrimental effect that the abandonment of the railroad might have upon present existing businesses, industries and farming operations there is the effect that it probably would have on the future development along these lines. As before stated, the economic developments of areas in this country have largely been commensurate with the adequacy of their transportation facilities. If the communities served by this railroad do not in the future have that transportation which places them on a parity with other communities of similar natural resources then, of course, the economic development of this area will be deterred as compared with the economic development of areas having adequate transportation. From all of the above and foregoing it seems that the proposed abandonment of this railroad would be something that would not only be a "concern of the county" but something that would affect the "advantages, attractions and natural resources of the county" and that the participation of the county in proceedings to oppose such abandonment would be clearly for the purpose of conserving the advantages, attractions and natural resources of the county and directly relate to the development and improvement thereof.

The removal of the railroad would require the substitution of other forms of transportation that would be ade-

quate. The only present possible substitute would be by transportation on the highways. This would necessitate the building of additional highways that could facilitate adequate motor transportation and stand up thereunder. Such would entail an expenditure of large sums of money which would fall back upon the properties in the county through the payment of taxes of one form or another. This in itself might be said to be sufficient as having a direct bearing on the resources of the county. Thus, even though such other adequate transportation could be substituted for the facilities heretofore furnished by the railroad, the additional tax burden arising therefrom directly affects the property values and business enterprises in the county.

While it is possible that motor transportation might for many purposes be adequate still, in some businesses such as the tobacco industry, the fruit orchards and others of a similar nature, transportation by truck is not desirable. Railroad transportation is necessary to the successful operation of such businesses in competition with like industries located in districts which have railroad transportation. If this be true then even though motor transportation could be substituted it would be inadequate and there would still remain the residual detrimental effect upon the future economic welfare of the community in so far as these industries are concerned.

Accordingly the abandonment of the railroad would have such a direct bearing upon the future prosperity of the county and its property owners and citizens as to relate to the development and improvement of "the advantages * * * and natural resources of the county." It would then be within the field for which a county may appropriate money pursuant to sec. 59.08 (28).

The appropriation being done for a purpose for which the county board has the power to appropriate funds, it is an appropriation for a public purpose and not for a private purpose, as the funds are to be expended by the county directly in carrying on an objective which is within the field of county activity. The general purpose of the appropriation being one for which the county may appropriate its funds, the question then arises whether it is proper to spend such funds for the employment of special attorneys to ap-

pear upon behalf of the county in proceedings in the furtherance of such purpose.

The provisions of sec. 59.47, Stats. 1937, specifying the duties of the district attorney, in so far as here applicable are as follows:

“(1) Prosecute or defend all actions, applications or motions, civil or criminal, *in the courts of his county* in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.”

It is apparent that the proceeding before the interstate commerce commission is not an action in the courts of your county and, therefore, the above-quoted provision of the statute would not make it the duty of the district attorney to appear for the county in such proceeding.

In *Frederick v. Douglas Co.*, (1897) 96 Wis. 411, 71 N. W. 798, it was held that so long as there is a duly elected, qualified and acting district attorney of the county there is no power in the county board to employ a special attorney to take charge of and conduct tax litigation in the courts of that county in which the county is interested. The quoted section of the statute expressly makes it the duty of the district attorney to take charge of and conduct such litigation.

However, it was held in *Town of Eagle River v. Oneida Co.*, (1893) 86 Wis. 266, 56 N. W. 644, that where the statute provided that it was the duty of the district attorney “to prosecute or defend all actions, civil or criminal, in which the state or county is interested or a party, *in the circuit court*” (p. 269), it was not the duty of the district attorney to attend to cases in the supreme court and that the county had power to employ special counsel to handle cases in such court. At page 269, the court said:

“* * * These cases were in the supreme court, and the statute is not applicable. It would seem to be a duty, from necessity, for a county to employ legal counsel to attend to cases against it in the supreme court. It has the legal capacity to sue and be sued, and to appeal to the supreme court, and it is its duty, by implication, when it has a case pending in the supreme court, to attend to it and see

that it is properly presented to that court; and connected with such a duty it must have the *power* to employ legal counsel for such purpose, and if he has such power it must have the power to direct or authorize some one to employ such counsel for and on its behalf. * * *."

Likewise in *Duluth So. Shore & Atl. R. Co. v. Douglas Co.*, (1899), 103 Wis. 75, 79 N. W. 34, the court said that it was not the duty of the district attorney to attend to tax litigation for the county in the supreme court and the county possessing the power to direct such appeal to be taken it followed that "as a matter of course, authority to direct the appeal to be taken carried with it, by implication, power" to employ a special attorney for that purpose (p. 79).

Applying the principles of law laid down in these cases to the present situation, the duty of the district attorney under sec. 59.47 (1), Stats., is limited to attending to cases in the courts of his county. This subsection of the statutes does not make it the duty of the district attorney to appear for the county in the supreme court. However, subsec. (7), sec. 59.47 Stats. does make it the duty of the district attorney upon the request and under the supervision and direction of the attorney general to attend to criminal cases from his county in the supreme court. We find no statute making it the duty of the district attorney to appear in the supreme court and attend to civil cases in which his county is a party or interested and, therefore, the county board would have power to employ special counsel to appear for it in civil matters in the supreme court. By the same reasoning, it would not be the duty of the district attorney to appear upon behalf of the county before the interstate commerce commission in the proceedings mentioned and oppose the application for the abandonment of the railroad. If the county board has the power to employ special counsel to appear for the county in the supreme court in civil cases in which the county is a party or interested then surely it has like power to employ special counsel to appear upon behalf of the county in the proceedings before the interstate commerce commission here in question.

While it is true that the county is not named as a party in the proceedings, it is stated in L. R. A. 1917 D, 240, at page 242, that the general rule is as follows:

"It is the rule, that where a county is actually interested in a litigation, it may employ counsel therein, *although it is not nominally a party.*" (Emphasis ours.)

It is therefore our opinion that an appropriation by a county of a sum of money to be used for the employment of counsel on behalf of the county and payment of expenses in connection therewith to appear in proceedings before the interstate commerce commission and oppose the application of a railroad for permission to abandon its branch line running through said county is within the power of the county board under sec. 59.07 (6) and sec. 59.08 (28), Stats., and valid.
HHP

Indigent, Insane, etc. — Prisons — Alleged insane person may be detained in padded cell located in room within building which houses county jail in that part thereof where sheriff has his living quarters but which is not used for confinement of criminals. Such place, however, may not be used if it is possible to use state or county institution for insane.

March 23, 1938.

MILTON L. MEISTER,
District Attorney,
West Bend, Wisconsin.

You cite sec. 51.04, Stats., which reads in part as follows:

"(3) Such person shall not be confined in any place established for the confinement of criminals or in any county home, and wherever possible shall be confined in a state or county hospital or asylum for the care of the insane. The superintendents of any state or county hospital or asylum for the insane, when requested by the judge, shall receive and care for any such person in such hospital or asylum. The period of such confinement shall not exceed thirty days for proper medical observations and ten days in cases where confinement is essential to the safety of such person, or of any other person or to the maintenance of public peace and safety."

You ask whether an alleged insane person may be detained in a padded cell established in some part of a building in which the county jail is housed, such cell not to be in that portion of the building used for jail purposes, but being in the part in which the sheriff has his living quarters.

It is apparent that two purposes are to be served by the above quoted statute. In the first place the public is to be protected by having insane persons confined, and in the second place such persons are to be confined, if possible, in institutions where they will be treated and regarded as sick persons rather than as paupers or criminals.

At the outset we wish to strongly emphasize the words "and wherever possible shall be confined in a state or county hospital or asylum for the care of the insane." The word "possible" as used in the statute means just that, and not "convenient" or "expedient," etc. Hence no makeshift or substitute of any sort is permissible if it is at all possible to confine these unfortunate individuals in regular institutions established for such purposes.

Emergencies may arise, as where some person starts out in the middle of the night with a shotgun and an axe with the insane intention of killing anyone he can find. It is more important that he be confined some place than it is that he be incarcerated in an institution for mental cases. For the moment it may be more vital for the safety of society that he be treated as a dangerous person than that he be treated as a sick person. This is especially true where the county has no asylum or hospital for the insane and where the nearest state institution is many miles distant over roads which, perhaps, may be impassable.

In instances of that sort we see no objection to temporary confinement in a padded cell provided specifically for that purpose in a building which also houses the county jail. A further consideration supporting this conclusion is the fact that the proposed location of the room is in that part of the building used by the sheriff as his living quarters. Is the place where the sheriff has his living quarters a "place established for the confinement of criminals"? We think not, and therefore conclude that the padded cell as planned does not come within the prohibition of the statute.

However, in view of the fact that you have a county asylum at West Bend, it would appear that facilities for the safe-keeping of mentally disturbed persons could better be established there than at the county jail.

WHR

Criminal Law — Informers — Public Officers — Constable — Deputy sheriff and constable are not entitled to informer's fees under sec. 353.24, Stats.

Where fine has been paid into county treasury, county treasurer may not later pay out any part of same to informer, even though judgment of court imposing fine ordered such payment, without informer filing claim against county and same being allowed in usual manner.

March 24, 1938.

EDMUND H. DRAGER,

District Attorney,

Eagle River, Wisconsin.

You direct our attention to sec. 353.24, Stats., and ask whether a person who is a deputy sheriff or constable may receive an informer's fee under said section.

Sec. 353.24 provides:

"On conviction of any person for any offense in respect to bribery, forgery, counterfeiting, gambling, houses of ill fame, obscene literature, game and fish, in case the whole or any part of the sentence shall be a fine, a part of such fine when paid may be awarded to the person or persons who informed against and prosecuted any such offender to conviction, in the discretion of the court, but no part of such fine shall be paid to any public officer whose duty it is to inform against or prosecute such offender."

This section specifically provides:

“* * * no part of such fine shall be paid to any public officer whose duty it is to inform against or prosecute such offender.”

In view of the above quoted language, a deputy sheriff or constable making an arrest is not entitled to an informer's fee.

You further state that a person was convicted of a misdemeanor for violation of the conservation laws. A fine was imposed and in default of the payment of same, the defendant was committed to jail. While in jail, the fine and costs were paid to the sheriff, who in turn paid such money into the county treasury. At the time of the conviction the justice had ordered that a third of the fine be paid to the informer.

You ask if the county treasurer under such circumstances must pay this informer's fee in accordance with the instructions of the justice.

The justice had authority to order that a third of any fine imposed upon the accused be paid to any informer by sec. 353.24, Stats., quoted above. Thus had the fine been paid upon conviction, one-third of such fine should have been paid to the informer and two-thirds paid into the county treasury. As a matter of fact, in the present case the entire fine was paid into the county treasury. As the money has already been paid into the county treasury, the county treasurer is probably without authority to reimburse the informer without such informer filing a claim against the county and the same being approved or disapproved in the usual manner. There would appear to be no reason why the county board should not allow such claim, as the judgment of the justice ordered a portion of the fine to be paid to the informer. The money has now reached the county treasurer through inadvertence and it would seem that the mistake may be rectified as above suggested.

NSB
JEM

Corporations — Securities Law — Under sec. 189.21, subsec. (3), Stats., only expenses which may be collected are those arising out of examination made to determine whether application for registration of securities is to be accepted or where it is made to determine whether dealer or agent is to be licensed or where it is made in connection with revocation of suspension order.

March 25, 1938.

BANKING COMMISSION.

Our attention is called to the first sentence of subsec. (3) of sec. 189.21, Stats., which reads as follows:

“The expense reasonably attributable to any examination or investigation, including any inspection, appraisal, or audit of any application for registration of securities or for any dealer’s or agent’s license or for revocation of any order of suspension issued under sections 189.03, 189.04 and 189.05 shall be borne by the applicant. * * *”

In this connection you inquire whether the expense for any examination or investigation may be charged to the applicant where the examination is deemed necessary because of the violation or suspected violation of the conditions of an order, license, or statute.

The only expenses which may be collected are those arising out of an examination made to determine whether an application for registration of securities is to be accepted, or where it is made to determine whether a dealer or agent is to be licensed, or where it is made in connection with the revocation of any order of suspension issued under secs. 189.03, 189.04, and 189.05, Stats.

The word “including,” contained in the part of the statute above quoted, has received frequent judicial construction. In some cases it has been interpreted as a word of enlargement or as being equivalent to “also.” *Achelis v. Musgrove*, 101 S. 670, 672, 212 Ala. 47; *United States v. Pierce*, 147 Fed. 199. In other cases it has been treated as being synonymous with “comprising,” “comprehending,” or “embracing.” *Blanck v. Pioneer Mining Co.*, 159 Pac. 1077, 1079 (Wash.); *Miller et al. v. Johnston et al.*, 91 S. E. 593, 597, 173 N. C. 62.

In determining whether the word "including" is used as one of enlargement or as a word of limitation, confining the application to the cases enumerated, we must look to the intent of the legislature as gleaned from the context of the statute as a whole.

By the provisions of sec. 189.14, subsec. (10), Stats., the commission may appoint agents and hold hearings when there is any suspected violation of the securities law. Witnesses may be subpoenaed and depositions taken. This section provides that witness fees and the cost of depositions are to be paid from the "securities regulation appropriation." If the legislature had intended that the cost of examinations and hearing to suspend a license should be borne by the one investigated, it seems that sec. 189.14, subsec. (10), would have been the section chosen to contain such a provision. However, this section contains only the provision that witness fees and depositions are to be paid out of the securities regulation appropriation.

It is interesting to note that sec. 196.85, Stats., contains lengthy and detailed provisions for the collection of expenses arising out of an investigation of utilities. The expenses which may be assessed to a public utility are limited to four-fifths of one per cent of the gross operating revenue and a method of appeal is provided where the utility deems the expense of the examination to be excessive. Sec. 196.85 (4), Stats. Sec. 196.85, subsec. (3), Stats., provides for the collection of the costs of an examination by levying on the property of the utility in the event it fails to pay within ten days from the receipt of the bill.

Sec. 189.21, Stats., contains no provision as to an appeal to the commission from the taxing of expenses of an examination and the only provision for the collecting of such an item is that contained in sec. 189.21 (3), which provides that no securities shall be registered and no dealer's or agent's license shall be issued until the expense reasonably attributable thereto shall be paid. If it were the intention of the legislature to permit the assessment of costs of any examination to determine whether a dealer or agent has violated the provisions of ch. 189, a more detailed provision would doubtless have been made as to the time when the bill should be rendered, when it should be paid, the method of appeal, and the method of collection in the event of failure to pay.

Secondly, you inquire whether the expense of holding hearings in your offices pursuant to complaints of investors may be charged to such applicant.

This question is covered by the answer to your first question, and we are of the opinion that the cost of such a hearing cannot be charged against the applicant.

Thirdly, you inquire as to the bearing of the cost of an examination made to ascertain the financial condition of the applicant and for examination of exhibits submitted pursuant to conditions in the order of registration or dealer's or agent's license.

If such an examination or investigation is made to determine whether a security should be registered or whether a dealer or agent should be licensed, such costs are clearly to be borne by the applicant under the provisions of sec. 189.21 (3). However, if such examination is made subsequent to the issuing of the license or the registering of securities and is not made in connection with an investigation to determine whether an order of suspension under secs. 189.03, 189.04 or 189.05 should be revoked, it cannot be assessed to the applicant in view of the discussion given in answering your first question.

WHR

Public Officers — District Attorney — Taxation — It is not duty of district attorney to represent towns, cities and villages in actions started under provisions of sec. 70.20, Stats.

March 25, 1938.

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

You ask whether it is the duty of the district attorney to prosecute actions to collect on personal property under the

provisions of sec. 70.20 of the statutes when such action is instituted by the town, village or city treasurers, or whether it is the duty of the district attorney merely to prosecute actions to collect taxes under the provisions of ch. 74 of the statutes.

Sec. 70.20, Stats., provides that an action to collect personal property taxes assessed to some person in charge or possession thereof, other than the owner, may be brought in the name of the town, city or village in which such assessment is made, if such action is commenced before the time fixed by law for the return of delinquent taxes. You will note that this is not a statute covering the collection of delinquent personal property taxes but deals only with a situation where one other than the owner is in possession of the property and for which tax both the owner and the person so in possession are liable. The statute simply grants the municipality the right, but does not impose a duty, to start an action to recover such taxes. The county as such has no interest in the action.

As it is not the duty of the district attorney to represent the various municipalities within his county, you are advised that it is not your duty to appear in behalf of a municipality in such an action.

Sec. 74.12, Stats., provides for a uniform procedure for the collection of all delinquent personal property taxes after the same have been returned to the county as delinquent and said section specifically provides that it is the duty of the district attorney upon request to attend and prosecute any action commenced under said section.

NSB

AGH

Indigent, Insane, etc. — Poor Relief — Legal Settlement
— One employed on federal works progress administration project can neither gain nor lose legal settlement while so employed.

March 25, 1938.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

You state that M, who had a legal settlement in the town of W, Price county, moved to the town of H in said county on July 6, 1935, and that he has continuously resided in the town of H until the present time. You give the following employment and relief history for M:

M resided in the town of W from 1929 to July 6, 1935, and was self-supporting during all of said time; from July 6, 1935 to October —, 1935, he resided in the town of H and was self-supporting; from October —, 1935 to January 1, 1936, he resided in the town of H and received some relief from the county; from January 1, 1936 to July 25, 1936, he resided in the town of H and was employed on a federal works progress administration project; from July 25, 1936 to September 1, 1936, he resided in the town of H and was self-supporting; from September 1, 1936 to March 15, 1937, he resided in the town of H and was employed on a federal works progress administration project; from March 15, 1937 to May —, 1937, he resided in the town of H and was self-supporting; from May —, 1937 to July —, 1937, he resided in the town of H and received relief from the county; from July —, 1937 to the present time he resided in the town of H and has received relief from the town of H.

You also state that on August 1, 1937, the unit system of relief was inaugurated in Price county.

You ask whether M now has his legal settlement in the town of W, the town of H, or whether he is a transient pauper and properly a county-at-large charge.

Subsec. (4), sec. 49.02, Stats. 1935, 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. * * *”

Subsec. (7), sec. 49.02, which deals with loss of a legal settlement, reads as follows :

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

The supreme court of the state of Wisconsin has held that the voluntary and uninterrupted absence referred to in the above quoted section of the statutes means a voluntary and uninterrupted absence while not being supported as a poor person in need of and receiving public relief. *Town of Scott v. Town of Clayton*, 51 Wis. 185, 191. *Town of Saukville v. Town of Grafton*, 68 Wis. 192. The legislature, by ch. 527, Laws 1935, has also determined that persons employed on a federal works progress administration project may not gain a new legal residence while so employed.

It follows that M, not having been absent from the town of W for a period of one full year while not being supported as a pauper or employed on a federal works progress administration project, has not lost his legal settlement in the town of W and said town is responsible for his support.

NSB

AGH

Banks and Banking — Mutual Savings Banks — Corporations — Securities Law — Salesmen for mutual savings bank organized under ch. 222, Stats., do not come within exception of sec. 189.02, subsec. (1), Stats., as amended by ch. 144, Laws 1937, and should be licensed under securities law, ch. 189, Stats.

March 26, 1938.

BANKING DEPARTMENT,

Banking Commission.

Ch. 144, Laws 1937, amends sec. 189.02, subsec. (1), Stats., so as to now provide that any person licensed by the banking commission pursuant to sec. 215.45 (1), Stats., or to any other statute requiring the licensing of agents of businesses under the supervision of the banking department is not required to be licensed by the securities division of the public service commission. In all probability this amendment was enacted to prevent the duplication of licenses. It has been suggested that persons acting as salesmen for a certain mutual savings bank organized under ch. 222, Stats., should not be licensed by the securities division under the securities law, ch. 189, Stats., but should be licensed by the banking department under sec. 215.45, Stats., or by the banking commission in its supervisory capacity over banking institutions as such.

Our opinion is requested as to whether such salesmen of said bank should be licensed under the securities law or whether they should be licensed by the banking department in its capacity as the supervisory and regulatory body of banking institutions.

Sec. 189.02, subsec. (1), Stats., as amended by ch. 144, Laws 1937, provides:

“ ‘Agent’ includes every natural person who in this state for compensation represents or acts for another with authority in the sale of any security except securities exempted by paragraph (a) of subsection (1) of section 189.03 but does not include any executor, administrator, guardian, or any other officer of the court making any sale under the provisions of subsection (8) of section 189.05, or

any pledgee who sells under the provisions of subsection (9) of section 189.05, or any person whose dealings in securities are limited to those sales exempted by subsections (4) and (5) of section 189.05, or any person licensed by the banking commission pursuant to subsection (1) of section 215.45 or pursuant to any other statute requiring the licensing of agents selling securities issued by any bank, building and loan association or other corporation while under supervision and regulation of the banking department and while acting exclusively for such bank, building and loan association or other corporation as an agent for the distribution of such securities."

The express wording of this statute requires that all persons selling securities in the state be licensed under ch. 189 Stats., the securities law, except those persons licensed pursuant to sec. 215.45, Stats., and persons required by any other statute to be licensed by the banking commission to sell securities issued by a bank, building and loan association, or other company which is under the supervision and regulation of the banking department in its capacity as a regulatory body of banking institutions.

The salesmen for the mutual savings bank mentioned do not come within the purview of sec. 215.45, Stats. Accordingly, they will not be licensed by the banking commission in its supervisory and regulatory capacity over banking institutions unless there is some other statute which requires such persons to be licensed by the banking department in that capacity. We find no statute which requires the banking department in its supervisory and regulatory capacity of banking institutions to license such salesmen nor is any such statute called to our attention. In the absence of such statute such persons thus do not come within the exceptions of the provisions of sec. 189.02 (1).

It is therefore our opinion that persons acting as salesmen for a mutual savings bank organized under ch. 222, Stats., do not come within the exception of sec. 189.02 (1), Stats., as amended by ch. 144, Laws 1937, and that accordingly such persons must obtain a license under the securities law, ch. 189, Stats.

NSB
HHP

Appropriations and Expenditures — Counties — County Board — Under sec. 59.06, subsec. (2), par. (b), Stats., county board may by two-thirds vote increase number of days for which compensation and mileage may be paid committee members subsequently to holding of additional committee meetings.

March 29, 1938.

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

You state that the members of a certain county board committee served approximately sixty days during one year without previous authorization by a two-thirds vote of the board, and you inquire whether under sec. 59.06, subsec. (2), par. (b), Stats., the authorization may be made after the services have been rendered.

Sec. 59.06, subsec. (2), Stats., provides in part:

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

“(b) In other counties, to thirty days in the aggregate for services on one or more committees, except that the county board of such county may, by a two-thirds vote of the members present, if it deems it necessary to expedite and properly conduct the business of the county, increase the number of days for which compensation and mileage may be paid a committee member in any one year and fix the compensation for each additional day actually served.”

There is nothing in the wording of the above statute that compels one interpretation to the exclusion of the other. The words “may * * * if it deems it necessary to expedite and properly conduct the business of the county, increase the number of days for which compensation * * * may be paid” give the statute a prospective cast, and taken alone would indicate that the matter is to be deliberated in advance of the rendition of the extra services.

However, the use of the words "for each additional day actually served" places the rendering of the services in the past tense and indicates that the decision of the county board is to be made after the extra services are rendered.

Thus, the statute is open to either construction, and it becomes necessary to approach the problem with a view to discovering the legislative intent if possible.

Prior to the enactment of ch. 236, Laws 1935, the thirty day limitation was absolute. The reason for permitting the increase in the discretion of the board by a two-thirds vote undoubtedly resulted from the fact that county business in recent years has so increased that the county board committees were unable to take care of the work within the thirty day limitation. Thus, it was necessary to allow either additional days for meeting or to have the affairs of the county suffer from inattention. The requirement of a two-thirds vote was undoubtedly inserted as a safeguard against abuses of the privilege of holding additional meetings.

If the approval of the board is required prior to the time of holding the additional committee meetings, county business might suffer serious neglect in the meantime, and the cost of calling a county board meeting for the purpose of approving additional committee meetings would be entirely out of proportion to the compensation and mileage involved in paying the committee members for the meeting in question. This would be an unreasonable result, and since a reasonable, rather than an unreasonable, construction is to be preferred, and having in mind the circumstances intended to be corrected by the 1935 amendment, we conclude that the county board authorization for additional committee meetings under sec. 59.06 (2) (b), Stats., may be granted subsequently to the holding of such extra meetings.

WHR

Indigent, Insane, etc. — Poor Relief — Legal Settlement
— Support given family of man legally responsible for same constitutes support to husband so as to prevent gaining of legal settlement, even though such husband may be residing apart from his family. XXII Op. Atty. Gen. 128 is discussed and modified.

March 30, 1938.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

Our attention is directed to a digest of decisions issued by the industrial commission relating to legal settlement and particularly to one holding:

“ ‘Relief given to a child with knowledge of its parent will constitute support to parent so as to prevent parent gaining or losing a settlement.’ Milwaukee County vs. Dane County (Dalle).”

In connection with the above you refer to XXII Op. Atty. Gen. 128, where this department held that a husband living apart from his family may gain a legal settlement even though his family is receiving support during that period.

You then ask for a review of this opinion.

The opinion in XXII Op. Atty. Gen. 128 did not consider the duty of a husband to support his wife and children. We believe this element is important as such support if not furnished by the husband must be supplied by the poor relief authorities. Aid granted the family of a man liable for their support would, in our opinion, constitute support to such man within the meaning of sec. 49.02, (4), Stats., so as to prevent the gaining of a legal settlement. This, of course, would only be true if the husband was legally responsible for such care as the public would only be taking his place if he was actually liable for the care given.

It is well settled that a husband is liable for the support of his wife. *Estate of Simonson*, 164 Wis. 590, 594; *Szumski v. Szumski*, 223 Wis. 500, 502; 13 R. C. L. 1188, 1204; Madden, *Persons & Domestic Relations*, pp. 180, 181. Such liability

also extends to his children. *Adams v. State*, 164 Wis. 223; 75 A. L. R. 1314; 20 R. C. L. 622; Madden, *Persons and Domestic Relations*, p. 384. This duty makes him liable for any necessities such as food and clothing or medical care supplied his wife or children. *Estate of Phalen*, 197 Wis. 336, 339; *Grasser v. Anderson*, 224 Wis. 654, 663. The general rule as to this liability is stated as follows in 13 R. C. L. at p. 1204:

“The fact that the spouses are living separate and apart does not necessarily relieve the husband from liability for necessities furnished her; his liability in such a case is dependent on the circumstances and causes of the separation. If she is in no wise responsible therefor he may be liable, it being the duty of a husband to supply his wife with proper support and maintenance. But it would be otherwise if she were the culpable cause of the separation, as no general duty is imposed on a husband to support his wife otherwise than at the common home. * * *”

Recovery for necessities supplied by public authorities may be had the same as though the same were supplied by some individual. *Hanover v. Turner*, 14 Mass. 227; 13 R. C. L. 1200. Thus, public relief authorities are placed in the same category as a private individual when supplying the necessities to a family whose husband is legally responsible for their care.

This rule has been followed and adopted by our supreme court in the case of *Morganroth v. Spencer*, 124 Wis. 564, 567.

The husband's duty to support his wife and children is recognized by secs. 49.02 (1), Stats., providing that a wife's settlement shall follow and be that of the husband, and sec. 49.11, specifically making a husband liable for the support of his wife and children.

In construing a statute almost identical to sec. 49.02 subs. (2) and (4), Stats., the North Dakota supreme court held that relief granted for the support of an indigent father's children constitutes support of the father even though he uses no part of the money for himself. *State v. Kambitz*, (N. D.) 258 N. W. 116. The court said at p. 117:

“Receiving aid under the poor relief law is not confined to the aid for the support of the father himself personally. Support furnished to him for his family is aid to the pauper himself. Hence it is immaterial where the father physically resided so far as the support of his children is concerned. * * *.”

What was said in this case we believe is equally applicable under the Wisconsin statutes.

It is therefore our opinion that relief granted the wife and children of a man legally liable for their support constitutes the furnishing of relief to such man within the meaning of the statute and hence prevents the gaining of a legal settlement. However, this would not be true where the husband is not legally responsible for such care. Under such circumstances aid furnished a wife and children would not constitute support to the husband and father within the meaning of sec. 49.02 (4), Stats. The opinion in XXII Op. Atty. Gen. 128 is modified to conform to the rule set out above.

WHR

Taxation — Taxes — Intake pipe extending into Lake Michigan from pumping house located on shore is taxable where pumping house is located.

March 30, 1938.

TAX COMMISSION.

You state that in the city of Manitowoc a certain company has constructed a pumping house on leased land. In connection with the pumping house a twenty-four inch intake pipe extends some four thousand feet into Lake Michigan, and you inquire whether the city assessor of the city of Manitowoc has power to assess this piping which extends beyond the city limits.

Under art. II of the Wisconsin constitution the eastern boundary of the state extends to a line in the center of Lake

Michigan, and under sec. 2.01, Stats. 1937, the eastern boundary of Manitowoc county conforms to the eastern boundary of the state of Wisconsin. According to the boundary of the city of Manitowoc the city's boundary conforms to the shore line of Lake Michigan. Thus the intake pipe extends some four thousand feet beyond the city limits.

The pipe in question is clearly subject to taxation. Sec. 70.01, Stats., provides that all general property in the state is subject to taxation except such as is specifically exempted therefrom. As to the place where property is to be assessed, sec. 70.12, Stats., provides that real property shall be entered on the assessment roll in the assessment district where it lies. Under sec. 70.13 personal property is to be assessed in the assessment district "where the same is located or customarily kept except as otherwise specifically provided."

It is our opinion that, since the intake pipe is an integral part of the pumping house, its situs for taxation purposes is the same as that of the pumping station, which is in the city of Manitowoc. This conclusion is supported by the case of *Joplin Waterworks Co. v. Jasper Co. et al.*, (Mo. 1931) 38 S. W. (2d) 1068. In that case a pumping station located in county A pumped water from a creek through pipes to a reservoir located in county B. It was held that county A could tax the pipes which extended into county B. The following cases are in accord: *State v. Harnsberger*, 322 Mo. 94, 104, 14 S. W. (2d) 554; *Appeal of Des Moines Water Co.*, 48 Ia. 324; *Oskaloosa Water Co. v. Board of Equalization*, 84 Ia. 407, 51 N. W. 18. See also 61 C. J. 550. There is, however, some authority to the contrary. See *Inhabitants of Paris v. Norway Water Co.*, (Me. 1893) 27 Atl. 143. The intake pipes so closely appertain to the pumping house that a conveyance of the pumping station without express inclusion of the intake pipe would probably transfer title to the pipes. See 26 C. J. 724, and also *Blain v. Corbin*, (Ga. 1935) 180 S. E. 854, holding that a pump and pipes located on lot two and used to supply water to lot one passed with a conveyance of lot one.

Our answer to this question in the affirmative makes unnecessary any answer to your second question which is hypothesized upon a negative answer to the first question.

WHR

Elections — Fish and Game — Hunting Licenses — Marriage — Marriage Licenses — Public Officers — County clerk is not authorized to charge fee for administering oath to applicant for marriage or hunting license.

County board may not require county clerk to render notarial services in matters unconnected with county business, but if such services are rendered and fees are collected they belong to county.

Sec. 326.02, subsec. (2), Stats., does not prohibit charging of fee for administering oath under sec. 5.05, subsec. (5), par. (b), Stats.

March 31, 1938.

LYALL T. BEGGS,

District Attorney,

Madison, Wisconsin.

You have requested our opinion upon several questions, which will be stated and considered separately.

1. May the county clerk charge a fee for administering an oath to the applicant for a marriage license or a hunting license?

It has been held in two opinions of this office that a county clerk cannot charge for administering an oath to an applicant for a marriage license or a hunting license. 1 Op. Atty. Gen. 287, VII Op. Atty. Gen. 561. The reason for such a holding is that the legislature has specifically stated the amount that may be charged for a marriage license and a hunting license. The fee charged for a hunting license is one dollar, of which the county clerk may retain ten per cent. See sec. 29.09, subsec. (7) and sec. 29.10, Stats. For a marriage license the county clerk is allowed a fee of fifty cents which becomes a part of the funds of the county. Sec. 245.38, Stats. Since the legislature has seen fit to set the fees for marriage and hunting licenses, these fees are exclusive and no additional fees may be changed.

It should also be noted that in the case of *Gregory v. Milwaukee County*, 186 Wis. 235 (1925), the court suggested at

p. 238 that in order to expedite business and prevent delay the county clerk must, of necessity, aid the applicants by assisting them in filling out blanks and by administering oaths and that this work is practically a necessary incident to the duty of issuing the licenses.

2. Must the county clerk make such a charge?

This question is answered in the negative upon the basis of the answer to the first question.

3. Has the county board the power to require the county clerk to make such a charge where the county clerk is on salary in lieu of fees?

The answer to the first question likewise necessitates a negative answer to this question.

4. Can the clerk be required by the county board to administer an oath as notary public in all cases where he is not required to do so as county clerk and collect and retain in behalf of the county the statutory fees therefor?

If the county clerk earns notarial fees during office hours, such fees must be turned over to the county in accordance with the holding in the case of *Gregory v. Milwaukee County, supra*. It was also suggested in the *Gregory* case that if the administering of an oath or the performance of similar notarial services is merely incidental to other duties required of the county clerk, the clerk may be required to perform such services.

However, in cases where the administering of an oath is unconnected with county business, we do not believe the county clerk can be compelled to administer such an oath as notary and retain on behalf of the county the statutory fee.

In this connection it must be remembered that the county board has only such powers as are delegated to it by the legislature or such implied powers as are necessary to carry out the expressed powers. *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798. We are unable to find any legislative enactment which would require county clerks to administer oaths as notaries and collect and retain on behalf of the

county the statutory fees. In certain instances a statutory duty is imposed upon the county clerk to administer oaths and to collect certain fees. See, for instance, sec. 59.17, subsec. (14), Stats. However, in the absence of a statute the county board is without power to compel the clerk to administer an oath when such oath is not incidental to county business.

We therefore conclude that a county clerk may not be compelled to administer oaths as a notary and to retain for the county the statutory fees.

5. You have called our attention to sec. 5.05, subsec. (5), par. (b), Stats., which requires the affidavit of the circulator on certain nomination papers. You then point out sec. 326.02, subsec. (2), Stats., which prohibits payment of fees in certain instances. On the basis of these two statutes, you inquire whether sec. 326.02, (2), Stats., prohibits a charge by the officer administering the oath to one who has circulated nomination papers.

Sec. 326.02, subsec. (2), Stats., reads as follows :

“No fee shall be charged by any officer for administering or certifying any official oath, or any oath to any person relative to his right to be registered or to vote.”

We believe that the affidavit required of those circulating nomination papers is not an oath relative to the right of any person to be registered or to vote and therefore a charge may be made for such an affidavit. The oaths which must be administered free of charge are those which may in certain instances be required as a condition precedent to the right to register or to the right to vote. Thus, sec. 6.53, Stats., requires challenged voters to take an oath, and sec. 6.22, (1) (g) provides that persons unable to read or physically disabled from marking the ballot may be assisted and that the presiding officer may administer an oath in his discretion as to such person's disability. These are the types of situations intended to be governed by sec. 326.02, subsec. (2), Stats.

WHR

Criminal Law — Gambling — Lotteries — Bank night as operated, allowing persons who have not purchased admission tickets to join in plan, is in violation of sec. 348.01, Stats.

March 31, 1938.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You state that "bank night" is being operated in certain cities in your county as follows:

All persons over eighteen years of age can register in the lobby for bank night free and they do not need a ticket to the theatre to be eligible for the prize. Notice to this effect is displayed outside the theatre and in the lobby and on the screen. The names of those who have registered are placed in a box, and a drawing is held on the stage of the theatre. Each name registered is given a number. These numbers are placed on tickets and are then placed in a box and, on the night of the drawing, one of the tickets is withdrawn from the box by an uninterested party; that number is then compared with the name in the register book, and the name of the person who has been assigned that number is entitled to the prize. It is required, however, that the prize winner claim the prize in the theatre within three minutes after the name has been ascertained. The party whose name has been drawn has his name called in the theatre, in the lobby, and on the outside of the theatre. The winning party is entitled to enter the theatre without paying an admission fee. If the prize is not claimed in the allotted time by the person whose name has been called, the prize is not paid, but an additional sum is added to the prize fund to be used at the next week's drawing.

You wish to be advised whether this method of operation violates the gambling or antilottery statutes of this state.

The legislature is prohibited from authorizing lotteries by art. IV, sec. 24 of the constitution. The legislature has acted affirmatively and prohibited lotteries by secs. 348.01 and 348.02, Stats.

Neither the constitution nor the statutes attempt to define a lottery. The generally accepted definition of a lottery is set forth in 38 C. J. 286-288, as follows:

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

This office has heretofore held, in XXVI Op. Atty. Gen. 143, that a similar scheme constituted a lottery where it was necessary for the persons to be present in the theatre, and where the prize would be given only to persons who had purchased an admission to the theatre. There the purchase of the ticket was held to clearly constitute the payment of a valuable consideration for the chance to obtain a prize.

The courts are not in agreement as to whether this new system of the operation of “bank night” is in violation of antilottery and antigambling statutes. All courts are agreed that there must be three elements to constitute an offense under the statutes, namely, (1) consideration, (2) a prize, and (3) the element of chance. All courts are agreed that the latter two elements, “prize” and “chance,” are present in this scheme or device. They are in conflict as to whether the third element of “consideration” is present. That question is an open one in this state. The authorities are collected in A. L. R. notes as follows: 48 A. L. R. 1115, 57 A. L. R. 424, 103 A. L. R. 866, and 109 A. L. R. 709. See also 1 American Lawyer (September, 1937) 5 for a full review of the authorities on both sides of the question. See also *State of Vermont v. Wilson*, (Feb. 1, 1938) — Vt. —, 196 Atl. 757.

Those courts that have given judicial sanction to this particular system of the operation of bank night as a legal device have approached the problem from the angle of the individual participants and those that have not given judicial sanction to it have approached the problem by looking at the system or device as a whole. Those courts that have approved the legality of this system reason that a person in attendance at the show pays only that which he would have

to pay to see the show; that he has no opportunity to win the prize, which is greater than those on the outside who have paid no admission fee, and that, therefore, such person has paid nothing for the privilege of participating in the drawing.

Such reasoning has not appealed to those courts which take the opposite view. They hold that such reasoning ignores the reality of the situation, and that there is a consideration passing from all of the participants to the operator of the theatre, which they otherwise would not have enjoyed. They point out that such a system creates increased attendance at the theatre and therefore increases the gross proceeds to the owner thereof. They hold that increased attendance and, therefore, increased receipts are inseparably connected with and form the real consideration for "bank night."

In *State v. Fox Kansas Theatre Co.*, 62 Pac. (2d) 929, 144 Kan. 687, 109 A. L. R. 698, the court says, p. 933:

"* * * Defendant insists that these entire receipts are for the theater entertainment and not a penny of it is for the chance afforded those of the theater patrons who register. This does not seem to be a very consistent position, that there is no consideration for the chance paid by any one and yet the plan increases the gross receipts.

"Can it be possible that this intricate plan and proceeding was invented to evade a danger point? Why pursue this long and circuitous route of registering and other requirements if the money paid by the attendant was not a consideration? * * *."

The court in the Kansas case concluded that the benefit under the "bank night" plan in the way of increased gross receipts for paid admissions is sufficient consideration, coming directly or indirectly from those entitled to the chances generally, to meet the third element of the definition of a lottery.

We have been favored with a pamphlet entitled a "Script, synopsis, rules and instructions of bank night," copyrighted by Affiliated Enterprises, Inc., Denver, Colorado. We quote therefrom:

“* * * No one is permitted to register twice, and you must impress upon the public, even though they have registered in June and it is now December, their names are still in the container, and they are each and every week a part of the possibilities of the award. * * *

“* * *
“If the person, whose name has been selected to receive the Bank Account, does not claim the same within the allotted time, be sure to make this announcement:

“Inasmuch as Mr. (or Mrs) ----- was unfortunate as not to have claimed the award within the time allowed, this Bank Account will be carried over until the next Bank Night, which will be held on ----- night at approximately this same time, and an additional \$----- will be deposited in the Bank Account, making a total of \$----- to be offered next week. In the event you do not now understand the rules of Bank Night, any employee of this theatre will gladly explain same to you.”

“Bank night” is explained in the script as an advertising stimulant. It seems perfectly apparent that the advertising stimulant has relation to the size of the prize that is offered. The conclusion would seem to be inescapable that the patrons drawn to the theatre in the hope of gaining the prize money collectively furnish the prize money itself as well as a profit to the proprietor. This consideration arises as an inseparable incident to increased attendance.

It is claimed by the copyright owners of “Bank night” that because those on the outside of the theatre are permitted to register and participate in the drawing without purchasing an admission ticket they, therefore, give no consideration. In our opinion it is unnecessary to determine whether such participants have given a consideration. Those who entered the theatre to attend the show have given a consideration. That which is a lottery does not cease to be a lottery merely because some of the participants have not given a consideration.

“A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances * * *.”
Commonwealth v. Wall, (Mass.) 3 N. E. (2d) 28, 30, citing *Glover v. Malloska*, 213 N. W. 107, 108, 238 Mich. 216, 219, 52 A. L. R. 77, 78; *State v. Eames*, 183 A. 590, 592, 87 N. H. 477; *State v. Danz*, 250 Pac. 37, 140 Wash. 546, 48 A. L. R. 1109.

In the case of *State of Vermont v. Wilson*, decided by the supreme court of Vermont in January, 1938, the court, after reviewing all of the decisions of the various courts of this country on this subject, rendered what appears to be a very well reasoned opinion, and found that the element of consideration was present both as to those on the inside and those on the outside of the theatre. However, we have heretofore pointed out that the giving of a consideration by those on the outside of the theatre, who do not purchase an admission ticket, is immaterial, because a lottery does not cease to be such merely because some of the participants have failed to give a consideration. For this reason we do not deem it necessary to pass upon this feature of the case, as was done by the supreme court of Vermont.

In view of the foregoing, it is our opinion that the plan of bank night, as outlined by you, contains all of the elements of a lottery, and that the operation thereof would constitute a violation of sec. 348.01, Stats.

OSL
LEV
NSB

Elections — Public Officers — Election Inspectors — XXVI Op. Atty. Gen. 459, holding that under ch. 423, Laws 1937, which repealed and recreated 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, is reconsidered and reaffirmed.

March 31, 1938.

THEODORE DAMMANN,
Secretary of State.

You have asked us to reconsider our opinion of October 9, 1937 (XXVI Op. Atty. Gen. 459), interpreting ch. 423, Laws 1937, which chapter repealed and recreated sec. 6.32, subsec. (4), par. (f), Stats., and reads:

"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."

This act relates, of course, to vacancies among the election inspectors, clerks of election and ballot clerks provided for in sec. 6.32 (1), Stats. Under the provisions of sec. 6.32 (4) (f), as it appeared in the 1935 statutes, emergency vacancies among such officers were filled by appointment by the inspectors and in default thereof by the electors present at the polling place by viva voce vote. Permanent vacancies were filled as provided for in the general statutes, 17.23 (1) (d) and 17.24 (2), viz., by appointment by the council in the case of cities and by the board in the case of villages in the same manner as original appointments are made.

The opinion dated October 9, 1937, interpreted the 1937 act to cast the power and the duty of filling all vacancies in such offices, of whatever nature, upon the city clerk in the case of cities and upon the village clerk in the case of villages, while leaving the power of original appointment where it was by virtue of sec. 6.32, (4) (a), Stats.

On re-examination of the question we see no reason to depart from the conclusions stated in the former opinion. The meaning of a statute must be obtained first of all from the language used. Where that is clear, there is no room for construction. *Gilbert v. Dutruit, et al.*, 91 Wis. 661, 65 N. W. 511; *State ex rel. Weller v. Hinkel*, 136 Wis. 66, 116 N. W. 639. Note the language used:

"If at any time there shall be a vacancy caused by the candidacy, sickness, or from any other cause * * * such vacancy shall be filled by the city or village clerk * * *"

What constitutes a vacancy is clearly set forth in sec. 17.03, Stats.

You have asked several questions to be answered in case we should find it necessary to adhere to the position taken in the opinion of October 9. These questions will be stated and answered separately.

1. When does jurisdiction to fill permanent vacancies pass from the council and village board to the city and village clerks?

Jurisdiction of the council of cities to fill permanent vacancies in these positions was formerly to be found in secs. 17.23 (1) (c) and 17.23 (2) (c), Stats.; that of the boards of villages, in sec. 17.24 (2), Stats. These statutes are general, apply to vacancies in all appointive offices. Sec. 6.32, subsec. (4) (f) is a specific statute, relating to a particular class of appointive officers. Under a familiar rule of construction, in so far as sec. 6.32, subsec. (4) (f) is repugnant to secs. 17.23 (1) (d), 17.23 (2) (c) and 17.24 (2), it constitutes an exception to them. *Western Bank of Scotland v. Tallman*, 17 Wis. 530; *State ex rel. De Forest v. Hobe*, 124 Wis. 8, 102 N. W. 350.

Therefore the councils and boards no longer have jurisdiction to fill the vacancies provided for in sec. 6.32 (4) (f), Stats., and such jurisdiction can be said to have passed to the city clerks and town clerks on July 17, 1937, the effective date of ch. 423, Laws 1937.

2. Seeing that the council makes all original *appointments* in the first instance, does its jurisdiction cease as to any office when some original appointee for that office has qualified? Should any appointee die, remove or decline before qualification, would there be a permanent vacancy to be filled by the clerk, or would there be merely another appointment to be made by the original appointing power?

An answer to the first part of this question is rendered unnecessary by the answer to question 1.

As to the second part, see sec. 6.32, subsec. (4) (d), Stats., which reads:

“The persons so appointed inspectors, clerks and ballot clerks shall hold their offices for two years and until their successors are appointed *and qualified* * * *.”

Sec. 6.32, subsec. (4) (g), Stats., provides that the appointee must qualify by filing his oath with the city clerk or town clerk within ten days after notice of appointment. Should he fail to do so the former incumbent holds over under the terms of the above quoted section.

If, for any reason listed in sec. 17.03, Stats., the hold over is unable to serve, a vacancy then exists which can be filled by the city clerk or village clerk. But in either of these events the official would serve only until the council or board should make another original appointment and the appointee should qualify. While sec. 6.32 (4) (a) provides that the appointments be made at the first regular meeting of the council or board in February of each general election year, or at a special meeting called by the mayor or president of the board for such purpose on the last Tuesday in said month, such statutes are generally considered directory and come within the maxim "better late than never" as set forth in *State ex rel. Johnson v. Nye*, 148 Wis. 659; *State ex rel. Cothren v. Lean*, 9 Wis. 279; *Application of Clark*, 135 Wis. 437, 115 N. W. 387. In short, the council or board does not lose its power of appointment by reason of its first appointee's failure to qualify.

3. If the latter, would such jurisdiction of the council continue through the term of two years to be exercised in its discretion? If not, when will it lose jurisdiction? In XXI Op. Atty. Gen. 252, it is held, in effect, that the duty to make appointments is a continuing one until performed. Has chapter 423 of 1937 changed this?

Generally speaking, the jurisdiction of the council or board to make an original appointment exists until it has made an appointment and the appointee has qualified.

The distinction between jurisdiction to make original appointments and jurisdiction to fill vacancies must always be kept in mind. Strictly speaking, the council or board never loses jurisdiction to make original appointments, just as the city clerk and county clerk never lose jurisdiction to fill vacancies. In each case the question is: When can the power be exercised? In the case of the former it is at the expiration of the previous two year term, or as nearly thereafter as need be; in the case of the latter it is whenever a vacancy, as provided in sec. 17.03, Stats., occurs.

4. If the council fails to appoint, or if any of its appointees fail to qualify, or are unable to serve, and the former incumbents automatically take over the duties, will the jurisdiction of such incumbents and of the council continue until some one of its appointees qualifies for each office? If not, will the clerk in such cases also succeed to the original appointing power, as well as that of filling emergency vacancies? If so, we again wonder at what point the clerk gains such authority.

The answers to the previous questions, notably the answer to question 3, render answers to these questions unnecessary.
WHR

Indigent, Insane, etc. — Poor Relief — Wisconsin General Hospital — Treatment at Wisconsin general hospital at public expense of person or his family does not interfere with loss of legal settlement under sec. 49.02, subsec. (7), Stats. Person having no legal settlement must be cared for at expense of county in which he resides under sec. 49.04.

March 31, 1938.

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

You have presented a problem arising under ch. 49 of the statutes. Prior to 1931 one A, a married man with children, acquired a legal settlement in the city of Milwaukee. In May, 1931, he moved with his family to Y township, in La Fayette county, where they lived until November, 1931. On this last date they moved to Z township in La Fayette county, where they lived until March, 1932, at which time they moved to the city of Darlington in La Fayette county and continued to reside there until the present time. On February 4, 1932, Mrs. A was admitted to the Wisconsin general hospital to receive medical care as an indigent. She was discharged on February 6, 1932. She was readmitted to the hospital on

May 17, 1932, where she remained until her death on July 4, 1932.

It appears that from May, 1931, until December 15, 1932, the free medical care at the Wisconsin general hospital was the only public assistance given the family during that time. On December 15, 1932, the family received relief in the nature of furniture, groceries and clothing from the city of Darlington, which relief continued until September 10, 1935, when Mr. A was assigned to WPA work. He worked on WPA until March 6, 1937, when he entered the hospital for an operation. On March 12, 1937, the family again received direct relief from the city of Darlington.

You ask where Mr. A now has a legal settlement.

If, as we interpret the facts, Mr. A and his family during the period from May, 1931, until December 15, 1932, received no public aid other than the free hospitalization of his wife, he thereby lost his legal settlement in the city of Milwaukee by reason of his voluntary and uninterrupted absence therefrom for a period exceeding one year. Sec. 49.02, subsec. (7), Stats.

In former opinions in XXII Op. Atty. Gen. 665, XVIII 379, XIV 294, it has been held that a husband may acquire a legal settlement although his wife has been during the year receiving medical treatment in the Wisconsin general hospital at public expense. *Rolling v. Antigo*, (1933) 211 Wis. 220, 248 N. W. 119.

Since such medical treatment so furnished did not make the person a pauper within the meaning of sec. 49.02 (4), Stats., and would likewise not make him a pauper so as to prevent him from losing his residence by voluntary and uninterrupted absence from the city of Milwaukee, the absence during the time of receiving such medical assistance would be voluntary and uninterrupted. See sec. 49.02 (7), Stats.

The absence from the city of Milwaukee from May, 1931, to December, 1932, being for a period of more than a year, during which time the person was not a pauper under the provisions of sec. 49.02 (7), effected a loss of the legal settlement previously acquired in the city of Milwaukee. However, from the time of leaving Milwaukee in May, 1931, to the time of moving to Darlington, he had not remained in any one township long enough to acquire a legal settle-

ment as he had not resided in any town for the period of a year. See sec. 49.02 (4), Stats.

Ever since he moved to the city of Darlington he has either been a pauper or has worked for the WPA and, therefore, under sec. 49.02 (4) has not acquired a legal settlement in the city of Darlington, except that if between the 12th of March, 1937, and the date of this opinion he has continuously resided in the city of Darlington and a whole year has expired during which he has not received direct relief. For a very similar situation see XX Op. Atty Gen. 622.

It is therefore our opinion that Mr. A lost his legal residence in the city of Milwaukee prior to the time he received direct relief in La Fayette county; that he has not yet acquired a new legal residence since leaving Milwaukee, and that he is therefore a public charge of La Fayette county under sec. 49.04, (4) Stats.

HHP

Tuberculosis Sanatoriums—Nurses' home and fixtures appurtenant thereto constructed at county tuberculosis sanatorium come within purview of sec. 50.07, subsec. (2), par. (d), Stats.

April 1, 1938.

BOARD OF CONTROL.

You state that one of the counties is contemplating the construction of a nurses' home at its tuberculosis sanatorium and that the state board of control has been asked to approve of such construction under the provisions of sec. 50.07, subsec. (2), par. (d), Stats., which directs the board, in the determination of actual per capita cost to be charged by a tuberculosis sanatorium for state-at-large and other county patients, to include a sum to apply on the cost of new additions made to a sanatorium after January 1, 1937, such additions to be approved by the board as provided in sec. 46.17, Stats.

We are asked whether such a nurses' home and the machinery, equipment and furnishings will constitute an "addition" within the meaning of the above statute.

The word "addition" is defined in 1 C. J. S. 1455 as follows:

"Spatial or Structural Sense. It has been said that, while the word 'addition' in this sense, may have an indefinite meaning, it should be held to mean enlargement or extension, so as to include additional space. Specifically, as applied to buildings, the word usually means a part added, or joined, to a main building; but such is not the exclusive meaning of the word; a part added to a building, either by being built so as to form one architectural whole with it, or by being joined with it in some way, as by a passage, and used so that one is a necessary adjunct or appurtenance of the other, or so that both constitute in use and purpose one and the same building; * * *."

There is no great uniformity in the reported cases, and it is apparent that each case must be considered in the light of its own particular facts and the intent shown by the contract, policy or statute involved. *Agnew v. Sun Ins. Co.*, 167 Wis. 456, 167 N. W. 829. It has been held on several occa-

sions that there need not necessarily be a physical attachment of the addition to the main structure. *Meyerstein v. Great Amer. Ins. Co.*, 255 Pac. 220, 82 Cal. App. 131; *Taylor v. N. W. National Ins. Co.*, 167 Pac. 899, 34 Cal. App. 471; *Home Mutual Ins. Co. of Cal. v. Roe*, 71 Wis. 33, 36 N. W. 594.

In the present instance the intent of the legislature was, quite broadly, to encourage counties to establish facilities for the care of tubercular persons. XXVI Op. Atty. Gen. 412. The statute, in the words of the legislature, was intended "As an emergency measure to encourage the expansion and improvement of the *facilities* of county tuberculosis sanatoria." Any building or structure on the premises and in close proximity to the main structure, and which is properly incident to and which aids and facilitates in the functioning of the institution may be considered as being within the purview of sec. 50.07 (2) (d), Stats.

It is obvious that the proper functioning of a sanatorium requires an adequate staff of nurses who must have proper and convenient housing. We therefore conclude that such a structure should be considered as an integral part of the entire sanatorium unit and necessary to its operation as a complete plant.

The problem of machinery, equipment, fixtures and furnishings is much more difficult and is governed by the law of fixtures, since it is evident that the legislature had in mind "additions" to sanatorium buildings, rather than to the personal property used in connection therewith.

"A 'fixture' is a thing which, although originally a movable chattel, is, by reason of its annexation to land, regarded as a part of the land, partaking of its character.
* * * " 26 C. J. 651.

Obviously, furniture and unattached furnishings are not fixtures and therefore cannot be considered as "additions" to the building. The real difficulty arises in attempting to make a ruling with reference to machinery and equipment, and there is much uncertainty on the subject, arising partly out of the fact that it is to some extent a question of fact in each case. Also, the result on the same set of physical

facts may shift with the intent of the parties concerned and their relationship. For instance, as between vendor and vendee, mortgagor and mortgagee, and landlord and tenant, the rule may vary and decisions arising out of these various relationships are of little guidance to us here.

Aside from the intent and relationship of the parties, whether any particular item is a fixture depends upon whether it is actually annexed or appurtenant to the land, whether appropriate to the use thereof, and the mode of annexation. *Phelps v. Ayers*, 142 Wis. 442.

In the absence of specific information on these points as they relate to the machinery and equipment in question, we are unable to do more than state the above-mentioned general principles.

WHR

School Districts — Transportation of School Children —
Under sec. 40.34, subsec. (1), Stats., school district is not authorized to furnish transportation for children attending extra-curricular activities carried on with neighboring schools.

April 1, 1938.

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

You inquire whether a school district is authorized by statute to provide transportation of school children who voluntarily accept such transportation to and from school activities, such as athletic, musical, and forensic activities carried on with neighboring schools.

Sec. 40.34, subsec. (1), Stats., provides.

“The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district * * *.”

Sec. 40.16, subsec. (1), provides:

“Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district.”

Sec. 40.53, subsec. (1), provides:

“The school board shall have the powers and be charged with the duties of common school district boards as far as the same are not otherwise provided for or limited by statute.”

The question we must decide, then, is the extent of the powers granted by the foregoing statutes.

You will note that sec. 40.34, subsec. (1), Stats., allows the school district meeting to provide transportation for all children in the district, but it does not say to what places or for what purposes the transportation may be provided. Perhaps the best approach to this problem is to investigate the past history of this section.

Ch. 441, Laws 1917, created a new section of the statutes, numbered 430-1, subsec. 2, providing:

“It shall be lawful for the electors of any school district to authorize the district board to provide for transportation to and from school for any and all children of school age residing in the district for whom transportation is not required by law. * * *.”

By ch. 578, sec. 2, Laws 1917, sec. 430-1, subsec. 2, Stats., was renumbered to be sec. 40.16, subsec. (1), par. (b). Then, by ch. 419, Laws 1923, sec. 40.16 was repealed and re-enacted and then read:

“The electors of any school district are empowered to authorize the district board to provide transportation to and from school for any or all of the children of school age residing in the district for whom transportation is not required by law.” Subsec. (1), par. (b), Stats. 1923.

By ch. 425, Laws 1927, entitled "An act to revise and codify chapters 39, 40, and 41 of the statutes relating to public schools, and various sections of the statutes relating to said subjects," sec. 40.16, subsec. (1), par. (b), was re-numbered and restated as sec. 40.34, subsec. (1), quoted above.

This is the form of the statute as it reads today. It is to be noted that the wording of this section was juggled about and the words "to and from school" are not contained in the revised form. What is the effect of this omission?

A major rule for the interpretation of revision acts is the reverse of the corresponding rule for construing other legislative acts. Disregard of this distinction often results in error. The general rule of construction of statutes is that every legislative act intends some change in the law. That rule does not apply to the construction of revision acts. The rule there is to the contrary. As to acts which revise or restate the law, there is a presumption that no change in substance was intended unless the change in language clearly indicates an intent to change the substance. Speaking of this rule, Justice Timlin said:

"* * * The act as originally passed may be resorted to in aid of the construction of the revised law, and it is to be presumed that the revisers intended no substantial change in the law unless otherwise expressed." *Bloch v. American Insurance Co.*, 132 Wis. 150, 163, 112 N. W. 45.

Since the revised statute does not include words enlarging the authority of the school district as expressed in the original enactment, we believe that sec. 40.34 (1) allows transportation to be provided only "to and from school."

In *Schmidt v. Blair*, 203 Iowa 1016, 213 N. W. 593, the Iowa supreme court held that the statutory power to provide transportation for pupils "to and from school" does not include authority to use school buses and school funds in the transporting of pupils to athletic contests, to moving picture shows, spelling contests, oratorical contests and picnics, for visits to state institutions, and to the scene of taking a class picture; nor for transporting teachers to teachers' institutes and conventions, and the like.

The question is not whether the board is properly exercising its discretion but whether it is exceeding its statutory power. The power actually conferred is extraordinary from any point of view. It has been carefully hedged about so as to forbid rather than encourage expansion. *State ex rel. Van Straten v. Milquet*, 180 Wis. 109.

The courts seem to be unanimous in holding that, in the absence of express statutory power, a school district or board is not authorized to expend money for the transportation of school children. *Hendrix v. Morris*, 127 Ark. 222, 191 S. W. 949; *Mills v. School Directors*, 154 Ill. App. 119 *State ex rel. Beard v. Jackson*, 168 Ind. 384, 81 N. E. 62; subsec. (1), or not at all.

It is clear, therefore, that the school boards have no authority under sec. 40.16, subsec. (1) or sec. 40.53, subsec. (1), Stats., to provide such transportation. The power is vested in the school district meeting by virtue of sec. 40.34, subsec. (1), or not at all.

We therefore conclude that the authority conferred by sec. 40.34 (1) is limited to provide transportation "to and from school" only, and that the school district or board cannot officially provide transportation to such extra-curricular activities as athletic, musical and forensic contests with neighboring schools. Any transportation for such purposes must be supplied by persons in their individual capacities, and the school district or board can incur no liability in connection therewith.

WHR

Civil Service — Municipal Corporations — Ordinances — School Districts — City School Board — Under sec. 40.53, Stats., city school board has power to hire employees and prescribe terms of employment. This power may not be divested by city ordinance.

April 2, 1938.

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

You call our attention to the fact that a certain city of the second class has adopted a civil service system for its employees, which provides that every person appointed to a position in the classified civil service shall establish his residence in the city.

We are asked whether employees of the city board of education are subject to such ordinance in view of the fact that the board desires to retain as employees certain employees residing outside the city.

It was held in *State ex rel. Harbach v. Mayor, etc.*, 189 Wis. 84, at pages 87-88, as follows:

“* * * While other provisions of art. X plainly indicate that it was contemplated that district schools should exist not only in cities and villages, but in towns of the state, it by no means follows that the management of the schools should be any part of municipal government, and, so far as our observation goes, the legislature has never placed the management of the schools of a city with the common council, which constitutes the ordinary governing body of the city, but in all city charters, whether general or special, the schools have been placed under the control and management of a body commonly called or known as the board of education. Thus the management of the schools has been kept separate and distinct from the management of the ordinary municipal affairs.”

The court further says as follows:

“* * * It clearly indicates a legislative understanding that there was nothing in common between school matters and the ordinary municipal affairs, but, on the contrary, they constitute distinct and separate fields. * * *” (p. 88).

“* * * They remain separate and distinct units of government * * *” (p. 90).

Again in *Manitowoc v. Board of Education*, 201 Wis. 202 at 209, the court says:

“* * * Neither ch. 41 nor ch. 40 conferred upon the common council any powers respecting the possession, care, control, and management of any property devoted to school purposes; nor do these chapters or any other provisions of the statutes give to the common council supervisory control over the board of education or the vocational board.
* * *”

The holdings of the above entitled cases, in so far as they hold a city school district to be a separate and distinct municipal entity from that of the city, including the purpose of suit, has been somewhat modified by later decisions of the court. See *State ex rel. Grelle v. Carroll*, 203 Wis. 602, which decision was modified in *State ex rel. Geneva School District v. Mitchell*, 210 Wis. 381. See also *State ex rel. Board of Education v. Racine*, 205 Wis. 389.

It appears from the above cited decisions that a city school district in a city of the second class is not an entirely separate and distinct municipal entity from that of the city for purposes of taxation and for other purposes, such as that of suit. It does not appear, however, that these decisions modify prior decisions to the extent of holding that the common council may control and manage the affairs of the city school system which are given to the board of education by statute.

Under sec. 40.53, Stats., the city school board has the power to employ certain help and to fix the compensation and prescribe the duties of all persons employed or appointed by the board. See subsecs. (9) and (10), sec. 40.53. Subsec. (16) also gives the board the power:

“To adopt rules for its own meetings and deliberations; and for the government of the schools, the faculty, and other employes of the board.”

In *State ex rel. Board of Education v. Racine*, 205 Wis. 389, in which case the court abandoned the separate municipi-

pal entity theory for purposes of taxation and suit, the court says at page 393:

“* * * They have general power to supervise and manage the city school system, as specifically defined and set forth in sec. 40.53, Stats. * * * The legislative purpose to put the fiscal affairs of the city under the control and management of the city council in all respects seems undoubted. The board of education may manage and supervise the schools, but it has no power to impose a school tax.
* * *”

We conclude that the power which the legislature has given to the city school board to manage the city school system and to adopt rules for the government of employees is such that the common council of the city may not interfere therewith by city ordinance.

WHR

Bridges and Highways — Law of Road — Tractors used exclusively in agricultural operations are exempt from motor vehicle registration under sec. 85.01, subsec. (4), par. (f), Stats., but such exemption does not extend to commercial hauling. Type of trailer or vehicle hauled is immaterial.

April 2, 1938.

THEODORE DAMMANN,
Secretary of State.

Our attention is directed to sec. 85.01, subsec. (4), par. (f), Stats., and in connection therewith a number of situations are submitted which involve the question of whether motor vehicle registration is required under the circumstances stated. These situations will be stated and considered separately.

(1) One K hauled sugar beets with a farm tractor having attached thereto an ordinary farm wagon from his farm located in the town of Fond du Lac over the county and state trunk highways to the loading point located in the North-western Railway yards in the city of Fond du Lac.

Sec. 85.01 (4) (f), Stats., provides:

“Tractors used exclusively in agricultural operations, including threshing, or used exclusively to provide power to drive other machinery, or to transport from job to job machinery driven by such tractor, or tractors used exclusively for construction operations need not be registered.”

Under this section all tractors used exclusively for agricultural operations are exempt from the payment of license fees. “Agriculture” is defined as follows in 2 American Jurisprudence, p. 395:

“Agriculture, in the broad and commonly accepted sense, may be defined as the science or art of cultivating the soil and its fruits, especially in large areas or fields, * * * including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account.
* * *”

This term is also defined in 1 Words and Phrases, 3d series, pp. 379-380:

“The word ‘agricultural’ means pertaining to, connected with or engaged in ‘agriculture,’ which is the science of cultivating the ground, especially in fields or large quantities including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming. * * *”

“Operation” is defined as “an action done as a part of practical work.” Applying the ordinary and usual meaning of the term “agricultural operation” as defined above, to sec. 370.01, subsec. (1), Stats., it is our opinion that the exemption in sec. 85.01 (4) (f), covers the situation where a

farmer hauls his produce from his farm to a point from which to ship the same to market. The fact that county or state trunk highways are used is immaterial. XIII Op. Atty. Gen. 321. See IX Op. Atty. Gen. 197.

(2) S owns a farm two miles west of the city of Fond du Lac and rents another farm about three miles east of that city. A farm tractor is used with a homemade trailer for hauling straw and hay from his rented farm east of the city to his own farm west of the city.

This situation is covered by the discussion given under question 1. If hauling produce from a farm to the place of shipment constitutes an "agricultural operation" certainly the transportation of farm produce between two farms operated by the same person would constitute such operation. It is therefore our opinion that the trailer in question comes within the purview of sec. 85.01, (4) (f), Stats.

(3) Is a tractor exempt under the statute where it is used to haul straw, hay and grain for various farmers in the community? This straw, hay and grain is purchased for resale from various farmers in the community.

The hauling of a farmer's own produce by means of a tractor constitutes an "agricultural operation" within the meaning of the statute. However, it cannot be said that that term includes a situation where produce of others is bought and sold and in the process transported from place to place by a tractor. The owner of the tractor would then be engaging in a commercial enterprise rather than an agricultural pursuit. It is doubtful that the legislature intended to exempt tractors used as outlined above.

Exemptions from license or taxation requirements are strictly construed and in case of a doubt are resolved in favor of taxability. *Katzer v. City of Milwaukee*, 104 Wis. 16, XXVI Op. Atty. Gen. 352, 355.

Applying this rule to the facts submitted, it is our opinion that the tractor in question does not come within the purview of sec. 85.01 (4) (f), Stats., and must, therefore, be licensed as required by law.

(4) Must the propelling unit be licensed when used to haul a farm wagon or other similar vehicle having pneumatic tires, where used to transport the produce of the owner?

If the propelled unit comes within the purview of sec. 85.01 (4) (f), Stats., it need not be licensed. The type of trailer or vehicle hauled is not material. As indicated in the first answer, a tractor used to transport the produce from the owner's farm comes within the exemption provided for by sec. 85.01, Stats.

Where a tractor is used for that purpose it would be exempt irrespective of what type of trailer or vehicle was used. We do not believe that XIX Op. Atty. Gen. 145, referred to in your letter, is applicable, as that opinion referred to a safety statute while your question relates to a licensing statute.

WHR

Corporations — Co-operative Associations — Counties — Public Officers — County Board — Register of Deeds — County board may waive recording fees under sec. 59.57, subsec. (13), Stats., when original easements are filed.

April 2, 1938.

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

You state that the LaFayette County Electric Co-operative Association, which was organized under the provisions of ch. 185, Stats., has filed original easements in the office of the register of deeds of Lafayette county. You also advise that the county board had previously passed a resolution that no fee was to be charged for the filing and recording of such instruments.

You ask whether the county board can waive the charging of a recording fee in view of the fact that the instruments were not filed in the form of photostatic copies thereof.

Subsec. (13), sec. 59.57, Stats., reads as follows:

“Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

“(13) For the recording of a right of way easement, or consent to easement, in favor of a co-operative association organized under chapter 185 for the transmission and distribution of electrical energy and power in order to secure benefits made available under the federal electrification administration, ten cents each, if filed by the co-operative association in the form of a photostatic copy. In counties where the register of deeds is on a salary basis, the county board may vote to waive the filing of such easements in photostatic form, and may vote to waive the recording fee, for such easements in whole or in part.”

It is obvious that it was the intent of the legislature to save co-operative associations organized for the purpose of securing the benefits made available under the federal electrification administration the usual expense incurred in filing easements. This section could have had no other purpose. This section provides for two situations: (1) where a register of deeds is upon a fee basis and (2) where he is upon a salary basis. In situation (1) the register of deeds may charge only ten cents each if the co-operative files the instrument in the form of a photostatic copy. In situation (2) the county board may *“vote to waive the filing of such easements in photostatic form, and may vote to waive the recording fee, for such easements in whole or in part.”* It would seem to follow from the foregoing that the county board in situation (2) may dispense with all or any part of a filing fee and may likewise dispense with the necessity for filing in photostatic form.

OSL
AGH
NSB

Indigent, Insane, etc. — Poor Relief — Under sec. 49.02, subsec. (1), Stats., husband may receive direct relief from place of his wife's legal settlement, but this section does not authorize granting of relief in some other community with charge back to place of wife's legal settlement.

April 4, 1938.

BOARD OF CONTROL.

You inform us that a person whom we will call X was admitted to the Winnebago state hospital on July 1, 1937, as a tentative state-at-large patient. During all periods in question the patient was an adult and able to acquire a settlement in his own right. For several years he had lived in Illinois, where he had acquired and maintained a legal settlement. In March, 1935, he was admitted to the Veterans Hospital in Chicago. On March 25, 1935, he was transferred to the Veterans Facility in Milwaukee, where he remained until July 10, 1936. Following his discharge he remained in Milwaukee, but this was for a period of less than one year, as he was committed to the Winnebago state hospital on July 1, 1937.

The patient's wife moved to Milwaukee with him on March 25, 1935, and has continued to make her home there until the present time. There is no evidence that the wife receives public assistance, although she does receive benefits from a government pension and war risk insurance.

You direct our attention to XXII Op. Atty. Gen. 665 at 666 and 667 and quote therefrom as follows:

“Under this statute [sec. 49.02 (1)] the husband may get relief at the place where his wife had the legal settlement. This practically makes her legal settlement his when he has not acquired any anywhere else.”

You ask whether the wife has now acquired a legal settlement in Milwaukee and, if so, whether the husband follows and has her settlement to such an extent that Milwaukee will be liable for his care and maintenance.

Subsec. (4), sec. 49.02, Stats., in part provides as follows:

“Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village or city while supported therein as a pauper or while employed on a federal works progress administration project or while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program 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 a 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. * * *”

This section specifically provides that the time spent as an inmate of an institution maintained by the United States for the care of veterans shall not be counted in acquiring a legal settlement. This would apply to time spent in the Veterans Facility at Milwaukee and consequently the husband has not gained a legal settlement in Milwaukee. Although X, the husband, has no legal settlement in this state, his wife could gain a legal settlement of her own in Milwaukee county by residing therein for a period of one year in view of sec. 49.02 (5), Stats., reading as follows:

“Every minor whose parent and every married woman whose husband has no settlement in this state who shall have resided one whole year in any town, village, or city in this state shall thereby gain a settlement therein.”

From the facts submitted it appears the wife of X has not been supported as a pauper and consequently has gained a legal settlement in Milwaukee county under the above statute. See XXIII Op. Atty. Gen. 755.

It is true that sec. 49.02 (1), Stats., provides that if the husband has no legal settlement and his wife has one he shall receive relief when in need at the place of her legal settlement. The fact that a man may *receive* relief at the

place of his wife's legal settlement does not make that place his legal settlement so as to permit a charge back if relief is granted in some other community. No statute specifically provides that a husband shall follow and have the legal settlement of his wife. A husband can gain a legal settlement only as provided in sec. 49.02 (4), Stats., and unless that is done he is, as was said by Judge Reis in the case of *Milwaukee County v. Town of Menomonie*, "a man without a country."

The cost of maintaining X at the Winnebago state hospital may be charged to Milwaukee county only if he has a legal settlement therein. It is clear that he does not have such settlement and consequently Milwaukee county is not liable for his care at the hospital. However, whenever X is returned to Milwaukee, then any relief he may need while residing therein must be supplied by Milwaukee county by reason of sec. 49.02 (1), Stats.

WHR

Taxation — Refunds — Chain store tax refund must be recovered under provisions of sec. 76.75, subsec. (5), Stats., rather than under sec. 20.06, subsec. (2), Stats.

April 4, 1938.

THEODORE DAMMANN,
Secretary of State.

You call our attention to certain claims for refunds on chain store taxes which have been duly approved as required by sec. 20.06, subsec. (2), Stats., and you inquire whether such refunds may be paid if the taxes were not paid under protest and suits commenced for recovery of the same.

Sec. 76.75, subsec. (5), outlines the procedure to be followed in securing such refunds. This statute, which expired on July 1, 1937, but which was re-enacted by ch. 12, Laws Special Session 1937, reads in part as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due and if paid under protest at any time within two years from the date of such payment sue the state treasurer in an action at law to recover the tax so paid, with interest at six per cent thereon, from the date of payment. * * *"

It is manifest from a reading of the above statute that refunds of chain store taxes can be obtained only when the taxes have been paid under protest and by suit brought within two years. The attorney general so held in two opinions. See XXIV Op. Atty. Gen. 701; XXIII 228; note also XXV 691.

At this point we call attention to ch. 326, Laws 1937, providing:

"Within thirty days after the effective date of this act, the state treasurer shall certify to the secretary of state the name of each person, firm and corporation having paid without protest the chain store tax imposed under subsection (1) of section 76.75 of the 1933 statutes (section 1 of chapter 469, laws of 1933), which provision has been declared unconstitutional, and the amount paid by each, and the name of each person, firm or corporation having paid said tax under protest but having failed to commence suit for recovery within the two-year limitation, and the amount paid by each. The secretary of state shall thereupon draw his warrant on the state treasurer for the amount so certified."

This provision, however, has no application to the claims for refunds under consideration here, since these claims are for taxes paid on December 2, 1937, January 17, 1938, and January 19, 1938, respectively. We assume they were paid for taxes accrued under sec. 76.75, as recreated by ch. 12, Laws Special Session 1937, and hence do not come within the purview of ch. 326, Laws 1937, which relates only to taxes paid under the unconstitutional 1933 statute.

Sec. 20.06, subsec. (2), Stats., under which the refunds in question are requested, is a statute dealing generally with moneys paid into the state treasury in error. The provisions of sec. 20.06, subsec. (2), must yield to the provisions of sec.

76.75 (5) in accordance with the well-known rule of statutory construction that general statutes covering an entire subject must yield to special statutes covering some particular part thereof when effect cannot be given to both. *State ex rel. De Forest v. Hobe*, 124 Wis. 8.

WHR

Public Health — Wells — One who drills wells on his own land for use of lessees is not so engaged in well drilling industry as to be subject to provisions of sec. 162.04, Stats.

One who contracts to construct for compensation is not subject to provisions of sec. 162.04, Stats., where he sublets actual performance of work to registered well driller, provided contractor has not advertised or held himself out as well driller.

April 5, 1938.

BOARD OF HEALTH.

You inquire whether it is necessary for the owner of land to register as a well driller under sec. 162.04, Stats., where he constructs one or more wells on his own premises for the purpose of supplying water to tenants in cabins located on his property.

Sec. 162.04, subsec. (1), Stats., provides in part:

“Every person * * * before engaging in the industry of well drilling in Wisconsin as herein provided shall * * * make application to the board for registration as a well driller * * *.”

We must, therefore, determine whether such person is “engaging in the industry of well drilling.”

Words and phrases used in the statutes are to be construed and understood according to the common and approved usage of the language. Sec. 370.01, subsec. (1), Stats. “Industry” means systematic labor or habitual em-

ployment, especially as a means of livelihood. Webster's New International Dictionary, 2d edition. If not engaged in as a means of livelihood or for profit, it does not come within the ordinary meaning of the term. *Rochester v. Girl's Home*, 194 N. Y. S. 236.

Sec. 162.04, subsec. (3), Stats., provides:

"Except as herein otherwise provided, no person, firm or corporation shall engage in the industry of well drilling for compensation in this state without having duly registered and obtained a permit therefor as herein provided. No permit shall be required of any person for driving, digging or otherwise obtaining ground water supply for his own personal use on real estate owned or leased by him, but such well and the work done thereon shall comply and be in conformity with law and the rules and regulations prescribed by the board."

It is apparent from the foregoing that the element of compensation must be present to bring well drilling within the regulation and permit provisions of the law. The last sentence of subsec. (3), quoted above, is merely explanatory of what is already implied by subsec. (1) and the first sentence in subsec. (3). Hence, it must not be regarded as setting up the only well drilling situation which does not require registration and a permit.

We therefore conclude that one who drills a well or wells on his own land for the use of lessees, is not so engaged in the well drilling industry as to be subject to the registration and permit provisions of sec. 162.04, Stats.

You also inquire whether one may contract to construct a well for compensation without a permit if the actual performance of the work is sublet to a registered well driller.

Whether or not an unlicensed person, firm or corporation could be prosecuted under the act would depend on whether he "advertises or holds himself out as * * * a well driller * * *."

Sec. 162.06, Stats., relating to penalties, provides:

"Any person, firm or corporation who engages in or follows the business or occupation of, or advertises or holds himself or itself out as or acts temporarily or otherwise as a well driller without first having secured the required permit * * * etc.

A "well driller" is defined as anyone who has duly registered as such. Sec. 162.02, subsec. (6), Stats. One who registers under sec. 162.04, subsec. (1), Stats., is licensed to engage in the industry of well drilling. "Well drilling" is defined in sec. 162.02, subsec. (4), Stats., "as the industry and procedure employed in obtaining ground water from a well" by specified and other methods.

It would therefore appear that one who does not undertake the actual procedure of constructing a well or doing the other acts specified in sec. 162.02, subsec. (4), Stats., and who does not advertise or hold himself out as a well driller is not one "who engages in or follows the business or occupation of * * * or acts temporarily or otherwise as a well driller" within the strict meaning of sec. 162.06, Stats. Where a statute is penal as well as remedial, it must be construed as a penal statute, that is, strictly, when it is sought to enforce the penalty. 59 C. J. 1121. Probably in the great majority of instances where contracts are made for well drilling, which contracts are to be sublet, the original contractor advertises and holds himself out as a well driller within the meaning of the statute and in such cases there is a violation. Whether there is advertising or holding out depends upon all of the facts and circumstances in connection with a particular method of operation.

WHR

Civil Service — Sec. 16.12, subsec. (1), Stats., requiring candidates for civil service examinations to file formal applications prior to taking such examinations, is mandatory, and applicant for one examination who, by mistake, takes examination for different position may not be certified for latter position; neither may he be certified for position for which he did file application if he failed to take examination for that position.

April 5, 1938.

A. E. GAREY, *Director,*
Bureau of Personnel.

You inquire whether it is legal under the civil service law and rules to allow credit in an examination to a candidate who did all of the required work in an examination for which he had not specifically made application.

The candidate in question, whom we will refer to as X, had filed application to take the examinations for enforcement officer and chief inspector. These two examinations were given at the same time and place, as was also an examination for chief enforcement officer. Candidates for the position of chief inspector and chief enforcement officer were required to take the examination for enforcement officer as a build-up or part of their respective examinations. However, except for such preliminary parts, the examination for chief inspector and chief enforcement officer were separate and distinct examinations although the examinations were comparable in difficulty and lead to positions of equal salary range.

Candidate X had received permits entitling him to take the examination of enforcement officer and chief inspector in accordance with his application, but through some unexplainable circumstances or mistake he received and wrote, in addition to the enforcement officer's examination, the chief enforcement officer's examination instead of that of chief inspector.

At first glance it would seem that X, having successfully passed the chief enforcement officer's examination, should be certified accordingly for that position even though he had filed no application for such position. The difficulty,

however, with such a disposition of the matter is to be found in the wording of sec. 16.12, subsec. (1), Stats., which reads as follows:

“The director shall require persons applying for admission to any examination provided for under sections 16.01 to 16.30, or under the rules of the board, to file in the office of the bureau a reasonable time prior to the proposed examination, a formal application.”

If this statute is mandatory in its scope X must be considered ineligible for the position of chief enforcement officer, since he did not file a formal application for such position in the office of the bureau a reasonable time prior to the examination.

It is true that when there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before, no presumption that, by allowing it to be so done, it may work an injury or wrong, and nothing in the act itself, or in other acts relating to the same subject matter indicating that the legislature did not intend that it should not be done after the time prescribed than not done at all, courts will deem the statute directory merely. *Appleton v. Outagamie County*, 197 Wis. 4.

It is doubtful, however, that this rule applies in the present instance.

In the first place, no application was filed by X for the position of chief enforcement officer at any time either before or after the examination.

Furthermore, it may properly be presumed that, by allowing X to file his application now, it may work an injury or wrong to some other candidate. We are informed that X's standing in the examination is such as to place him among the first three eligible candidates. If X is ruled out, candidate number four will become candidate number three on the list. Thus, candidate number four would be deprived of certification among the first three if sec. 16.12, subsec. (1), is to be considered as directory rather than mandatory.

Also, there is the element of administrative interpretation of sec. 16.12, subsec. (1), Stats.

It is our understanding that this statute has always been rigidly adhered to in the past and that under no circumstances has the director knowingly permitted a person to take an examination without having filed an application in advance and strictly within the time limits set for making application.

It has always been considered that the long standing administrative interpretation of a statute by the officer charged with its enforcement is entitled to great weight and may well be decisive. *State v. Johnson*, 186 Wis. 59. Applying this principle here, we must conclude that the statute is mandatory rather than being merely directory.

The aim and purpose of all civil service laws must be that of procuring efficient and well qualified personnel for public service and under reasonable rules and regulations established by the commission applied uniformly and without favor to all alike. Thus, in the instant case, had X requested the commission at the time of taking the examination the privilege of taking the particular examination that he did take and without previous filing and compliance with the rules and regulations established by the commission, the commission would without hesitation have advised X that he could not take such examination. The commission cannot apply this rule impartially and waive the rule as to some and refuse to waive it as to others. The rule has never knowingly been waived by the commission. Does it make any difference that the commission is now asked to waive it after the happening of an event? The effect so far as privilege is concerned is the same as if the commission had waived the rule in advance of the examination. There is only one practical method of procedure for the commission to follow if the rule is to be applied impartially and without favor, and that is for the commission to insist upon a rigid adherence to the rule.

This may seem like a harsh rule in the particular instance, but any other procedure does result in favoritism. If the result is more carefully examined, the rule is not as harsh as it appears to be. The candidate presents himself to the commission as a qualified applicant. It does not seem that placing the responsibility upon the applicant to write an examination for the particular position for which he is

an applicant is placing too big a burden upon him. If he qualifies for state service he will have equally as heavy burdens cast upon him in the future. In any event, this is the only practical manner in which the rule can be applied without favoritism. A waiver of the rule after examination is just as vicious in result as is a waiver as to some and a refusal to waive as to all prior to the examination.

We understand that the examination papers in this instance were plainly labeled and that the examining officer gave clear instructions at the time of the examination. Also, mimeographed instruction sheets were handed to each candidate, containing among other things the following express direction: "Compare the title on your permit with the title on the booklet and be sure you have the right material."

Responsibility for following this direction rests squarely upon the candidate and he must assume the consequences of his failure to follow directions. If the civil service law and regulations are to be effective and are to command the respect and support of the public, exceptions and deviations must not be countenanced. To do so only opens the door for charges of favoritism and corruption, regardless of the good faith and honest intentions of those entrusted with the administration of the law.

We also understand that you are desirous of knowing whether X may be certified for the position of chief inspector, a position for which he filed application but for which he did not take part of the examination.

This would obviously be irregular, even though the examination for chief enforcement officer which he did write is comparable to that of chief inspector. That candidates for the same position must take the same examination is such a fundamental principle in civil service that it scarcely calls for comment. Any deviation from this rule would form the basis for just complaint by other candidates and would strike at the very foundation of the competitive system. Furthermore, it would hardly be fair to give another examination at this time for chief inspector. If X were now given the same examination as that taken by the other candidates, he would be in a position of having the opportunity of learning the questions asked from other candi-

dates who have already taken the examination, and if he were to be given a new and different examination to avoid such difficulty, he would have to be judged on the basis of an examination different from that taken by the others. This should not be permitted, as we have already pointed out.

In view of the foregoing we conclude that X may be certified only for the position of enforcement officer, a position for which he filed application and wrote the examination.

WHR

Criminal Law — Gambling — Lotteries — Scheme whereby frequenters of store register and prizes are awarded to those whose names are drawn by chance constitutes lottery in violation of sec. 348.01, Stats.

April 6, 1938.

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

You ask whether the following scheme constitutes a lottery: A promoter distributes registration books among such merchants as pay him a fee for the privilege of "representation." The merchants display these books in their places of business and invite the public to sign. Each week cash prizes are given away by lot among the class which signs the registers. Announcement of winners is made at a certain hour over the local radio station. A winner thus announced is required to be present in the place of business where his name is registered when the announcement is made in order to be eligible to collect the prize. At no time is it necessary to buy anything.

Sec. 348.01, Stats., which provides a penalty for distributing prizes by means of a lottery, does not define the term. Where undefined, the term has no technical meaning. *State*

v. Schwemler, (Ore.) 60 P. (2d) 938; 38 C. J. 286. Rather, it is generic in nature. *People v. McPhee*, 139 Mich. 687, 103 N. W. 174. The universally recognized principle, however, requires the concurrence of three elements: prize, chance and consideration. 17 R. C. L. 1222; 38 C. J. 289. The first two of these elements being plainly present here, the subject of our inquiry is limited to the question of whether there is consideration. The plan seems to have been devised with a view to evading this particular pitfall, and on its face participation is free in the sense that a purchase is not a prerequisite to a chance to win a prize. As to whether or not such scheme shall be judged at its face value, the authorities differ.

In *Cross v. People*, 18 Colo. 321, 32 P. 821, the proprietors of a shoe store gave free chances in a drawing of a piano to all who would visit the store, whether customers or not. In *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338, prizes were distributed by chance among patrons of a free "medicine show," where profits depended on sale of medicine between acts. In each case the scheme was held not a lottery because nothing of value had been paid directly for a chance to win a prize. The benefit to the promoters from augmented crowds was considered immaterial. The same principle has found application in the following "bank night" cases: *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *State v. Eames*, 87 N. H. 477, 183 A. 590; *Roswell v. Jones*, (N. M.) 67 P. (2d) 286; *State ex rel. Dist. Att'y Gen. v. Crescent Amusement Co.*, (Tenn.) 95 S. W. (2d) 310; *Griffith Amusement Co. v. Morgan*, (Tex.) 98 S. W. (2d) 844; *People v. Shafer*, 289 N. Y. S. 649, 160 Misc. 174.

However, in *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242, a scheme whereby an automobile was raffled off among those attending an auction sale, whether bidders or not, was held to be a lottery. The court found that, the purpose of the scheme being obviously to attract potential bidders, the act of the plaintiff in attending the sale in response to defendant's announcement of the raffle was consideration for the latter's promise. In *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, and in *Featherstone v. Ind. Serv. Sta. Ass'n.*, (Tex.) 10 S. W. (2d) 124, wholesale oil dealers sold tickets to retailers who distributed them free

to all who would call at the service station. The tickets entitled the holder to a chance in the drawing of an automobile. In each case the scheme was held to be a lottery, the courts finding consideration in increased patronage and the attendant profits thus diverted from other dealers not engaged in the scheme. In *Willis v. Young*, (1907) 1 K. B. 448, 96 L. T. N. S. 155, tokens bearing numbers were distributed free among the public to increase interest in a weekly newspaper. Prizes were drawn periodically and winning numbers were published in the newspaper. Although the same information could be obtained free by calling at the newspaper office, the scheme was held to be a lottery, the court finding consideration to have been paid collectively by the increased number who in fact bought the paper during the contest.

These last mentioned cases are more in line with the principle that lottery statutes are to be construed broadly with a view to preventing the mischief aimed at, viz., stimulation of the gambling spirit and the natural desire to get something for nothing. 38 C. J. 306. Moreover, they seem to be based on a more practical concept of the nature of consideration and thus pierce the semblance of free participation which cloaks so many of these schemes.

A consideration may consist of a benefit to the promisor or a detriment to the promisee. *Dohr v. Wolfgang*, 151 Wis. 95, 138 N. W. 75; *Gegare v. Fox R., etc., Co.*, 152 Wis. 548, 140 N. W. 305; *Drover's, etc., Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777.

Not every benefit or detriment is consideration however. The test is whether the element of bargain or agreed exchange is present, i. e.: Is the benefit enjoyed or the detriment suffered the *quid pro quo* of the promise? *Com. Nat. Bank v. Smith*, 107 Wis. 574, 83 N. W. 766; *Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796; *Briggs v. Miller*, 176 Wis. 321, 186 N. W. 163; 1 Restatement of the Law of Contracts, sec. 75.

In the instant case the presence of the contestant in the place of business is twice required — once in order to sign the register, and again when announcement of winners is made in order to claim the prize. Can such detriment be said to be the *quid pro quo* of the promise?

According to Williston an aid in determining this question is whether the happening of the condition may be expected to be a benefit to the promisor. 1 Williston, Cont. (rev. ed.), sec. 112. See also *State of Vermont v. Wilson*, --- Vt. ---, 196 Atl. 757.

It must be supposed that the motive behind this plan is not completely altruistic and that the merchants involved anticipate some material benefit from it. The presence of throngs of potential customers may reasonably be expected to divert at least some quantum of trade from nonparticipating merchants, and perhaps induce some sales which might not have been made had not the customer first been lured into the store by the promise of something free. Thus, it may well be concluded that the element of consideration is present and that the scheme consequently falls within the purview of the lottery statute.

WHR

School Districts — No minimum number of pupils is necessary to constitute school.

April 14, 1938.

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

You have requested the opinion of this office on the question: "How many pupils are necessary to constitute a legal school?"

The law does not prescribe that any specified number of pupils must be in attendance at an institution of learning before the same may legally be called a school. In sec. 40.01 of the statutes the legislature defined a great many terms used in connection with schools and school districts. The legislature, however, did not specify that an institution of learning must have any minimum number of pupils before it could legally be classified as a school.

In the absence of a statutory definition of a school it would have the meaning attached to it in ordinary usage. See sec. 370.01 subsec. (1). A school has been defined as "A place for instruction in any branch or branches of knowledge; an establishment for imparting education; also, the institution or collective body of teachers and learners in such a place * * *." Webster's New International Dictionary.

Within the contemplation of law, an institution of learning would not lose its status as a school even though only one pupil were in attendance. The number of pupils in attendance at a school would, of course, affect the advisability of maintaining the institution because a small number of pupils would increase the per capita cost of instruction. The number of pupils in attendance at a school in some cases would affect the amount of state aid paid. See sec. 40.87. A limited number of pupils may, in other ways, affect the operation of a school but the number of pupils in attendance at an institution does not determine whether such institution can properly be designated as a school.

JRW

Indigent, Insane, etc. — Parole — Inmate paroled from central state hospital for insane under provisions of sec. 51.234, Stats., is not automatically released after expiration of two year parole period.

Committing court retains jurisdiction to determine sanity or insanity of inmate committed to central state hospital for insane pursuant to subsec. (4), sec. 357.13, Stats.

April 15, 1938.

BOARD OF CONTROL.

You request our opinion as to whether feeble-minded individuals committed to the central state hospital for the insane under sec. 357.13, Stats., and later paroled pursuant to

the provisions of sec. 51.234, Stats., are automatically released from the jurisdiction of the central state hospital after a continuous two year parole period as contemplated by sec. 51.13, Stats.

Subsec. (1), sec. 51.23, Stats., provides as follows:

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

Sec. 51.13, Stats., provides for the parole of inmates, leave of absence, presumption of sanity and discharge by lapse of time, and permits each superintendent of the state and northern hospitals for the insane and the Milwaukee county hospital for the insane to allow any inmate to go at large on parole, if in their opinion it is safe and proper to do so. After the expiration of two years from the time of granting such parole the presumption of insanity against such person so paroled shall cease and, until a new adjudication to the contrary, he shall be presumed to be sane.

It will be noted that none of the provisions of sec. 51.13, Stats., are applicable to the inmates of the central state hospital for the insane. Those committed to the central state hospital may be released only by following the provisions of sec. 51.234, Stats., and this section does not provide for the automatic release of such inmates from the jurisdiction of the hospital authorities after a continuous two year parole period.

Sec. 357.13, Stats., indicates the procedure to be followed to obtain the permanent release of an inmate from the jurisdiction of the hospital. This statute provides, in effect, that the inmate can be released only upon a rehearing as to his sanity and a determination by the court that he is neither insane nor feeble-minded.

You are therefore advised that, even though an inmate of the central state hospital for the insane is paroled, the mere passage of the two year period of time does not operate as a permanent release, and such passage of time does not operate to establish a presumption of sanity.

You also ask whether the court originally committing the inmate has the jurisdiction or authority to discharge a pa-

tient from the central state hospital for the insane at any time after commitment, regardless of whether the inmate is insane and feeble-minded and committed pursuant to sec. 357.13, Stats., without such patient having been found to be sane or not feeble-minded.

Sec. 357.13, subsecs. (3) and (4), Stats., provide as follows:

“Upon the recovery of such person from his insanity or feeble-mindedness the said superintendent shall notify the court in which such indictment or information is pending of such recovery, and said court shall thereupon issue to the sheriff of the county a warrant requiring him to take such accused person into his custody and confine him in the county jail of said county pending trial, sentence, or commitment for such offense; but such person may be released on recognizance or bail as provided in chapter 361.”

“Any person committed under the provisions of this section shall at any time after said commitment be entitled to a rehearing as to such sanity as provided by, and according to procedure outlined in, section 51.11, except such person shall make his application for rehearing to the court from which he was committed. If upon such rehearing a jury shall determine he is insane or feeble-minded, then another hearing shall not be had thereafter unless the court which had jurisdiction in the first case shall be satisfied there is reasonable cause to believe that there is an improvement in the person's mental condition, in which case such court may order another jury trial. If it shall be determined, pursuant to any such re-examination, that the insanity or feeble-mindedness of such accused person is incurable he shall be treated and disposed of as persons incurably insane or feeble-minded are required by law to be treated; but no such person shall be removed or discharged from said hospital or home except upon the order of the court having jurisdiction over such person for trial, sentence or commitment.”

It will be noted that the above cited sections of the statutes provide a very definite procedure to be followed for the release of any person committed to the central state hospital for the insane in the event his mental condition is such that he should be released.

You are therefore advised that the court committing the inmate retains jurisdiction for the purpose of determining

the sanity or insanity of the inmate at any time thereafter. The rehearings, however, are to be held pursuant to the provisions of sec. 357.13, subsec. (4), Stats.

LEV

Education — School Administration — State Aid — Supervising Teachers — State aid to counties for salaries of county supervising teachers under sec. 39.14, subsec. (7), Stats., should be refused where sec. 39.14, subsec. (2), has been violated in fixing such salaries.

April 16, 1938.

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

You state that under sec. 39.14, subsec. (7), Stats., the state superintendent of public instruction has adopted and promulgated a salary schedule for county supervising teachers and that the county board of a certain county is not compensating its supervising teachers in accordance with this schedule, in violation of sec. 39.14, subsec. (2), Stats.

We are asked whether the state superintendent of public instruction may legally refuse certification of state aid to the county in question for paying the salaries of such supervising teachers under sec. 39.14, subsec. (7), Stats.

Sec. 39.14 (2), Stats., provides that the county board shall fix the salary of supervising teachers and that the salary fixed is not to be less than the amount the supervisor is entitled to under a schedule set up by the state superintendent of public instruction under sec. 39.14 (7), Stats.

Sec. 39.14 (6) makes provision for reports by county superintendents to the state superintendent relating to such supervising work and, among other things, such reports are to include the salary paid.

Sec. 39.14 (7), Stats., provides:

"On receipt of such report, and it appearing from an actual inspection by direction of the state superintendent that the work of such supervising teacher has been efficient, and that she has devoted her time exclusively to the duties of the position, the state superintendent shall certify in favor of the county which employed her, the amount of the salary paid but not to exceed an amount to which such teacher shall be entitled under a salary schedule for supervising teachers to be adopted and promulgated by the state superintendent of public instruction which shall provide for a salary range of from twelve hundred to seventeen hundred dollars per year, varying with length of service and professional training. The county shall also be entitled to reimbursement for the actual and necessary expenses paid to her in the year preceding, and file it with the secretary of state, whereupon he shall draw his warrant for the amount of the certificate and in favor of the proper county treasurer.

This office has ruled that supervising teachers are entitled to the minimum salary provided for under sec. 39.14, subsec. (2), Stats. XXV Op. Atty. Gen. 67; see also opinion to the district attorney of Grant county from this department under date of March 5, 1938.*

As respects state aid, the situation is to be distinguished from that which was discussed in our opinion to your department under date of February 7, 1938,† wherein we pointed out that state aid may not be withheld because of failure of the county treasurer to keep separate accounts of school moneys as required by sec. 40.57, Stats., since the manner in which the city treasurer keeps his accounts would not necessarily appear in any reports submitted to the state superintendent in connection with the granting of state aid under secs. 40.39, subsec. (4), and 40.87, subsec. (5), Stats., and consequently could not be passed upon by the state superintendent.

Here, however, the state superintendent must directly pass upon reports containing evidence of illegal salary payments. It is no part of the duties of a public official to connive at the violation of law by approving and certifying a re-

*Page 136 of this volume.

†Page 82 of this volume.

port which shows illegality on its face. Sec. 39.14, subsecs. (2), (6) and (7), Stats., all relating to supervising teachers and their salaries, are to be read together, and when so read and construed we conclude that it is your duty, as a matter of sound public policy, to refuse certification where the salary schedules of supervising teachers set forth in the reports in question are in violation of law.

WHR

Tuberculosis Sanatoriums — Addition to county tuberculosis sanatorium for purpose of handling soiled linen, and new garage erected on premises comes within purview of sec. 50.07, subsec. (2), par. (d), Stats.

April 25, 1938.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary*.

You have asked for an opinion interpreting sec. 50.07, subsec. (2), par. (d), Stats., which directs the board of control, in the determination of actual per capita cost to be charged by a tuberculosis sanatorium for state-at-large and other county patients, to include a sum to apply on the cost of new additions made to such sanatorium after January 1, 1937. You wish to know whether the following, built during 1937, may be considered "new additions" within the meaning of the statute: (1) a small addition to the sanatorium structure for the purpose of handling and sorting soiled linen, costing \$3,185.10, and, (2) a twenty-car garage built at an approximate cost of \$6,000.00.

At the outset we wish to call attention to our opinion to your department under date of April 1, 1938,* wherein we pointed out that a nurses' home and fixtures appurtenant thereto come within the purview of sec. 50.07 (2) (d),

*Page 201 of this volume.

Stats. This opinion discusses the meaning to be ascribed to the word "addition" and the broad general purpose of sec. 50.07 (2) (d). It was there stated that any building or structure on the premises and in close proximity to the main structure, and which is properly incident to and aids and facilitates in the functioning of the institution, may be considered as subject to the conditions of sec. 50.07 (2) (d), Stats.

In the light of this discussion we conclude that:

1. The small addition to the sanatorium structure for the purpose of handling and sorting soiled linen is both physically attached to the main structure and is necessary and proper to the functioning of the sanatorium. Consequently it is a "new addition" within the meaning of sec. 50.07, subsec. (2), par. (d), Stats.

2. The garage, although not physically connected with the main structure, is also a "new addition" within the meaning of the statute since it forms an integral part of the entire unit and is presumably necessary in the operation of the institution as a complete plant. In other words, such garage is one of the "facilities" of the sanatorium within the provisions of the statute.

WHR

Banks and Banking — Corporations — Trust Companies
— Foreign trust company may not sell securities in Wisconsin through medium of one of its agents licensed as Wisconsin dealer. Except as permitted by sec. 223.12, subsec. (1), Stats., foreign trust company may not qualify to do business in this state. Upon compliance with terms and conditions of sec. 223.12, subsec. (1), foreign trust company may do business in this state to limited extent authorized by said section.

April 26, 1938.

BANKING COMMISSION.

You state that certain foreign trust companies are indirectly doing business in this state as dealers in securities,

and that this is done by having their employees obtain licenses in their own names as dealers in Wisconsin. The employees so licensed solicit the purchase of securities but the customers are informed that they are doing business with the foreign trust company and all orders are confirmed by such trust companies.

We are asked whether an employee of such a foreign trust company may be licensed as a security dealer under the Wisconsin statutes.

Sec. 189.02, subsec. (1), Stats., which defines the word "agent" as used in the securities law of Wisconsin, provides in part:

"'Agent' includes every natural person who in this state for compensation represents or acts for another with authority in the sale of any security * * *."

Sec. 189.02, subsec. (2), defines the term "dealer" in part as follows:

"'Dealer' includes every person and company, *not an agent*, who in this state, for compensation, sells or accepts orders for purchase of any security issued by others. * * *"

It is thus apparent that the terms "agent" and "dealer," as used in the securities law, are mutually exclusive and cannot overlap. A "dealer" cannot be an "agent" under the wording of the above statute, and you are therefore advised that a foreign trust company may not obtain a dealer's license for one of its agents or employees in Wisconsin.

You have also inquired whether a foreign trust company may qualify to do business in this state.

Sec. 226.02, subsec. (1), Stats., sets up the requirements which must be met by a foreign corporation seeking to do business in this state. Subsec. (2) provides certain exceptions to such license requirements and concludes with these words:

"* * * provided, that nothing herein contained shall be construed as authorizing any foreign corporation to transact the business of a bank or *trust company*."

However, foreign trust companies do enjoy certain limited rights to do business in Wisconsin by virtue of sec. 223.12, subsec. (1), Stats., which reads:

“Any trust company, incorporated under the laws of any other state, named by any resident of this state, as executor or trustee, or both, under his last will and testament or any codicil thereto, may be appointed and may accept appointment and may act as executor of, or trustee under, the last will and testament of any such person in this state, or both, provided trust companies of this state are permitted to act as such executor or trustee, or both, in the state where such foreign corporation has its domicile, and such foreign corporation shall have executed and filed in the office of the banking commission a written instrument appointing such commission in its name of office its true and lawful attorney upon whom all process may be served in any action or proceeding against such executor or trustee, affecting or relating to the estate represented or held by such executor or trustee, or the acts or defaults of such corporation in reference to such estate, with the same effect as if it existed in this state and had been lawfully served with process therein, and shall also have filed in the office of such commission a copy of its charter, articles of organization and all amendments thereto certified to by the secretary of state or other proper officer of said foreign state under the seal of office together with the post-office address of its principal office and shall further have complied with the provisions of section 223.02 of the statutes.”

Subsec. (3), sec. 223.12, Stats., makes it apparent that the rights granted by subsec. (1), above quoted, are not to be extended by implication so as to include the transaction of general unrestricted trust business. Subsec. (3) provides:

“No such foreign corporation, having authority to act as executor or trustee under the last will and testament of any person, shall establish or maintain directly or indirectly any branch office or agency in this state or shall in any way solicit directly or indirectly any business as executor or trustee therein. If any such foreign corporation violates this provision, such foreign corporation shall not thereafter be appointed or act as executor or trustee in the state.”

Attention is further called to sec. 223.08, Stats., which provides in part:

“* * * All persons, partnerships, associations, or corporations not organized under the provisions of this chapter, except state banks vested with trust powers under and pursuant to the provisions of subsection (6) of section 221.04, are hereby prohibited from using the word ‘trust’ in their business, or as portion of the name or title of such person, partnership, association, or corporation. * * *.”

In construing this section in III Op. Atty. Gen. 32, it was pointed out that a foreign corporation cannot attain any other or greater powers than a domestic corporation, and that consequently a foreign corporation having the word “trust” as a part of its corporate name cannot be authorized to do business in this state. See also VIII Op. Atty. Gen. 473.

Thus it is apparent that, except as permitted under sec. 223.12, subsec. (1), above quoted, a foreign trust company is not authorized to do business in this state. Upon compliance with the statutory provisions of sec. 223.12, subsec. (1), a foreign trust company may do business in this state to the limited extent authorized by said statute.

WHR

NSB

Public Officers — City Sealer of Weights and Measures
— City has right to add to duties imposed on sealer of weights and measures that of testing gas and electric meters.

April 27, 1938.

GEORGE WARNER, *Chief Inspector of Weights & Measures,*
Department of Agriculture & Markets.

In your recent letter you state that a certain city contemplates an ordinance requiring the city sealer of weights and measures to test gas and electric meters used in the city; that the city sealer now tests scales, measures, etc., and is under the general supervision of the weights and measures department and the city contemplates adding this additional duty to his other weights and measures activities.

You direct our attention to sec. 196.17, Stats., which provides a method for the testing of gas and electric meters by the public service commission. You inquire whether there would be any conflict between sec. 196.17 and a properly drawn city ordinance making it mandatory for the city sealer to test these devices. Said sec. 196.17, Stats., provides:

“(1) The commission shall provide for the examination and testing of all appliances used for measuring any product or service of a public utility.

“(2) Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commission.

“(3) The commission shall establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and repaid to the consumer or user if the appliance be found defective or incorrect to the disadvantage of the consumer or user.”

We understand that the commission has not made any provision requiring the sealer of weights and measures to test gas and electric meters. He is, however, an officer or employee of the city and the city undoubtedly under its general charter powers may add to his duties those contemplated. We are, however, of the opinion that the additional service of the sealer of weights and measures would not in any way be binding on the commission, as the commission has the right to act independently of the city.

JEM

Charitable and Penal Institutions — Feeble-minded — Courts — Juvenile Court — Minors — Child Protection — Juvenile court may commit child who has been found delinquent and who is mentally deficient to southern Wisconsin colony and training school.

April 28, 1938.

BOARD OF CONTROL.

You state that A was on the 16th day of September, 1937, found to be a "delinquent child, in that she habitually so reports herself as to injure or endanger the morals or health of herself and others" and was accordingly committed by the acting judge of the juvenile court of Milwaukee county to "the care and custody of Southern Wisconsin Colony & Training School at Union Grove, Wisconsin (said commitment being made as provided in chapter 48, sec. 48.07, subsec. (1), (b) for and during the period until she is 21 years of age, unless same be hereafter modified by order of the court."

You also state that said girl was mentally deficient at the time of her commitment and that the court was conversant with that fact. You wish to be advised whether the juvenile court may commit to the institution in question or whether it may commit only to institutions mentioned in other sections of chapter 48, Stats.

The provisions of chapter 48 of the statutes were incorporated into the written law at rather a recent date, to wit, in 1929. This chapter was enacted because the legislature felt that delinquent and neglected children should be dealt with in a more intelligent manner than had theretofore been possible, due to the fact that the hands of our various courts had been more or less tied by the statutory law. This chapter not only provides that all actions against such children shall be heard before a juvenile court but it gives such court very broad discretionary powers. In fact, it becomes apparent upon reading the whole of the act that it was the legislative intent to surround unfortunate children with a protective barrier which would result in their best interests being served and their rights protected. The act recognizes the fact that children may do many things through no par-

ticular fault of their own which, if done by a more mature person, would be criminal acts. It also recognizes the fact that in order to properly administer the provisions thereof in accordance with the intent of the legislature, broad discretionary powers must be given to juvenile courts established for the particular purpose of administering the act.

Among the discretionary powers above referred to are those given by sec. 48.07, par. (1), subsec. (b), which provides as follows:

“If the court shall find that the child is delinquent, neglected or dependent, it may:

“* * *

“(b) Commit the child to a suitable public institution or to a suitable child welfare agency licensed by the state board of control and authorized to care for children or to place them in suitable family homes. The terms and duration of such commitments, other than to the industrial school for boys or to the industrial school for girls, shall in each case be fixed by the court, subject to modification by the court on its own motion or otherwise; provided that in case of commitment to a county home for dependent children the terms of such commitment shall not exceed three months at any time, subject however to the power of the court after the three months' period to extend the term as special circumstances require; and provided further, that the court upon application before commitment may consider the wishes of the parent or guardian in the selection of a suitable institution or agency;”

The above quoted statute clearly provides that the court may commit such a child to some “suitable public institution.” What is a suitable public institution must be determined from all of the facts surrounding each particular case. That this was the legislative intent is clearly indicated by sec. 48.10 (1), which provides as follows:

“The court may cause any person coming under its jurisdiction to be examined by a physician, psychiatrist or clinical psychologist as defined in section 52.02, appointed by the court, in order that the condition of such person may be given due consideration in the disposition of the case. The expenses of such examination, when approved by the court, shall be paid by the county. In counties maintaining an examination service by one or more physicians, psychiatrists

and clinical psychologists such county service shall be used for the purposes of this subsection."

This subsection contemplates that the court may, if it deems it advisable, ascertain the mental condition of the child and give due consideration to the facts found in disposing of the case. This subsection indicates that the legislature had the provisions of chapter 52 of the statutes in mind at the time of enactment, as reference is specifically made to it. With the foregoing in mind, we cannot conclude that it was the legislative intent that a child, if found to be insane or feeble-minded, should be committed to the industrial school or the state public school or any other equally inappropriate institution or other agency named in chapter 48. It must have been the legislative intent that the child should be committed to some "public institution" which has facilities to properly care for it. The southern Wisconsin colony and training school being such a public institution, we cannot conclude that it was unlawful or an abuse of discretion to commit this child thereto.

The above leaves one more question to be answered. Did the court have the power, considering the provisions of chapter 52, to commit such child without following the procedure provided for by that chapter?

Chapter 52 provides a very definite procedure to be complied with in committing patients to the institutions named therein and from a reading of the statute one would be inclined to believe that such procedure must be strictly followed in order to make a valid commitment. However, that chapter was in effect prior to the enactment of chapter 48 and it is a well-known rule of statutory construction that a general provision, concerning a subject as a whole, must be deemed to have been intended as subordinate to a particular provision relating to a particular element included in such subject. *Mason v. Ashland*, 98 Wis. 540.

Our courts have also said that "there is no more familiar rule relating to the construction together of two statutes which conflict, than that, so far as they cannot reasonably be both given full effect, the later statute is to be regarded as having been intended to supersede the earlier one."

State ex rel. M. A. Hanna Dock Co. v. Willcuts, 143 Wis. 449, 453.

In the present matter, sec. 48.07 and sec. 48.10, Stats., were not only enacted after the enactment of chapter 52 but they also deal with a particular type of case or subject. They deal with neglected or delinquent children while chapter 52 deals with general requirements for admission. By the enactment of secs. 48.07 and 48.10, the legislature evinced the intent that the procedure relative to delinquent children should take precedence over the general provisions of chapter 52. The legislature provided for a mental examination. It next provided that the facts ascertained from such examination should be taken into consideration in disposing of the case and it then provided that the court might commit such child to a "suitable institution." Certainly the institution to which this child was committed was a suitable one. In fact, it is primarily maintained for the purpose of caring for mental cases—children or otherwise. Therefore, you are advised that the court did not err in committing the child to the southern Wisconsin colony and training school.

NSB

AGH

Civil Service — Public Officers — Deputy Sheriff — In counties which have adopted civil service ordinance for deputy sheriffs pursuant to sec. 59.21, subsec. (8), Stats., only one examination needs to be given where more than one vacancy exists provided vacancy to be filled has no relation to residence in town, city or village. In such cases separate examination must be held to fill such positions.

April 28, 1938.

JOHN P. MCEVOY,

District Attorney,

Kenosha, Wisconsin.

You state that Kenosha county has adopted a civil service ordinance for deputy sheriffs in accordance with the provisions of sec. 59.21, subsec. (8), par. (a), Stats. Recently the county board has authorized the sheriff to hire two new deputies. The question has now arisen as to whether both of these candidates may be chosen as a result of one competitive examination, or whether two competitive examinations are necessary.

Sec. 59.21 (8) (a), Stats., making provision for civil service for deputy sheriffs, reads in part as follows:

“* * * the county board * * * may further provide by ordinance, that deputy sheriff 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. * * * In the event that a civil service commission is decided upon for the selection of deputy sheriffs, then the provisions of sections 16.31 to 16.44 shall apply so far as consistent with this subsection, except sections 16.33, 16.34

and 16.43 and except the provision governing minimum compensation of the commissioners and except that such ordinance may provide for three commissioners.”

The foregoing statute makes provision for appointment from a list of three candidates who shall receive the highest rating in a competitive examination. Such provision might be construed to mean that a separate examination must be given for each vacancy since, after making one appointment, it would be impossible to make a further appointment from a list of the three candidates who receive the highest rating in the examination. Assuming, for instance, that the first vacancy is filled by the appointment of a candidate placing first in the examination, the next list of three candidates would consist of those who placed second, third and fourth, respectively, in the list rather than those three who received the highest ratings.

However, to so read the above statute as to require separate examinations for two vacancies of the same nature occurring at the same time would be contrary to the usual practice under civil service laws. It would be expensive, cumbersome and entirely unnecessary as far as any basic principles of the merit system are concerned. If the statute is open to construction at all, it should not be so construed as to reach such an unreasonable result if any other interpretation is possible.

If the above statute is read as a whole and effect is to be given to every part thereof, we must not overlook the provisions contained in the last sentence of the section, which provides that, with certain exceptions not material here, the provisions of secs. 16.31 to 16.44 shall apply so far as they are consistent with sec. 59.21, subsec. (8), Stats. Under sec. 16.35, subsec. (1), it is specifically provided that if more than one vacancy in the same class or position is to be filled, one additional name shall be certified for each additional vacancy. Sec. 16.35, subsec. (3), Stats., provides that the appointing power may object to one or more persons named, and if the objection is sustained, the commission shall certify in addition the name next following upon the eligible list.

Doubtless it occurred to the legislature in passing sec. 59.21 (8) (a) that it would be awkward and inexpedient to

repeat the various detailed provisions of the civil service law, such as the above mentioned provisions, in making provision for appointment of deputy sheriffs by civil service. Hence, such provisions were, to a large extent, incorporated by reference in the last sentence of sec. 59.21 (8) (a), which applies to counties such as Kenosha county, having a civil service commission.

We see no real inconsistency between the first part of sec. 59.21, (8) (a), providing for appointment from a list of three candidates receiving the highest rating in a competitive examination, and those provisions of ch. 16 incorporated in the last sentence of the subsection, which provides for appointments to fill additional vacancies. As a matter of fact, these provisions from ch. 16 supplement and fill out what would otherwise be a serious gap in sec. 59.21 (8) (a).

We therefore conclude that but one examination need be given for the position of deputy sheriff where more than one vacancy occurs at the same time, provided the vacancy to be filled has no relation to residence in a town, city or village. In such cases we are of the opinion that a separate examination would have to be held to fill such positions.

WHR

NSB

Contracts — Counties — County Board — County Board Committee — When county committee has set up lime project without authorization by county board, county may by subsequent action of county board ratify and approve acts of committee provided that contracts and liabilities incurred are not subject to some other legal infirmity.

April 29, 1938.

JAMES P. CULLEN,
District Attorney,
Prairie du Chien, Wisconsin.

In your letter you state:

“A committee appointed by the board of supervisors of Crawford county, Wisconsin, known as the agricultural committee, on July 26, 1934, according to the minutes of the meeting, decided to put on a lime project whereby the WPA were to furnish the labor and the farmers were to purchase the lime at \$1.00 per ton. This \$1.00 was to be spent to pay for the grinding and hauling and it was presumed to be a self-supporting project. The collection of the funds was supposed to be supervised by the agricultural committee in conjunction with the county agent. This money as collected by the county agent was paid into the county treasurer's office and paid out only on signed vouchers from the county agent. The agricultural committee had never received any authority from the county board at any of the sessions to enter into this lime crushing project. There is now a shortage of approximately \$2,000.00 which is still owing to the lime crushers.”

You do not state how this deficit arose. In as much as the government pays the labor costs upon WPA projects, we assume that the deficit arises out of something other than labor costs, such as purchase or rental of equipment and perhaps purchase of material.

You wish to be advised whether the county board may authorize payment of the deficit that has been incurred.

The county agricultural committee probably did not have authority to conduct this project without authorization from the county board. However, there is no question but that the county board could have authorized such a project. Sec.

59.08, subsec. (18), Stats. Projects or contracts that the board may authorize in the first instance may be adopted by ratification by the board provided there is no legal infirmity in the contracts sought to be ratified, such as failure to submit a contract that requires awarding of bid to the lowest bidder, etc. See *Wagner v. Milwaukee*, 196 Wis. 328, *Shulse v. Mayville*, 223 Wis. 624.

You are therefore advised that unless the obligations and liabilities incurred are subject to some legal infirmity other than failure of the county board to authorize the agricultural committee to conduct the project, the county board may by appropriate action approve and ratify the acts of the committee and pay the deficit that has been incurred.

NSB

Appropriations and Expenditures — Counties — County Board — Salary of elective county officer may not be changed during his term of office, but county board may at its organization meeting in month of May change salary of officer whose term commences following January.

At its May meeting county board may increase number of days for which compensation is allowed for committee meetings and exercise all powers which may be exercised at annual meeting.

April 29, 1938.

CLARENCE J. DORSCHER,

District Attorney,

Green Bay, Wisconsin.

You have inquired whether, at the organization meeting of the county board on the first Tuesday of May, an elective officer's salary may be raised for the balance of his term.

This question is answered by sec. 59.15, subsec. (1), Stats., which provides that salaries of county officers are to be fixed at the annual meeting of the county board and that the salaries so fixed shall not be increased or diminished during the term of office.

Secondly, you inquire whether an elective officer's salary may be changed at the May meeting of the county board where such change relates to the term of office commencing January 1, 1939.

As above pointed out, sec. 59.15, subsec. (1), makes provision for the fixing of the salaries of county officers at the annual meeting of the county board, which is held on the Tuesday next succeeding the second Monday of November. However, sec. 59.04, subsec. (1), par. (b), Stats., makes provision for an organization meeting of the county board on the first Tuesday of May in each year. This subsection further provides that at such organization meeting the board may transact any and all business permitted by law to be transacted at the annual meeting. This being true, and since salaries may be fixed at the annual meeting, it must be concluded that they may also be fixed at the organization meeting in May, subject to the limitation of sec. 59.15, subsec. (1), Stats., discussed above.

It should also be noted that the requirement relating to fixing of salaries at the annual meeting is directory only and that salaries may be fixed at special meetings of the county board. See XXIV Op. Atty. Gen. 88.

Thirdly, you inquire whether the county board at its May meeting is authorized to increase the number of days for which compensation and mileage may be paid to committee members, such committees to be appointed after the organization meeting.

We believe that the county board may at its organization meeting increase the number of days for which compensation and mileage may be paid to committee members. However, in a case of counties having more than twenty-five thousand population, the number of days of service on one or more committees is limited to thirty under sec. 59.06 (2) (b), Stats., except that the county board may, by a two-thirds vote, increase the number of days for which compensation and mileage may be paid. In an opinion to the district attorney of Eau Claire county under date of March 29, 1938,* it was ruled that such increase might be voted after the holding of the additional committee meetings.

*Page 181 of this volume.

Lastly, you inquire whether the county board at its organization meeting may by virtue of sec. 59.04 (1) (b), Stats., transact any and all business not otherwise designated to be transacted at the annual meeting.

It is specifically provided in this section that the county board may at its organization meeting transact all business which may be transacted at the annual meeting. The powers which may be exercised at the annual meeting and therefore at the organization meeting are those general powers of the county board enumerated in sec. 59.07, Stats., and the special powers enumerated in sec. 59.08, Stats.

WHR

Bridges and Highways — Law of Road — Public Officers
— Traffic officer acting under sec. 85.19, subsec. (6), Stats., may only move vehicle to position permitted by law and may not order its removal to police station and charge cost of such moving to defendant.

April 29, 1938.

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

You refer to sec. 85.19, subsec. (6), Stats., and ask if that section authorizes a traffic officer to move a vehicle to the police station or merely move it to a position permitted by the statute.

Sec. 85.19 (6), Stats., provides:

“Whenever any traffic officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is authorized to move such vehicle or to require the operator in charge thereof to move such vehicle to a position permitted under this section.”

Sec. 85.19, Stats., was enacted to provide rules to be used in determining what parking is unlawful as constituting a hazard to those using the highways. The statute must be considered as a whole with this purpose in mind when construing subsec. (6) thereof. *Rice v. Ashland Co.*, 108 Wis. 189; *State ex rel. City Const. Co. v. Kotecki*, 156 Wis. 278.

Any person parking his automobile in violation of sec. 85.19, Stats., subjects himself to the penalties prescribed in sec. 85.91 Stats. However, the fact that a ticket may be placed on an illegally parked automobile does not remove the danger created by such illegal parking if the machine is not moved. In recognition of this fact the legislature has provided that an officer in addition to arresting the driver may either move the vehicle or order the owner thereof, if present, to move it "to a position permitted" by the statute. The requirements of the statute are met when a car is moved to a position on the highway that does not interfere with the safe use of such highway. When acting under authority of sec. 85.19 (6), Stats., an officer may only move an illegally parked vehicle to a position that will remove the danger to those using the highway that was created by such illegal parking. An officer must act in a reasonable manner when carrying out this statute. If it were not for subsec. (6) of sec. 85.19 an officer moving a vehicle without the knowledge of the owner might subject himself to the penalty fixed by some other law, such as operating an automobile without the owner's consent. Such liability would undoubtedly attach were he to exceed the authority granted him by that statute.

It could not be said in the absence of some legislation permitting it that a vehicle may be taken to a police station when the danger created by its position on the highway will be eliminated by moving the vehicle to a position permitted by the statute. We find no such authority and in the absence of same believe that should not be done.

Furthermore, sec. 85.19, Stats., refers to vehicles parked on the highway and subsec. (6) must be construed with that in mind. A "position permitted" by the statute would not necessarily mean a police station, but refers only to a place on a highway that will not interfere with the safe use of such highway.

Furthermore, sec. 85.19 (6) provides that a traffic officer may either move an illegally parked vehicle himself or order the owner, if present, to move it to a legal position. When several words are followed by a clause which is applicable as much to the first or other word as to the last, the natural construction of the language demands that the clause be read as applicable to all. *Porto Rico Ry. Co. v. Mor*, 253 U. S. 345, 348.

Applying this rule to the statute in question, the clause "move such vehicle to a position permitted by this section" refers to cases where the officer personally moves the vehicle, as well as where the vehicle is moved by the operator or owner thereof.

In view of the foregoing it is our opinion that a traffic officer acting under sec. 85.19 (6), Stats., may only move a vehicle to a position permitted by the law and may not order its removal to the police station and charge the cost of such moving to the defendant.

LEV

Indigent, Insane, etc. — Poor Relief — County having adopted county system of poor relief may repeal resolution adopting such system only by majority vote of all supervisors entitled to seat in such board. Majority of quorum is not sufficient.

April 29, 1938.

EMORY O. ELLINGSON,
District Attorney,
Ladysmith, Wisconsin.

In your letter of April 25 you state:

"On March 24th, at a special meeting called for that purpose, the county board of supervisors of Rusk county voted to abandon the county form of relief. By a resolution adopted on that date, it was voted to repeal a former reso-

lution which had abolished the distinction between county poor and town, village and city poor in Rusk county and had made the expense of maintaining all the poor therein a county charge. The vote on the said resolution was 18 ayes and 17 noes. The total number of supervisors elected to the county board is 39."

You further direct our attention to sec. 49.15, Stats., which provides that the distinction between county poor and town, village and city poor may be abolished "by a resolution adopted by an affirmative vote of a majority of all the supervisors entitled to a seat in such board, * * *," and to sec. 49.16, which provides that such resolution may be repealed "by a similar vote."

You state that in view of the language of the foregoing sections of the statutes you are of the opinion that it would require an affirmative vote of twenty members to enable the board of your county to repeal the prior resolution abolishing the distinction between county poor and town, village and city poor relief. You wish our opinion as to whether you have correctly interpreted the statutes in question.

The language "by a resolution adopted by an affirmative vote of a majority of all supervisors entitled to a seat in such board" is about as plain as it is possible to make any language. The language is so plain as to permit of no construction.

We are of the opinion that you have correctly interpreted the statutes in question and that a county operating under the county system of relief can go back to the town, city or village system only by a majority vote of all members of the board that are elected and qualified to vote. A majority of a quorum is not sufficient.

NSB

Labor — Public Officers — County employees may join labor unions.

April 29, 1938.

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

In your letter of April 22 you state that there are CIO organizers in your county and that these organizers are trying to organize the county highway department employees. You wish to be advised whether employees of a municipality may organize under AFL or CIO.

In an opinion dated January 18, 1938, rendered to William H. Stevenson, district attorney of La Crosse county,* we held that a county highway committee may bargain with employees as a group and by such means reach an agreement as to hours, wages, seniority, classifications, nondiscrimination, etc., but that neither county highway committee nor the county board may make a contract stipulating that all employees must be members of a particular organization.

The plain implication of the opinion is that governmental employees may organize for purposes of procuring the benefits of collective bargaining. We know of no rule of law that would prohibit governmental employees from so organizing. In fact, state and federal employees have joined unions and the right to do so has not been challenged by either the national or state government.

You are therefore advised that employees of the county may join labor unions.

NSB

*Page 30 of this volume.

Public Health — Public Records — Health records of public school pupils and consents to vaccination and immunization are not public records and matter of their preservation is one of policy.

April 30, 1938.

BOARD OF HEALTH.

You have inquired how long public school health records of pupils are to be preserved after they have finished school, and how long consent slips signed by parents for vaccination or immunization should be kept.

Sec. 18.01, subsec. (1), Stats., provides:

“Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.”

It is to be noted from the foregoing statute that the duty of preservation extends only to things required by law to be filed, deposited, or kept. A public record has been defined, among other things, as one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law. 53 C. J. 604. Such records may be destroyed only when authorized by law. 23 R. C. L. 169.

Our attention has not been directed to any statutory provisions requiring the keeping of health records of pupils or of consents for vaccination or immunization. In this connection we direct your attention to XI Op. Atty. Gen. 294, holding that the records of a state sanatorium relating to condition of patients cannot be disclosed by the superintendent without the consent of the patients. The records in question are not, properly speaking, public records, and are, therefore, not subject to the statute and rules above discussed.

The matter of the preservation of the records must, consequently, resolve itself into a question of policy rather than one of law to be answered by this department.

In conclusion, it might be pointed out that the consent to vaccination or immunization is apparently for the purpose of protecting the public and its officers or employees from personal injury claims which might otherwise be made in the event of illness or other complications arising out of vaccination or immunization where no consent had been given. Personal injury claims are barred after six years, and may be barred after two years if no notice of claim is served. See sec. 330.19, subsec. (5), Stats. Actions to recover damages for wrongful acts resulting in death are barred after two years under sec. 330.21, subsec. (3), Stats. It would seem that these limitations should be kept in mind in adopting any policy with reference to the length of time during which such consents are to be preserved.

WHR

Minors — Child Protection — Maternity aid may be granted under sec. 48.331, Stats., even though such aid is not likely to continue for period of one year.

April 30, 1938.

PENSION DEPARTMENT.

Our attention is directed to that part of sec. 48.331, Stats., providing for maternity aid, reading as follows:

“* * * Such aid shall be governed in all respects by the provisions of section 48.33, * * *”

In connection therewith you state:

“A woman applied for maternity aid under section 48.331 on the grounds that her husband has been sentenced to prison for fourteen months. Her application was filed three months after the husband began serving the sentence. Without time off for good behavior the husband's time will be up eleven months after the date of his wife's application. With time off for good behavior he will be released in less than ten months from the date of that application.”

You ask if aid may be granted in view of the facts outlined above.

The pertinent portions of sec. 48.33, subsec. (5), Stats., read as follows:

“(d) Aid shall be granted to the mother or stepmother of a dependent child who is dependent on the public for proper support if such mother or stepmother is * * * the wife of a husband who has been sentenced to a penal institution for a period of at least one year * * *

“(e) The person having the care and custody of such children must be a fit and proper person to have the custody and care of the dependent children and the period of aid must be likely to continue longer than one year.”

Reading these two subsections together and strictly construing this statute, it would seem that a woman whose husband has been sentenced to a penal institution for a period of one year could not receive aid to dependent children if the aid granted was not likely to continue for a period of one year. However, sec. 48.331, Stats., provides that aid shall be granted six months before and six months after the birth of a child if the mother's circumstances are such as to deprive either her or the child of proper care. This statute in effect provides that maternity aid shall be granted for a period of one year where the mother or child will not otherwise get adequate care at the time application for aid is made. Furthermore, sec. 48.33 (5) (e), Stats., providing that the period of aid shall not continue for more than a year, can have no application to maternity aid as such aid by the very terms of the statute cannot be granted for more than a year.

The special care provided for by this statute is needed before the child is born and the fact the father may be in a position to care for the child five months after its birth does not alleviate that need. Sec. 48.331, Stats., provides for special care only in cases where an unborn child is involved and consequently the specific provisions of that section should control over the general provisions of sec. 48.33 (5) (e), quoted above. This is especially true when a strict application of the latter will deny aid in a case where all other conditions are met.

It must be remembered aid granted under sec. 48.33, Stats. is for the benefit of the child. XXVI Op. Atty. Gen. 304. Also that the statute should be liberally construed to effectuate such purpose. XXVI Op. Atty. Gen. 289, 290. Applying this rule to the facts presented, it is our opinion that aid may be granted the mother in question.

NSB

Minors — Child Protection — Mothers' Pensions —
Commencement of bastardy proceedings is not condition precedent to granting aid to unwed mother under sec. 48.331, Stats.

April 30, 1938.

PENSION DEPARTMENT.

You ask if aid may be granted under sec. 48.331, Stats., to an unwed mother only after steps have been taken to force the putative father to provide proper support.

Sec. 48.33, subsec. (5), par. (d), provides that aid may be granted "to the mother or stepmother of a dependent child who is dependent upon the public for proper support if such mother or stepmother *is without a husband, * * **" This has been construed to authorize the granting of aid for illegitimate as well as legitimate children. V Op. Atty. Gen. 787; VI 576 and XVII 268. Maternity aid is granted a mother if "her financial circumstances are such as to deprive either the mother or child of proper care." Thus an unwed mother who has no means of caring for herself or child may be granted aid under sec. 48.331, Stats., as she is or will be the mother of a dependent child in need of support who is without a husband within the meaning of the statutes. There is nothing in sec. 48.33, Stats., that requires the commencement of proceedings to determine the identity of the father as a condition precedent to granting aid. In the absence of such requirement proceedings need not be started before aid is granted if the facts show the mother and child are in need.

Ch. 166 authorizes the commencement of proceedings to determine the paternity of an illegitimate child. Such proceedings are usually brought by the district attorney. See sec. 166.08, Stats. If such an action is started before the birth of an illegitimate child and the putative father is determined and found able to care for the mother and expected child, then aid may not be granted as the mother would not be in such financial condition as to deprive her or the child of adequate care. However, as stated above, aid may be granted if this has not been done when all requirements of the statute are met.

NSB

Insurance — Fraternal Benefit Societies — Labor — Labor Relations — Labor union composed of more than five hundred members not restricted to persons engaged in hazardous occupations, maintaining sick and health benefit plan, is subject to ch. 208, Stats., regulating mutual benefit societies.

May 2, 1938.

H. J. MORTENSEN,

Commissioner of Insurance.

A labor union composed of about 1,500 truck drivers and helpers is desirous of instituting a sick benefit plan for its members. Each member will be assessed a dollar to start a fund therefor and an additional twenty-five cent assessment at any time the fund becomes depleted to the extent of twenty-five per cent. The money will be kept in a separate account designated "Sick benefit fund" and payments made therefrom by check to members in payment of sick benefits as provided by the plan. You inquire whether the operation of such sick benefit plan by said union is subject to the insurance laws of this state.

Sec. 208.01, subsec. (1), Stats., reads as follows:

"Any corporation, society, order or association, without capital stock, organized and carried on solely for the mutual benefit of its members or their beneficiaries and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of death or disability benefits or for both is hereby declared to be a 'Mutual Benefit Society,' which shall be held to be synonymous with a 'Fraternal Benefit Society.' Domestic societies licensed to do business in this state as mutual benefit societies on the first day of May, 1911, shall be considered within this subsection."

The terms "lodge systems" and "representative form of government" as used in said subsec. (1) of sec. 208.01 are defined by subsecs. (2) and (3), respectively, of sec. 208.01, Stats.

Originally, the term "fraternal benefit society" was applied to an organization whose function was the promotion of fraternal relations among its members and the maintenance of an insurance plan for the members and their families. Couch, *Cyclopedia of Insurance Law*, vol. 1, sec. 40, page 63, states that fraternal benefit societies are of two kinds: those organized for the purpose of doing an insurance business, and those having a social benevolent or like character, but the nature and dominant purpose of which is insurance. The courts of Wisconsin, however, have never determined the type of organizations to which the terms "mutual benefit society" and "fraternal benefit society" as used in sec. 208.01, Stats., are meant to apply.

The organization here considered is a labor union organized primarily to deal with matters involving or growing out of an employee-employer relationship. The proposed sick benefit plan would seem to be only incidental to the primary functions of the organization. However, sec. 208.01 (1) does not limit the definition of "fraternal benefit societies" to those whose predominant purpose is insurance. The language used in sec. 208.01 (1) indicates an intent rather that the statute shall pertain to societies in which the insurance feature is only incidental. Were a more restricted definition intended the statute would read that any society organized for the purpose of or primarily for the purpose of effecting a death or disability benefit plan or both is a mutual benefit society.

In the case of *Clark v. Grand Lodge of Brotherhood of Trainmen*, (1931) 328 Mo. 1084, 43 S. W. (2d) 404, where a labor organization was involved and the Missouri statute, for all purposes of this opinion, was identical with sec. 208.01, Stats., the court at pages 408, 409 said:

"It is apparent that defendant is primarily a labor organization having to do largely with questions of employment, collective bargaining, hours of labor, working conditions, etc., but its activities and liabilities in this respect are in no way here involved.

"* * *

"We think it apparent that defendant association, although not incorporated, is a fraternal benefit association within the meaning of said statute."

To the same effect see: *Westemeyer v. Journeymen Barbers' Int. Union, Local 102 of St. Louis*, (1934) 77 S. W. (2d) 493; *Brotherhood of R. R. Trainmen v. Woods*, (1934) 256 Ky. 613, 76 S. W. (2d) 911.

Whether or not the labor union in question has a lodge system with ritualistic form of work and representative form of government is a question of fact. Assuming that such organization is so constituted and governed it is our opinion that a labor union which makes provision for the payment of death or disability benefits, or both, is a mutual benefit society within the meaning of sec. 208.01, subsec. (1), Stats., and would be subject to the provisions of ch. 208, Wis. Stats.

The labor relations act, ch. 111, Stats., deals with labor unions only in reference to matters pertaining to or arising out of conditions of employment and problems peculiar to the employee-employer relationship. The matter of insurance benefits does not relate to conditions of employment or industrial relations. It is something distinctly apart therefrom and not within the scope of the Wisconsin labor relations act. Thus there is no conflict between the provisions of ch. 111 and the general insurance laws in this regard. In so far as the activities of a labor union pertain to matters arising out of or relating to conditions of employment or the employee-employer relationship the provisions of ch. 111 would control. But as to other matters not within that field a labor union would be governed by the general law. The property rights of a labor union would be controlled by the general property laws in the absence of some specific provision of the labor relations act covering the subject. So, also, the insurance activities of a labor union would be governed by the insurance laws.

The provisions of sec. 111.07, Stats., grant to unions the power to engage in concerted activities for mutual aid or protection. This would be a sufficiently broad grant of power to authorize such an organization to conduct a benefit insurance plan. The provisions of sec. 133.07, Stats., likewise are merely a grant of power so as to exempt labor unions and other organizations of similar nature from the operative effect of the statutes prohibiting monopolies. Such grants of power, however, by the provisions of these sec-

tions, would not exclude the operative effect of the insurance laws upon the exercise by the union of the power so granted. There is nothing in ch. 111 or in ch. 133 that grants to a labor union exemption from regulation by general law when it engages in activities other than those essentially the functions of a labor union.

Sec. 208.03, Stats., provides:

“Unless express reference is made thereto, no insurance law shall apply to societies which admit to membership only persons engaged in one or more hazardous occupations in the same or similar lines of business and their immediate families and dependents; * * * But any such order or society, except societies which admit to membership only persons engaged in one or more hazardous occupations in the same or similar lines of business and their immediate families and dependents, which has more than five hundred members and provides for death or disability benefits or which issues a certificate providing for the payment of benefits shall comply with all the requirements of law relating to mutual benefit societies.”

It is difficult to determine just what the legislature meant by this exemption of societies whose members are engaged in one or more hazardous occupations. In insurance law “hazardous” is used for the purpose of expressing the degree of danger involved in one occupation as compared with another. Nowhere in the statutes do we find any definite classification of hazardous and non hazardous occupations. Under the workmen’s compensation law trucking is considered a hazardous occupation, as are many other occupations, none of which however would be considered hazardous as the word is commonly understood.

“Hazardous occupations” as used in sec. 208.03, Stats., refers to those occupations which, by their very dangerous nature, would render persons engaged therein undesirable insurance risks and make it extremely difficult for them to secure insurance from regular companies. However, truck driving generally is not so dangerous to the life and health of the individuals engaged therein as to place them outside of the field of insurable risks. Therefore, a labor union composed of truck drivers and helpers would not be a society

composed only of persons engaged in one or more hazardous occupations within such exception.

It is, therefore, our opinion that a labor union, composed of more than five hundred members not restricted to only persons engaged in one or more occupations so inherently dangerous that the persons engaged therein are outside of the field of insurable risks, and which maintains a death and sick benefit plan, under the provisions of sec. 208.03, Stats., is subject to ch. 208, Stats., regulating mutual benefit societies.

HHP

Illegitimacy — Minors — Trustee in illegitimacy agreement and judgment under provisions of ch. 166, Stats., should make payment to person having legal custody of child, pursuant to order of court. It is immaterial whether such child is within or without state or whether he is in custody of his mother or some other person.

May 2, 1938.

HERBERT J. STEFFES,

District Attorney,

Milwaukee, Wisconsin.

Attention Nathan W. Heller.

You ask whether it is permissible for the trustee in an illegitimacy agreement or judgment under ch. 166 of the statutes to send monthly payments to (a) the mother of the illegitimate child when she has the child in her own care and custody but is living in a state other than Wisconsin, (b) any person, agency or institution other than the mother, having custody of the illegitimate child, such person, agency or institution being in a state other than Wisconsin.

Sec. 166.11, Stats., in part provides as follows:

“(1) * * * All payments for the future support of the child shall be paid to a trustee and shall be held by him for the benefit of the child and by him shall be paid to the person having legal custody of the child in such manner and amounts as the court may direct.”

The above statute does not provide that the payments are to be made only in the event the child is within the state. The legislative purpose would seem to be that of insuring that the child will be properly supported. Such child is as much in need of support if it is in some other state as it would be if it were within the state of Wisconsin. The statute imposes the duty upon the father or the stipulating accused person to support the child and provides a procedure for enforcing such duty.

Therefore you are advised that it is permissible for the trustee in an illegitimacy agreement and judgment under ch. 166 and upon proper order of the court, to send monthly payments to the mother of an illegitimate child when she has the child in her own care and custody but is living in a state other than Wisconsin, or to any person, agency or institution which has the lawful custody of such child even though such institution is located in another state.

AGH

Appropriations and Expenditures — Witness Fees — Taxation — Income Tax — Witness fees incurred in income tax hearings before county board of review under sec. 71.13, Stats., are not chargeable to county.

May 3, 1938.

TAX COMMISSION.

You have inquired whether a county is liable for witness fees in connection with an income tax board of review hearing.

Sec. 71.13, subsec. (1), Stats., makes provision for the appointment by the state tax commission of a county board of review, consisting of three resident taxpayers.

Sec. 71.13, subsec. (2), Stats., provides:

“The county clerk shall be clerk of such board, and shall keep an accurate record of all proceedings thereof, including a correct record of all changes in the assessment rolls made by the board. The county shall employ a stenographic reporter to take all evidence given before the board and to extend the same in type-written form. The county clerk shall preserve in his office a record of all such proceedings, minutes and evidence taken, and all documentary evidence offered, and shall notify the parties to the appeal of the decision of the board of review. The expense of such stenographic reporter shall be borne by the county, and shall be paid by the county treasurer on the certificate of the assessor of incomes, but if not so paid shall in the first instance be paid out of the state treasury as other claims against the state are audited and paid, and shall be included in the next apportionment and certification of state taxes and charges, and shall be collected from such county as other special charges are certified and collected.”

There are no provisions in sec. 71.13, Stats., making the county liable for witness fees. In the case of *Frederick v. Douglas County*, 96 Wis. 411, 417, the court quoted as follows from 1 Dillon, Mun. Corp. (4th ed.), sec. 25:

“* * * the statutes confer upon them [the counties] all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject.”

Thus it must be concluded that, in the absence of a statute, there is no liability on the part of the county to pay witness fees under sec. 71.13, Stats. This view is further supported by the fact that sec. 71.13, subsec. (2), above quoted, specifically provides that the expense of the stenographic reporter shall be borne by the county. If the legislature had intended that other expenses of these hearings, such as witness fees, should also be borne by the county, it could easily have said so. Its failure to say so is significant and gives rise to the presumption that the expression of the one item

of expense chargeable to the county results in the implied exclusion of other items under the well known rule of statutory construction, *expressio unius est exclusio alterius*.
WHR

Public Officers — School Districts — Band Director — Music Teacher — Acceptance of commission by music teacher or band director in employ of public school on musical instruments sold to students under his direction violates provisions of sec. 40.14, Stats.

May 4, 1938.

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

You ask whether a music teacher or band director in the employ of a school district can legally act as the agent in the sale of musical instruments to students under his direction in schools and accept a commission on the sales of said instruments.

Sec. 40.14, Stats., provides as follows:

“Neither the state superintendent, nor any person in his office, nor any county superintendent, nor any officer or teacher connected with any public school, shall act as agent or solicitor for the sale of any schoolbooks, maps, charts, school library books, school furniture, apparatus or stationery, or furnish any assistance to or receive any reward therefor from any author, bookseller or dealer doing the same. Every person violating this section shall forfeit not less than fifty nor more than two hundred dollars for each offense and be liable to removal from office therefor.”

From the wording of the statute taken as a whole, it is apparent that at the time of the enactment thereof the legislature recognized that the persons named therein might be

in a position to take an unfair advantage either of the school or of the students attending such a school and it was to prevent such an abuse that the statute was enacted. It is necessary in construing a statute or a word used therein to look first to the legislative intent. In regard to this, our courts have said that in determining the proper construction of a word in a statute "consideration must be given to the object and purpose of the statute and the end to be attained." *State ex rel. Schauer v. Risjord*, 183 Wis. 553, 556. The court further said in *State v. Boliski*, 156 Wis. 78, 81:

"* * * Sometimes a strict and sometimes a liberal construction is required, even in respect to a penal law, because the dominating purpose of all construction is to carry out the legislative purpose."

The sale of musical instruments under the circumstances outlined is within the condemnation of sec. 40.14, Stats., if a musical instrument is "apparatus" as that term is used in said statute. "Apparatus" is defined in Webster's New International Dictionary as "any complex instrument or appliance, mechanical or chemical, for a specific action or operation." It would seem that a musical instrument is mechanical in nature and is at least capable of being used for the specific purpose of producing music.

We are of the opinion that a musical instrument is "apparatus" as that term is used in sec. 40.14, Stats., and that a music teacher or band director in the employ of a school district cannot legally act as agent in the sale of musical instruments to students under his direction and accept a commission on such sales.

NSB
AGH

Appropriations and Expenditures — Taxation — Income Tax — Refunds — Taxes paid in error may not be refunded under provisions of sec. 20.06, subsec. (2), Stats.

May 4, 1938.

TAX COMMISSION.

You state that a certain firm has made payment to the tax commission of chain store taxes imposed by ch. 12, Laws of the Special Session of 1937, and such payment has been transmitted to the state treasurer. Thereafter it was ascertained that because this taxpayer was operating a wholesale business it was not subject to such tax because applicable only to sales at retail. At the time of the payment the taxpayer erroneously thought he was liable for such chain store tax. The taxpayer now requests a refund of the taxes so paid, although such taxes were not paid under protest and no legal action has been brought for the recovery of the same. You inquire whether such taxes may be refunded pursuant to the provisions of sec. 20.06, subsec. (2), Stats.

In an opinion to the secretary of state under date of April 4, 1938*, we advised that such chain store taxes so paid were refundable only under the provisions of sec. 76.75 (5), Stats.

In an opinion in XV Op. Atty. Gen. 10, it was held that fees collected by the oil inspection department for the inspection of fuel oil were refundable under sec. 20.06 (2), Stats., where it appeared that such fuel oil was, in fact, exempt from the statutory requirement of inspection. Likewise, in XXI Op. Atty. Gen. 432, it was held that motor vehicle hauling permit fees collected by the public service commission under an erroneous construction of the law were properly refundable under sec. 20.06 (2). Both of these opinions, however, dealt with the refunding of fees collected and did not involve taxes.

In XXV Op. Atty. Gen. 34, it was held that flat taxes on motor vehicles collected by the public service commission under an act later declared invalid because improperly en-

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acted might not be refunded under sec. 20.06 (2), Stats. The reason that such taxes were not refundable is that subsec. (2) of sec. 20.06 provides generally for the refunding of moneys paid into the state treasury in error and then subsecs. (3), (4) and (8) of the same statute specifically provide for the refunding of taxes in certain instances. In all of the instances of refunding of taxes for which specific provision is made by subsecs. (3), (4) and (8) the money was paid into the state treasury in error in the sense that the tax was not properly collectible. It is a fundamental rule of statutory construction that the enumeration of one is the exclusion of the other. Thus, the specific provisions of subsecs. (3), (4) and (8) of sec. 20.06, Stats., for the refunding of taxes thereby exclude refunding of taxes under the provisions of subsec. (2) of the same section. If taxes could be refunded under the provisions of subsec. (2) then there would be no necessity for the provisions of subsecs. (3), (4) and (8).

Upon the basis of the foregoing reasoning, it was held in XXV Op. Atty. Gen. 499 that suit taxes paid by the Home Owners' Loan Corporation after we had held in a prior opinion, in XXV Op. Atty. Gen. 401, specifically that the Home Owners' Loan Corporation was not required to make payment of suit taxes upon the commencement by it of various actions to foreclose mortgages, could not be refunded under the provisions of sec. 20.06 (2), Stats. In so holding, we said as follows:

"Sec. 20.06, subsec. (2), Stats., makes provision for refund of moneys paid into the state treasury in error, but we do not consider this section applicable to taxes, since there are specific provisions for refund of certain taxes in subsecs. (3), (4), and (8), sec. 20.06.

"The legislature having made specific provision for the refund of certain taxes, and no provision for the refund of taxes paid under sec. 271.21, the doctrine of *expressio unius est exclusio alterius* would seem to apply."

The above and foregoing may effect a harsh result but the legislature has met since the rendering of said opinions and has not seen fit to make any change in the statute to the contrary. In fact, the legislature by sec. 5, ch. 181 of the Laws

1937, published May 29, 1937, added subsec. (10) to sec. 20.06, Stats., without effecting any change in the other provisions of said statute.

It is therefore our opinion that moneys paid into the state treasury as remittances of chain store taxes by firms not subject to such tax may not be refunded under sec. 20.06 (2), Stats.

HHP

Tuberculosis Sanatoriums — Any building or structure on premises and in close proximity to main structure which is properly incident to and which aids and facilitates in functioning of institution may be considered as being within purview of sec. 50.07, subsec. (2), par. (d), Stats.

Test as to whether land improvement items may be included in cost is whether it can be said that such land improvement items are so closely related to structural improvement, all or part of which is qualified for improvement, as to be part of said improvement. Furniture and furnishings which are in no sense fixtures cannot be included as items of cost.

May 5, 1938.

BOARD OF CONTROL.

You cite ch. 285, Laws 1937, which creates subsec. (2), par. (d) of sec. 50.07, Stats., and relates to maintenance charges in county tuberculosis sanatoria. You ask whether the following items fall within the meaning of the act:

	Actual Cash Paid	Total Cost Including All Payments of 1936-37
"Land and Land Improvement:		
Shrubs and trees -----	\$ 122.68	
Fence -----	136.48	
Drain tile at entrance gate ---	31.90	
Coping around parking area --	25.03	
Pavement around nurses' home	745.80	\$ 758.40

Structures and Attached Fixtures:

Nurses' home addition -----	393.63	3,266.61
(Total Amount -----)		20,320.65)
Garage -----	667.15	6,053.40
Elevator -----	1,400.40	7,135.81
Incinerator -----	234.30	768.00
Heating elevator -----	47.10	
Entrance gate -----	198.06	393.55
Outside fireplace -----		7.25
Electric fly screens -----		124.82
Furniture & Furnishings:		
Nurses' home furniture -----	933.22	959.04
Hair drier -----	15.00	
Centrifuge -----	55.00	
Sewing machine -----	85.00	
Wheel chair stretcher -----		54.04
Lobby furniture -----		27.33"

You also advise that the nurses' home addition above referred to was completed in July of 1936 and that the heating of the elevator was also concluded in 1936. The portion of the said act which is pertinent to the present matter provides as follows:

"50.07 (2) (d) 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. * * *"

In an opinion dated April 1, 1938*, we advised you:

"* * * Any building or structure on the premises and in close proximity to the main structure, and which is properly incident to and which aids and facilitates in the functioning of the institution may be considered as being within the purview of sec. 50.07 (2) (d), Stats."

In the same opinion we advised that machinery, equipment, fixtures and furnishings could not be included unless they were so attached to the real estate as to become "fixtures." You now submit additional land improvement items. The question with respect to such items would appear to be whether the land improvement item in question can be said to be so connected with the structural improvement as to be

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a part of the same improvement. We doubt that a general improvement of the sanatorium grounds that has no relationship to the structural improvement in question could be said to be a part of the "addition" as that term is used in the statute. Thus, with respect to the items listed under "lands and land improvement" and the entrance gate and outside fireplace listed under "structures and attached fixtures," the test as to whether such items may be included would seem to be whether it can reasonably be said that these land improvements are so closely related to a structural improvement, all or a part of which is qualified for inclusion, as to be a part of said improvement.

With respect to those items listed under "structures and attached fixtures" the nurses' home may not be included, as under the facts submitted the construction was completed prior to January 1, 1937. If the structure had been erected after January 1, 1937, there is no reason why it should not be included if it meets the test above quoted from the opinion rendered to you on April 1 of this year. The same applies to the garage. If the elevator is part of an addition that may be included, there is no reason why that item should not be included. If it is an item placed in an addition that may not be included, or in the old structure, it would seem that the elevator would then be an item which cannot be included. It appears from the facts stated that the particular elevator in question was part of an addition within the meaning of the statute but it does not appear at what time the addition or any part thereof was constructed. If any part of the addition was constructed subsequently to January 1 and the elevator installed subsequently to that date, that part and the elevator may properly be included. The incinerator and electric fly screens will have to be subjected to the same test and the further test as to whether they are fixtures within the meaning of that term as that term is expounded in the opinion of April 1.

As to those items listed as "furniture and furnishings," it would seem that they should not be included as an item of cost. None of the items listed appear to be fixtures.

In conclusion, we wish to point out that the act provides only for additions made after the first day of January, 1937.

This clearly eliminates the nurses' home addition and heating of elevator. As the statute contemplates that the addition or any part thereof must be made after January 1, 1937, it is unimportant when the payment for such an addition or part thereof may be made. With respect to many of the items, it appears that payment was made in 1937 but it does not appear when the construction or improvement was actually made. It would seem that you will have to obtain this additional factual data before you can make a final determination upon the particular items in question.

NSB

Counties — Courts — County Judge — Sec. 253.15, subsec. (4), Stats., is controlling over sec. 59.15, subsec. (1), Stats., so far as it is inconsistent therewith.

County judge is entitled only to annual salary fixed by county board plus such additional fees and compensation as county board authorizes him to retain under sec. 253.15 (4), Stats.

May 5, 1938.

CLARENCE W. WIRTH,
District Attorney,
Berlin, Wisconsin.

You inquire whether the county judge may retain for his own use the fees for certified copies of records in his court and also moneys received for preparing copies of records for certifying. In addition you inquire whether he is entitled to five dollars per day for hearing applications for medical aid under ch. 142, sanity hearings under sec. 51.07, subsec. (1), and miscellaneous matters under sec. 253.15 (3), Stats.

We understand that the salary of this judge was fixed at \$1,800.00 per year for the six-year term beginning January 1, 1938, and that the resolution of the county board fixing

the salary further provided "together with all fees for certified copies furnished by him of records belonging to his office."

Sec. 59.15 (1), Stats., 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,
* * *"

There is a long line of opinions from this department to the effect that where the county judge has been placed on a salary basis he is not entitled to fees or additional compensation by reason of the limitation provided in sec. 59.15 (1) quoted above. See VIII Op. Atty. Gen. 720, X 889, XIV 176, XVI 669 and XXIII 111.

However, these opinions were all rendered prior to the enactment of ch. 468, Laws 1935, which, among other things, created subsec. (4), sec. 253.15, reading as follows:

"The county board may by resolution provide that the salary fixed shall be in lieu of all fees, per diem or other compensation out of the county treasury for the performance of any official duty imposed upon the county judge by law by virtue of his office which are authorized under the provision of subsection (3) of this section or of any other statute."

The effect of this statute is to make it optional with the county board whether the county judge is to receive any fees, per diem or other compensation in addition to his fixed salary, and this applies regardless of what statute is involved. Hence, the county board may, if it chooses, permit the county judge to retain fees for certified copies of records, fees for preparing copies, per diem for hearing applications for medical aid under ch. 142, per diem for sanity hearings under sec. 51.07 (1) and miscellaneous matters under sec. 253.15 (3), Stats.

To this extent secs. 59.15 (1) and 253.15 (4) are in conflict and under familiar rules of statutory construction it must be held that the later specific statute is controlling over the earlier general statute. *State ex rel. De Forest v. Hobe*, 124 Wis. 8.

As we see it, the only question presented here is as to how far the county board in the case in question has gone under sec. 253.15 (4) in allowing the judge to retain fees and compensation over and above his annual salary.

This question is easily answered by referring to the county board resolution which fixes an annual salary "together with all fees for certified copies furnished by him of records belonging to his office." This the judge receives and no more. To the extent that the county board has failed to authorize the judge to retain other fees and per diems, our previous line of opinions based on sec. 59.15 (1) must be considered as controlling.

You are therefore advised that the county judge, under the county board resolution referred to, is entitled only to his annual salary plus the fees received for certified copies of records belonging to his office.

WHR

Public Officers — Soldiers' Relief Commission — Member of soldiers' relief commission may be compensated by lawful per diem rate for services rendered in investigating needs of applicants for aid, but he is entitled to compensation for only days actually and necessarily spent in proper performance of his official duties.

May 6, 1938.

LEWIS C. MAGNUSEN,
District Attorney,
Oshkosh, Wisconsin.

You state that a member of the soldiers' relief commission individually makes a number of investigations in your county and reports his findings to the commission; that upon

these findings, the commission determines whether relief should be given; that this member of the commission annually presents to the county board a bill for services, and claims that he is entitled to the same number of days that the county board members are entitled to, basing his claim on sec. 45.15, Stats.

You ask whether a member of the soldiers' relief commission may make individual investigations in reference to certain claims and be compensated therefor at the lawful per diem rate. You also ask whether he is entitled to the same number of days that county board members are entitled to.

Sec. 45.14, Stats., in part provides as follows :

"Such commission shall meet at the office of the county clerk on or before the first Monday of January in each year and at such other times as may be necessary, and at such annual meeting carefully examine the lists reported pursuant to section 45.11, and being satisfied that the persons named on such lists are entitled to assistance shall fix the amount to be paid to each. * * *"

It is obvious that it was the intention of the legislature to permit reasonable investigation of the financial conditions of applicants for relief. Otherwise, it would not have provided that the commission be satisfied that the persons named on the list are entitled to assistance. It would be impossible in many instances, in fact in practically every instance in counties having a large population, for the commission to have any knowledge of the need of an applicant without making some sort of an investigation, and certainly there would be no necessity for the full membership of the commission to conduct such an investigation. In fact, if the full membership of a commission were to conduct each and every investigation, it would mean that the overhead expense of administering the relief provided for by the statute would be exorbitant.

Therefore, you are advised that an individual member of the soldiers' relief commission may make an investigation of particular relief clients' needs, report his findings to the board, and receive per diem compensation for the time spent in making such investigations.

Sec. 45.15, Stats., in part provides as follows:

“The county board shall allow the members of the commission the same rate of compensation as is fixed by law for their own compensation and also the amount of their actual expenses incurred in the performance of their duties,
* * *”

The purpose of the above section is to provide a rate of compensation to be paid to members of the soldiers' relief commission for the number of days they have actually and necessarily spent in the performance of their duties. The statute fixes the maximum compensation that a member of the commission may be paid. It does not fix the minimum. That must be based upon the number of days actually and necessarily spent in the performance of duty.

NSB

AGH

Peddlers — Person engaged in business of taking so-called tintype pictures of people on street, developing and delivering them to persons on street where pictures are taken, is not peddler under sec. 129.01, Stats.

May 6, 1938.

GEORGE WARNER, *Chief Inspector of Weights & Measures,*
Department of Agriculture & Markets.

You state that there are a number of persons, especially in the city of Milwaukee, that make it a business of taking so-called tintype pictures of people on the street. These pictures are taken, developed and delivered to the persons right on the street where the pictures are taken and the whole transaction consumes only a few minutes. You inquire whether the party operating this machine and selling these pictures is a peddler under sec. 129.01, Stats.

There is no definition given of a peddler as that term is used in sec. 129.01, Stats. In *Dewitt v. State*, 155 Wis. 249, 251, it was said of a peddler "that he must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with." It is also stated:

"* * * A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him."

In 29 C. J. 223 it is stated:

"* * * One who goes about selling lightning rods from house to house is a peddler, but one who sells no rods, without putting them up, and who travels about with all the necessary appliances for so doing, charging so much a foot for his work, is not a peddler."

The test in such cases must be whether the personal service element enters into the transaction to such an extent as to make the transaction essentially one for personal service rather than for sale of goods, wares or merchandise. In XXII Op. Atty. Gen. 686 we held that a person moving about from place to place fashioning keys according to order at a work bench is not a transient merchant within the contemplation of sec. 129.05, Stats.

We are of the opinion that the element of work, skill and personal service involved in the taking, developing and sale of tintype pictures upon the street is such that persons engaged in such trade cannot be classified as peddlers within the meaning of sec. 129.01, Stats., even though the whole transaction may consume only a few moments.

NSB

JEM

Education — School Administration — Teacher Tenure
 — School board has power to change position and reduce salary of teacher who has acquired permanent tenure under sec. 39.40, Stats., but such power must be exercised in good faith and may not be exercised to accomplish indirectly that which cannot be done directly.

May 7, 1938.

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

A teacher in a certain city has occupied the position of principal of an elementary school for the past eight years. The superintendent has assured the teacher that positively no criticism of the teacher's work can be made in any way; that the results accomplished were outstanding; that discipline was of the best and that the teacher was exceedingly well liked as a teacher and as a friend both by parents and children. The superintendent has notified the teacher, however, that he felt obliged to replace her with a man principal and that she would be given a position as teacher of mathematics in the junior high school. You inquire:

(1) Under section 39.40, has the school board through its agent, the city superintendent, the legal authority to make the above described change?

(2) Could the teacher involved be forced to accept a reduction in salary for the apparently lower position?

Sec. 39.40 provides a tenure for teachers who have continuously and successfully taught in the same school system or school during a probationary period of five years. Subsec. (3), sec. 39.40 provides:

"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. * * *"

Sec. 40.53, subsecs. (1) and (4) provide:

“(1) The school board shall have the powers and be charged with the duties of common school district boards as far as the same are not otherwise provided for or limited by statute.”

“(4) To employ a city superintendent but for not longer than three years at a time; and to employ assistant superintendents, school principals and teachers.”

Sec. 40.19, subsec. (1), Stats., provides :

“The common school board shall contract in writing with qualified teachers, * * *.”

Sec. 40.58, subsec. (1), provides that the city superintendent of schools shall have general supervision of the professional work of the schools, and subsec. (2) provides that the city superintendent “shall make written recommendations to the school board relative to teachers, courses of study, discipline and such other matters as he may deem for the best interests of the schools; and shall perform such other duties as the board may require.”

In the absence of sec. 39.40, the city school board through its agent, the city superintendent, would have legal authority to employ the teacher in question as principal or in any other capacity in which she was legally qualified to act. The board could have employed her one year as principal, the next year as mathematics teacher and the succeeding year as science teacher if she were qualified to act in each capacity.

Sec. 39.40 provides that a teacher may acquire tenure after completing a continuous and successful probationary teaching period of five years “in the same school system or school.” Thus the teacher could acquire tenure if she continuously and successfully taught in the same school or school system for five years even though she were employed each of those years in a different capacity. The tenure given by sec. 39.40 constitutes a guaranty of employment as therein provided in the same school system or school rather than in the same position in the school or school system. You are therefore advised that the tenure statute, sec. 39.40, does

not prevent the school board through its agent, the superintendent of schools, from changing the position of those that have acquired tenure under the law.

But any such change in position or reduction in salary must be made in good faith and cannot be made merely for the purpose of effecting indirectly that which cannot be done directly. Under sec. 39.40 a teacher who has continuously and successfully taught in the same school or school system for five years acquires permanent tenure and can be dismissed only for cause. Any arbitrary change in position or reduction in salary of such a nature that in all probability a teacher would resign rather than submit to same would be the equivalent of unauthorized dismissal. It would be accomplishing indirectly that which cannot be accomplished directly. Neither change in position nor reduction in salary may be used as a subterfuge to in effect accomplish dismissal of a teacher who has acquired permanent tenure. See *State ex rel. Karnes v. Board of Regents*, 222 Wis. 542.

The school board has power to change the position and reduce the salary of a teacher who has acquired permanent tenure under sec. 39.40, Stats., but such power must be exercised in good faith and may not be exercised to accomplish indirectly that which cannot be done directly.

NSB

JRW

Municipal Corporations — School Districts — Detached Territory — Agreement to pay tuition in excess of legal rate for admission to schools of district from which new district is formed by detachment under sec. 40.85, Stats., of pupils of latter does not abrogate right to division of assets pursuant to sec. 66.03, subsecs. (5) to (8), Stats., for refusal to accept said pupils at legal rate.

May 7, 1938.

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

A school district comprised a village and the surrounding rural territory. A high school was maintained in the village. The territory lying outside the village was detached as provided in sec. 40.85, Stats., and was formed into a new district. The village district furnished school facilities for the children living in the "new district, so no distribution of assets has been made. However, a dispute arose with respect to the amount of tuition to be charged, which led finally to an agreement between the two boards by which the tuition was fixed at one dollar per week per pupil. You state that the tuition should be approximately seventy cents if figured as provided in the law, and ask whether in view of these facts the new district is in position to have a division of assets.

Section 40.85 relates to detachment of territory from school districts under certain conditions, by means of a described procedure, with certain consequences. Subsec. (5), par (d), Stats., reads:

"The assets and liabilities of the former district shall be determined, adjusted, transferred and assigned in the manner provided in section 66.03, *except as provided in paragraph (e).*"

Par. (e) reads:

"No distribution, transfer or assignment of the assets of the district from which territory is detached, shall be made, *so long as* said district continues to receive and adequately

provide school facilities for both grade and high school pupils from the detached territory *on the legal tuition basis*. In the event of failure or refusal of the said district to so provide for and receive such pupils, or if the provisions of this paragraph be declared unconstitutional, then the assets shall be adjusted, assigned and transferred as provided by paragraph (d) as of the date of detachment."

This paragraph states the exception to the general rule with respect to division of assets upon transfer of territory from one municipality to another as set forth in subsec. (2), sec. 66.03. The condition under which the exception may apply to any given state of facts requires not merely that school facilities be afforded the children living in the detached territory, but that such facilities be furnished on the legal tuition basis. The phrase "legal tuition basis" refers to sec. 40.47 (11) in the case of high school pupils and to sec. 40.21 (5) (a) in the case of common school pupils. Failure to furnish facilities to either class on the basis provided will remove any given case from the operation of the exception and bring it within the operation of the general rule.

The foregoing sections set a maximum tuition fee which may be charged nonresident pupils. Obviously, making a charge greater than the maximum set by the applicable statute is a failure to meet the conditions of sec. 40.85 (5) (e).

We are therefore of the opinion that a division of assets may be had pursuant to the provisions of sec. 66.03 (5) to (8), Stats.

HHP

Indigent, Insane, etc. — Poor Relief — Minors — Mothers' Pensions — Legal Settlement — Construction of term "legal settlement" as used in sec. 48.33, aid to dependent children, in XXIII Op. Atty. Gen. 796 is adhered to.

Construction placed thereon in XXV Op. Atty. Gen. 470 is overruled.

May 7, 1938.

PENSION DEPARTMENT.

In your letter of March 12 you point out that this office by an opinion in XXV Op. Atty. Gen. 470 construed the terms "legal settlement" and "legal settlement in the county" as used in sec. 48.33, Stats., to be synonymous with "legal settlement" as used in sec. 49.02, Stats. You point out that such opinion is in conflict with the opinion in XXIII Op. Atty. Gen. 796, which opinion construed the same statute. You further point out that the construction placed upon the term "legal settlement" in XXV Op. Atty. Gen. 470 results in (1) the splitting up of family groups where the legal settlements of the children differ by reason of subsequent remarriages and illegitimacy; (2) unsound administrative situations wherein the county of legal settlement is financially responsible and the county of residence is expected to give adequate social treatment; (3) the remoteness of the county of legal settlement from that of residence, which often occurs in divorce cases where the subsequent family home of the mother and children has been long established; (4) the uprooting of established family homes and the severance of family ties and school arrangements for dependent children where counties of legal settlement insist upon the removal of families to the county of legal settlement before the granting of relief under the statute; (5) protracted delays and even denials of aid where legal settlement must be determined prior to the granting of aid, a condition which does not obtain in direct relief, where aid is furnished and legal settlement is subsequently determined; (6) the interminable disputes that arise between municipalities where there is more than one legal settlement in a family group of dependent children.

You state that in your opinion the legislature did not intend any such result and you therefore inquire whether the language of sec. 48.33 is so compelling as to require the interpretation rendered in XXV Op. Atty. Gen. 470. You request that in the light of the foregoing, we reexamine that opinion.

From 1915 to 1929 the basis of relief for dependent children under sec. 48.33 was residence of the child or parent or other person with whom the child resided. In 1929 the legislature changed the phraseology from that of "residence" to that of "legal settlement" of the child. What did the legislature intend by such change in terminology? Too much significance cannot be attached to the use of the term "legal settlement" as used in sec. 49.02. Said section provides:

"Legal settlements may be acquired in any town, village, or city so as to oblige such municipality to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows."

This section was enacted to fix responsibility of the town, city or village in which the person had a legal settlement in pauper relief cases, and has always been so construed. Prior to the 1929 amendment of sec. 48.33, this office had held that relief given to dependent children under sec. 48.33 was not pauper relief. XV Op. Atty. Gen. 186, XVIII 81. If the legislature in 1929 intended to entirely uproot the existing system of administering aid to dependent children and substitute a new system therefor, it would have so provided. Had the legislature intended that the term "legal settlement" as used under sec. 48.33, Stats., be given the same meaning it has under the regular relief statute, apt language could have been used to so provide. We are unable to find any legislative language whereby it becomes necessary to interpolate sec. 49.02, Stats., verbatim into sec. 48.33 in order to determine what the legislature meant by certain phraseology and terms in sec. 48.33. In fact it seems to us that such interpolation defeats the obvious legislative intent. Sec. 48.33 (5) (b), Stats., provides:

“Such child must have a legal settlement in the county in which application is made for aid; but such child may, with the approval of the court, reside and be cared for outside of the county while receiving aid. For the purposes of this section, the receipt of public aid during the year next preceding by the family of any child shall not bar *such child from having a legal settlement in the county.*”

Sec. 48.33 (5) (c), Stats., provides:

“In cases in which all other conditions for granting aid shall be satisfied but in which the child does not have a legal settlement in the county in which application for aid is made, such aid shall be granted, nevertheless, but only with the approval of the state pension department; provided, that the person having the care of said child has lived in this state for a period of one year next preceding the application for such aid. The entire amount paid from county funds as aid in such cases shall be recoverable from the state out of the appropriation made by law. *Such aid shall not operate to prevent the gaining of a legal settlement within the county, and shall be chargeable to the state only until the child shall have acquired such legal settlement and in no event longer than one year from the date of the first payment.*”

In construing the aid to dependent children's law, the opinion in XXV Op. Atty. Gen. 470 held that a child could gain a legal settlement in a county only when the parents have no legal settlement in this state. This opinion in effect held that a child not having a legal settlement in the county in which application for aid is made, whose parent has a legal settlement elsewhere, is entitled to no aid after the expiration of one year from the date of first payment. A child so circumstanced is left suspended in mid-air ad infinitum, or, as an alternative, the child must be removed to the county of legal settlement under sec. 49.02. We do not believe any such result was intended by the legislature, but rather it was intended that a child, by residing for a year in the county, could gain a legal settlement of its own for aid to dependent children purposes.

Legal settlements referred to in sec. 49.02 are legal settlements within towns, cities and villages. That section sets forth a number of rules for determining legal settlement in a town, city or village for purposes of fixing liability for

support of the poor. On the other hand, liability for the care of children aided under sec. 48.33, Stats., is based on the county of legal settlement. There is no such thing as a county legal settlement under sec. 49.02. The entire reference in sec. 48.33 is to a settlement "within the county." It would appear, therefore, that the "legal settlement" referred to in sec. 48.33 is something quite separate and distinct from the legal settlement referred to in sec. 49.02. There can be no connection between the legal settlement referred to in sec. 48.33 when a determination of the question of legal settlement under sec. 49.02, if and when made, has nothing to do with the ultimate liability of the town, city or village in which it is determined that the child has a legal settlement.

The purpose and objective of the so-called "mothers' pension law" has ever been to provide for the proper care, nurture and training of abandoned and neglected children.

"* * * The concern of the state in passing this law was not so much with the condition of the mother [including legal settlement of the mother], who oftentimes is in a position to support herself, if relieved of the burden of supporting her children, as it was with the welfare and destiny of the children themselves." V Op. Atty. Gen. 124 at 126.

Certainly the legislature did not intend to interpolate the term "legal settlement" as used in sec. 49.02, Stats., into sec. 48.33, Stats., so as to suspend the granting of aid to dependent children until their legal settlement is determined as required by the interpretation given in XXV Op. Atty. Gen. 470. This is especially true when liability for this care rests upon *the county* rather than a particular town, city, or village. Furthermore, any construction that tends to split a family and family ties is incompatible with the purpose of the law to provide a family environment for dependent and neglected children. See XXVI Op. Atty. Gen. 304. We therefore agree with the following conclusion reached in XXIII Op. Atty. Gen. 796, 797:

"* * * In 1929 the law was changed so that a 'legal settlement' was required, but a study of sec. 48.33 leads one to the conclusion that the 'legal settlement' here required more nearly approaches a year's residence in one town, village or city than it does the 'legal settlement' required by the 'poor laws.' * * *"

This conclusion is strengthened by the fact that subsequent to 1929 the juvenile courts and administrative agencies administering sec. 48.33, Stats., continued to grant aid on the basis of one year's residence in the county.

Furthermore, it must be remembered that the legislature in 1935 reviewed all statutes relating to social security, including the aid to dependent children's law, for the definite purpose of having the Wisconsin law comply with all federal requirements, so that federal aid might be secured. Since the legislature did not amend any portion of sec. 48.33, Stats., relating to legal settlement, it must be assumed that the legislature approved of the interpretation given that term in XXIII Op. Atty. Gen. 796, as the construction given therein complies with settlement requirements.

That opinion is, therefore, adhered to and the opinion in XXV Op. Atty. Gen. 470, in so far as it deals with this specific problem, must be overruled.

NSB

Intoxicating Liquors — Public Officers — Alderman —
Member of common council is prohibited from selling beer to licensed taverns located in city of which he is alderman.

May 7, 1938.

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

You state in your letter of April 7 that in the last city election a candidate for alderman of city "A" in your county was elected as such alderman to the city council; that this alderman is the agent for a brewing company of Milwaukee, Wisconsin, and as such sells beer to various taverns located in said city "A". You refer to section 176.05, subsec. (1), Stats., and you inquire:

“Under such section is a member of the common council denied the right to sell beer to taverns located in the same city?”

Said subsection in part provides :

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

The provisions of this statute are clear and there is no room for construction. Under its clear provisions your question must be answered in the affirmative.

JEM

School Districts — Tuition — Words and Phrases — Maintain — Under sec. 40.21, subsec. (2), Stats., expense of maintaining school includes all items of expense necessary to such maintenance. Additions to buildings or improvement by way of added expenditures for permanent equipment should be amortized.

State or county aid should be deducted in computing net cost to local municipality.

May 9, 1938.

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

You refer us to sec. 40.21, subsec. (2), Stats., which reads as follows :

“Every person of school age maintained as a public charge shall for school purposes be deemed a resident of the school district in which he resides, except that such school district

shall be compensated by the municipality or by the county in case the county system of poor relief is in effect in such municipality in which such person of legal school age has a legal settlement as defined in section 49.02 with an amount equal to the pro rata share of the year's expense of maintaining such school, based upon the total enrollment and year's expense of the maintenance of such school. In case such person maintained by the county has his legal settlement outside the county then the county shall pay such school district's pro rata share and such county may recover such sums paid, from any municipality in the state where the legal settlement may be established."

We are asked what items of expense are properly included under the words "pro rata share of the year's expense of maintaining such school." In this connection we are referred to a bill from one municipality to another which includes the following items of expense: teacher's salary, teacher's pension, equipment, treasurer's bond cost, district officer's salary, text books, school supplies, janitor service, fuel and lights, repairs and insurance.

We see no reason why all of these items are not proper expense in the maintenance of the school.

Sec. 40.21 (2), above quoted, neither expressly nor impliedly excludes any of such items. The words "expense of maintaining" mean just that and necessarily include *all* items of such expense.

While the word "maintain" has no precise legal significance in the construction of statutes, its meaning varying with the subject matter of the law and the purpose to be accomplished, the word "maintain" has been defined as to hold or keep in a particular state or condition, especially in a state of efficiency or validity. *Davis Holding Corporation v. Wilcox*, 112 Conn. 543, 153 A. 169.

The purpose of sec. 40.21 (2) is by no means cloaked in obscurity. The legislature plainly wanted to place the cost of educating indigent pupils upon the municipalities legally responsible for their support. In the absence of such a statute, there would be a strong temptation for one municipality to induce its indigents to move into other municipalities so as to escape the expense of educating the children of such indigents. Hence to eliminate certain items of actual ex-

pense in computing the pro rata share of school maintenance costs would be to defeat the purpose of the statute to that extent.

The only item listed that presents any serious question as to whether it may properly be an item of annual maintenance is the item of equipment—\$23.65. The nature of the equipment is not stated, but as the item is small, in all probability it is one that may properly be included as an item of annual maintenance. Additions to buildings and permanent improvement by way of additional equipment would obviously not be proper items of annual maintenance expense. It would seem that the proper method of apportioning such expenditure upon an annual basis would be that of amortizing the expenditures over a period of years based upon the prospective life of the improvement or equipment.

We do, however, call attention to the fact that the expense of maintenance means *net* cost of maintenance and that state or county aid received by a school must be deducted from gross cost of maintaining the school before determining the pro rata share of expense chargeable to the place of legal settlement. See XX Op. Atty. Gen. 742.

NSB

WHR

Intoxicating Liquors — State treasurer (now tax commission by virtue of ch. 9, sec. 4, Laws 1937 (Special Session), and Executive Reorganization Order No. 3, effective February 1, 1938) may not issue licenses under sec. 176.05, subsec. (4a), Stats., to clubs when municipality has voted dry under sec. 176.38, Stats.

May 9, 1938.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

In your letter of April 6 you state that under sec. 176.05, subsec. (4a), Stats., licenses may be issued to country clubs and, when issued are issued by the state treasurer for an an-

nual fee of fifty dollars, but the same is paid to the treasurer of the town, city or village in which the club is located.

You inquire whether the state treasurer may issue a license to a club located in a town, city or village that by referendum has voted dry so far as intoxicating liquor is concerned. You refer us to section 176.38, the local option statute.

Sec. 176.05 (4a) reads thus:

“All ‘Class A’ and ‘Class B’ licenses issued to clubs, as defined in subsection (8) of section 176.01, that are operated solely for the playing of golf, tennis or similar sports, and commonly known as country clubs, shall be issued by the state treasurer for an annual fee of fifty dollars which shall be paid to the treasurer of the town, city or village in which such club is located. The provisions of subsection (1a) of section 176.05 relative to suspending or revoking permits shall apply to all licenses issued by the state treasurer hereunder, and, except as herein provided, all provisions of this chapter relating to ‘Class A’ and ‘Class B’ licenses for the sale of intoxicating liquors shall apply to licenses issued to the country clubs by the state treasurer.”

The last provision of this section, that “all provisions of this chapter relating to ‘Class A’ and ‘Class B’ licenses for the sale of intoxicating liquors shall apply to licenses issued to the country clubs by the state treasurer,” clearly indicated that the local option provision under sec. 176.38 is applicable.

No “Class A” or “Class B” license can be issued in the municipality when a local option election has decided against the issue at the election under sec. 176.38. You are therefore advised that the state treasurer may not issue a license to a club located in a town, city or village that by referendum has voted dry so far as intoxicating liquors are concerned.

Your attention is invited to the fact that by virtue of ch. 9, sec. 4, Laws of Special Session 1937, and executive reorganization order No. 3, effective February 1, 1938, the state treasurer no longer has the duties of issuing licenses. The executive order above referred to transferred that duty to the tax commission as of February 1, 1938.

NSB
JEM

Elections — Residence — Indigent, Insane, etc. — Art. III, sec. 1, Wis. Const., and sec. 6.51, subsec. (4), Stats., preclude patient at state institution for insane from acquiring residence for voting purposes in town where institution is located, regardless of whether patient has been committed to institution or is voluntary patient.

May 10, 1938.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary*.

You have inquired whether patients undergoing treatment at a state hospital for mental cases may acquire a voting residence in the town in which the hospital is located.

Article III, sec. 2 of the Wisconsin constitution provides that no person under guardianship, non compos mentis or insane shall be qualified to vote at any election.

This provision clearly prohibits patients committed to a state hospital for the insane from voting.

Sec. 51.10 of the statutes permits a person who believes himself to be insane or to be suffering from a mental disorder to make a written application for admittance into a public hospital, the application being supported by the certificate of two doctors.

It is unnecessary to consider whether persons who enter a mental hospital without a commitment order as voluntary patients are barred from voting under the constitutional provision above mentioned. Art. III, sec. 1 of the Wisconsin constitution and sec. 6.01, subsec. (1), Wis. Stats., provide that in order to vote a person must be twenty-one years of age or over and must have resided in the state of Wisconsin for one year and in the election district or precinct where he offers to vote for ten days.

This raises the question of whether voluntary mental patients are residents of the town in which the hospital is located.

Sec. 6.51, Stats., sets forth a number of rules for determining whether a person has gained a residence for voting purposes. Sec. 6.51, subsec. (2), provides:

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

Sec. 6.51, subsec. (4), Stats., provides:

“A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely.”

These patients come to the hospital to be treated for their mental ailments. They do not intend to give up their original residences and they do intend to return to such residences when they are well.

There are a number of Wisconsin cases determining that persons are prevented from voting because they are in a community for temporary purposes. Thus lumberjacks were not permitted to vote in the case of *State ex rel. Small v. Bosacki*, 154 Wis. 475. Under certain circumstances students attending college are not considered to be residents for voting purposes in the town where the college is located. *Seibold v. Wahl*, 164 Wis. 82.

This department has ruled in XXIII Op. Atty. Gen. 610 and XXV Op. Atty. Gen. 543 that in general those who come to a CCC camp do not have a right to vote at the place where the camp is located.

We therefore conclude that persons who enter a hospital for the insane, whether voluntarily or otherwise, cannot acquire a voting residence in the town in which the institution is located.

WHR

Public Officers — County Supervisor — Divorce counsel is ineligible for office of county supervisor by reason of sec. 59.03, subsec. (3), Stats.

May 10, 1938.

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

You have inquired whether the offices of divorce counsel and county supervisor are compatible.

At common law it was held that a public officer could not hold another office when the duties of the two offices were such that the officer's full time and attention were required in each office, and when the duties were such that a conflict of interest might arise.

In determining whether there is a conflict of interest a number of tests are applied: One is whether one office is subordinate to the other; another test is whether one office is subject to some degree of power over the other; a third test is whether the power of removal or the power of appointment is vested in one office, and a fourth test is whether one office has the power of auditing the accounts of the other.

In regard to this last test, it might be said that since the county board pays the salary of the divorce counsel, the county board has the power to audit such salary. However, sec. 247.17, Stats., fixes the amount which a divorce counsel is to receive in each case at the sum of ten dollars, with a proviso that if the case shall occupy more than one day of time, the court, in its discretion, may require the parties to the action to pay an additional sum to compensate the divorce counsel. All fees of the divorce counsel are paid on the order of the presiding judge and on the certificate of the clerk of the circuit court. Because of these factors, it is doubtful that the county board would have any discretion in allowing or disallowing such claims, and the county board has nothing to do with the appointment or removal of the divorce counsel.

Sec. 59.03, subsec. (3), Stats., provides that no county officer is eligible to the office of supervisor.

This raises the question of whether a divorce counsel is a county officer.

In the case of *In re Appointment of Revisor*, 141 Wis. 592, 608, it was stated that one of the tests of an office is "that the duties must be continuous and permanent, and not merely transient, occasional, or incidental."

Another test is whether any official oath is required, and, under sec. 247.13, a divorce counsel must take an official oath.

"Public office" has been defined as the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portions of the sovereign functions of government to be exercised by him for the benefit of the public. See XIX Op. Atty. Gen. 241, 244 and cases there cited.

That a divorce counsel is invested with some portion of the sovereign functions of government to be exercised by him for the benefit of the public is demonstrated by sec. 247.15, Stats., which provides, among other things, that no decree in any action in which the divorce counsel is required to appear shall be granted until the divorce counsel "of the county in which the action is tried shall have appeared in open court *and in behalf of the public* make a fair and impartial presentation of the case to the court and fully advised the court as to the merits of the case and the rights and interests of the parties *and of the public.*" Thus, a divorce decree granted by authority of law is in most instances dependent to some extent at least upon the exercise of the powers vested in the divorce counsel.

It is true that under sec. 59.12 the legislature has enumerated a list of county officers with designations of their terms of office, and that under sec. 59.15, provision is made for compensation, fees and salaries of each county officer "who will be entitled to receive a salary payable out of the county treasury."

While the divorce counsel is not an elective county officer, within the purview of secs. 59.12 and 59.15, Stats., it would seem, nevertheless, that he should be considered as a county officer. If he is an officer at all, and we believe he must be held to be an officer, then he must be an officer of the state,

or of some political subdivision thereof. It could hardly be contended that he is a state officer, since his jurisdiction is confined to but one county, although his appointment is by the circuit judge, whose jurisdiction may extend over the several counties in his circuit. It might be pointed out here that under sec. 247.13, it is provided that in counties of over 250,000 population the district attorney or assistant district attorney shall be the divorce counsel. The district attorney, of course, is a county officer and this provision lends color to the conclusion that the divorce counsel must also be regarded as a county officer. It should also be noted that sec. 247.15, Stats., refers to "the divorce counsel of *the county*," which further supports this conclusion.

You are therefore advised in the light of the foregoing discussion that a divorce counsel is a county officer within the meaning of sec. 59.03 (3), Stats., and is ineligible for the office of county supervisor.

WHR

Banks and Banking — Public Deposits — Public Officers — Treasurer Police Pension Fund — Funds coming into hands of city treasurer as ex officio treasurer of retirement board of policemen's annuity and benefit fund are subject to public deposits law, ch. 34, Stats.

May 11, 1938.

BOARD OF DEPOSITS.

Attention Gerald C. Maloney.

You have inquired whether the funds coming into the hands of the city treasurer of Milwaukee as *ex officio* treasurer of the retirement board of the policemen's annuity and benefit fund of the city of Milwaukee, fall within the definition of "public moneys" as defined in ch. 34, Stats., and whether such funds are subject to the provisions of ch. 34, the public deposits law.

Sec. 34.01, subsec. (5), Stats., defines the term "public moneys" so as to include all moneys coming into the hands of a city treasurer, by virtue of his office, without regard to the ownership thereof.

Sec. 34.01, subsec. (1), Stats., defines the term "public deposit" so as to include private funds held in trust by a public officer.

Sec. 34.01, subsec. (7), Stats., defines the word "treasurer" to mean:

"* * * any duly elected, appointed or acting official of the state or of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, whose official duties require that he receive and account for public moneys."

Sec. 62.13, subsec. (9), par. (b), subd. 2, Stats., provides, among other things, that the city treasurer shall be *ex officio* treasurer of the board of trustees of the police pension fund and that, as such, he is custodian of the fund and all securities and property belonging thereto. He is required by this section to keep books of account in such manner as the pension board shall direct, and he is liable on his official bond for the performance of such duties.

It seems clear from the foregoing statutory provisions that the city treasurer is acting by virtue of his office in discharging the duties outlined above. Under the statutory definitions set forth in ch. 34 it is unimportant whether the moneys are, in fact, public moneys, since the definition of "public moneys" in sec. 34.01, subsec. (5), Stats., is controlling and that definition includes moneys coming into the hands of the city treasurer by virtue of his office without regard to ownership thereof. Furthermore, the term "public deposit" as defined in ch. 34, specifically includes private funds held in trust by a public officer.

Consequently, we must be guided by the definitions set forth in ch. 34, rather than by general usage of the terms involved, which might lead to a different result.

In view of the foregoing, you are advised that the funds in question are subject to the public deposits law as set forth in ch. 34 of the statutes.

WHR

Courts — Prisons — Prisoners — Probation — Court is authorized by sec. 57.01, subsecs. (1) and (2), Stats., to provide for probationary period in case of felony which is of greater duration than maximum penalty prescribed by law for such offense.

May 11, 1938.

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

You state in your letter of April 27 that a defendant was charged with the crime of adultery in the county court for your county and entered a plea of guilty, was adjudged guilty by the court, sentence was suspended and the defendant placed on probation with the state board of control for the period of four years. This offense is a felony and carries a maximum penalty in state prison of not more than three years. You refer us to sec. 57.01, subsec. (1), Stats., which makes provision for the court to suspend a sentence and place the defendant on probation, but there is no maximum period stated for such probation.

You also refer to sec. 57.04, Stats., which provides for suspension of sentence in case of misdemeanors in violation of sec. 351.30, Stats., as well as sec. 57.05, Stats. The latter section provides for probation of minors, fixing the maximum probationary period to comply with the maximum penalty prescribed for the offense.

You inquire whether the action of the court providing for a probationary period under sec. 57.01 which is of greater duration than the maximum penalty provided by law for the offense is proper.

You also refer us to subsec. (2), sec. 57.01, Stats., which reads:

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

The subsection above quoted does not limit the time during which the court may extend the period of probation. The period of probation is expressly limited by sec. 57.04, Stats., which provides for suspension of sentence in case of misdemeanors and for violations of sec. 351.30, Stats. The same applies to sec. 57.05, which provides for sentencing of minors. As the legislature has specifically limited the probationary period under secs. 57.04 and 57.05, Stats., and has placed no such limitation upon sentences imposed under sec. 57.01, it would seem to follow that the legislature did not intend to impose any restrictions upon the court in fixing the probationary period when acting within the jurisdiction conferred by sec. 57.01 and that the court may fix a probationary period in the case of a felony which is of a greater duration than the maximum penalty prescribed by law for such offense.

NSB

JEM

Elections — Where election ballot gives elector right to vote for two candidates and he votes for one only, such ballot must not be disregarded.

May 12, 1938.

THEODORE DAMMANN,
Secretary of State.

You call our attention to an election of town officers wherein the names of four candidates for supervisor were arranged in alphabetical order. At the top of this portion of the ballot were the words "Vote for two," and some of the electors voted for one candidate only, and election officials refused to count such votes.

It is your view that these ballots should be counted, and you request our opinion on the matter.

Sec. 6.42, Stats., provides that all ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intent can be ascertained therefrom.

This statute clearly requires the counting of the ballots in question. Furthermore, the statutes provide that election laws are to be liberally construed so as to carry out the will of the electorate. Sec. 5.01, subsec. (6), Stats. See also *State ex rel. Oaks v. Brown*, 211 Wis. 571.

It would be difficult to imagine a more glaring example of disregarding the will of the electors than that reflected in the situation mentioned here. You are therefore advised that election officials may not rightfully exclude ballots where the voters have the right to vote for two candidates but decided to vote for one only.

WHR

Dairy and Food — Product known as “honee butur,” designed to be used, among other things, as substitute for butter, is subject to provisions of sec. 97.46, subsec. (1) and sec. 97.44, Stats.

May 12, 1938.

DEPARTMENT OF AGRICULTURE AND MARKETS.

You call our attention to the proposed sale in this state of a product having the trade name of “honee butur.” This is a spread for toast, waffles, and ice cream, and is said to have many other uses. It contains honey, sweet cream butter, corn syrup and Carnation milk.

We are asked as to the legality of the use of such a coined name under the circumstances.

Sec. 97.46, Stats., provides:

“(1) No person, firm or corporation, shall use in any way in connection or association with the sale or exposure for sale or advertisement of any substance designed to be used as a substitute for butter, the word ‘butter,’ ‘cream,’ ‘creamery,’ or ‘dairy,’ either alone or in combination with other words, except as required by sections 97.43 and 97.45, or the name or representation of any breed of dairy cattle, or any combination of such word or words and representation, or any other words or symbols or combination thereof commonly used in the sale of butter.

“(2) No person, firm or corporation shall use the term ‘butter’ in the name or in connection with the name, designation, advertising or description of any article of food prepared and offered for sale or served with any meal for which a charge is made unless all of the fat contained in such article of food is butter fat; provided, that nothing herein shall be construed as prohibiting the use of the term ‘butter’ in connection with a trade name which is the individual property and has been in continuous use by its owner at least one year prior and up to the first day of January, 1931, if immediately after or below such trade name the word ‘a trade name’ shall appear on all reading matter wherein it is used.”

Subsec. (2) does not apply for the reason that all of the fat in the product in question is butter fat, nor would subsec. (2) apply even if other types of fat were contained in the products, if the trade name were in use one year prior

to January 1, 1931. However, the situation is different under subsec. (1).

We assume that the product in question is designed, to some extent at least, to be used as a substitute for butter, and hence it is subject to the provisions of subsec. (1) of sec. 97.46, Stats., above quoted. It is our opinion that statutory regulations concerning the use of the word "butter" are not to be evaded by calling a product "butur." As far as we are able to determine the words have exactly the same sound when pronounced. This is important because the great bulk of retail sales will be made orally rather than in writing. Furthermore, since correct spelling has become somewhat of a lost art, even among that portion of the intelligentsia who have grown up since the days of the old-fashioned spelling bee, it is entirely possible that the word "butur" might be confused with the word "butter" even where it appears in print.

Unless the manufacturers of the product in question intended to trade upon the known qualities of that wholesome and inimitable dairy product known as "butter," scant excuse can be offered for the birth of such a monstrous word as "butur."

Hence, we conclude that such brain-child was not only born deformed, but is cursed with the quasi-illegitimacy visited upon butter substitutes in Wisconsin and must perforce go through life impressed with the legal disabilities imposed by sec. 97.46, subsec. (1), Stats., upon products of doubtful dairy parentage. Even if "honee butur" could escape from the ban imposed by sec. 97.46, subsec. (1), Stats., it would still come squarely within the provisions of sec. 97.44, regulating the sale of products made in imitation or semblance of pure butter.

The nation looks to Wisconsin, its greatest dairy state, for guidance in the matter of standards of quality and purity for all dairy products. Wisconsin creamery butter is made from fresh, rich cream in more than six hundred state inspected creameries. Butter and Wisconsin are almost synonymous. Because Wisconsin butter has attained the highest standards for deliciousness and nourishment, it is world famous. The unchallenged competition of hybrid substitutes masquerading under misleading names would constitute not

only insult but injury both to the fair name of butter, that matchless product, and to the great dairying state of Wisconsin.

The use of butter is more than a matter of health, for butter is the inexpensive yet priceless ingredient of excellent cookery. As P. Morton Shand says in his "Book of Food": "Only the best fresh butter is good enough to cook with" and "Honest dripping is preferable to margarine, as all genuine but humble things are preferable to pretentious and specious shams."

The whole history of butter is luscious, from the very beginning of culinary culture when Deborah sang of it in the Bible—"butter is a lordly dish." That hardy old herbalist, Culpepper, refers to butter as being "very wholesome and commodious for students, for it rejoiceth the heart and comforteth the brain and qualifyeth the heat of the liver."

OSL

WHR

Prisons — Prisoners — State board of control and wardens of state prison and of Green Bay reformatory have power to grant interviews with prisoners without presence of officer of institution.

May 13, 1938.

PROF. J. L. GILLIN,

Member of the State Pardon Board.

You inquire whether a member of the pardon board has the right to see a prisoner at the Waupun prison or the reformatory at Green Bay alone without interviewing him in the presence of an official. You state that the only reason you raise the question is because sometimes prisoners do not feel like talking freely in the presence of the prison official; that there has been no difficulty about this matter, but you raise the question for the reason that sometimes you feel

that the prisoners experience a blocking in answering fully the questions that you ask them as you interview them when they have applied for a pardon.

Under sec. 53.02, Stats., it is provided:

“(1) The warden shall, under the direction of the state board of control, have the charge and custody of the prison,
* * *. He shall enforce the regulations of the board for the government of the officers and convicts of the prison;
* * *.”

It is also provided that he shall file an official oath and execute and file an official bond in the sum of twenty thousand dollars with sureties approved by the board.

Sec. 53.07, Stats., provides:

“All necessary means shall be used, under the direction of the warden, to maintain order in the prison, enforce obedience, suppress insurrections and effectually prevent escapes, even at the hazard of life; * * *.”

We find no provision in the statutes that one may not interview a prisoner without the presence of a prison official. The above statutes seem to contemplate that this matter is under the control of the warden and the state board of control, who are held responsible for the prisoners and are required to prevent their escape. A rule to prevent interviews with prisoners by outsiders without the presence of an official seems absolutely necessary unless the officials are satisfied that those attempting to interview the prisoner may safely be entrusted with such interviews without the presence of an officer. You are advised that the board of control and the warden have the right to grant the privilege of interviewing the prisoner without the presence of an officer. The foregoing is equally applicable to the state reformatory.

NSB

JEM

Public Officers — City Police — Deputy Sheriff — Highway Patrolman — County highway police officer who is also deputy sheriff is prohibited by sec. 82.07, Stats., from accepting recognizance or any money for appearance of offender in court.

It would seem that governing body of city of fourth class may grant police officers right to accept recognizances or admit to bail for violation of city ordinance, but in absence of such action by city council police officers of city have no right to accept recognizances or admit to bail.

May 13, 1938.

CHARLES L. LARSON,

District Attorney,

Port Washington, Wisconsin.

You have referred us to sec. 61.62, Stats., which makes provision for the acceptance of a recognizance by an arresting police officer of a village for a violation of an ordinance, rule, regulation, resolution or by-law of any village having a police department. You also refer us to sec. 82.07, Stats., which expressly prohibits a county highway policeman from taking money or any other thing of value as or in lieu of bail. You state that in Ozaukee county all highway officers are also deputy sheriffs and are bonded as such.

You inquire whether it is legal for city policemen in cities of the fourth class or county highway police officers who are also deputy sheriffs to accept a recognizance for the appearance of a violator of a city or county ordinance at the court having cognizance of the offense.

The matter of recognizance or admitting to bail is purely a statutory matter. We find no statute that authorizes deputy sheriffs to accept recognizance or admit to bail. Sec. 82.07, Stats., specifically prohibits a county highway policeman from taking money or any other thing of value as or in lieu of bail. As deputy sheriffs have no right to admit to bail or take money or any other thing of value as or in lieu of the bail, it must follow that county highway officers who are also deputy sheriffs have no greater right to admit to bail or accept money or other thing of value as or in lieu of

bail than they would have as plain county highway officers appointed under sec. 82.07, Stats.

With respect to your question as to whether police officers in cities of the fourth class have the right to accept recognizance or admit to bail for violation of municipal ordinances, it impresses us that the right is purely one of statutory creation and as there is no statute giving such power, it would seem to follow that such police officers do not have such right in the absence of a grant of such right by the governing body of the municipality. It was held in *Hack v. Mineral Point*, 203 Wis. 215, that the legislature has granted to the cities all of the police power of the state that it is possible to grant to them. As cities have such broad police power, it would seem to follow that they may make a reasonable regulation in exercise of the power and may confer upon police officers the right to admit to bail or accept money or something of value as or in lieu of bail upon arrest for violation of some or all municipal ordinances. So far as we know, cities have been very reluctant to grant to police officers any such power and in the few instances where it has been done the grant has been only with respect to violation of certain specified ordinances of minor importance.

NSB

Counties — County Board — County Board Resolutions — Sec. 59.02, subsec. (2), and sec. 59.04, subsec. (3), Stats., do not prohibit county board from adopting rule for suspension of its rules when quorum is present by majority vote or such other vote in excess of majority as board may deem desirable.

May 13, 1938.

C. STANLEY PERRY,

*Assistant Corporation Counsel, Milwaukee County,
Milwaukee, Wisconsin.*

You state that the Milwaukee county board of supervisors is considering a revision of its rules of parliamentary procedure, and the question has arisen as to the vote necessary for a suspension of the rules.

Sec. 59.02, subsec. (2), Stats., provides:

“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. 59.04, subsec. (3), Stats., provides:

“A majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business. All questions shall be determined by a majority of the supervisors present unless otherwise provided.”

In the case of *St. Aemilianus Orphan Asylum v. Milwaukee County*, 107 Wis. 80, it was held, among other things, that a quorum of the members of the county board is the board and that a majority vote of such quorum is a majority vote of the board.

In XII Op. Atty. Gen. 24 it was ruled that the county board may not adopt a rule requiring a larger vote than is required by statute to authorize expenditures by that body, this ruling being based upon the statutes above quoted.

This department has ruled that resolutions of the county board which comply with the statutory rules of procedure

but which fail to comply with county board rules are valid. XXI Op. Atty. Gen. 214; XVIII Op. Atty. Gen. 268. It seems to be well settled law that where rules of procedure are not prescribed by statute it is competent for a governing municipal body to adopt its own regulations. 43 C. J. 504. *Green Bay v. Brauns*, 50 Wis. 204. *Fletcher v. La Crosse County*, 165 Wis. 446.

When the legislature in sec. 59.04 (3), Stats., used the words "unless otherwise provided" we do not believe that the legislature intended to prohibit the county board from establishing their own rules, such as the vote necessary for a suspension of the rules. The power to make their own rules seems to be inherent in all municipal governing bodies subject to the limitation, of course, that the rules must be consistent with the statutes. The language above quoted is hardly that clear and explicit language that the legislature would use if it intended to abolish entirely the inherent rule-making power of municipal bodies. We think that this language means all questions shall be determined by a majority vote of the supervisors unless otherwise provided by statute or by the board acting in pursuance to its inherent power to make rules consistent with the statutes.

We conclude, therefore, that a county board may, when a quorum is present, provide for suspension of the rules by a majority vote or such other vote in excess of majority as the board deems proper.

WHR

NSB

Public Officers — Village Trustee — Village which had less than three hundred fifty population under 1930 federal census is entitled to but two trustees under sec. 61.20, subsec. (3), Stats.

May 14, 1938.

THEODORE DAMMANN,
Secretary of State.

You state that a certain village at the time of its organization had a population permitting of six trustees, but that its population decreased so that it had only three hundred forty-six inhabitants according to the 1930 federal census. Under sec. 61.20, subsec. (3), Stats., a village with less than three hundred fifty population should have but two trustees. The village in question, however, has continued with six trustees.

We are asked whether the business transacted by the six trustees is legal, and how the number of trustees may be reduced without injustice to any of the present incumbents.

Sec. 61.20, Stats., provides:

“(1) Villages shall have six trustees, except as provided otherwise in subsection (3) of this section, whose term of office shall be two years, three of whom shall be elected each year.

“(2) Villages not now having six trustees shall, on the first Tuesday of April, 1920, and annually thereafter, elect three trustees.

“(3) Villages having a population of three hundred and fifty or less shall have two trustees, who together with the president shall constitute the village board, a majority of whom shall constitute a quorum. One trustee shall be elected each year for a term of two years.”

Sec. 370.01, subsec. (27), Stats., provides:

“The word ‘population,’ when used in connection with a classification of towns, villages, cities or counties for the exercise of their corporate powers or for convenience of legislation, means the population of such towns, villages, cities or counties according to the last national census.”

Thus, it is apparent that the population of the village in question for all official purposes is governed by the 1930

census, regardless of any variance from this figure since 1930, and it follows that the village is legally entitled to but two trustees.

This does not mean, however, that the official acts of the six trustees are subject to collateral attack, since they are *de facto* officers, holding office under color of authority pursuant to an election. The fact that the election was irregular does not make them mere volunteers. Mechem, Public Officers, p. 227; *The State ex rel. Jones v. Oates*, 86 Wis. 634.

It has been held that the acts of an officer *de facto* are valid and effectual where they concern the public or the acts of third persons until the title to the office is adjudged insufficient. *State ex rel. Bloomer v. Canavan*, 155 Wis. 398.

Since the village has been proceeding with six trustees, we assume that this was done pursuant to sec. 61.20, subsec. (1), Stats. Obviously, this situation should not continue indefinitely, although it is not serious enough to call for any immediate action. The manner in which the size of the board should be reduced is pretty much a matter of policy. It could be accomplished by resignations without further delay, if this can be amicably arranged among the present trustees. At any rate, three trustees should not be elected next spring as has been done in the past. Commencing next spring, and annually thereafter, the village should elect but one trustee, pursuant to sec. 61.20, subsec. (3), Stats. If this is done, the difficulty will be corrected automatically within the next two years.

WHR

Dairy and Food — Cold Storage Act — Egg whites and egg yolks separately stored are subject to provisions of ch. 99, Stats., uniform cold storage act.

May 14, 1938.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Harry Klueter, *Chief Chemist*.

You have inquired whether egg whites and egg yolks come within the purview of sec. 99.01 of the uniform cold storage act.

Sec. 99.01, Stats., reads in part:

“* * * ‘article of food’ shall mean fresh meat as defined in section 97.02 and fresh meat products and *all eggs*, butter, and butter substitutes; and articles of food shall be deemed to be ‘received in cold storage’ when they are delivered to and come into possession or custody of the licensee of a cold storage warehouse.”

When is an egg not an egg?

In answering this question with reference to the cold storage law, one must keep in mind the object of the law. Its purpose is to protect the consuming public from the contingency of certain types of foods attaining too great an age in cold storage. *Columbus Packing Co. v. State*, 100 Ohio State 285, 126 N. E. 291. While eggs are valued in certain portions of the orient in the inverse order of their freshness, the occidental world has adopted an opposing philosophy in enacting uniform cold storage acts. We have a saying,—“As innocent as a new-laid egg.” Such innocence, however, like youth, is a fleeting thing, and in the words of Erasmus, “An angelic boyhood becomes a satanic old age.”

Keeping in mind the central purpose of the act, we conclude that such purpose may not be evaded by reducing an article of food, otherwise within the statute, into its component parts. In construing a statute, the mischief it is intended to prevent may be considered. *Pettingill v. Goulet*, 137 Wis. 285; *State v. Hall*, 141 Wis. 30. Also, it is to be noted that technical assaults on the law are in disfavor. *Calumet Service Co. v. Chilton*, 148 Wis. 334. To say that

the yolk and the white of an egg, when unseparated, are subject to the act, but when separated cease to be subject to the act, just doesn't make sense so far as the purposes of the statutes limiting the period of cold storage are concerned, and you are therefore advised that the words, "all eggs," as used in sec. 99.01, Stats., defining "articles of food," includes all edible parts of eggs, however separated.

WHR

Municipal Corporations — Town Sanitary Districts — In absence of proceedings for establishment of town sanitary district town board is without authority to provide for preliminary engineering survey for public waterworks and sewerage systems intended to serve only portion of town. Where proceedings to establish such district have been commenced, preliminary engineering expenses are to be borne by district, if formed, otherwise by petitioners under sec. 60.303, subsec. (4), Stats.

May 16, 1938.

BOARD OF HEALTH.

You have inquired whether a town board may obtain engineering services for the purposes of making surveys and preparing plans for public waterworks and sewerage systems intended to serve a portion of the town.

It has been held that a town has no authority to levy a general tax to pay for construction of sidewalks and street lamps in an incorporated village within the town. *McGowan v. Paul*, 141 Wis. 388. The principle on which this case rests is that a town has only such powers as have been delegated to it by statute or which arise by necessary implication from those granted. Under sec. 60.29, subsec. (3), Stats., the town board is empowered:

"To procure * * * such * * * expert help as may from time to time be necessary in the conduct of the affairs of the town and the promotion of the financial welfare * * *."

In *Pettibone v. West Chicago Park Commissioners*, 215 Ill. 304, 74 N. E. 387, it was said that affairs of the town mean such matters as affect the people of the town. The term "people" implies the people generally rather than a limited, ascertainable class. In *Pixley v. Saunders*, 168 Cal. 152, 141 Pac. 815, a sanitary district included a number of towns. It was held that the sanitation of any one of the towns was therefore not a town affair within the meaning of the state constitution. In Wisconsin a town sanitary district may include more than one town, or it may include a part only of a town or parts of more than one town, and it has a corporate existence independent of that of the town.

We therefore conclude that the matter of waterworks and sewerage systems is a town sanitary district affair rather than a town affair and that the town board is hence without authority to provide for engineering surveys in connection with proposed sewerage systems intended to serve only a portion of the town.

Secondly, you inquire whether the town board is authorized to provide for a preliminary engineering survey and estimate, where proceedings have been started for the establishment of a town sanitary district.

In establishing a town sanitary district the town board is authorized to act only upon petition signed by sixty per cent of the property owners or the owners of sixty per cent of the property within the proposed district. Sec. 60.302, subsec. (1), Stats. The petitioners are required to file a bond with security satisfactory to the board for the purpose of paying the entire cost of the proceedings in the event the board should determine not to establish a sanitary district. Under sec. 60.303, subsec. (3), Stats., before the board shall order the district established, it must appear to the board, on the hearing, not only that the petition was properly signed but that the proposed work was necessary, that the public welfare, etc., will be promoted, and that the property within the district will be benefited. If these facts do not appear, the board is required under subsec. (4), to dismiss the petition. Sec. 60.303, subsec. (4), Stats.

If the board feels that the existence or nonexistence of the above facts cannot be established to its satisfaction in

the absence of a preliminary engineering survey, we see no reason why one may not be required, with the cost to be borne by the petitioners in the event no sanitary district is established. Sec. 60.303, subsec. (4), Stats., provides:

“If the town board finds that the territory set out in the petition should not be incorporated into a town sanitary district, it shall dismiss said proceedings and tax the cost against the signers of the petition. If the district is established, certified bills covering the reasonable cost and disbursements of the petitioners may be presented to the commissioners hereinafter provided for and paid out of the funds of the district.”

Any cost would have to be borne either by the petitioners or by the district, depending upon the outcome of the hearing, and in no event by the town. The entire matter of sanitation under these statutes is an affair of the district and not of the town, the town board being merely the medium by which the sanitary district is to be established.

WHR

Taxation — Income Tax — Sec. 71.19, Stats., governs distribution of income taxes among state, county and local municipality and sec. 71.10, subsec. (4), par. (d), Stats. 1931, providing for collection by county and retention of penalties and interest by county, which statute was repealed in 1933, has no application to collection commenced prior to such repeal and compromise subsequent thereto, where no penalties and interest were in fact collected.

May 16, 1938.

TAX COMMISSION.

You state that in September, 1932, income taxes were assessed against the M. E. White Company of Chicago, pursuant to the provisions of sec. 71.10, subsec. (3), par. (f), Stats., as follows:

Normal tax	\$41,176.89
Teachers' retirement surtax	6,810.71
Soldiers' educational bonus surtax	1,217.24

These taxes, with penalties and interest, computed to May 24, 1937, amounted to \$77,153.20.

At the time of the assessment county treasurers and other county officials were charged with the duty of collecting income taxes, and under the provisions of sec. 71.10, subsec. (4) (d), Stats., 1931, it was provided in substance that the county should retain all delinquent penalties and interest collected in return for the services of county officials in making collections. The provisions of this section were repealed by ch. 367, Laws 1933, which placed the duty of collecting income taxes upon the Wisconsin tax commission.

Prior to the passage of ch. 367, Laws 1933, the corporation counsel for Milwaukee county instituted proceedings for the collection of these taxes in the circuit court for Milwaukee county, judgment being rendered on January 26, 1933, for \$64,695.57. An action to collect this judgment was commenced in the United States district court for the northern district of Illinois, eastern division, because of diversity of citizenship. Prolonged litigation followed, terminating in the United States supreme court. See *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 80 L. ed. 220. The United States supreme court decided the case in favor of Milwaukee county and judgment was accordingly entered in the district court on January 30, 1937. During the process of litigation, the corporation counsel was assisted by the attorney general's department, and also by special counsel appointed by the governor.

Income taxes were also assessed against the White Construction Company, a corporation affiliated with the M. E. White Company. These taxes were as follows:

Normal tax	\$16,693.13
Teachers' retirement surtax	2,862.46
Soldiers' educational bonus surtax	1,462.53

Taxes with penalties and interest totaled \$31,514.07 as of May 24, 1937.

After considerable negotiation and due to the threatened bankruptcy of one of these companies, it was finally decided to accept \$50,000.00 in full settlement of the taxes against both corporations. The sum of \$28,981.88 was to be ap-

plied against the taxes of the M. E. White Company and the sum of \$21,018.12 was to be applied against the taxes of the White Construction Company. Payment in accordance with the compromise was made on May 24, 1937.

You inquire whether any part of the \$50,000.00 collected should be paid to Milwaukee county as penalty and interest collected by it, under the provisions of sec. 71.10, subsec. (4) (d), Stats. 1931, which provided:

“Income taxes shall become delinquent if not paid within thirty days after the same are due as provided in this chapter, and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one per cent per month until paid, and the county treasurer shall immediately proceed to collect the same in the manner provided in sections 74.29 and 74.30, and the county shall retain all such delinquent penalties and interest for such collections.”

The statute governing the division of the principal amount of the taxes without penalty and interest has not been materially changed since the assessment of the taxes in question. This division is and was at all times involved in this matter governed by sec. 71.19, subsec. (1), Stats. 1935, which provides:

“All income taxes collected in cash shall be divided as follows, to wit: Forty per cent to the state, ten per cent to the county, and the balance to the town, city or village from which the income was derived as provided in section 71.18, except that when such balance exceeds seven-tenths of one per cent of the equalized value of all taxable property in such town, city or village under section 70.61, such excess shall be paid to the county to be distributed and paid to all of the several towns, cities and villages of the county, according to the school population therein. If, subsequent to July, 1931, there shall be paid over to any town, city or village any amount in excess of seven-tenths of one per cent of the equalized value of all taxable property therein, such excess payment shall be recoverable by the county.”

Sec. 71.19, subsec. (1), Stats. 1935, reads substantially the same as it did in the 1931 statutes, there being but one slight change which is not material to the present discussion.

Hence the only item about which any question is raised here is the division of delinquent interest and penalties.

That question might have been very important and troublesome had any penalties and interest been in fact collected, but we fail to see how the question can be raised in this instance, since no penalties and interest were collected from either company. \$21,018.12 was collected from the White Construction Company. This was the face amount of the tax owing by that company and it included no penalties or interest. \$28,981.88 was finally collected to apply upon the taxes of the M. E. White Company, this amount being several thousand dollars less than the normal tax of \$41,176.89 without even considering the teachers' retirement and soldiers' educational bonus surtaxes.

Consequently, the question of whether penalties and interest should go to Milwaukee county or the state, or be divided between the two, does not arise on the facts presented, and the principal amount of tax collected should be divided as provided in sec. 71.19, subsec. (1), Stats.

WHR

Physicians and Surgeons — Public Health — Basic Science Law — Optometry — Sec. 147.14, subsec. (3), Stats., precludes use of title of "Dr." by optometrist in his advertising.

May 17, 1938.

BOARD OF HEALTH.

You ask whether or not an optometrist, by using the title "Dr. John Doe, Optometrist," violates sec. 147.14, subsec. (3), Stats.

Sec. 147.14, subsec. (3) reads:

"No person not possessing a license to practice medicine and surgery, osteopathy, or osteopathy and surgery, under section 147.17, shall use or assume the title 'doctor' or ap-

pend to his name the words or letters 'doctor,' 'Dr.,' 'specialist,' 'M. D.,' 'D. O.' or any other title, letters or designation which represents or may tend to represent him as a doctor in any branch of treating the sick."

Of this subsection it was said in the case of *Corsten v. Industrial Commission*, 207 Wis. 147, 149.:

"* * * Thus these names and letters may be applied only to those who are licensed as physicians to practice medicine and surgery, * * *"

State v. Michaels, (Wis. Jan. 11, 1938) 277 N. W. 157, involved the use of the title "Dr. H. J. Michaels, Chiropractor." The court, after tracing the history of the statute, said at p. 159:

"* * * From a consideration of these various acts of the legislature it is apparent that for more than fifty years the use of the term 'doctor' has been restricted in the State of Wisconsin and the right to the use of the term has become associated with *those who were entitled to practice* medicine, surgery, or since 1903, osteopathy."

This broad language, however, is qualified by a statement at p. 158:

"* * * The statute by its terms relates to the words 'Dr.,' etc., in connection with 'treating the sick.' The statute does not forbid the use of the words in other connections, as, for instance, in connection with academic degrees."

The question, therefore, is whether the use of "Dr." in connection with "Optometrist" is a use of the term in connection with a branch of treating the sick, and whether optometry is a branch of treating the sick.

The phrase "treating the sick" was introduced by the laws of 1925, ch. 284, which created the basic science law, secs. 147.01 to 147.12, inclusive. This act changed the title of ch. 147 from, "Medicine, Surgery, Osteopathy," etc. to "Treating the Sick." Later in the same session sec. 147.14, subsec. (3) was amended by ch. 408, laws of 1925, and by this

amendment the phrase "the practice of medicine, surgery or osteopathy" was replaced by "any branch of treating the sick."

These acts are *in pari materia*, and the phrase being defined in one of them must be supposed to carry the same meaning in the other, in the absence of a clear expression of intention to the contrary. *Nolan v. Milwaukee, Lake Shore & Western Ry. Co.*, 91 Wis. 16.

Sec. 147.01, subsec. (1), Stats., reads in part:

"(a) To 'treat the sick' is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, 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.

"(b) 'Disease' includes any pain, injury, deformity, or physical or mental illness or departure from complete health and proper condition of the human body or any of its parts."

While sec. 147.01, subsec. (2), Stats., exempts optometrists from the operation of the basic science law, the protection is not extended to sec. 147.14, subsec. (3), and the exemption cannot be said to affect the meaning of "treating the sick" as used therein.

What is the function of an optometrist?

"The practice of optometry is the employment of any means, other than the use of drugs, for the measurement of the powers of vision and the adaption of lenses, prisms and mechanical therapy for the aid thereof. * * *." Sec. 153.01, Stats.

The testimony of Mr. Charles D. Waugh, secretary of the optometry board, in the case of *Price v. State*, 168 Wis. 603, as paraphrased in the report at pp. 605-606, reads in part:

"* * * The applicant for a license to practice optometry is expected to demonstrate a knowledge of the general make-up and construction of the eye and to be able to recognize a healthy eye—that is, an eye which may properly be fitted with glasses as against an eye which should be directed to a doctor for medical attention. In other words, to differentiate between those cases which require a physician's

attention and those which may be fitted with glasses without being referred to a physician. * * *. A patient who has a slight astigmatism and is also far-sighted, if left to pick his own glasses will almost invariably select near-sighted glasses. A near-sighted glass, before a patient of that kind, will give him seemingly better vision, but it will result in a constant eye-strain, because it will make his condition of far-sightedness and astigmatism worse. We frequently have to send away persons who do not see so well with their glasses as they do without them, knowing that the glasses are for their good and will give relief for certain conditions of which they are complaining."

From this description it is clear that one function of an optometrist is to "examine into the fact, condition or cause of human health or disease." That alone is sufficient to amount to treating the sick within the statutory definition, for there is nothing to indicate that the word "or" used so freely in the statute is used in any other than its common and approved sense, viz., disjunctively. Disease being used in the sense of any departure from complete health and proper condition of the body or any of its parts, it cannot but be supposed that any imperfect condition of the eye is a disease. The condition referred to as astigmatism, for example, is a disease. *Nickell v. State*, 205 Wis. 614. Accord, *State v. Yegge*, 19 S. D. 234, 103 N. W. 17. When the optometrist advises, prescribes or fits glasses with a view to correcting the defect of vision or, as stated in the testimony above quoted, to do what is best for the patient, he again performs an act which amounts to treating the sick. The fact that only mechanical therapy is resorted to does not change the fact, for it is the fact of treatment and not the technique employed that characterizes the act. *Nelson v. Harrington*, 72 Wis. 591; *Kuechler v. Volgmann*, 180 Wis. 238. Accord, *Baker v. State*, (Tex.) 240 S. W. 924.

In the case of *Baker v. State, supra*, it was held that the practice of optometry, involving examination of the eye, determination of whether or not it properly performs its functions, and prescription and fitting of glasses amount to treating disease and therefore practice of medicine under the terms of a statute which reads:

"Any person shall be regarded as practicing medicine within the meaning of this act:

"(1) Who shall publicly profess to be a physician or surgeon, and shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

"(2) Or who shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."

The cases involving this question, however, have gone both ways, depending on the fact situations and more especially on the terms of the particular statute involved. For that reason they are doubtful authority for any stand that might be taken in the present inquiry. Those cases which involve the question of validity of statutes regulating optometry and those which restrict the use of the term "doctor" in any of its various forms generally agree on two propositions pertinent here; these propositions recognize, respectively: (1) the close relationship between the practice of optometry and health, and (2) the principle that such statutes are to be construed liberally in the public interest.

In the former type of case it is recognized that the power of the state to regulate the practice of optometry can only be justified as a health measure. In only one instance has a statute of this kind been declared invalid. *People v. Griffith*, 280 Ill. 18, 117 N. E. 195. The supreme courts of Wisconsin and of the United States, among others, hold to the contrary. *Price v. State, supra*; *McNaughton v. Johnson*, 242 U. S. 344. There is an inconsistency in saying that the practice of optometry is sufficiently related to health to justify regulation but is not sufficiently related to it to amount to treating the sick within the statutory definition, especially in view of the second proposition set forth above, viz., liberal construction in the public interest.

The purpose of statutes restricting the use of the term "doctor" is to protect the public by preventing the indiscriminating from being misled. *Roesler v. Shastri*, 168 Wis. 153; *State v. Michaels, supra*. Broad construction is more likely to effectuate that purpose. *State v. Yegge, supra*. For

this reason it is generally held that qualifying words do not purge the use of the forbidden term of its illicit character. *State v. Yegge, supra; Commonwealth v. Houtenbrink*, 235 Mass. 320; *State v. Pollman*, 51 Wash. 110, 98 Pac. 88. In the last named case the court said, p. 91:

“* * * The statute is a prohibition against any use of the word in connection with announcements of the profession or business of a person other than practitioners of medicine and surgery who have passed the examination prescribed in the statute and received the license therein provided for, and this prohibition is not evaded by the use of qualifying adjectives prefixed to the prohibited words.”

As stated in the case of the *State v. Michaels, supra*, because of the restriction on the use of the term “doctor” in this state since 1881 it has come to be associated with those who practice medicine, surgery or osteopathy. It implies educational qualifications which are not required of an optometrist. The latter is required only to have reached the age of twenty-one and to have acquired a high school education or its equivalent and to have spent two years at a school of optometry or one year at such a school and two as a registered assistant to a licensed optometrist. See sec. 153.03, Stats. Any degree granted by such school of optometry is an undergraduate, not a graduate, degree, whether it be called “doctor” or something else. And when used in Wisconsin it implies more than it actually represents.

You are therefore advised that the practice of optometry in this state constitutes treating the sick, and that an optometrist may not advertise himself as “Dr. John Doe, Optometrist.”

WHR

Criminal Law — Gambling — Lotteries — Trade Regulation — Trading Stamps — Advertising scheme by which every cash purchaser of merchandise receives cash slip bearing date and amount of purchase, holders of which are entitled on particular day selected by merchant to receive free from merchant merchandise equal to amount of cash slip bearing particular date merchant selects, is in violation of trading stamp law, sec. 100.15, Stats. It is also in violation of antilottery law, sec. 348.01 and sec. 100.16, Stats.

May 17, 1938.

GEORGE WARNER, *Chief Inspector of
Weights and Measures,
Department of Agriculture and Markets.*

You have submitted a scheme which is advertised under the caption of "Lucky Day" and you ask whether it is in violation of the trading stamp law, the antilottery law and sec. 100.16, Stats.

The instructions to the purchaser of goods are as follows:

"Save your cash sales tickets. They are all dated. On the 1st day of each month a number will be drawn from 1 to 31 representing the days of the previous month. All customers having Cash Slips for the LUCKY DAY will receive a like amount in trade absolutely free."

Sec. 100.15, Stats., clearly provides that the tokens shall have a stated cash value and shall be redeemable only in cash. Under the above stated scheme, they are redeemable in merchandise, which makes the plan illegal. XXII Op. Atty. Gen. 369. It is also in violation of the antilottery law, as the purchaser, for a consideration, is given a chance to receive something of value. It is also in violation of sec. 100.16, Stats., which clearly appears from the following wording of said section:

"No person shall sell or offer to sell anything whatever, by the representation or pretense that a sum of money or something of value, which is uncertain or concealed, is inclosed within or may be found with or named upon the thing

sold, or that will be given to the purchaser in addition to the thing sold, or by any representation, pretense or device, by which the purchaser is informed or induced to believe that money or something else of value may be won or drawn by chance by reason of such sale."

NSB
JEM

Indigent, Insane, etc. — Poor Relief — School Districts — Tuition — Neither sec. 40.21, subsec. (2), nor sec. 40.47, subsec. (4), Stats., requires county to pay tuition claims presented by city in cases of indigent elementary and high school pupils who have no legal settlement.

May 18, 1938.

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

You inquire whether the county should reimburse a city within the county for tuition claims against county-at-large indigent students attending the elementary and high schools of the city. By county-at-large indigent students is meant those who have no legal settlement in this state.

We believe it is well established that a school district is obliged to furnish free education to the residents of the district. For school purposes the test of residence is whether the person came into the district for the purpose of residing there as distinguished from the purpose of merely participating in its educational facilities. *State ex rel. School Dist. No. 1 of Waukesha v. Thayer*, 74 Wis. 48; *State ex rel. Smith v. Board of Education*, 96 Wis. 95. It should be noted that residence for school purposes and legal settlement as defined in sec. 49.02, Stats., are not at all alike. Thus, a child may have a school residence different from the legal settlement of his parents. XXI Op. Atty. Gen. 117; XVIII Op. Atty. Gen. 549.

Ch. 49, Stats., which deals generally with the relief of the poor, allocates the burden of supporting the poor on the basis of legal settlement. As we have pointed out, education is to be free to residents and residence for school purposes is not equivalent to legal settlement for relief purposes. Consequently, ch. 49 has no application to the question of responsibility for the cost of educating the children of indigents.

The only relevant statutes are secs. 40.21, subsec. (2) and 40.47, subsec. (4). These sections read as follows:

40.21 (2) "Every person of school age maintained as a public charge shall for school purposes be deemed a resident of the school district in which he resides, except that such school district shall be compensated by the municipality or by the county in case the county system of poor relief is in effect in such municipality in which such person of legal school age has a legal settlement as defined in section 49.02 with an amount equal to the pro rata share of the year's expense of maintaining such school, based upon the total enrollment and year's expense of the maintenance of such school. In case such person maintained by the county has his legal settlement outside the county then the county shall pay such school district's pro rata share and such county may recover such sums paid, from any municipality in the state where the legal settlement may be established."

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

Sec. 40.21 deals with the conduct of common schools, while sec. 40.47 relates solely to high schools.

In interpreting sec. 40.21, subsec. (2), Stats., it must be remembered that the burden of supplying free education to residents is imposed on the school district and our inquiry

should be directed to determining to what extent this section permits the school district to shift a part of the burden to other communities.

As we interpret sec. 40.21, subsec. (2), Stats., a school district supplying educational facilities to indigent pupils may secure a repayment from the municipality in which the indigent has his settlement. If such municipality is in a county which is on the county system of poor relief, then the school district may secure reimbursement from the county. However, we can find nothing in sec. 40.21, subsec. (2), Stats., which requires the county to reimburse a school district for the educational costs of those who have no legal settlement. In XXV Op. Atty. Gen. 454 it was indicated that a county is not liable for tuition of county-at-large indigents, which is the very question under consideration here.

It is true that the cost of relief of those who have no legal settlement is borne by the county, and it would seem logical that the county should be required to pay tuition in such cases. However, sec. 40.21, subsec. (2), Stats., does not so provide, and in the absence of any other relevant statute it must be concluded that the county is not responsible for county-at-large students attending the common schools.

As above indicated, sec. 40.47, Stats., relates to high schools. It was pointed out in XXIII Op. Atty. Gen. 191, 192, that sec. 40.47, subsec. (4), provides only for the paying of tuition in the case of nonresidents and that no provision is made for the payment of tuition for indigent pupils in that section. It was also stated in that opinion that sec. 40.21 (2) applies only to the common school of eight grades and does not apply to the ordinary high school or to the union free high school.

You are therefore advised that neither sec. 40.21, subsec. (2), Stats., nor sec. 40.47, subsec. (4), Stats., requires the county to reimburse a city for the cost of educating county-at-large indigent students whether attending the elementary or the high school.

WHR

Criminal Law — Prisons — Sentence to state prison commences on day of actual incarceration in state prison, regardless of any statement made by court as to when sentence is to commence.

May 19, 1938.

BOARD OF CONTROL.

You state that a prisoner was received by the Wisconsin state prison on February 12, 1938; that he was sentenced to the institution on February 7, 1938, to serve from one to two years; but that the sentencing court ordered that the sentence should begin as of the 30th day of September, 1937.

You ask whether you are to consider that the sentence began on September 30, 1937, or on February 12, 1938, as provided by sec. 359.07, Stats.

Previous opinions of this department have held that sentence does not commence until incarceration in the state prison, and we see no necessity for changing the rule in this case. XX Op. Atty. Gen. 806; XIV Op. Atty. Gen. 12; XVI Op. Atty. Gen. 284.

It is true that the sentence of a court of competent jurisdiction, even though erroneous, controls until modified by appropriate proceedings. XXII Op. Atty. Gen. 737; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261. But, as a general rule, the time for imprisonment to begin or end is no part of the judgment or sentence proper. 16 C. J. 1304, 1372; cases collected in 69 A. L. R. 1177. As it was said in *Brooke v. State*, 128 So. 814, 816, 99 Fla. 1275, "The court fixes the penalty and the law fixes the beginning and expiration, * * *"

"* * * The law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and ending of the period during which the imprisonment shall be suffered. The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly

executed. But the order of the court with reference to the time when the sentence shall be executed is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence. * * *." *State v. Horne*, 42 So. 388, 391, 52 Fla. 125.

In a legal sense, the sentence is the punishment fixed for the offense of which the accused has been convicted, and any order respecting the time of its infliction is but the award of execution or a direction to the clerk for framing the *mittimus*. Such an order or direction is said to be, not a judicial, but merely a ministerial act. *Bernstein v. United States*, (C. C. A., 4th) 254 Fed. 967 (certiorari denied in 249 U. S. 604, 39 S. Ct. 260). In Wisconsin, even this ministerial act is not required of the court, since the certificate of conviction issued by the clerk of court under sec. 359.02, Stats., is in itself sufficient authority for the execution of the sentence.

The court, in determining the amount of punishment to be suffered by the prisoner, might have taken into consideration the time he was in custody awaiting trial; instead of doing so, it sentenced him "to the full term and period of not less than one nor more than two years." Since, in legal view, punishment for a crime does not begin until after the criminal has been convicted and sentenced, any imprisonment prior to sentence will not inure to his benefit as part of that punishment. *People ex rel. Stokes v. Warden of State Prison*, 66 N. Y. 342.

Our conclusion is that the sentence began on the first day of incarceration in the state prison, February 12, 1938, the statement of the court as to the time when sentence is to begin being rejected as mere surplusage.

LEV

Automobiles — Law of Road — Criminal Law — Prisons — Prisoners — Pardon — Legal consequences of conviction of crime are absolved by full pardon and person convicted for driving while intoxicated should have his driver's license restored when pardoned, upon application, without furnishing proof of financial responsibility required under sec. 85.08, subsec. (10), par. (j), Stats.

May 19, 1938.

THEODORE DAMMANN,
Secretary of State.

You state that on March 1, 1933, the driving privileges of a certain person were suspended under sec. 85.08, subsec. (10), Stats., for driving while intoxicated, and that such person was granted a pardon in 1937.

We are asked whether the granting of an absolute pardon automatically releases the suspension of driving privileges or whether proof of ability to respond in damages may be required as a condition for reinstatement of the driver's license.

Under sec. 85.08, subsec. (10), par. (b), Stats., a driver's license may be suspended for a violation of sec. 85.13, which prohibits the operating of any vehicle upon any highway while under the influence of intoxicating liquor. Under sec. 85.08 (10) (j), Stats., such license

“* * * shall remain so suspended and shall not at any time thereafter be renewed, nor shall any such license be thereafter issued to him or any motor vehicle, owned or used in whole or in part by him, be thereafter registered until he shall have given proof of his ability to respond in damages for any liability thereafter incurred, resulting from the ownership, maintenance, use or operation thereafter of a motor vehicle for personal injury to or death of any one person in the amount of at least five thousand dollars and, subject to the aforesaid limit for any one person injured or killed, of at least ten thousand dollars for personal injury to or the death of two or more persons in any one accident, and for damage to property in the amount of at least one thousand dollars resulting from any one accident. * * *.”

This department recently had occasion to consider the legal effect of a pardon in XXVI Op. Atty. Gen. 381, where it was ruled that an unconditional pardon of a person imprisoned for felony removed the statutory disability to receive old-age assistance imposed by sec. 49.22, subsec. (5), Stats. In this opinion we quoted from 46 C. J. 1192-1193, as follows:

“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.”

Another clear statement of the rule appears in Bishop's Criminal Law (9th ed.) sec. 916 as follows:

“A full pardon absolves the party from all the legal consequences of his crime and his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided.
* * *”

Generally it may be said that the granting of a pardon does not automatically reinstate a license revoked because of a conviction. 47 A. L. R. 542, note. Where a conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualification. 28 Harvard Law Review 647.

Thus it would appear that upon proof of the pardon being furnished to the secretary of state, he should immediately restore or reissue the license or certificate in question. He is required to do this under sec. 85.08, subsec. (10), (k), Stats. in the event the judgment of conviction is vacated or reversed and, as previously pointed out, a pardon would have like effect, since it absolves the party from all of the legal consequences of the conviction.

WHR

Automobiles — Law of Road — Under sec. 85.02, subsec. (6), Stats., auto dealers' license plates may be used in lieu of regular plates only on vehicles offered for sale by dealers, distributors or manufacturers, or on vehicles in transit from factory to dealer or distributor, or when being used for trial tests by manufacturers; otherwise there is no restriction as to the use or as to driver of vehicles equipped with dealers' license plates.

May 20, 1937.

THEODORE DAMMANN,
Secretary of State.

You have asked us for an interpretation of the application of sec. 85.02, subsec. (6), Stats., as amended by ch. 301, Laws 1937.

At one time this statute provided that vehicles equipped only with dealers' license plates should not be operated on the highways "except by an authorized representative of the dealer, distributor or manufacturer, and for demonstration purposes only." Sec. 85.02, subsec. (4), Stats. 1931.

This was changed by ch. 418, Laws 1933, and renumbered as subsec. (6), so as to provide:

"* * * such plates shall be used only on those vehicles used for trial test or adjustment or for demonstration or exhibition or for some purpose necessarily incidental to the sale of such vehicle, or on vehicles while in transit from the factory to a distributor or dealer and being driven by an authorized representative of the manufacturer, distributor or dealer."

Under this statute it was ruled in XXII Op. Atty. Gen. 752 that a garage could permit a prospective purchaser of a new car to drive the same upon the highways without an official representative of the garage being present.

The language of this statute was somewhat confusing and it was not entirely certain as to the extent that dealers' plates might be used. This section was amended again by ch. 301, Laws 1937. As amended, sec. 85.02, subsec. (6), Stats., now provides in part:

“* * * such plates shall be used in lieu of regular plates only on those vehicles actually offered for sale by dealers, distributors or manufacturers or on vehicles while in transit from the factory to a dealer or distributor or while being used for trial tests by manufacturers.”

From this history and the present wording of the statute, it would appear that the right to operate a vehicle upon the highways with dealers' license plates depends upon the status of the vehicle. If it is one that is owned and “actually offered for sale” by a dealer, distributor or manufacturer, it may be operated with dealers' plates.

Furthermore, since the statute provides that such dealers' plates may be used “in lieu of regular plates,” it would seem that a vehicle so equipped might be operated on the highways under the same conditions and with the same limitations only as would be true in the case of a vehicle equipped with regular plates. There is now no limitation in this section of the statutes as to who may drive such a vehicle.

If the vehicle is owned and actually offered for sale by a dealer, distributor or manufacturer, or is in transit from factory to dealer or distributor, or is being used for trial tests by the manufacturer, it may be operated upon the highways with dealers' plates as freely as if equipped with regular plates.

WHR

Physicians and Surgeons — Public Health — Basic Science Law — Under sec. 147.20, subsec. (3), Stats., power to revoke physician's license because of crime committed by him in course of his professional conduct is vested in Wisconsin state board of medical examiners* and may not be redelegated by board to its president.

May 21, 1938.

BOARD OF MEDICAL EXAMINERS.

Henry J. Gramling, M. D., *Secretary*.

You have inquired whether the Wisconsin state board of medical examiners may grant to the president of such board the right to revoke the license of a physician convicted of a crime committed in the course of his professional conduct upon receipt of a transcript of the court record.

Sec. 147.20, subsec. (3), Stats., 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.”

It is clear from reading the foregoing statute that the legislature has vested the power of revocation under this section in the board and not in the president of the board.

In an opinion to the board on August 27, 1937, XXVI Op. Atty. Gen. 378, this department ruled that revocation under sec. 147.20, subsec. (3), Stats., requires affirmative action of the board and the right to practice continues until such action is taken.

Where a board has been given authority to perform certain functions it cannot delegate to others such powers specifically given to it. 46 C. J. 1033. In other words, delegated authority cannot be redelegated. 18 C. J. 471. For other authorities see XX Op. Atty. Gen. 1080, in which it was ruled that the members of the state board of medical examiners cannot vote by proxy.

You are therefore advised that the board of medical examiners only may revoke licenses under sec. 147.20, subsec. (3), Stats., and that the powers granted to the board may not be redelegated to any individual member or officer of the board.

WHR

Municipal Corporations — City Ordinances — Closing-out Sales — Wisconsin Statutes — Municipality under sec. 66.35, subsec. (1), Stats., may pass ordinance that supplements statute, but may not pass ordinance in conflict therewith.

Where terms of ordinance are less severe in requirements than terms of statute, statute controls.

May 21, 1938.

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

In your recent letter you refer to sec. 66.35, subsec. (1), Stats., which provides:

“No person shall conduct in any city a ‘closing-out sale’ of merchandise except in the manner hereinafter provided or in the manner provided by ordinance of such city.
* * *”

You further state that in a case involved locally the firm conducting the closing out sale has complied with the city ordinance by furnishing the inventory required by the ordinance. The inventory required by the ordinance does not begin to be as exacting as the inventory required by sec. 66.35 (2), Stats.

You inquire whether an inventory in compliance with the ordinance is sufficient in view of the fact that sec. 66.35 (1)

reads "or in the manner provided by ordinance of such city."

It is fundamental that cities and villages cannot enact ordinances contrary to or in conflict with state law. *Fox v. Racine*, 225 Wis. 542. A municipal ordinance more exacting than the state law upon the same subject is not in conflict therewith. *Caeredes v. Platteville*, 213 Wis. 344.

The above cases are not deemed controlling upon the question presented, in that said cases merely expound what are now well recognized concepts of municipal authority and do not touch upon the problem as to whether municipalities may pass ordinances in conflict with state law when the legislature has purportedly granted authority to do so. The legislature, in exercise of its police power, may classify cities, but the classification must be based upon substantial distinctions, be germane to the purpose, and cannot rest on existing circumstances only, or preclude additions to those included in a class, and must apply equally to all within the class. *Borgnis v. Falk Co.*, 147 Wis. 327. If the legislature by use of the language "or in the manner provided by ordinance of such city" intended that any city by ordinary municipal ordinance might supplant rather than supplement the provisions of sec. 66.35, Stats., it would seem that the statute, if otherwise valid, might present a serious constitutional question on classification.

But even though the legislature has power to pass a law in exercise of the police power applicable to all cities, except those cities that by ordinary municipal ordinance enact city laws in conflict therewith, such a legislative intent is not to be presumed and should be expressed in the clearest possible language. 43 C. J. 221.

By use of the language in question we do not believe that the legislature intended to give cities the power to pass ordinances in conflict with the state law. The language is subject to the interpretation that the sale must be held in the manner provided by the statute or in the manner provided by city ordinance, provided the ordinance is not in conflict with the statute. Furthermore since the adoption of the home rule amendment to the constitution, art XI, sec. 3, and the legislative provisions in relation thereto, sec. 66.01, Stats., any legislative enactment applicable to all

cities always presents the question as to whether the enactment and the subject matter dealt with is of such state-wide concern that municipalities may not deal with said subject in exercise of their home rule powers. *Van Gilder v. Madison*, 222 Wis. 58. The language in question "or in the manner provided by ordinance of such city" may merely be a legislative expression to the effect that the subject matter dealt with in sec. 66.35 is not of such state-wide concern that municipalities are prohibited from dealing therewith by charter ordinance pursuant to sec. 66.01, Stats.

We conclude that the legislature did not intend by use of the language in question to permit municipalities by ordinary municipal ordinance to enact city ordinances in conflict with sec. 66.35, Stats., but that the legislature did signify a legislative intent that the subject matter dealt with was not of such state-wide concern that the municipalities might not, by charter ordinance, enact an ordinance in conflict therewith.

It does not appear that the local ordinance to which you refer is a charter ordinance. If it is not, and to the extent that said ordinance is in conflict with the provisions of sec. 66.35, Stats., the state law must be deemed controlling.

NSB

Insurance — Public Health — Wisconsin General Hospital — Nurse transporting patient at request of county court pursuant to sec. 142.05, Stats., may be held liable for negligence in accident occurring during such transportation.

Liability insurance may not protect nurse if mileage paid for transporting patient is construed as transportation for hire within terms of most liability insurance contracts. County would not be liable, as it is acting in performance of essential governmental function.

May 21, 1938.

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

From time to time county nurses employed by county boards and working under the direction of the county health committee, and occasionally nurses employed by state boards of health, and less frequently nurses employed by school boards, are requested by the county judge to transport patients to the Wisconsin general hospital and other tax-supported institutions. The patients are to be admitted at the expense of the county. These public health nurses drive either a car owned by the county or a personally owned car for which they receive a flat mileage, or mileage at the rate provided for by statute. When the car is owned by the county, the county usually, if not always, carries liability insurance; but when the car is owned by the public health nurse, she takes care of her own liability insurance. In the event that the nurse should have an accident while conveying a patient to or from one of these institutions, you inquire whether the nurse could be held liable should she be sued by child or parent.

Although your question does not specifically so indicate, you apparently have in mind the possibility that the county, rather than the nurse, may be liable. From the facts which you have submitted, it does not appear that a local health nurse transporting a patient when requested by the county court is performing any duty prescribed by statute or assigned by the local board of health (sec. 141.05 subsec. (1) Stats.), or that a county nurse when transporting a patient

at the request of the county court is performing any duty required by statute or assigned by the county health committee (sec. 141.06 subsecs. (1) and (2)).

Chapter 142 of the statutes relates to commitment of patients to the Wisconsin general hospital, or other institutions, by the county courts. Sec. 142.05 subsecs. (1) and (2) provide:

“(1) If the patient is unable to bear his expense to the place of treatment, and the county court shall so order, the county treasurer shall advance to the patient the necessary transportation and expenses out of the county treasury. Likewise, upon the patient’s discharge from the place of treatment, the county judge may order transportation and expenses for the patient’s return to his residence. If the patient is unable to travel alone to the place of treatment, the court may appoint a suitable person to accompany him, and such person shall receive actual and necessary expenses, and, if not a salaried officer, a per diem of three dollars per day going and returning; and the same shall be paid by the county.

“(2) If at the time of commitment the court is satisfied that the patient is unable to bear the expense of returning to his residence or that he will not be able to return alone, the court may at that time authorize the hospital to pay such transportation and expense and may appoint a suitable person to accompany the patient and authorize the hospital to pay the actual and necessary expenses of such person and the per diem provided for in subsection (1). Any hospital making such payments shall be reimbursed by the county.”

A nurse transporting a patient at the request of the county court, pursuant to sec. 142.05 subsec. (1), is transporting such patient as an individual employee of the county.

“The general rule is that where a municipal corporation is performing a public or governmental function, from which it derives no profit or advantage, it is not responsible for the negligence of its officers in respect to this function * * *; but that where it is functioning in its private or proprietary capacity, for the profit, benefit or advantage of the corporation or the people who compose it rather than for the public at large, it is liable for the negligence of its employees * * *.” 64 A. L. R. 1545.

In the case of *Morrison v. Fisher*, 160 Wis. 621, it was held that, in the absence of statute, there is no liability on the part of a public corporation (state fair conducted by board of agriculture) for the negligence of its employees while engaged in a governmental function. The doctrine is well stated in the following quotation in the case of *Apfelbacher v. State*, 160 Wis. 565, 575-576:

“* * * municipalities carrying on proprietary enterprises for gain, as for instance the sale of water to its inhabitants, are held to respond in damages for the tort of their servants in so doing (*State Journal P. Co. v. Madison*, 148 Wis. 396, 134 N. W. 909), while if they act in a governmental capacity where there is no question of financial profit but only a service rendered for the general welfare of its inhabitants, as the maintenance of a public playground, there is no liability for the negligence of its agents. *Bernstein v. Milwaukee*, 158 Wis. 576, 149 N. W. 382. So it will be observed that the doctrine of *respondeat superior* has by courts been applied to public subdivisions of the state only in those cases where the municipality has been engaged in a proprietary enterprise which may or does result in a financial benefit. * * *

“A denial of the application of the doctrine of *respondeat superior* to the state when exercising a governmental function does not leave a person injured remediless. He has his cause of action against the person or persons actually committing the wrong. *Morrison v. Fisher*, *post*, p. 621, 152 N. W. 475. It merely refuses to extend the master's liability to cases where he does not profit by the enterprise he is engaged in, leaving the injured party free to prosecute his suit against the person or persons who actually committed the tort * * *.”

There is no statute making the county liable for the negligence of a nurse who has an accident while transporting a patient at the request of the county court pursuant to the provisions of sec. 142.05. The nurse is acting for the county which, in transporting such patient, is engaged in a governmental enterprise and not in a proprietary enterprise from which it receives any profit. In the event that the nurse had an accident while conveying a patient to or from one of these institutions, the county would not be liable but the nurse could be sued and might be held liable in the event that she was guilty of actionable negligence.

Your attention is directed to the fact that the policy embracing most, if not all, individual liability insurance contracts contains a provision to the effect that the insurance carrier shall not be liable for accidents occurring while the insured is transporting passengers for hire. If the mileage paid the nurse for transporting the patient were construed as hire, the liability insurance of the nurse would not operate to protect her from a personal judgment.

JRW

Taxation — Tax Sales — County board resolution directing that county purchase all tax certificates at tax sales does not prevent county board from directing county treasurer subsequently to sell and assign part of such certificates to private purchaser.

May 21, 1938.

JOSEPH E. HOUSNER,
District Attorney,
Oconto, Wisconsin.

You have submitted a copy of a resolution passed at the annual county board meeting held in November, 1937. By this resolution the county board purported to authorize “* * * the land committee * * * to prepare a list of tax certificates on properties where the public interest would benefit by offering these for sale to any purchaser; that this list be advertised, and a copy furnished the county treasurer; that the county treasurer be and hereby is directed to sell these certificates to any purchaser provided that purchaser pays cash in full for all of the certificates outstanding against the property, plus such fees and penalties as may at the time be in force.”

This resolution was passed pursuant to the provisions of sec. 75.35. The resolution also incorporates a part of sec. 75.34, subsec. (1), to the effect that a sale of certificates by

the county treasurer "shall include all certificates in the hands of such treasurer on the same lands."

Oconto county has on record a resolution providing that the county shall buy all tax certificates. It is your belief that the resolution as now submitted is discriminatory in that it proposes to offer for sale only certificates on certain desirable real estate, while the remainder of the certificates would be held by Oconto county. Apparently also you feel that there is an inconsistency between the resolution submitted and the resolution on record directing the county treasurer to buy all tax certificates.

Secs. 75.35 and 75.34 subsec. (1), provides:

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

"75.34 (1) The several county treasurers, when no order to the contrary shall have been made by the county board, shall sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest thereon at the rate specified in the certificates; but every such sale shall include all certificates in the hands of such treasurer on the same lands."

In our opinion there is no inconsistency between the resolution directing the county treasurer to buy all tax certificates and the later resolution providing for the listing and sale of tax certificates on certain desirable properties. The resolution directing the county treasurer to buy all tax certificates is satisfied when all tax certificates offered at the tax sale are struck off to the county. The resolution which you have submitted as having been passed by the county board at the annual meeting in November, 1937, purports to specify what disposition shall be made of at least a portion of the tax certificates which are struck off to the county by the county treasurer pursuant to the previous resolution.

In other words, the resolution submitted is a step taken chronologically with a view of disposing of a part of the tax certificates purchased by the county. It indicates that, while the county board has directed the county treasurer to purchase all tax certificates offered for sale, it does not want the county to hold all of them indefinitely. It would serve no useful purpose here to speculate concerning the reason which the county board may have entertained for directing that all tax certificates offered for sale be struck off to the county.

It does not appear that the county board has made an order forbidding the county treasurer to sell any of the tax certificates held by the county. In the absence of such an order, the county treasurer has the right, under sec. 75.34 (1), to sell any or all of the tax certificates held by the county, subject only to the limitations provided for in that subsection.

The exact meaning of the language “* * * cash in full for all of the certificates * * *, plus such fees and penalties as may at the time be in force,” in the resolution submitted, is uncertain. Very probably the county board intended this language to have the same or substantially the same meaning as the following language of sec. 75.34 (1): “* * * amount for which the land described therein was sold, with interest thereon at the rate specified in the certificates; * * *.” Such being the case, the county treasurer, under sec. 75.34 (1), and in the absence of an order to the contrary, already had authority to do what the enclosed resolution directs him to do.

Sec. 75.34 subsec. (2), provides as follows:

“No county board shall, at any session thereof, sell, convey or transfer, or order or direct the sale, conveyance or transfer of any tax certificates owned or held by the county at less than the face value thereof unless such board shall have previously directed the county clerk to give notice of their intention so to do by publication thereof for four successive weeks in some newspaper published in the English language in such county and having a general circulation therein, and such notice has been so given. Any and all sales, conveyances or transfers of such tax certificates made in violation of these provisions shall be null and void.”

Sec. 59.07, subsec. (6), provides that the county board shall

“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.”

Under these sections it was held in XX Op. Atty. Gen. 1192 that a county board is not required to put up for sale at less than face value *all* tax certificates held by it, but that the county board, in the exercise of good business judgment, may put up for sale at less than face value a portion only of the certificates held by it. It was decided in that opinion that inasmuch as there was no express provision concerning the duties or powers of a county board to offer for sale at less than face value all or a part only of the tax certificates held by the county, the county could sell a part only of the tax certificates. It was concluded, p. 1193:

“* * * The county’s moneys should enjoy the benefit of the same business management that an individual would accord to his personal affairs * * *.”

The same question presented in that opinion is now presented by you except that in your question the tax certificates are not to be sold at less than face value.

It is our opinion that the reasoning in XX Op. Atty. Gen. 1192 is applicable to the question which you present and, therefore, the county board has authority to direct the sale of a part only of the tax certificates held by the county.

JRW

School Districts — School Administration — Teacher Tenure — Three year probationary period necessary to acquire teacher tenure under sec. 41.15, subsec. (12), Stats., may not be added to two year probationary period under sec. 39.40 to acquire teacher tenure under latter section.

May 23, 1938.

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

You advise that a teacher who has acquired tenure under sec. 41.15, subsec. (12), Stats., by virtue of three years of successful teaching in the Milwaukee vocational school has received an offer of a position in the vocational schools of West Allis.

You ask whether the teacher in question could tack a prospective period of two years of successful teaching in the West Allis system to the three years of successful teaching in the Milwaukee Vocational School for the purpose of acquiring tenure in the West Allis system.

Sec. 41.15, subsec. (12), Stats., governs tenure of full-time day teachers in schools of vocational and adult education in the city of Milwaukee. Under that section the teacher in question acquired tenure only after having successfully taught in the Milwaukee vocational school for at least three years, during which time the teacher was on probation. Sec. 39.40 relates to the tenure of certain teachers, but subsec. (1) excepts from its provisions teachers employed by the board of vocational and adult education in Milwaukee. Sec. 39.40 subsec. (2), governs the tenure of a teacher employed by the board of vocational and adult education of West Allis and provides:

“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. A teacher who has acquired permanent employment by reason of five or more years of continuous service as herein pro-

vided, upon accepting employment in another school system or school to which this section applies, shall be on probation therein for two years and after continuous and successful probation for such two years in such school system or school, such employment therein shall be permanent during efficiency and good behavior and until discharge for cause."

To acquire tenure under sec. 39.40 subsec. (2), a teacher must have completed a continuous and successful probationary period of five years "in the same school system or school." The Milwaukee vocational school and the West Allis vocational school could not be classified as "the same school system or school." Sec. 39.40 (2) provides that a teacher who has acquired tenure thereunder may, upon accepting employment in another school system or school to which sec. 39.40 is applicable, acquire tenure in such new employment after an additional continuous and successful probationary teaching period of two years. Our statutes do not permit a teacher to tack two years of successful teaching in a school or school system governed by sec. 39.40 to three years of successful teaching in a school or school system governed by sec. 41.15 subsec. (12) for the purpose of gaining tenure in the former school system. Tenure is not a common-law right. It exists only by virtue of the statute which creates that right. Successful teaching under one system is wholly without effect as an aid in acquiring tenure under another system. If the teacher accepts the position in the vocational school of West Allis, it will be necessary for her to complete five years of continuous and successful teaching in the West Allis school before tenure may be gained therein.

JRW

Counties — County Board — Taxation — Tax Sales —
County may not accept quitclaim deed from owner of land upon which county holds tax certificates in consideration for quitclaim deed from county to such owner covering part of such lands, with taxes on such latter lands marked paid.

May 23, 1938.

JOSEPH E. HOUSNER,
District Attorney,
Oconto, Wisconsin.

You state that Oconto county holds delinquent tax certificates on forty-four forties of land owned by one company. This company offered Oconto county a deed to the forty-four forties upon the consideration that Oconto county deed back fifteen of these forties with all taxes marked paid. You inquire whether it would be legal for Oconto county to complete this transaction. You do not state for how many years the county holds delinquent taxes on these government descriptions, or what remains to be done by the county in order to acquire tax deeds to these properties.

In XXVI Op. Atty. Gen. 177 this office ruled that a county board may not lawfully authorize the exchange of county-owned lands for a quitclaim deed from the previous owner to other lands to which the county already holds title by tax deed. It appeared from the facts in that opinion that a county had taken tax deeds to several thousand descriptions of tax delinquent lands, and the county board proposed to quitclaim these lands to the former owner, in return for quitclaim deeds from such former owner covering other descriptions to which the county also held title by tax deed. All of the land to be exchanged previously was owned by the one person from whom and to whom the quitclaim deeds were to run. It was stated in that opinion, p. 179:

“* * * 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.”

It is true that in the present instance the county does not have tax deed to any of the property described in the tax certificates. Nevertheless, if the county took quitclaim deeds to the forty-four forties and quitclaimed a portion of such descriptions back to the previous owner with the taxes marked paid, this would amount to a remission of the taxes on the descriptions so reconveyed. As pointed out in XXVI Op. Atty. Gen. 177, the county does not have authority to remit taxes validly levied.

Sec. 75.35 provides in part:

“The county board may, by an order entered in its records prescribing the terms of sale, authorize the county clerk * * * to sell and convey by quitclaim deed * * *” lands to which the county has taken tax deed title.

In XXII Op. Atty. Gen. 484 it was held that the words “to sell and convey” as used in sec. 75.35, contemplated “a present completed sale by receiving cash and delivering a deed which would constitute a muniment of title.” The reconveyance by the county to the previous owner of a portion of the forty-four descriptions would not be a cash sale and would not satisfy the consideration requirement of sec. 75.35. You are therefore advised that the county may not legally make the proposed exchange.

JRW

Contracts — School Districts — Construction contract let by building committee appointed by school district meeting is void, since school district and school board may not delegate powers vested in them by sec. 40.04, subsec. (4) and (5) and sec. 40.16, subsec. (1), Stats.

May 24, 1938.

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

You state that at a special meeting of a common school district a building committee was appointed and authorized

to select plans and let a contract for the construction of a school building. You inquire whether such contract is legal.

Sec. 40.04, Stats., reads in part:

“The annual common school district meeting shall have power:

“* * *

“(4) To designate sites for district schoolhouses or teacherages.

“(5) To vote a tax to purchase or lease suitable sites for school buildings, to build, hire or purchase schoolhouses or teacherages or outbuildings, and to furnish, equip and maintain the same.”

Sec. 40.16, subsec. (1), Stats., reads:

“Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district.”

The powers of the district and of the board are given by statute. Neither may exceed the powers granted to it or interfere with the exercise of the powers granted to the other. The powers of the district with respect to construction of school buildings include the designation of a site and the voting of a tax to buy or lease the site, build the schoolhouse and furnish, equip and maintain it. The actual control, care, possession and management of the property is vested in the board. This would include the selection of plans, letting of contracts, approval of work, making of payments, and the like.

No statute authorizes the district to delegate these functions to a committee of its own, since the powers and duties in this regard have already been delegated to the board by the legislature.

This question was squarely presented in the case of *People ex rel. Moore v. Banfield*, 6 How. Pr. (N. Y.) 437, which was an action of mandamus to compel the school board to make out a tax list and warrant. The action failed on the ground that the district was without power to delegate

statutory powers of the board to a building committee, and the contract was therefore void. The court said at p. 438:

“* * * The inhabitants and trustees are alike dependent upon the statute for all the powers they can legally exercise; no power is given to the inhabitants to invest a building committee with authority to advertise for, or to make a contract for building a school house, or to do any other act binding on the trustees without their assent.”

The same principle was applied in *Baumann v. West Allis*, 187 Wis. 506, and *Schmitt v. Milwaukee*, 185 Wis. 119. In the former case a contract let by a building committee composed of certain members of the council and of the board of education was considered to be void as being made without statutory authority, although the contractor was held estopped to raise the point. In the latter case it was said that the power of the board of education in this regard, being granted by statute, is exclusive, and its exercise is not to be conditioned or interfered with by the council even though the contracts are made in the name of the city.

In those cases, upholding contracts made by building committees, there has been statutory authority either in the district or in the board permitting the delegation of this function. See *Morse v. School District*, 3 Allen (85 Mass.) 307, and *Wright v. Jones*, 55 Tex. Civ. App. 616, 120 S. W. 1139.

There being no such statutory authority here, we conclude that a contract let by a building committee appointed by the school district is void.

WHR

Intoxicating Liquors — Licenses to sell liquor for period of six months beginning June 1 and ending December 1 may be granted under provisions of second sentence in sec. 176.05, subsec. (6), Stats.

Licenses may be granted under first sentence of said section for year or any shorter period of time but must expire on June 30 following issuance.

May 24, 1938.

WM. A. NATHENSON,

Beverage Tax Division.

You have submitted the following question:

“Can the town board grant resort licenses to sell liquor for six months beginning June 1st, to December 1st?”

Sec. 176.05, Stats., pertaining to liquor licenses, provides in subsec. (6) as follows:

“Licenses may be granted which shall expire on the thirtieth day of June of each year upon payment of such proportion of the annual license fee as the number of months or fraction of a month remaining until June thirtieth of each year bears to twelve. Licenses may also be issued at any time for a period of six months in any calendar year for which one-half of the annual license fee shall be paid. Such six months' licenses shall not be renewable during the calendar year in which issued.”

This statute clearly provides for two kinds of so-called semiannual licenses. In the first sentence, the license may be granted at any time during the six months beginning with the first day of January and ending the 30th day of June, or it may be granted at any time prior to January 1. All those licenses expire on the 30th day of June. Another kind of license, provided for in the second sentence of the above quoted statute, provides that licenses may also be issued at any time for the period of six months in any calendar year, for which one-half of the annual license fee shall be paid. Under the second sentence, a license may be issued beginning June 1 and ending on December 1. The statute

means exactly what it says and there is no ambiguity in the wording of it, nor does an ambiguity arise in applying the statute to a concrete case.

Your question must be answered in the affirmative. In granting licenses under the first sentence of the above statute, there should be some indication that the license ends on the 30th day of June. If the license is granted under the second sentence, it should state the date when it expires, which may be any date six months from the time when the license was issued, but within the same calendar year. XXIII Op. Atty. Gen. 457.

NSB

JEM

Public Officers — Register of Deeds — Social Security Law — Old-age Assistance — Register of deeds is not entitled to fee for filing release or satisfaction of lien acquired by filing certificate of old-age assistance.

May 25, 1938.

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

You state that the register of deeds of your county is on a salary basis and ask whether he shall charge a fee for filing releases of liens arising from the filing of old-age assistance certificates in his office.

Subsec. (4), sec. 49.26, Stats., as added by sec. 2, ch. 7 of the laws of the Special Session of 1937, provides as follows:

“* * * When old-age assistance is granted to any person * * * the name and residence of the beneficiary * * * shall be entered upon a certificate, * *. The county judge of the county granting old-age assistance shall cause such certificate, or a copy thereof, to be filed in the office of the register of deeds of every county in the state in

which real property of the beneficiary may be situated. * * * The certificate herein provided need not be recorded at length by the register of deeds, but upon the filing thereof all persons shall thereby be charged with due notice of the lien and the rights of the county thereunder. The register of deeds shall keep a separate book, properly indexed, in which shall be entered an abstract of every certificate so filed which shall show the time of filing, the name and residence of the beneficiary, the date of the certificate, the name of the county granting old-age assistance to such beneficiary, and a record of any releases and satisfactions. No fee shall be charged for the filing of such certificate or the entry of the abstract thereof except in counties wherein the register of deeds is compensated otherwise than by salary and in such counties a fee of twenty-five cents shall be paid to the register of deeds by the county filing the certificate. * * * and provided, also, that whenever the county judge of the county in whose favor such lien exists is satisfied * * *, he may release the lien hereby imposed * * *, which release shall be filed in the office of the register of deeds of the county in which the certificate is filed. The beneficiary, his heirs, personal representatives, or assigns may discharge such lien at any time by paying the amount thereof to the treasurer of the proper county who, with the approval of the county judge, shall execute a proper satisfaction which shall be duly filed with the register of deeds."

It is to be noted that the statute does not require that a certificate of old-age assistance or the release or satisfaction thereof, shall be recorded, but merely provides that it shall be filed.

The fees to be charged by a register of deeds are set out in sec. 59.57, Stats., and, except as otherwise provided by law, a register of deeds receives only such fees as are therein set forth. As a certificate of old-age assistance, or a release or satisfaction thereof, is not recorded the filing thereof would not come within the provisions of subsec. (1), sec. 59.57, Stats., which applies only in the event that an instrument is recorded. None of the other provisions of sec. 59.57 being applicable, there is no provision of the statutes authorizing a register of deeds to charge for the filing of an old-age assistance certificate or a release or satisfaction thereof, except the provision contained in sec. 49.26 (4) above quoted.

Sec. 49.26 (4) specifically provides that only a register of deeds compensated other than by a salary shall charge a fee of twenty-five cents for the filing of each certificate of old-age assistance. This section makes no provision for the charging of a fee for the filing of a release or satisfaction of the lien acquired by the filing of the certificate, by any register of deeds. There is thus no provision in the statutes authorizing the charging of a fee for the filing of such release or satisfaction. Had the legislature intended that a fee should be charged therefor it would have expressly so provided, either by a provision in sec. 49.26 (4) or by a special provision added to sec. 59.57, in the same manner as has been done in reference to fees for the filing of other specific documents.

It is therefore our opinion that a register of deeds upon a salary basis is not entitled to charge a fee for the filing of a release or satisfaction of the lien acquired by a county upon the filing of a certificate of granting old-age assistance.

HHP

Taxation — Property omitted from tax roll under provisions of sec. 70.44, Stats., when returned on tax roll should be assessed at rate prevailing during year of its omission.

May 25, 1938.

TAX COMMISSION.

You request an opinion of this office as to a construction of sec. 70.44, Stats. You ask what rates should be applied by the clerk in computing taxes on property which has been omitted from the tax roll for three preceding years, pursuant to sec. 70.44, Stats.

Sec. 70.44, Stats., provides:

“Real or personal property omitted from assessment in any of the three next previous years unless previously reassessed for the same year or years, shall be entered once ad-

ditionally for each previous year of such omission, designating each such additional entry as omitted for the year 19-- (giving year of omission) and affixing a just valuation to each entry for a former year *as the same should then have been assessed* according to his best judgment, and taxes shall be apportioned and collected on the tax roll for such entry."

This statute is a correctional measure. There is nothing in the language used that indicates an intent that, upon the omitted property being put on the tax roll, the taxpayer should pay more or should pay less than would have been payable had the property been included in the proper year. The express language that when the omitted property is assessed it should be given the valuation "as the same should then have been assessed," indicates that the legislature intended that the omitted property should be treated in the same manner as it would have been had it been included in the proper year. As there is no intent definitely expressed in the statute as to the rate of taxation to be used upon the inclusion of the property previously omitted, the general intent of the statute must govern.

As was said by the court in *State ex rel. Davis & Starr Lumber Co. v. Pors*, (1900) 107 Wis. 420, at pages 424-425:

"This section had for many years served to authorize, and with the aid of the general taxing machinery to enable, the assessment and collection of omitted taxes on real estate. The addition of personal property to the subjects affected thereby could have had no purpose save to authorize and enable in like manner, and to the same extent, the collection of personal taxes which ought in previous years to have been paid, but, by reason of like omission to assess, had not been. This legislative purpose is entirely obvious, and should be given complete effect, unless insuperable obstacles prevent. * * *"

This means that the property should be taxed at the rate prevailing at the time of its omission and not according to the current rate.

HHP

Criminal Law — Gambling — Lotteries — Trade Regulation — Trading Stamps — Bakery packing in each loaf of bread letter of alphabet which entitles purchaser, after accumulating enough of letters to spell words "golden cream bread," to premium does not violate sec. 100.15 but does violate secs. 348.01 and 100.16, Stats.

May 25, 1938.

GEORGE WARNER,

Department of Agriculture & Markets.

You submit the following facts as they relate to the trading stamp law, sec. 100.15, Stats.

"A bakery has in mind packing in each loaf of bread a letter of the alphabet. The purchaser of this bread collects letters and if successful in accumulating enough of the letters to spell the words "Golden Cream Bread" is entitled to take these letters to the bakery and receive in exchange therefor a premium, and in addition each letter is marked with a cash value and will be redeemed by the bakery for the amount stated thereon in addition to the premium.

"* * * The question confronts us as to whether or not these letters are actually merchandise trading stamps as contemplated by the exemption in the law. Further, is there not a violation of the lottery law, and is there not a violation of section 100.16?"

This scheme seems to fairly come within the last exemption of sec. 100.15, Stats., which reads as follows:

"* * * and provided further, that this section shall not apply to any coupon, certificate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer."

You are therefore advised that the scheme does not violate sec. 100.15, Stats. XXII Op. Atty. Gen. 389.

If the scheme is to constitute a lottery, there must be three elements, namely, (1) a prize, (2) the award of same by chance and (3) consideration. All three elements are present in the scheme in question and you are therefore advised that this scheme is in violation of sec. 348.01, Stats.

You further inquire whether this scheme is in violation of sec. 100.16, Stats.

Sec. 100.16, Stats., reads as follows:

"No person shall sell or offer to sell anything whatever, by the representation or pretense that a sum of money or something of value, which is uncertain or concealed, is inclosed within or may be found with or named upon the thing sold, or that will be given to the purchaser in addition to the thing sold, or by any representation, pretense or device, by which the purchaser is informed or induced to believe that money or something else of value may be won or drawn by chance by reason of such sale."

The scheme appears to be within the plain prohibition of the statute.

NSB

Civil Service — Municipal Corporations — City Ordinances — School Districts — Board of Vocational Education — City school board and local board of vocational and adult education are not compelled to discharge present employees residing outside city where such city has adopted civil service ordinance under sec. 66.19, Stats., requiring city employees to reside within city, but such ordinance should be followed in future selection and discharge of employees so far as possible.

May 26, 1938.

BOARD OF VOCATIONAL EDUCATION.

You have referred to an opinion from this department to the state superintendent of public instruction under date of April 2, 1938,* in which was considered the question of whether a city civil service ordinance requiring city em-

*Page 207 of this volume.

ployees to reside within the city is applicable to employees of the city board of education where such board desires to retain certain of its employees residing outside of the city. We concluded that this question called for a negative answer, and you inquire whether the same result would be true in the case of a janitor employed by the local board of vocational and adult education in the same city.

Sec. 41.15, subsec. (6), Stats., provides in part that the local board of vocational and adult education may employ and fix the compensation of such clerical assistants, janitors and other employees as may be necessary.

The civil service ordinance of the city in question was presumably adopted pursuant to sec. 66.19, as created by ch. 258, Laws 1937, and which reads as follows:

“Any city or village may proceed under subsection (1) of section 61.34, subsection (5) of section 62.11 or section 66.01 to establish a civil service system of selection, tenure and status, and said system may be made applicable to all municipal personnel except the chief executive and members of the governing body, members of boards and commissions including election officials, the teaching staff of the board of education and the board of vocational education, employes subject to section 62.13, members of the judiciary, and supervisors. Such system may also include uniform provisions in respect to attendance, leave regulations, compensation and pay rolls for all personnel included thereunder.”

We have examined the civil service ordinance of the city involved and find that it expressly safeguards the status of employees who shall have held their positions for at least one year of actual service prior to the adoption of the ordinance. The residence clause reads:

“Every person appointed to a position in the classified civil service shall establish his residence and maintain his abode in the city of _____ within sixty days of his appointment.”

Under well established rules of construction this clause must be given a prospective rather than a retrospective application, and we therefore read it as applying only to persons appointed to the classified civil service subsequently to

the passage of the ordinance in question. In any event, literal compliance with the ordinance would be impossible if it were applied to persons already employed at the time of the adoption of the ordinance. A nonresident employee appointed, let us say, ten years ago, could not possibly establish his residence and maintain his abode within the city within sixty days of his appointment ten years ago.

There may be some question as to the validity of the residence requirement under the powers granted to cities by sec. 66.19 to establish civil service systems. The matter of residence would appear to have nothing to do with merit, which is the underlying consideration in any civil service system, but it is unnecessary for us to rule upon this point in view of the fact that our conclusion can be amply sustained on other grounds. Perhaps the most practical reason supporting our answer lies in the fact that the ordinance in question does not shift the power of discharge from the appointing authority to the personnel officer or board of personnel. The ordinance specifically provides that any appointing authority or department head in whom is vested disciplinary or removal power, shall be allowed full freedom in his action on such matters. The ordinance sets up specific causes for discharge but with the right of appeal to the board of personnel. The employee is entitled to a written statement of the reasons for his discharge, to which he may make answer and be entitled to hearing before the personnel board.

However, there is nothing in the ordinance which makes it incumbent upon the appointing authority to discharge an employee even though there is sufficient cause, and no such power is granted to the personnel officer or board. The most that can be said is that if the city school board or local board of vocational and adult education desires to discharge an employee, it must do so pursuant to the civil service ordinance and for cause. Consequently, if the services of the employee in question are satisfactory to the employing board, that should end the matter.

As pointed out in our previous opinion under sec. 40.53, Stats., the city school board has the power to employ certain help and to fix the compensation and to prescribe the duties of all persons employed or appointed by the board, as well

as to adopt rules affecting such employees. We do not read into sec. 66.19 any intent upon the part of the legislature to transfer from the school board to the city civil service board the fundamental powers over schools granted to the school board by sec. 40.53, Stats. Neither do we read into sec. 66.19 any intent upon the part of the legislature to transfer from the local board of vocational and adult education to the city civil service board the powers granted to the vocational board by sec. 41.15, subsec. (6), above mentioned.

Effect should be given to all pertinent sections of the statutes if possible, since the law does not favor implied repeals of statutes. This is particularly true where the earlier sections, such as sec. 40.53 and sec. 41.15, (6), specifically cover certain subjects, and the later statute, such as sec. 66.19, merely affects the same matters in a general way. *Ward v. Smith*, 166 Wis. 342. If these sections cannot be fully harmonized, relief should be sought from the legislature.

Giving to all of these sections their fullest possible scope, we conclude that both city school boards and local boards of vocational and adult education retain all of the powers over their respective schools and employees granted them by secs. 40.53 and 41.15, (6), Stats., except that in the selection, demotion and discharge of employees, these boards should henceforth follow the provisions of city civil service ordinances adopted pursuant to sec. 66.19, so far as that may be possible. Consequently, our opinion of April 2, 1938 is reaffirmed as to the precise question asked and is extended to apply to the same situation as it exists with reference to a local board of vocational and adult education.

WHR

Taxation — In assessment of merchandise under sec. 70.34, Stats., according to true cash value, consideration should be given to state and federal excise taxes already paid and which will be included in final retail price; but where such taxes are paid only by ultimate purchaser and are not included in price to him, such taxes form no part of true cash value of commodity while in hands of manufacturer, wholesaler or retailer.

May 26, 1938.

TAX COMMISSION.

You inquire whether under sec. 70.34, Stats., in the assessment of personal property consisting of stocks of goods in the hands of manufacturers and merchants, any consideration should be given to federal and state excise taxes to which certain commodities such as gasoline, beer, liquor, tobacco, etc., are subject. In this connection you state that it has been the policy to include all federal excise taxes in the assessment of all companies and to include the state excise tax on beer and liquor only after the state stamp has been affixed, while it has not been the practice to include the tax on gasoline.

Sec. 70.34, Stats., provides in part:

“All articles of personal property shall, as far as practicable, be valued by the assessor upon actual view at their *true cash value* * * *.”

In *State Board of Tax Commissioners v. Holliday*, 150 Ind. 216, 49 N. E. 14, it was held that “cash value” means the usual selling price at the place where the property to which such term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at a forced or auction sale.

“Requiring property to be valued at its fair and reasonable ‘cash value’ means, * * * what the property would sell for in cash, excluding the uncertainty of valuation based on sales wholly or partly on credit.” 3 Cooley, *Taxation*, p. 2307, (4th ed.).

In *People ex rel. Sebring v. Dowd*, 200 N. Y. S. 500, it was held that the assessment of property for taxation should be based primarily upon its market value, which is ordinarily measured by the price obtainable after a reasonable and ample time for sale.

It has also been held in the following cases that, for purposes of taxation, property should be valued at its actual "cash value," or what it will bring in money: *Magnolia Petroleum Co. v. Sandlin*, 18 La. App. 287, 137 So. 595; *Lee-Baker Dry Goods Co. v. Tax Comm.*, 15 La. App. 237, 130 So. 877; *State v. Halliday*, 61 Ohio St. 352, 56 N. E. 118; *State v. Maxwell Motor Sales Co.*, 142 Minn. 226, 171 N. W. 566.

Sec. 70.34, Stats., does not use the term "market value," but uses the term "true cash value." If a federal or state excise tax, or other tax, whatever the name, has been paid by either a manufacturer, wholesaler or retailer, and as such will be included in the final price to the purchaser, it should be considered in determining the "true cash value" of the commodity when viewed by the assessor, since such tax is an element of value that has attached to the commodity and goods, and which goes to make up the "true cash value."

We do not consider the name of the tax determinative of the question. The test must be whether the manufacturer, wholesaler or retailer has in fact paid a tax which has become so attached to the article or commodity as to form a part of the total number of elements that go to make up "value." There should be no taxation of the tax as such. But if the tax paid has been commingled with the other elements that go to make up "value" and to the extent that the tax has actually added to "value," we think that the tax may be thus indirectly considered in arriving at "value."

If the tax has not been paid by either the manufacturer, wholesaler or retailer, but is to be collected from the purchaser by the retailer who last handles the commodity, the tax should not be considered as an element in arriving at "cash value." Under such circumstances it cannot be said that any tax paid has become so attached to the commodity as to be one of the constituent elements that go to make up "cash value" at the time of appraisal. The tax has not in

fact at that time been paid by anyone, and hence cannot be an element of value except in the hands of the purchaser who has by purchase paid the tax and thus made the tax adhere to and become a part of the value of the product.

If a tax has been paid so that it can be said that such element of cost is so attached to the commodity or product in question as to become one of the elements of cost that go to make up total cost, there is on legal reason why such tax may not be considered. The thing to determine is "value." If the tax paid goes to make up part of the "value" it, like any other element that goes to make up the total, may be and should be considered.

If we apply the foregoing test to present practices, it would appear that (1) the practice of considering federal excise taxes is in accord with the foregoing test; (2) the practice of considering state excise taxes only after the stamp has been affixed is in accord with the foregoing rule. We do not think it can be said that the tax has become a part of the element of cost of the product or commodity so as to add to the value thereof until the stamp has been affixed; and (3) state gasoline taxes may be considered when the product is in the hands of the retailer, but not in the hands of the wholesaler. The tax is imposed upon the wholesaler, but he in fact never pays this tax while the product is in his hands, so that it can be said that the tax has become associated with the product in question and to the extent that it has actually added to the value thereof. The same is not true of the product in the hands of the retailer. The tax is included in the cost of the commodity to him and has become so associated with the product as to be one of the constituent elements of cost and "value."

WHR

NSB

Corporations — Intoxicating Liquors — Municipal Corporations — Beer Licenses — Domestic corporation can be organized only by residents of this state.

Sec. 176.05, subsec. (13), Stats., is not applicable to corporation that applies for wholesale beer license.

License for sale of beer cannot be granted to resident of foreign state under sec. 66.05 (10) (e), Stats.

May 27, 1938.

TAX COMMISSION,

Beverage Tax Division.

Attention Arthur Pugh.

You direct our attention to sec. 66.05, subsec. (10), Stats., and inquire:

“(a) Can citizens of a foreign state organize such a domestic corporation in Wisconsin?”

“(b) Must such a domestic corporation, in order to obtain a wholesale beer license, appoint an agent for said corporation in the manner required in section 176.05 (13), relating to licenses issued to corporations for the sale of intoxicating liquors?”

In answer to (a) above, sec. 180.01, Stats., provides as follows:

“Three or more adult residents of this state may form a corporation in the manner provided in this chapter for any lawful business or purpose whatever, except banking, insurance and building or operating public railroads, but subject always to provisions elsewhere in the statutes relating to the organization of specified kinds or classes of corporations.”

The right to incorporate is purely a statutory matter and corporations may come into existence only on such terms as the legislature of the state of creation may prescribe. *Turner v. Goetz*, 184 Wis. 508, 199 N. W. 155. Sec. 180.01, above quoted, is clear and unambiguous in its language and specifically provides that corporations in this state can be formed only by three or more adult residents of this state. You are advised that citizens of a foreign state cannot organize a domestic corporation in Wisconsin.

With reference to question (b) above, as you point out, the provision in question applies only to intoxicating liquors. You do not point out any similar provision in relation to malt beverages and we find no similar provision. In the absence of such a provision applicable to malt beverages, the appointment of an agent as required in sec. 176.05 (13) with reference to intoxicating liquors is not required.

You have submitted a further question as follows:

“Under the Wisconsin beer law, can a resident of a foreign state, who is the distributor for a Wisconsin brewery in his own community, take such Wisconsin beer back over the state line into Wisconsin and wholesale the same within this state without obtaining a license therefore? (In this connection I refer you to XXIII, Op. Atty. Gen. 364.)”

The prior opinion to which you refer is applicable to sale outside of the state with distribution in Wisconsin. That opinion can have no application to sale of the product in this state. A license for sale in this state is clearly required under sec. 66.05 (10), Stats. In the particular case presented, the proposed licensee is not a resident of this state. Under sec. 66.05 (10) (e) a license can not be granted to him.

NSB

Appropriations and Expenditures — Bridges and Highways — Street Improvement — Labor — County highway committee may not set uniform wage scale to be paid by all towns and villages in expending funds allotted under sec. 20.49, subsec. (8), Stats.

May 28, 1938.

FULTON COLLIPP,

District Attorney,

Friendship, Wisconsin.

You inquire whether the county highway committee may establish a set wage to be paid upon highway improvement

projects by towns and villages in expending the allotments made by sec. 20.49, subsec. (8), Stats.

Sec. 20.49 (8), Stats., provides in part:

“* * * The amounts allotted to cities, towns and villages under this subsection shall be paid into their respective treasuries. *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.*”

The question presented is whether the words “supervision and approval,” as used in the statute, are sufficiently broad in scope and meaning to warrant the establishment of a uniform wage. In our opinion these words are not subject to such construction. Supervision is defined by Webster as follows: “Act of overseeing; inspection; superintendence; oversight.” Thus, when supervisory bodies are likewise given regulatory control as well as supervisory control, the statutes so specify. The powers of the public utility commission are defined by sec. 196.02 as follows:

“(1) The commission is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

Likewise, the regulatory power of the industrial commission is in express language and not left to implication arising out of the exercise of a supervisory power. See secs. 101.09 and 101.10, Stats. Many similar examples might be cited.

The money allotted to cities, towns and villages under sec. 20.49 (8), Stats., is money that belongs to said cities, towns and villages after allotment, and by the express language of the statute must be paid into the treasury of each city, town or village. The cities, towns and villages have the right to spend this money for the purposes specified in the statute subject only to “the supervision and approval of the county highway committee.” By the use of such language, we do

not think that the legislature intended to divest the governing bodies of these municipalities of all governmental discretion or that the legislature intended to reduce said bodies to mere automatons in the expenditure of the money. We think that the legislature intended to leave a wide discretion in the governing bodies of these municipalities, that discretion, however, to be exercised subject to a reasonable supervisory and approval function to be exercised by the county highway committee. But we do not believe that the supervisory and approval function implies the right to regulate or establish wages. The municipality has the right to perform the work, the right to determine where the work shall be performed and how it shall be performed, always subject to a supervisory and approval function to be performed by the county highway committee, but a supervisory and approval function may not be so arbitrarily exercised by the highway committee as to rob the governing body of the municipality of all discretion that is in the first instance lodged with such body. The municipalities have the right to employ, and the right to employ certainly implies the right to determine and fix wages. A supervisory function that absorbed such power would cease to be supervisory. It would be regulation and control.

It is our opinion that the establishment of a uniform scale of wages, to be paid by towns and villages for labor on highway improvement projects in expending the funds allotted under sec. 20.49 (8), Stats., is outside of the function of the county highway committee in supervising and approving the expenditure of such funds.

NSB

HHP

Marriage — Minors — Child Protection — Adoption — Bigamous marriage does not constitute “lawful wedlock” within meaning of sec. 322.04, subsec. (4), Stats., and child born to such marriage cannot be adopted without consent of state board of control.

May 31, 1938.

BOARD OF CONTROL.

You request our opinion as to the proper procedure to follow in an adoption case and submit the following facts: A, the mother of the child, was married to its father, B, prior to the child’s birth. Such marriage was bigamous and A, immediately upon learning that fact, had the marriage annulled and later married her present husband, D. D now desires to adopt the child.

You ask whether the consent of the actual father, B, as well as of the mother, is sufficient, or it is also necessary to have the consent of the state board of control pursuant to the provisions of sec. 322.04, subsec. (4), Stats.

Sec. 322.04 (4), Stats., 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.”

We assume that the care and custody of the child in question has not been granted to a licensed welfare agency. This leaves but one question: Was the child born in “lawful wedlock” within the meaning of the statute? Sec. 245.36, Stats., to which you refer in your request, specifically provides that “the issue of all marriages declared null at law shall, nevertheless, be legitimate.” However, this does not mean that such a marriage shall be considered “lawful wedlock.” To attribute such an intent to the legislature would be inconsistent. On the one hand it would be saying that bigamy, which is a criminal act, is unlawful, while on the

other it would say that such a marriage is lawful. In fact, such a marriage is null and void at its inception and of no effect whatever except that the issue thereof is legitimate.

In dealing with this subject, our supreme court in effect said in *Lyannes v. Lyannes*, 171 Wis. 381, that the marriage of the parents of the child was void, hence unlawful. At page 390 of said case the court said:

“The void marriage, strictly speaking, is one where the relationship between the parties is necessarily incestuous, as between parent and child and brother and sister, and invariably, where monogamy is the law of the land, when either has a spouse living from whom he or she is not then legally divorced. * * *”

This office, in dealing with a similar situation, has also held that such a child, even though it is legitimate, was not born in lawful wedlock and that therefore the consent of the state board of control was necessary in the adoption proceedings. XIX Op. Atty. Gen. 575, XX Op. Atty. Gen. 292.

We agree with the above cited opinions and therefore advise that it will be necessary that the state board of control give its consent in the adoption proceedings.

AGH

Dairy and Food — Preparation of so-called cream puff filling from skim milk base with vegetable fat compounded therewith is in violation of sec. 97.39, subsec. (2), Stats.

Sale of so-called cream puffs as cream puffs with artificially prepared filling containing no whipped cream or cream violates sec. 97.25, subsecs. (1) and (3), Stats.

May 31, 1938.

DEPARTMENT OF AGRICULTURE AND MARKETS.

You state that a bakery is manufacturing and selling what are represented as cream puffs. In the process of manufacture the baker prepares a mix by adding ten ounces

of skimmed milk powder, two pounds and twelve ounces of Sweetex, which is hydrogenated vegetable fat, cotton seed oil, and three pounds of unsalted butter to eight pounds and eight ounces of skim milk. This mixture is heated to 140 to 142 degrees Fahrenheit and then run through a homogenizer. The product obtained is a thick, heavy liquid which has the appearance of a heavy cream. The mixture is aged for thirty-six hours at the proper temperature and then transferred to a whipping machine, where one and one-half pounds of marshmallow, consisting of egg whites and three and one-half pounds of sugar and one-half ounce of vanilla extract are added. This mixture is then whipped until the resulting product looks and tastes very much like whipped cream. It is this product which is used in the so-called cream puffs which the bakery in question is selling. You further state that, generally speaking, whipped cream is ordinary cream which has been whipped, sweetened with sugar, and flavored with vanilla. The filling above described has been sweetened and flavored. There are cream puffs on the market which are made with just sweetened and flavored whipped cream and there are others where some foreign substance, usually not a fat or oil, has been added to the cream.

You inquire whether sec. 97.39, subsec. (2), Stats., prohibits the manufacture of the cream puff filling which you have described, and also whether it would be a violation of sec. 97.25, subsec. (3), to sell a so-called cream puff containing this filling.

Sec. 97.39 subsec. (2) provides, in part:

"It shall be unlawful for any person, firm or corporation, by himself, his servant or agent, or as the servant or agent of another, to manufacture, sell or exchange, or have in possession with intent to sell or exchange, any * * * cream, skim milk, * * * powdered milk, * * * or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products or articles or the derivatives thereof or under any fictitious name or trade name whatsoever * * *."

There is at least one and there probably are two ingredients in the mix in question, namely, skim milk and skimmed

milk powder that under the statutes may not be possessed with intent to sell when they have added to them any fat or oil other than milk fat. It appears that the ingredients above named are compounded with vegetable fat and that the ultimate product is possessed with intent to sell. That is prohibited under the statute.

Sec. 97.25, subsecs. (1) and (3), Stats., provide in part:

“(1) No person shall sell, exchange, deliver or have in his possession, with intent to sell, exchange, offer for sale or exchange any drug or article of food which is adulterated, * * *. An article shall be deemed to be adulterated within the meaning of this section:

“* * *
“(3) * * * fourth, if it is an imitation of, or sold or offered for or exposed for sale under the name of another article; * * * sixth, if it is mixed, * * * so that it tends to deceive or mislead the purchaser or consumer, * * * or if it is colored or flavored in imitation of the genuine color or flavor of another substance; * * *.”

A “cream puff” is defined as a round shell of chou paste filled with whipped cream or a cream filling. Webster’s New International Dictionary, 2d edition. See sec. 370.01 (1), Stats.

The so-called cream puff in question does not contain any whipped cream, nor does the filling contain any cream. Since cream, either whipped or as a part of the filling, is a necessary ingredient of a cream puff, the so-called cream puffs in question are sold as an imitation of another article. Moreover, the filler is colored and flavored in imitation of the genuine color and flavor of whipped cream. In answer to your second question, it is our opinion that sale of this product as a cream puff is in violation of sec. 97.25 (3) Stats.

NSB

JRW

Appropriations and Expenditures — Bridges and Highways — Diversion of Funds — Money in county treasury representing unexpended balance of village money, matched by county money for improvement of specific portion of prospective state trunk highway system, which is not required for particular improvement for which fund was raised, can be expended for construction, improvement, repair or maintenance of highway of different class than that for which money was originally made available only by separate action of both village and county boards and approval of state highway commission.

May 31, 1938.

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

Your letter states that in 1937 the following petition was presented to the county board for Iowa county and duly passed and allowed, to wit:

“The village board of Hollandale respectfully represents that on the 6th day of April, 1937, at the annual election of said village, the electors thereof voted the sum of \$1100.00 for surfacing and construction of a highway in said village of Hollandale.

“WHEREFORE, Your petitioners pray for an appropriation of \$1100.00 to be made by this county board, making a construction fund of \$2200.00, same to be expended as provided under sections 83.14 and 83.03 of the statutes (county aid law). This money to be borrowed by the village for construction this spring.

“Said improvement shall consist of constructing roads as follows:

“Grading and mat top of one inch (1) thickness of Bitumen M. C. 2 or M. C. 3 and crushed rock of state specifications, to extend from railroad to state trunk 39 on county trunk K and B, then on county trunk W from 39 south to village limit. This mat coat to be sealed with heavy cut back asphalt and fine chipped rock or coarse sand. This construction to consist of 1136½ cu. yards.”

You further advise:

"It appears that the highways in the village sought to be improved are prospective state highways. After the passage and allowance of this petition the village of Hollandale borrowed the full \$2200.00 and paid it into the county treasury. Iowa county then proceeded to do the work as outlined in said petition, however it was found that the appropriation was far greater than was necessary for the improvement with the result that there still remains to the credit of this project, approximately \$1200.00 unexpended. The village of Hollandale now desires to use the unexpended balance of this money for oiling the balance of its streets, none of which are prospective state highways. * * *."

You have requested our opinion as to whether this fund is available for oiling village streets and under whose direction the fund should be expended.

The village tax and the county appropriation were both for a specific purpose. Such being true, the fund cannot be diverted or used for another purpose. II Op. Atty. Gen. 104; IV Op. Atty. Gen. 775, 586.

But it appears that this particular fund is not needed for the purpose for which it was raised. Under such circumstances this office has ruled that the fund is available for expenditure under the provisions of sec. 83.04, subsec. (6), Stats. This office ruled in XV Op. Atty. Gen. 221 that such a fund is available for expenditure by the county highway committee with approval of the state highway commission to meet the cost of any construction job on the state trunk highway system in the village, but that such fund must be devoted to a construction job of the same class as that for which the fund was originally made available.

We do not think that the foregoing opinion should be extended. If the fund is to be made available for a construction job in the village but upon some class of road different from that for which the fund was originally made available, it is our opinion that separate action of both the village and county boards and approval of the state highway commission would be necessary. The foregoing would be true whether the resolution be construed to be a resolution under sec. 83.03 or 83.14, Stats. The boards with authority to levy and appropriate money in the first instance should authorize expenditure of this fund subject to the approval of the state highway commission if the fund is to be expended for the

construction, improvement, repair or maintenance of a highway of a different class than that for which the money was originally made available.

NSB

Public Printing — School Districts — School Board Proceedings — It is duty of school board to publish its proceedings pursuant to sec. 40.15, subsec. (3), Stats.

June 3, 1938.

A. J. ASCHENBRENER,
District Attorney,
Stevens Point, Wisconsin.

You ask whether it is the duty of the school board or of the county superintendent of schools to publish the proceedings of the school board as provided in sec. 40.15, subsec. (3), Stats.

Sec. 40.15 (3), enacted by ch. 289, Laws 1937, provides:

“The proceedings of all school boards, except in cities of the first class and except school boards included in section 40.60, including a statement of all receipts and expenditures, shall be printed and published within thirty days after the annual school meeting in a newspaper having a general circulation in the school district or in such manner as the board shall direct.”

The duties of the county superintendent of schools are prescribed by the statutes. We find no provision thereof which in any way indicates that he has any concern with the proceedings of the school board or the publication thereof, except the duty under sec. 39.03, (1), Stats., to advise the board as to its duties. However, sec. 40.15 (3) says that such proceedings shall be published in a newspaper “or in such manner as the board shall direct.” This language gives the school board the control over the method of publication and clearly shows that the action of the school board is the motivating force in effecting the publication of the board’s own proceedings.

It is therefore our opinion that it is the duty of the school board to publish its proceedings pursuant to sec. 40.15 (3), Stats.

HHP

Athletic Commission — Inspectors of state athletics commission appointed pursuant to sec. 169.01, subsec. (10), Stats., to supervise boxing matches may not be paid for services by boxing club which promotes boxing match.

June 3, 1938.

ATHLETIC COMMISSION,

Milwaukee, Wisconsin.

Attention Fred J. Saddy, *Secretary*.

You state that the rules of the athletic commission permit licensed amateur clubs to hold one boxing show per month as a matter of course. Additional shows may be held only by virtue of special permission. An amateur club has asked permission to hold an additional show, and has volunteered to pay the necessary inspector's fee therefor. The inspector's fee amounts to two dollars per show and is normally payable by the commission. You ask whether this is a lawful condition to granting permission to hold the additional show.

Sec. 169.01, subsec. (10), Stats., reads:

"The commission shall appoint *official representatives* designated as 'inspectors,' each of whom shall receive from the commission a card, authorizing him to act as such inspector wherever the commission may designate him to act. The commission may, and at least one inspector shall be present at all exhibitions and matches and see that the rules are strictly observed, and an inspector shall also be present at the counting up of the gross receipts, and shall immediately mail to the commission the official box-office statement received by him from the officers of the club."

The commission is entitled to a tax of five per cent of the gross receipts from each show. Sec. 169.01, subsec. (8).

The inspectors are appointed from civil service lists pursuant to sec. 14.71, subsec. (1), Stats.

There is nothing inherently against public policy in permitting the inspected to pay the fees of the inspectors. Thus, sec. 189.21, subsec. (3), and sec. 196.85, Stats., provides that the inspected pay the fees of the inspectors under the circumstances provided for in said statutes.

But while there may be nothing against public policy in the proposal merely because the inspected pay the fees of the inspectors, we think that there is another principle of public policy which is applicable and which would condemn the practice.

Sec. 169.01, subsec. (5), Stats., provides :

“* * * The commission shall have full power and authority to limit the number of sparring or boxing exhibitions to be held or given by any club, * * *.”

Permission to hold any show is apparently a matter which the board in its discretion may grant or refuse at will.

The commission must decide the application upon the merits and without regard to private considerations or inducements. *State ex rel. Peart v. Wisconsin Highway Comm.*, 183 Wis. 614. At page 620 the court quotes with approval from *State ex rel. Dosch v. Ryan*, 127 Wis. 599, 601, 106 N. W. 1093, as follows :

“Highways are only to be laid out when the public good will thereby be promoted. Private considerations or inducements cannot rightly enter into the question in any degree. If private individuals with special interests were allowed to bargain with public officers who are exercising this important and sovereign power, and to offer inducements of any kind tending to influence their free action, the interests of the public would be at once in jeopardy. Not only are such bargains void as against public policy, but official action based thereon ceases to be based solely upon the public welfare, and becomes tainted with some degree of private interest. . . . No nice separation of motives is possible. There is safety only in the entire prohibition of such transaction.’”

We believe the foregoing to be the applicable principle, and that in passing upon applications the commission may not consider extrinsic bargains made by private interests.

Likewise, there is the question of whether such a proposal would not constitute a fee in addition to that provided by the legislature. While the legislature might have provided for a fee in addition to the annual license fee provided by

sec. 169.01, subsec. (9), Stats., the athletic commission has no power to so provide. The commission cannot take upon itself a legislative function. Its rules and orders must accord with its authority conferred by statute.

For any or all of the reasons stated we conclude that it would be unlawful for the inspector's fees to be paid directly or indirectly by the boxing club.

WHR

NSB

Physicians and Surgeons — Basic Science Law — Osteopathy — Person licensed to practice osteopathy and surgery under sec. 147.17, subsec. (1), Stats., is considered to be physician and surgeon.

June 3, 1938.

BOARD OF MEDICAL EXAMINERS.

H. J. Gramling, M. D., *Secretary*.

You ask whether an osteopath is considered to be a "physician and surgeon" in Wisconsin within the meaning of the phrase "licensed physician or surgeon" as used in a policy of insurance.

The legislature has not undertaken to define the term "physician." The medical practice act, secs. 147.13, *et seq.*, provides for two kinds of licenses: an applicant may be licensed to practice (a) medicine and surgery, or (b) osteopathy and surgery. Sec. 147.17, Stats. See *State ex rel. Pollard v. Board of Medical Examiners*, 172 Wis. 317. There is nothing in the statute to indicate that the term "physician" may be applied to either class to the exclusion of the other.

It must be kept in mind that we are dealing here with the term not as it is used by the legislature but as it has been used in an insurance contract, the terms of which we do not have before us. Whether the term has been used in a broad

or in a restricted sense depends on the intention of the parties. For that reason we can answer the question only in a general way, by adversion to general principles.

In *Ex parte Rust*, 35 Cal. App. 422, 169 P. 1050, an osteopath was prosecuted for practicing optometry without a license. The defense pleaded a statute exempting "duly licensed physicians and surgeons" from the operation of the optometry law. Two kinds of licenses were provided for: (a) physicians' and surgeons', and (b) drugless practitioners'. The defendant had been licensed under (b). It was pointed out that the exception applied only to class (a), and a conviction was affirmed.

Where a statute specifically provided that the practice of medicine was not to be construed to include the practice of osteopathy it was held that an osteopath was not a physician or surgeon. *LeGrand v. Security Benefit Asso.*, 210 Mo. App. 700, 240 S. W. 852. It was held that an osteopath is not a physician within the meaning of a New Jersey statute in *Chastney v. Board of Education*, 7 N. J. Misc. 385, 145 A. 730.

However, under the Michigan statutes an osteopath is considered to be a physician. *Mutual Life Ins. Co. v. Geleynse*, 241 Mich. 659, 217 N. W. 790; *Hostetler v. Woodworth*, 28 F. (2d) 1003. Where statutes required all physicians to register with the local registrar of vital statistics, it has been held that the terms "physician" and "legally qualified physician" are not restricted to those licensed to practice medicine and surgery in all their branches, but include osteopaths. *Bandel v. Dept. of Health*, 193 N. Y. 133, 85 N. E. 1067; *People ex rel. Gage v. Siman*, 278 Ill. 256, 115 N. E. 817. In the latter case it was said, pp. 257-258:

"* * * A physician is one versed in or practicing the art of medicine, and the term is not limited to the disciples of any particular school. * * * In common acceptance, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician, and this is the sense in which the term is used in the Medical Practice act."

Mutual Life Ins. Co. v. Geleynse, *supra*, was a bill to cancel an insurance policy on the ground that the defendant

had failed to list treatments by an osteopath in his application. Treatments by "physicians and practitioners" were required to be listed. In the act regulating the practice of osteopathy they were referred to in the title as "practitioners" and in the body as "osteopathic physicians." The defense contended that osteopaths are not physicians. The court said, p. 662:

"* * * To the average layman they and the 'regulars' are all doctors who are consulted in case of illness, and it is doubtful if he ever makes in his own mind the fine distinction in which we are asked to indulge."

In Wisconsin the term "physician" has been considered in several cases, but not in connection with osteopathy.

State v. Schmidt, 138 Wis. 53, involved the term as used in laws of 1899, ch. 87, which provided that the board might register anyone who could show a diploma and who was a "reputable resident physician or surgeon," etc. The defendant had graduated from a school which taught the "Physio-Medical Hydropathic" method, and was engaged in the practice of that method. The court held that in using the term "physician" the legislature was dealing with the entire class known as physicians and said, at p. 60.

"* * * The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged, in good faith, in treating human ills by any remedy or remedies, however simple, so as to be known among the people as a physician."

In *Raynor v. State*, 62 Wis. 289, 300, the court said:

"* * * This language must be construed to mean all who practice physic and surgery, and who are recognized by the people as physicians and surgeons, and cannot be limited to one school of practitioners in preference to all others."

In *Isaacson v. Wisconsin Cas. Asso.*, 187 Wis. 25, it was considered that a chiropractor was not a "legally qualified physician" within the meaning of an insurance policy. At

that time (1925) chiropractors were allowed to practice but were not licensed. The court said at p. 29:

“* * * But it seems quite clear that in using the term ‘legally qualified physician’ the insured as well as the insurer meant a physician who was qualified and *licensed* to practice, and that the term did not include a specialist in body manipulations only such as chiropractors.”

An osteopath is licensed under the medical practice act, the same as a practitioner of medicine. It appears, from the principles enunciated in the cases cited, that the fact that his method of treating the sick is limited to manipulations of the body does not prevent an osteopath from being a “physician” in the popular sense of the term. In the law of contracts words are given their ordinary and popular meaning unless a contrary intention appears. *Sands v. Kaukauna W. Power Co.*, 115 Wis. 229.

Sec. 147.14 (2), Stats., refers to “medical or osteopathic physicians,” which implies that the term may be applied to either class equally. Sec. 147.19 (1), Stats., employs the same phraseology, with the same implication. Sec. 147.14, subsec. (3), Stats., limiting the use of the title “Dr.” and similar titles or designations to those licensed to practice medicine, surgery or osteopathy, in no way qualifies the use of any such title or description on the part of osteopaths. Also, it is to be noted that the membership of the Wisconsin state board of medical examiners under sec. 147.13, (1), Stats., is made up as follows:

“* * * Three members shall be allopathic, two homeopathic, two eclectic and one osteopathic, and all shall be licentiates of the board.”

We conclude that the term “physician” includes osteopaths within the ordinary meaning of the term in Wisconsin. While several opinions of this office have drawn a distinction between osteopaths and “physicians” with respect to prescribing drugs and medicines, the question before us was not there presented, and it is clear on examination of those opinions (V Op. Atty. Gen. 470, XVIII 6, and

XIX 594) that the term was used for convenience, to designate practitioners of medicine, rather than in the ordinary, popular meaning of the word.

WHR

Public Printing — School Districts — School Board Proceedings — Proceedings of all meetings of school board in city not operating under city school plan, under sec. 40.15, subsec. (3), Stats., are required to be published in full once annually.

June 4, 1938.

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

You call attention to secs. 40.15 and 40.60, Stats., and ask whether the proceedings of a school board in a city not operating under the city school plan should be published within thirty days after each meeting or cumulatively once a year.

Sec. 40.15, subsec. (3), Stats., provides:

“The proceedings of all school boards, except in cities of the first class and except school boards included in section 40.60, including a statement of all receipts and expenditures, shall be printed and published within thirty days after the annual school meeting in a newspaper having a general circulation in the school district or in such manner as the board shall direct.”

Sec. 40.60, Stats., provides:

“The proceedings of city school boards, except in cities of the first class, including a statement of all receipts and expenditures, shall be printed and published within thirty days in a newspaper printed in the city, if there be one, and if there be none, in such manner as the board shall direct.”

Subsec. (1), sec. 40.15, Stats., provides for a meeting of the school board of a common school district on the day fol-

lowing the annual school district meeting and for other meetings of the board upon notice, or without notice when all members are present and consent. Subsec. (2) of the same section provides that on the Saturday preceding the annual school district meeting the school board shall hold a meeting at which it shall examine into the financial affairs of the district, determine the amount necessary to be raised by taxation for the ensuing year, and make a report thereon to the annual district meeting. Such were the provisions of sec. 40.15 when subsec. (3) above quoted was added thereto by ch. 289 of the laws of 1937.

This statute then not only specifically provided for two required meetings of the school board during the year, but expressly contemplated that other special meetings might be held during the year if occasion required. While the language of subsec. (3) is specific as to the time of publication it does not specifically describe the proceedings to be published. The time within which publication must be made is not measured from a meeting of the school board, so that it could be said to refer to the proceedings of that particular meeting. Nothing in the language used refers to any particular meeting. It applies no more to one meeting than to another. The word "proceedings," being in the plural, includes the minutes of all meetings as well as the minutes of any particular meeting.

The statutes providing for a city school plan are contained in secs. 40.50 to 40.60, both inclusive. Being one of such statutes, sec. 40.60 applies only to school boards operating under the city school plan.

The underlying purpose in requiring publication of the proceedings of school boards is to convey information as to the affairs of the district to the residents thereof.

The language of subsec. (3), sec. 40.15 is sufficiently broad to be construed as providing that the proceedings of all meetings of such school boards shall be published once annually within thirty days after the annual school district meeting, so as to carry out the purpose of such publication.

You also ask whether it is permissible to condense the proceedings of a school board in making the publication required by the statutes.

In XXIV Op. Atty. Gen. 646, it was held that it is not a compliance with the provisions of the statutes requiring publication to publish an abbreviated or condensed statement of such proceedings. It was pointed out in that opinion that the minutes of the proceedings are a statement of all steps taken at such meeting. The statute does not contemplate that the minutes shall be condensed or abbreviated but that they shall contain a complete statement of all steps taken at the meeting. If it were permitted to abbreviate or condense the same it would be an easy matter by taking only parts thereof to materially change the record of the steps taken at the meeting.

It is therefore our opinion that the publication of the proceedings of a school board in a city not operating under the city school plan is governed by the provisions of sec. 40.15 (3), Stats., which require that it be made only once a year, within thirty days after the annual school meeting, and that such publication include the proceedings of each and every meeting of the school board during the year preceding such annual school meeting without abbreviation or condensation.
HHP

Municipal Corporations — Sewerage Systems — Public Officers — Register of deeds is entitled to no fee for filing sewerage system plans and specifications which are filed pursuant to provisions of sec. 62.18, subsec. (5), Stats.

Such plans and specifications should not be recorded in tract index.

June 6, 1938.

CHARLES D. MADSEN,
District Attorney,
Luck, Wisconsin.

You ask the following questions:

1. When plans and specifications for sewage systems are filed in the office of the register of deeds pursuant to the

provisions of sec. 62.18, subsec. (5), Stats., what fee, if any, should the register of deeds charge for such filing?

2. Should the register of deeds make entries in the tract index showing that such instruments affect the title to the various parcels of real property involved?

Sec. 62.18, subsec. (5), Stats., provides as follows:

“When the plans and specifications for any sewerage system or material alterations thereto are finally determined they shall be prepared in triplicate and submitted to the state board of health for approval. When the same shall have been approved one copy thereof shall be filed in the office of the city clerk and one in the office of the register of deeds of the county within which the city is located.”

It should be noted that this section requires only that plans and specifications shall be filed in the office of the register of deeds. It does not require the recording or entry thereof by such officer nor does any section of the statutes make it his duty to enter or record the same in any particular manner or place. Therefore his only duty would be to receive the documents and file the same.

Sec. 59.55 in effect provides that the register of deeds shall enter in the tract index every deed, mortgage or other instrument which has been recorded or entered in his office by him providing it affects the title to real property. Therefore, as sec. 62.18 (5) does not require that sewage plans or specifications shall be recorded or entered, it is unnecessary to enter the same in the tract index and the register of deeds is entitled to no fee therefor in the event he does so.

Sec. 59.57, which is the general provision governing fees which the register of deeds shall receive, does not provide that such officer shall receive fees for the filing of sewage plans and specifications or like instruments. We find no other section of the statutes where the legislature has provided that the register of deeds shall receive a fee for such filing. It is a well settled rule that a public officer takes his office *cum onere* and is entitled to no salary or fee except what the statutes provide. *Outagamie County v. Zuehlke*, 165 Wis. 32, 40, and *Henry v. Dolen*, 186 Wis. 622, 624.

You are advised that the register of deeds must file proper sewage plans and specifications when they are sub-

mitted to him for that purpose and that he is entitled to no fee for the performance of such duty.

NSB

AGH

Corporations — Motor Transportation — Public Officers — Motor Transportation Inspectors — Under sec. 194.12, Stats., motor transportation inspectors have power of sheriffs and, as such, may do whatever is reasonable and necessary to protect and preserve property properly in their custody.

June 6, 1938.

PUBLIC SERVICE COMMISSION.

You state that your transportation inspectors frequently apprehend on the highways motor vehicles which, being delinquent in some requirement of the law, cannot properly be operated. Where the freight consists of live stock or other perishables the operation cannot be stopped without serious damage resulting unless some means are adopted to protect the cargo.

Consequently you inquire whether the inspectors have power to provide for care and protection of such property until the owner or carrier furnishes lawful transportation therefor.

By virtue of sec. 194.12, Stats., the inspectors, in the discharge of their duties, have the power of sheriffs. It is the duty of a sheriff to do whatever is reasonable and necessary to protect and preserve property properly in his custody. See 57 C. J. 785, 786. Thus, in *Hiatt v. Turner* (Ga. App.), 172 S. E. 607, it was held that the sheriff was entitled to reimbursement for the necessary and reasonable expense incurred in taking care of property where no provision therefor was made by statute. In *Morris v. Bolt*, 245 Ky. 169, 53 S. W. (2d) 337, the plaintiff had permitted A to use his au-

tomobile. A used the car to transport liquor and was stopped on the highway and arrested by the defendant, a county patrolman. The defendant parked the car on the roadside, and subsequently the unattended car rolled away and was damaged. It was held that the defendant, having taken possession of the car, was duty bound to use ordinary care to prevent its injury or destruction.

In view of these principles we conclude that the motor transportation inspectors provided for in sec. 194.11, Stats., have power to do whatever is reasonable and necessary to protect and preserve perishable property until such time as the carrier provides for lawful transportation of such freight.

WHR

Banks and Banking — Public Deposits — Money collected and deposited by probation and parole department of state board of control is public deposit within meaning of ch. 34, Stats.

Said department is protected against loss of such money same as are other public deposits in case of bank failure.

June 7, 1938.

BOARD OF CONTROL.

You advise that a department of your board known as the probation and parole department exists to make effective the provisions of ch. 57 of the statutes; that part of its work is the handling of the savings of probationers and parolees under its jurisdiction, who now number over 2700 cases; that these savings, amounting to over \$10,000 per month, are submitted monthly by the probationer or parolee with a detailed statement of total earnings and expenditures to the district officer, who in turn transmits them to the Madison office.

You also advise that said moneys are then credited to the proper individual accounts and are deposited in a checking

account in the name of the state board of control, division of probation and parole, in a local bank. Disbursements are made from this checking account by checks signed by L. F. Murphy, supervisor, or by some person authorized to sign for him. These disbursements are made only upon proper authorization from the court which committed the prisoner or by order of the probationer or parolee.

We assume that the board of deposits has authorized the deposit of such moneys to such an extent that said deposit will come within the purview of sec. 34.06, Stats.

You ask:

(1) Is the money so collected and deposited by the probation and parole department a public deposit within the meaning of ch. 34?

(2) Is the department protected against loss of this money the same as other public deposits in case of bank failure?

Sec. 34.01, subsec. (5), Stats., which defines public deposits, reads as follows:

“ ‘Public moneys’ shall include all moneys coming into the hands of the state treasurer or the treasurer of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, by virtue of his office without regard to the ownership thereof.”

The above quoted section of the statutes defines “public moneys” as including all moneys coming into the hands of any commission, board or officer of any governmental subdivision of the state. The state board of control and its division of probation and parole falls within the meaning of this language. It is a board or governmental subdivision of the state and its division of probation and parole is a part of said board of control.

Therefore we advise that money so deposited by the parole and probation department of the state board of control is a public deposit within the meaning of ch. 34 and that the department is protected against loss of this money the same as are other public deposits in case of bank failure.

AGH

Fish and Game — Search — Indians — Searches may be made for game and Indians may be arrested for violation of game laws on lands owned by them which are not part of Indian reservation or other land under jurisdiction of federal government.

June 8, 1938.

F. W. HORNE,

District Attorney,

Crandon, Wisconsin.

You state that it has always been your contention that the state conservation wardens have the right to arrest Indians for the violation of game laws, either on or off the Indian lands, when the lands held by the Indian were not part of an established Indian reservation and, as such, regulated and controlled by the federal government under federal supervision.

You further state that you were advised by the Indian agent in Crandon that a conservation warden had arrested some Indians for having possession of illegal venison and that his superior officer had advised him that conservation wardens have no jurisdiction under any state law to search for illegal game and make arrests on Indian owned land, where the venison is held in possession on Indian land or was killed on Indian land. He cited the case of *United States v. McGowan*, handed down by the United States supreme court on January 3, 1938, and reported in 58 Sup. C. R. 286, 82 L. ed. 305 (advance sheets).

You inquire whether this decision will in any way interfere with the state policy of arresting Indians on Indian owned land which is composed of parcels separated from other Indian land and scattered throughout regions where white people also own and occupy land.

The *McGowan* case decided that the Reno Indian Colony was Indian country within meaning of the statute providing for forfeiture of automobiles used to carry intoxicants into Indian country. The Reno Indian Colony was composed of Indians residing on land purchased by the federal government for needy Indians in the state of Nevada. You will note that the land was not owned by an Indian or Indians, but was

purchased by the federal government for the purpose of caring for needy Indians.

The court said p. 306:

“The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as ‘reservations.’ Congress alone has the right to determine the manner in which this country’s guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a ‘reservation’ or colony.”

The court said also, p. 307:

“The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the government. The government retains title to the lands which it permits the Indians to occupy. The government has authority to enact regulations and protective laws respecting this territory.”

In the *McGowan* case, the court was passing on the right of the federal government to enforce its regulations on Indian lands over which the federal government had the same rights as it has over a reservation.

In 14 R. C. L. 143, a rule is stated as follows:

“* * * The state jurisdiction extends over the territorial limits of an Indian reservation so as to apply to all crimes committed thereon by persons not members of the tribe against other non-members of the tribe, and in such case the United States courts have no jurisdiction.”

When an Indian has purchased land which is not a part of a reservation nor a part of a colony such as the court was considering in the *McGowan* case, then the jurisdiction of the federal government under its present laws does not apply to such Indian.

The statute authorizing the state conservation commission and its deputies to search for game is found in sec. 29.05 (6). The following language is therein used:

“* * * any such officer may, with or without warrant, open, enter and examine all buildings, camps, vessels, or boats in inland or outlying waters, wagons, automobiles or other vehicles, cars, stages, tents, suit cases, valises, packages, and other receptacles and places where he has reason to believe that wild animals, taken or held in violation of this chapter, are to be found; but no dwelling house or sealed railroad cars shall be searched for the above purpose without a warrant.”

In view of the above observation and the quoted statute, your question must be answered in the negative.

JEM

Fish and Game — Wholesale Fish Markets — One soliciting business for out-of-state wholesale fish house who does not purchase or operate wholesale fish market or fish house but is occasionally named as consignee for purposes of shipping to out-of-state fish house is not required to be licensed under sec. 29.135, Stats.

June 8, 1938.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

You advise us of the following facts: A solicits business from fishermen in the state of Wisconsin, telling them that a fish house located outside the state will pay such fishermen a certain price for all fish consigned to them under their own names at A's request. For all such fish thereby received, the out-of-state fish house issues checks to the fishermen at the promised prices. A then is given a commission of from one-quarter to one-half cent a pound for all fish shipped in accordance with this plan.

You ask whether A should obtain a license under the provisions of sec. 29.135, subsec. (1), Stats.

Sec. 29.135 (1), Stats., provides as follows:

“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. Every such license shall expire on the thirty-first day of December, and the fee for such license is twenty-five dollars.”

From the facts stated it appears that A is at most an agent for the out-of-state purchaser. He does not purchase; he merely solicits for his principal. He does not “deal in fish by operating a wholesale fish market or fish house.” He is not operating anything. He merely solicits. As sec. 29.135, Stats., applies only to “dealers” who operate a wholesale fish market or fish house and A is in no sense such a dealer or operator, you are advised that A is not required to obtain a license under sec. 29.135, Stats.

You further advise that in rare instances for shipping purposes the shipper names A as consignee but merely for purposes of shipping to the out-of-state fish market under the name of A. The transaction otherwise is no different than that heretofore described. You wish to be advised whether these additional facts make it necessary for A to obtain a license if he is not otherwise required to obtain same.

In our opinion these additional facts do not make A one who “deals” in fish by operating a wholesale fish market or fish house. A is still acting merely as a soliciting agent for the out-of-state fish house.

AGH

NSB

Public Printing — Newspapers — Change of name of newspaper otherwise complying with sec. 331.20, Stats., does not create disqualification as organ for publication of legal notices.

June 9, 1938.

F. W. HORNE,

District Attorney,

Crandon, Wisconsin.

In your letter you state that you have received an inquiry from a newspaper published within your county, asking whether or not the changing of the name of the paper from the "Wabeno Advertiser" to the "Northern Wisconsin News" would act as a legal impediment for the publication of legal notices.

Sec. 331.22, Stats., provides as follows:

"Whenever a legal notice shall be required or ordered to be published in a particular newspaper and the name of such newspaper shall be changed before such publication is commenced or before it shall be completed the publication shall be made or continued in the newspaper under its new name with the same effect as if the name had not been changed. The proof of the publication shall state the change of name and specify the period of publication in such newspaper under each name."

This section clearly contemplates that a newspaper may change its name after having been designated as the paper in which to publish a legal notice either before publication commences or during the course of publication, and this office has so ruled upon a previous occasion. XXV Op. Atty. Gen. 544.

You are advised that a change of the name of a newspaper otherwise complying with sec. 331.20, Stats., does not create disqualification as an organ for publication of legal notices.

NSB

Education — Public Officers — Liability of Teachers — Negligence — Tort — Teacher in public school is liable for actionable negligence in performance of duty same as any other individual and is liable for damages that proximately follow as result of such negligence.

June 10, 1938.

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

In your recent letter you state that state teachers of civics and science frequently take class groups on education tours.

You inquire: In case a pupil is injured while en route to or while at the destination of such tour, is the teacher in any way responsible for damages?

As a matter of public policy it is the law of this state that the state and the municipal subdivisions thereof are not liable under the doctrine of *respondeat superior* when engaged in the exercise of a governmental function for the torts committed by officers and employees thereof. But this immunity from suit is applicable only to the state and the municipal subdivisions thereof. It is not applicable to the officers and employees of the state and the various governmental units. Thus it was said in *Apfelbacher v. State*, 160 Wis. 565, 576:

“A denial of the application of the doctrine of *respondeat superior* to the state when exercising a governmental function does not leave a person injured remediless. *He has his cause of action against the person or persons actually committing the wrong.* *Morrison v. Fisher*, post, p. 621, 152 N. W. 475. * * *”

The rule is that, the public corporation not being liable for the reason stated, the members constituting it cannot be charged with liability unless it be shown that they were guilty of such misconduct in the discharge of their duties as would render them liable as individuals. *Morrison v. Fisher*, 160 Wis. 621, 631.

If an officer would be liable in the discharge of official duties where the misconduct has been such that he would be liable as an individual, it must follow that an employee is liable under similar circumstances.

A teacher is not an officer but rather an employee of the district. Both officers and employees are liable for torts committed. Both officers and employees can be made to respond in damages that are proximately caused as the result of actionable negligence on their part and the liability for actionable negligence is the same as that of any individual.

NSB

Agriculture — Live Stock — Bang's Disease — Cattle owner is one who suffers loss in case animal reacts to test and one to whom indemnity is paid.

Minor who owns cattle is qualified through his guardian to sign petition for test.

Cattle owners in county are qualified to sign petition regardless of whether or not their names appear on last assessment roll.

Petitions may be received up to time of hearing.

If several members of family can prove individual ownership of certain cattle they are privileged to sign petition.

If petitions do not have number of signers required by statute (seventy-five per cent) department of agriculture and markets has no jurisdiction.

Jurisdiction is acquired when petitions signed by seventy-five per cent of cattle owners resident in county are presented to department and subsequent withdrawal of some names does not oust department of jurisdiction.

June 13, 1938.

DR. WALTER WISNICKY,

Director of Livestock Sanitation.

You have submitted a number of questions and asked for an interpretation of sec. 95.495, subsec. (2), Wis. Stats.,

relative to the "area test" for Bang's disease, which reads as follows:

"County areas for testing for the presence of Bang's disease shall be determined by the department in the same manner as provided in subsection (1) of section 95.25 and with like effect, except that the number of signers upon the petitions shall be seventy-five per centum or more of the cattle owners in the county. The provisions of subsections (2) to (7) of said section 95.25 shall apply to this section, except that a complete area retest shall be made in every area-tested county in the state at least once in every three years, and that when retests are ordered they shall have priority over initial area tests. In executing its duties hereunder the department may co-operate with the United States bureau of animal industry when deemed practical and feasible."

To properly interpret this section, we must also consider sec. 95.25 (1), which reads:

"Whenever petitions signed by more than fifty per cent of the cattle owners, (as disclosed by the last assessment rolls) resident in any county, shall be presented to the department, asking that all cattle within such county be tested for tuberculosis, said department is hereby authorized to make such test without expense to the owners, to the extent of the funds provided therefor. The department shall fix a time when and place where said petitions and any objection thereto will be heard by the department, and notice of said hearing shall be published in at least one paper published in such county, not less than ten days before the time set for such hearing. At the time and place fixed for such hearing, the department shall examine and consider said petitions and the evidence, facts and things offered in support of and against the same, and shall render its decision thereon. In case the department determines that the petitions are sufficient to satisfy the statute, such determination shall be final unless reviewed in the manner herein provided. In case the department grants the petition and undertakes the work, notice of such determination and the time when the testing will begin shall be given by publishing the same in at least one newspaper published in such county."

You have submitted several questions, as follows:

(1) What constitutes a cattle owner?

The word "owner" has various meanings, depending upon the connection in which it is used. A lessee, under certain

circumstances and for certain purposes, is considered an owner, but we would not put such a broad meaning on the word in interpreting this statute. Webster defines an owner as "One who has the legal or rightful title, whether the possessor or not." "Owner" has been defined in *Woodward v. Republic Fire Insurance Company*, (N. Y.) 32 Hun. 365, 369, as "The right to own; exclusive right of possession; legal or just claim or title; proprietorship."

Garver v. Hawkeye Insurance Company, 28 N. W. 555, 556, 69 Iowa 202, quotes from Bouvier's Law Dictionary, as follows:

"* * * The owner of property is said to be one 'who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy, and to do with as he pleases, even to spoil or destroy it as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.'"

We believe that in sec. 95.25 (1) the word "owner" should be given the meaning given to it in *Garver v. Hawkeye Insurance Company*, 28 N. W. 555, 556, 69 Iowa 202. The owner would be the one to suffer the loss in case the animal reacted to the test and the one to whom the indemnity would be paid unless he be prevented by some agreement or covenant which restrains his right. He is the one that will be affected in case the petitions are granted and the area test made.

(2) Are minors who claim to be owners of cattle qualified to sign the petition? If so, what evidence must they show to demonstrate ownership?

In Wisconsin, minors are permitted to own property, both real and personal, and the statute restricts signers to cattle owners resident in any county. It is our opinion that minors who own cattle are qualified to sign the petition. It would seem to us, however, that the minor should act through a qualified guardian. The same evidence as is needed to show ownership in an adult is required to show ownership in a minor.

(3) Are all resident owners of cattle in the county qualified to sign the petition regardless of whether their names appear on the last assessment roll or not?

It was evidently the intention of the legislature in enacting this statute to control the spread of Bang's disease in cattle, and a liberal construction should be given to the statute. The statute requires that the petitions be signed by seventy-five per cent of the cattle owners resident in the county. The reference made to the assessment roll is to determine the basis upon which to determine the percentage. All the cattle owners listed on the assessment roll would be one hundred per cent. Some cattle owners listed on the assessment roll may have moved out of the county. They would not be eligible to sign the petition. Nevertheless, they would be counted in determining the number of cattle owners in the county. If the statute said seventy-five per cent of the cattle owners and did not furnish a base from which to figure, there would be no way of determining when you had seventy-five per cent of the cattle owners except by actual count. This would be impractical and uncertain because it would be subject to change from day to day and from week to week.

In our opinion this statute is very similar to a statute involving population of a certain area and in construing such a statute the last national census is taken as the basis.

In the case of *Zweifel v. Milwaukee*, 188 Wis. 358, in connection with the annexation of territory to the city of Milwaukee, it was argued that an elector is a person having a legal right to vote in a given precinct, and to hold that the law does not require a majority of the electors residing in the territory which it is proposed to detach from the town of Wauwatosa will result in abridgment of the legal rights and privileges of such electors. The court in that case held that the meaning which the plaintiff gave to the term elector was altogether too narrow and restricted, and said, p. 363:

“* * * Had the legislature intended the result
* * * it would have used apt language to indicate that
fact.”

What was said in the *Zweifel* case is equally applicable to the statute in question.

We should also bear in mind that cattle owners move from one county to another and it is quite possible that a cattle owner has moved into the county and his name is not on the assessment roll. It may be that he has a herd free from Bang's disease and is very anxious to have the program carried on. By not permitting him to sign the petition you would be depriving him of a right which is justly his and which might render the statute unconstitutional if he were not permitted to sign the petition. It seems to us that the important thing is that the signer of the petition be a resident cattle owner regardless of whether or not his name is on the assessment roll.

(4) Can additional petitions from qualified resident cattle owners be accepted after the initial filing and up to the time of the completion of the hearing held under the provisions of the law to qualify the petition?

The statute provides: Whenever petitions signed by more than seventy-five per cent of the cattle owners shall be presented to the department. It is necessary that there be seventy-five per cent of the resident cattle owners on the petitions before the department acquires jurisdiction. I see no reason why additional petitions should not be received up to the time of the hearing.

(5) Can more than one or several members of a family sign as owners of cattle if the cattle are maintained together and assessed to only one member of the family?

The statute says "cattle owners." It is our opinion that actual ownership is the test. The assessment roll may be evidence of ownership, but is not conclusive. If the several members of the family can prove individual ownership of certain cattle, then they are privileged to sign the petition; if they cannot do this, then they have no right to sign the petition.

(6) If upon examination of the petitions at the hearing it is found that they are a few signatures short of the neces-

sary number to bring the percentage in excess of seventy-five per cent, what procedure is to be followed?

The statute provides that petitions are to be signed by more than seventy-five per cent of the cattle owners. If the petitions do not have the necessary per cent, the department has no authority to proceed further. It is without jurisdiction.

(7) What is the course of procedure where a qualified resident cattle owner has signed the petition and before the hearing is terminated requests to remove his name from the petition?

Jurisdiction is acquired when petitions signed by seventy-five per cent of the cattle owners resident in the county are presented to the department, and it is not impaired by the subsequent withdrawal of some of the names. *Seibert v. Lovell, et al.*, 92 Iowa 507, 61 N. W. 197; *Peverill v. Board of Supervisors*, 208 Iowa 94, 222 N. W. 535.

RMO

Workmen's Compensation — Unpaid award to injured employee against foreign mutual insurance company which insured employer at time of accident and later withdrew from Wisconsin and assigned assets to foreign stock company, upon failure of assignee company to meet payments should be paid from "mutual fund" set up by sec. 102.65, subsec. (4), Stats., and recovery therefor may be made by state treasurer under sec. 102.65, subsec. (11), from liquidator of assignee company.

June 16, 1938.

H. J. MORTENSEN,

Commissioner of Insurance.

You state that a mutual casualty company, an Illinois corporation, was licensed as a mutual company to transact business of workmen's compensation insurance in this state

until May 1, 1937. In June, 1937, a new stock company was organized in Chicago, which took over all of the assets and assumed all of the liabilities of the mutual company. This stock company, however, was never licensed to do business in Wisconsin. In April, 1936, an employee of an employer carrying his compensation insurance with the mutual company was injured and subsequently was awarded about \$9,000.00 by the industrial commission, payable at the rate of \$91.00 per month. The mutual company made these monthly payments until it ceased to exist in June, 1937, and thereafter the stock company made the monthly payments until April, 1938, at which time it went into liquidation in Illinois with the director of insurance of Illinois as liquidator.

You request an opinion as to whether the balance of such employee's claim of about \$7,504.00 should be paid from the stock fund of subsec. (2), or from the mutual fund of subsec. (4), sec. 102.65, Stats.

Subsec. (11), sec. 102.65 provides:

"A valid claim for compensation or death benefits, or instalments thereof, heretofore or hereafter made pursuant to the workmen's compensation act, which has remained or shall remain due and unpaid for a period of sixty days, by reason of default by an insolvent carrier, shall be paid from the proper fund in the manner provided. * * *"

Subsec. (2) of the same section, creating the stock fund, provides as follows:

"There is created a fund to be known as 'the stock workmen's compensation security fund,' for the purpose of assuring to persons entitled thereto the benefits provided by this chapter for employments insured in *insolvent stock carriers*. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, * * * of an insolvent stock carrier. * * *"

Subsec. (4) of the same section, creating the mutual fund, provides as follows:

"There is created a fund to be known as 'the mutual workmen's compensation security fund,' for the purpose of assuring to persons entitled thereto the benefits provided by

this chapter for employments insured in *insolvent mutual carriers*. Such fund shall be applicable to the payments due under the provisions of this chapter, and remaining unpaid, in whole or in part, by reason of the default, * * * of an insolvent mutual carrier. * * *

Each of these subsections provides how the respective fund is to be made up. The stock fund provided by subsec. (2) consists of all contributions paid into the fund by stock carriers. The mutual fund provided by subsec. (4) consists of all contributions paid into the fund by mutual carriers.

By the provisions of par. (1) of subsec. (1) of sec. 102.65 an "insolvent stock carrier" is defined as a "stock carrier * * * which has failed to make payment of compensation due on a valid order of the industrial commission, * * * or a foreign stock * * * carrier which withdraws from or discontinues operation in this state and fails to meet payments due under the workmen's compensation act, * * *." Likewise, by the same paragraph, an "insolvent mutual carrier" means "a mutual carrier * * * which has failed to make payment of compensation due on a valid order of the industrial commission, * * * or a foreign * * * mutual * * * carrier which withdraws from or discontinues operation in this state and fails to meet payments due under the workmen's compensation act, * * *."

The business of the employer for whom the injured employee in question was working when he was injured was not insured at that time by a stock carrier. The insurance that was being carried was in a mutual carrier. It thus seems clear that the stock fund provided by subsec. (2) of sec. 102.65 could not be used to pay the balance of the award. That fund was provided to pay the benefits arising out of employments insured in stock carriers. If the unpaid balance of this award were at this time paid from the stock fund it would be the making of payment from a fund to which no contribution had been made by the carrier of the risk. The only contribution that has been made to either of these funds was made by the mutual company while it was operating in Wisconsin. Such contribution by the mutual company to the "mutual fund" was to provide a fund to make payments of this very nature.

While it is true that the stock company, after being formed, did make some payments on the award, in reality such payments were being made upon a liability of the old mutual company. Such liability continues until it is fully discharged. Under the definition set out in sec. 102.65 (1) (1), Stats., a foreign mutual carrier would not become an "insolvent mutual carrier" so that payment could be made out of the mutual fund as the claim against an insolvent mutual carrier, until it had not only withdrawn from or discontinued operation in the state but had also failed to make the payments due on an award under the workmen's compensation act. Thus the old mutual company's merely withdrawing from or discontinuing operation in this state was not sufficient to authorize payment of the balance of the award out of the "mutual fund." It was not until it had failed to meet the payments due on that award that such liability existed against that fund. So all during the time that the stock company was making the monthly payments on the award no such liability of the fund existed. However, immediately when the stock company ceased to make such payments then liability attached and the necessary conditions had come into existence which gave rise to a right to make payment from that fund. In so far as sec. 102.65, Stats., is involved the stock company, during the time it was making payments on the award, was not making payments of an award against it but an award against the mutual company, which it had assumed. Thus, the award having been made against a mutual carrier, the liability thereof was one of a mutual carrier, which, in the event of default, would be payable from the mutual fund.

It is therefore our opinion that the balance of \$7,504.00 unpaid upon the award in question should be paid from the "mutual fund" provided by subsec. (4), sec. 102.65, Stats.

You also ask as to whether the state treasurer may recover the amount so paid from such mutual fund by filing a claim against the liquidator of the stock company in Illinois.

Subsec. (11), sec. 102.65, Stats., provides:

"* * * The state treasurer * * * shall proceed to recover the sum of all liabilities of such carrier assumed by such funds from such carrier, its receiver, liquidator, re-

habilitator or trustee in bankruptcy, employers and all others liable, and may prosecute an action or other proceedings therefor. * * *”

It is our opinion that the state treasurer has a valid claim for the amount so paid from the “mutual fund” in the liquidation proceedings of the stock company in Illinois. The stock company, when it took over the assets of the mutual company, assumed all liabilities of the mutual company, which included not only the liability to meet the payment of said award but also the statutory liability to rehabilitate the fund from which payment was made pursuant to the statute. In making such claim the state treasurer would be asserting against the stock company one of the liabilities which it assumed on taking over the assets of the mutual company. He would be asserting a claim against it as the assignee of the assets for a claim against the mutual company. Basically, the claim asserted would be one against the mutual company arising under the statute, but it would also at the same time be a claim against the stock company because it had assumed that liability.

HHP

Taxation — Beverage Tax — Words and Phrases — Spoiled — Unfit for Beverage Purposes — Words “spoiled” and “unfit for beverage purposes,” as used in sec. 139.03, subsec. (7), Stats., providing for liquor tax refunds, mean “not fit for drinking,” and this is question of taste rather than one of law.

In order to entitle dealer to refund, salability of product for beverage purposes should be entirely gone.

June 16, 1938.

TAX COMMISSION.

Attention Arthur Pugh, *Chief Accountant,*
Beverage Tax Division.

You have called our attention to sec. 139.03, subsec. (7), Stats., which reads in part:

“* * * The state treasurer shall also refund the tax paid on any fermented malt beverages or intoxicating liquor which is spoiled or has become unfit for beverage purposes, and shall prescribe the method of proof required for obtaining such refund.”

In connection with this section you request our opinion on the meaning of the phrase, “unfit for beverage purposes.”

While the attorney general is presumed to be able to render competent advice to state officers and commissions on legal questions, he is not necessarily presumed to be equipped by training and experience to render an expert opinion on questions of fact—in this case one essentially a matter of taste in the field of beer and intoxicating beverages. We are therefore certain that in presenting the question under consideration there was no intention to imply that the attorney general has more than average qualifications in this respect. Consequently, what is said here may be subject to some revision by more highly experienced connoisseurs of the subject matter.

The answer to the question of when a beverage is “unfit for beverage purposes” will, of course, vary in accordance with the tastes of the individual who is answering the question.

An ardent prohibitionist, on the one hand, would argue, perhaps with more force than logic, that all beer and intoxicating liquor are unfit for beverage purposes. However, since the repeal of the ill-fated eighteenth amendment, these beverages have once more come to have a recognized, and perhaps reputable, status in the scheme of civilized living, and we cannot be guided by the views of the teetotaler in determining fitness for beverage purposes.

On the other hand, there is the more or less indiscriminate drinker whose words are echoed in a popular song of a generation ago:

"My favorite drink is whiskey sling,
But I can drink 'most anything."

This attitude in its extreme form is manifested by the wrecked flotsam and jetsam of humanity who drank "canned heat," a wood alcohol compound not designed for beverage purposes, lemon extract and other concoctions containing some proportion of ethyl or methyl alcohol. Such standards of palatability must likewise be discarded in devising any workable test under the statute.

The words "which is spoiled or has become unfit for beverage purposes" are clear and unambiguous. The word "spoiled," when used in connection with food or drink, implies that the commodity in question through chemical change and decomposition has become so altered in character as to be of little or no use for purposes of human consumption. "Unfit for beverage purposes" means not fit for drinking. A mere decrease in palatability would not meet the test imposed by the statute if the beverage could still be used with any degree of success for drinking.

We understand that requests for refunds arise in some instances where a particular brand or blend falls off in popularity and the dealer desires to return it to the manufacturer to be redistilled, rectified or reblended in some manner which will increase the salability of the product. Obviously such instances fall outside the refund provisions of the statute.

It is to be noted that the statute permits the state treasurer (now the tax commission under executive reorganiza-

tion order) to prescribe the method of proof for obtaining a refund. This is purely a matter of policy, and if the dealer takes the position that a particular lot of beer, wine or liquor is spoiled or unfit for beverage purposes, he should be willing to destroy it and furnish evidence of such destruction. Perhaps this should be done in the presence of some beverage tax agent to insure that the merchandise will not thereafter be offered for sale for beverage purposes. In other words, the salability of the product for beverage purposes should be completely gone before any refund is allowed.

Any other solution would be difficult to apply and would open the door to subterfuge and tax evasion. As before indicated, if it is left to the opinion of any individual taster, the attorney general cannot furnish expert assistance and must defer to the judgment of those officials in whom the legislature in its wisdom has vested the administration of the statute, including such incidental tasting as may be necessary and proper in the enforcement of the statute.

OSL

WHR

Appropriations and Expenditures — Bridges and Highways — Street Improvement — Allotment under sec. 20.49, subsec. (8), Stats., should not be made to city for roads over property owned by city outside its corporate limits, but to town in which property is located.

June 18, 1938.

HIGHWAY COMMISSION.

You ask whether under sec. 20.49, subsec. (8), Stats., an allotment can be made to a city for public roads located on property owned and maintained by the city but which has not been annexed to the city under sec. 66.025, Stats. Sec. 20.49 (8) provides:

“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, * * * the following sums: * * *.”

The words “within their respective limits” are clear and unambiguous and must be given their literal meaning. Until land is formally annexed to the city, even though title to the land is in the city, such property is not within the city limits. Under the express wording of the statute no allotment can be made to such city for any roads over property which is owned by the city, but is located outside the corporate limits thereof.

A showing that the city constructed and maintained the highways and roads in the property owned by the city but outside its corporate limits will not result in a different conclusion because the statute is very definite in its instructions. The statute merely prescribes a means or method of measuring the amount that should be allotted to each municipality and nowhere in the statute is there any indication that such measurement of the allotment is conditioned upon any showing that the money so allotted will be used on any particular road or portion thereof.

You also ask whether an allotment can be made to a city under sec. 20.49 (8) after the property in which the roads are located has been duly annexed to the city pursuant to sec. 66.025, Stats.

It is clear that after annexation property owned by the city, formerly outside its corporate limits, falls “within the respective limits” of the city and from that time forward an allotment can be made to the city for the roads located in such annexed property.

You then ask: If such allotment cannot be made to the city under sec. 20.49 (8) for roads located in property owned by the city but outside its corporate limits, can an allotment for such roads in said area be made to the town in which the property is located?

The answer to your first question is based upon the fact that the roads in such city-owned property are not within

the corporate limits of the city until the territory has been annexed to the city. If such territory is not "within the limits" of the city because it has not been annexed and brought within the corporate limits of the city, it follows that such territory, until it has been so annexed by the city, necessarily remains in the town. Such territory owned by the city being within the town, the roads in such territory are "within the limits" of the town and under sec. 20.49 (8), Stats., an allotment should be made to the town for such roads.

It is therefore our opinion that where a city owns property outside its corporate limits which it has not annexed, the allotment under sec. 20.49 (8) for the roads in such territory should not be made to the city, but to the town in which the property is located.

HHP

School Districts — Union High School Districts — Sec. 40.64, subsec. (5), Stats., applies only to high school districts and is not retroactive beyond its effective date.

June 20, 1938.

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

You state that prior to January 22, 1927, the city of Fennimore and part of the township of Fennimore comprised the school district known as joint school district No. 2. At that time it was a common school district maintaining a high school. On January 22, 1927, the electors of the townships of Mt. Ida and Fennimore and the city of Fennimore voted to create a union free high school district out of the townships of Mt. Ida and Fennimore and the city of Fennimore. Since then the union free high school district has been renting the high school building from joint school dis-

trict No. 2 and it purchased the fixtures and personal property from said joint school district.

We are asked whether the high school building, personal property and fixtures which were owned by the joint school district became the property of the union free high school district at the time of its creation.

This same question was considered by this department in XXVI Op. Atty. Gen. 10, but the facts were stated differently and our ruling in that instance was based upon the assumption that joint school district No. 2 was a high school district, whereas we are now informed that such was not the case. That opinion was based upon sec. 40.64, subsec. (5), Stats., which reads:

“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.”

Sec. 40.64, subsec. (5), Stats., does not apply, since joint school district No. 2 was not “an existing high school district” within the meaning of the statute but was a common school district which maintained a high school.

Furthermore, we are now informed that the certificate of establishment of the union free high school district was issued January 26, 1927, this being prior to the enactment of sec. 40.64, subsec. (5), as revised by ch. 425, Laws 1927, which was approved July 21, 1927, although effective as of July 1, 1927

Sec. 40.64, subsec. (5), Stats., is not retroactive beyond its effective date and consequently would not apply to consolidations taking place prior to that time.

You are therefore advised that the high school building and the personal property and fixtures which belonged to joint school district No. 2 did not become the property of the union free high school district upon its creation in 1927.

WHR

Public Health — Basic Science Law — Board of Medical Examiners — Sec. 147.16, Stats., contemplates that applicants for licenses to practice medicine and surgery or osteopathy and surgery in Wisconsin are to be examined by Wisconsin state board of medical examiners rather than by some out-of-state board or agency and that all applicants are to be given same examination as far as possible. However, such board is not prohibited from availing itself of examinations conducted by national board of medical examiners provided practice is such that it can still be said to be examination of board and there is no great dissimilarity between examinations.

June 23, 1938.

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

You have inquired whether your board may secure from the national board of medical examiners the original questions and answers of an examination given by that board to a person who applies for a license in Wisconsin and review and grade such examination as though it were and in lieu of the examination usually given by your board.

We understand that this would be done only when requested by the applicant and that your board would not be obliged to accept the examination given by the national board but would do so only in its discretion and when fully satisfied as to the scope, thoroughness and authenticity of such examination. You state further that your board would be at liberty to approve or disapprove of the grades given by the national board and that the applicant would be required to meet all other conditions necessary for a Wisconsin license.

Sec. 147.17 provides for the issuance of a license if six of the eight members of the board find the applicant qualified.

This office expressed the opinion in XXV Op. Atty. Gen. 459 that your board could not delegate its powers with respect to setting standards and giving examinations to the national board of medical examiners.

Also in XXIII Op. Atty. Gen. 303, the opinion was expressed that the state board of examiners in basic sciences could not substitute for its examination the result of an examination made by the national board of medical examiners. And in XXII Op. Atty. Gen. 610 it was stated that your board may not issue a license to an applicant solely because of his having passed the examinations of the national board of medical examiners.

We are unable to escape the conclusion that it was the intention of the legislature that applicants for licenses to practice medicine and surgery or osteopathy and surgery in this state are to be examined by the Wisconsin state board of medical examiners in the various branches mentioned in sec. 147.16 and that if some other board or agency outside the state were to conduct the examination for the board in whole or in part it would fall short of the statutory requirements.

However, there is nothing in the statute that would prohibit the board from availing itself of examinations conducted by the national board of medical examiners provided the board procures authentic examination papers and applies its own system of grading to the examination papers thus examined, and further provided that there is not any great dissimilarity between the examinations conducted by the national board and the state board. Under such conditions the board would be justified in proceeding to issue its certificate.

If the foregoing practice is adopted, the board should establish some uniform classification whereby applicants requesting such procedure will be entitled to be treated uniformly. The board, in the exercise of its discretion, should not permit such an examination as to some and deny it as to others who are similarly situated and who may reasonably be classified as being entitled to examination in such manner.

WHR

NSB

Aeronautics — Under sec. 114.24, subsec. (3), Stats., state aeronautic board may register airplanes operated in intrastate commerce by both residents and nonresidents of Wisconsin, but it may not require registration of airplanes engaged in interstate commerce.

June 24, 1938.

PUBLIC SERVICE COMMISSION.

Attention Robert A. Nixon, *Secretary*
Aeronautic Board.

You have inquired whether the state of Wisconsin aeronautic board may, under the provisions of ch. 114 of the statutes, require the registration of airplanes operated by residents and nonresidents of Wisconsin within the state, and of airplanes operated by commercial companies engaged in interstate commerce.

Sec. 114.24, subsec. (3), Stats., provides:

“The state aeronautic board is hereby authorized to make the following charges for the issuance of the following types of registration:

“(a) For each annual airport registration, two dollars.

“(b) For each annual landing field registration, two dollars.

“(c) For each annual air school registration, five dollars.

“(d) For each annual airplane registration, two dollars.

“(e) Fees shall not be charged for flying club, or air beacon licenses.

“(f) For approving identified aircraft, ten dollars.”

In *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, it was held to be essential to the safety of sovereign states that they possess jurisdiction to control the air space above their territories and that, consequently, under the police power state regulation of intrastate air navigation is permissible.

You are therefore advised that the board has the power to charge a registration fee for aircrafts operated in intrastate commerce, whether operated by residents of Wisconsin or by nonresidents.

Whether registration may be required of airplanes operated by commercial companies engaged in interstate commerce calls for more extended consideration.

It is well established that, in the absence of federal regulation, a state, in the exercise of its police power, may require the registration of vehicles engaged in interstate commerce and a state may charge a license fee to defray the cost of regulation. *Hendrick v. Maryland*, 235 U. S. 610, 622; *Morris v. Doby*, 274 U. S. 135; *Sprout v. South Bend*, 277 U. S. 163, 169.

However, where congress has directly regulated an instrumentality of interstate commerce, state laws covering the same field must give way to the federal regulation. *Employers' Liability Cases*, 223 U. S. 1, 55.

The air commerce act of 1926, Title 49 U. S. C. A., sec. 181 (a) (3), makes it unlawful to navigate an aircraft in interstate commerce without a federal aircraft certificate. Sec. 173 (a) and (b) of the air commerce act states the requirements which must be met to obtain a certificate.

Under sec. 114.18, Stats., an airplane may be operated in Wisconsin only when it has been licensed by the federal government.

Since the federal government has assumed the power to license and register aircraft engaged in interstate commerce, this field has been pre-empted by the federal government and consequently may not be invaded by similar regulation on the part of the states. As was pointed out in *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605, where the federal and state statutes are directed to the same subject and operate on the same object the state regulations must give way to the federal regulation.

We therefore conclude that the state of Wisconsin has no power to require the registration of aircrafts engaged in interstate commerce.

WHR

Criminal Law — Public Health — Sec. 340.35, Stats., prohibiting mayhem, is not applicable to vasectomy performed for purpose of benefiting health of patient.

June 25, 1938.

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

You ask whether a vasectomy "can be performed safely" where the patient is willing to consent in writing and where it is the opinion of several examining physicians that the operation would benefit the patient's health. The man is not confined in an institution as a criminal, insane, feeble-minded or epileptic person and therefore sec. 46.12, Stats., relating to sterilization does not apply. No doubt you have in mind the mayhem statute, sec. 340.35, and the question is whether this statute would forbid sterilization in the present circumstances.

So far as is applicable, the section reads:

"Any person with malicious intent to maim or disfigure, who shall * * * cut or disable a limb or member of another person, and any person privy to such intent who shall be present aiding in the commission of such offense shall be punished by imprisonment in the state prison, not more than fifteen years nor less than one year, or by fine not exceeding five thousand dollars nor less than two hundred dollars."

The sex organs are "members" of the person within the meaning of the statute. *Moore v. State*, 3 Pin. 373 (1851). As vasectomy involves a disability to procreate, one performing such an operation would bring himself within the terms of the statute if possessed of a malicious intent to maim or disfigure. "Maim" has no technical meaning. *State v. Foster*, 281 Mo. 618, 220 S. W. 958; *Commonwealth v. Newell*, 7 Mass. 245. As used in sec. 340.35, Stats., it is sufficiently broad to include the infliction of almost any disability.

A malicious intent does not necessarily involve malice toward the particular individual. 40 C. J. 3. So-called "legal malice" is sufficient. Construing a statute practically identical to ours (U. S. Rev. Stats. 1873, sec. 5348), the court said in *United States v. Gunther*, 5 Dak. 234, 38 N. W. 79, 80-81:

"* * * The word 'maliciously' * * * means nothing more than that the act should be done voluntarily, intentionally, unlawfully, and without excuse or justification, * * *."

To the same effect, see *Bowers v. State*, 24 Tex. App. 542, 7 S. W. 247, and *State v. Compton*, 77 Wis. 460, 466.

From an act done voluntarily and against the terms of the statute malice is implied unless the circumstances of the particular case are such as to justify or excuse the act, for such justification or excuse negatives the presence of malice.

Mere consent of the patient is not sufficient excuse to negative malice, however. For while certain crimes, such as larceny and rape, require that the act be done against the will, in others, such as homicide and mayhem, consent of the victim is no defense. See I Bishop on Criminal Law, 9th ed., sec. 259 and cases cited; Coke, on Littleton, 127, a. The only purpose of obtaining consent is to foreclose civil liability. See Bishop, *opere citato*, sec. 256; but compare *Miller v. Bayer*, 94 Wis. 123 (1896).

The only case involving voluntary sterilization which has come to our attention is *Christensen v. Thornby*, (Minn.) 255 N. W. 620, a case notable in that the plaintiff sued on a theory of breach of warranty in that the operation did not have the desired effect, and he sought to measure his damages by the expense of a subsequent and unexpected childbirth. The court held that the contract was not void as against public policy, since it was thought to be necessary to save the life of the plaintiff's wife.

It is said by Bishop in sec. 346 of the work cited that the law of necessity is supreme and that all law has in it this implied exception. Stephen writes to the same effect in his Digest of the Criminal Law, art. 33, but points out that the limits of the doctrine are vague. Each case in which the

doctrine is invoked would necessarily have to stand on its own particular set of facts.

In this regard necessity to save life and necessity to preserve health should stand on an equal footing, because of the difficulty of telling in some cases where one stops and the other begins. It is only because justified by the necessity to preserve health that a dentist who pulls an ailing incisor does not commit mayhem under the broad terms of the statute. Likewise with the physician.

We conclude that vasectomy in the instant case may be excusable by reason of necessity to preserve health. For a more complete discussion of the subject we refer you to Miller and Dean's article in 16 Am. Bar Ass'n Journal 158 (1930). See also XXI Op. Atty. Gen. 940.

WHR

Appropriations and Expenditures — Trade practice department, created pursuant to ch. 3, Laws 1937 (Special Session), is not liable for telephone service between July 25, 1937, and October 17, 1937.

June 28, 1938.

TRADE PRACTICE DEPARTMENT.

Attention E. M. Rowlands, *Commissioner*.

You have requested an opinion as to whether your department is liable for the payment to the Wisconsin Telephone Company for exchange, switch board and trunk line service rendered to the trade practice commission after July 26, 1937, and prior to October 17, 1937.

Sec. 110.02, Stats. 1935, under which the trade practice commission existed, provided as follows:

“This chapter shall cease to be in effect and any agencies established thereby shall cease to exist on July 25, 1937,

* * *

Thus, from July 25, 1937, until the enactment of ch. 3 of the Special Session of 1937, there was not in existence any trade practice commission or department. Sec. 110.09, Stats., as created by said ch. 3 of the laws of 1937 (Special Session) took effect upon its publication October 16, 1937, and provided as follows:

“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.”

As was stated in our opinion in XXVI Op. Atty. Gen. 565, if the liabilities for such telephone bills constitute rights and obligations that became vested under ch. 110 of the 1935 statutes, then your department would be clearly liable for their payment. However, since the trade practice commission ceased to exist on July 25, 1937, the expiration date of the old trade practice act, no liabilities could be incurred by it as an agency of the state after that date. The asserted liability and such telephone bills are not for anything that occurred or any services rendered prior to that date and therefore the liability therefor does not arise out of a right or obligation that became vested under ch. 110 of the 1935 statutes. The asserted liability is for services rendered after the old trade practice commission ceased to exist. Furthermore, the old trade practice commission could not, prior to the date it ceased to exist, incur a liability for services to be performed after it no longer had existed. Its power to act was expressly limited solely to its lifetime.

Sec. 110.02 of the 1935 statutes was perfectly clear and subject to only one interpretation,—to the effect that the old trade practice commission ceased to exist on the particular specified date. The express terms of the statute, which all persons dealing with such agency would be found to know, definitely limited its authority to the time during which it was in existence. In 46 C. J. at page 1032, it is said:

“While officers are presumed to have acted within their authority, statutes delegating powers to public officers must

be strictly construed, and all persons dealing with public officers must inform themselves as to their authority,
* * * * ”

See also 2 American Jurisprudence, page 76.

Not only did the authority of the old trade practice commission to do business cease to exist by virtue of such expiration but thereafter no purpose existed for which the services in question could be rendered. After July 25, 1937, and prior to October 17, 1937, there was not in existence any trade practice agency for whom such telephone service could be or was performed.

It is therefore our opinion that your department is not liable for any charges for telephone services rendered between July 25, 1937, and the time when your department came into existence pursuant to ch. 3 of the laws of the special session of 1937.

HHP

Appropriations and Expenditures — Education — Vocational Education — Sec. 41.16, subsec. (5), Stats., relating to expenditure of funds by local board of vocational and adult education, is subject to operation of sec. 66.04, subsec. (8), Stats., providing for disbursement of city and village funds on order of city or village clerk.

June 29, 1938.

BOARD OF VOCATIONAL EDUCATION.

Attention George P. Hambrecht, *State Director*,
Vocational and Adult Education.

Under sec. 41.16, subsec. (5), Stats., vocational school funds have been disbursed by the town, city or village treasurer on orders issued by the local board of vocational education and signed by its president and secretary. You ask whether sec. 66.04, subsec. (8), as amended by ch. 432,

Laws 1937, affects ch. 41, Stats., so as to require a change in this procedure.

Sec. 66.04, subsec. (8), Stats., reads:

“In every city and village all disbursements from the treasury shall be made by the city or village treasurer upon the written order of the city or village clerk after proper vouchers have been filed in the office of the clerk; *and in all cases where the statutes provide for payment by the treasurer without an order of the clerk, it shall hereafter be the duty of the 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 city or village treasury.*”

You suggest that sec. 66.04 (8) applies to “general municipal laws” and that matters relating to vocational schools may therefore be exempt from its operation.

The statute relates to *all* disbursements from the city or village treasury and supersedes all general and special statutes relating to the same subject. It is not confined to “city funds,” i. e., funds under the control of the council rather than under the control of some other agency.

The words, “money from the city or village treasury” mean the money raised, received and expended by the city or village. See *Farrell v. Board of Education*, 133 App. Div. 405, 98 N. Y. S. 1046.

Local boards of vocational and adult education have no independent corporate existence and do not act as a corporation but as an arm of the municipal government. For example, all conveyances, leases and contracts are made in the name of the municipality. Sec. 41.15 (7), Stats. While the board may sue or be sued, this must be done in the name of the municipality. Sec. 41.15 (10) (a).

Thus, when the board directs the expenditure of vocational school funds, it does so as an arm of the municipal government. The fact that the funds must be devoted to school purposes does not make them the less a part of the municipal treasury. See *Terry v. Milwaukee*, 15 Wis. 490, and *Board of Education v. Racine*, 205 Wis. 489, to the ef-

fect that where the board has no corporate existence title to school funds is in the municipality.

The obvious purpose of the statute is to achieve uniformity, in the form of making such disbursements. The duty of the municipal clerk in this connection will be ministerial only, and will not affect the board's control of vocational school funds. *State ex rel. Treat v. Richter*, 37 Wis. 275.

In view of these principles we see no justification for an implied exception to the broad and emphatic terms of the statute.

WHR

Appropriations and Expenditures — Refunds — Criminal Law — Fines — Informers' Fees — Where fine is paid to sheriff by one committed to jail, sheriff must remit full fine to county treasurer under sec. 360.35, Stats.

If such fine is remitted to state treasurer by county treasurer without deduction of informer's fee, as provided in judgment, such fee may be refunded to county treasurer by state under sec. 20.06, subsec. (2), Stats.

June 30, 1938.

EDMUND H. DRAGER,

District Attorney,

Eagle River, Wisconsin.

You have called our attention to an opinion from this department to your office under date of March 24, 1938, XXVII Op. Atty. Gen. 171, in which it was stated that where a fine has been paid into the county treasury the county treasurer may not later pay out any part of the same to an informer even though the judgment of the court imposing the fine ordered such payment unless the informer files a claim against the county and it is allowed in the usual manner.

In the case which gave rise to that opinion a person had been convicted of a misdemeanor, a fine was imposed and in default of payment of the same the defendant was committed to jail. At the time of the conviction the justice had ordered that one-third of the fine be paid to the informer. While in jail the defendant paid the fine and costs to the sheriff, who, in turn, paid the money into the county treasury.

We are now informed that the fine has been remitted to the state, and you inquire whether the sheriff in such case is required to pay the informer's fee when he collects the fine, and if the county board is required to pay the informer's fee out of county funds where such fine has been remitted to the state without deduction of the informer's fee.

Sec. 360.35, Stats., provides:

"If the accused be committed payment of any fine imposed on him shall be made to the sheriff of the county who shall, within thirty days after the receipt thereof, pay over the same to the county treasurer for the purposes aforesaid."

This section is clear and express. It should be followed by the sheriff to the letter and does not contemplate any deduction by the sheriff for the purpose of paying informers' fees. This ordinarily would be done by the county treasurer when advised of the terms of the conviction relating to payment of one-third of the fine to the informer.

Consequently, it was error to remit the full fine to the state treasurer, since only the clear proceeds of fines for breach of the penal laws are paid into the state treasury for the school fund. Art. X, sec. 2, Wisconsin constitution.

Sec. 20.06, subsec. (2), Stats., makes provision for refund of moneys paid into the state treasury in error. This subsection reads:

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

You are therefore advised that under sec. 360.35, Stats., the sheriff must make full remittance to the county treasurer of fines paid to him by persons committed to jail and that where the county treasurer pays the full fine into the state treasury without deducting the informer's fee provided for in the judgment of conviction, the informer's fee may be refunded to the county treasurer by the state pursuant to the provisions of sec. 20.06, subsec. (2), Stats.

WHR

Navigable Waters — Water Levels — Public Officers — Public service commission has power under sec. 31.02, Stats., to make order changing minimum water level to be maintained by reservoir storage dam at Rest Lake.

June 30, 1938.

PUBLIC SERVICE COMMISSION.

At a hearing before the public service commission with regard to the regulation of the Rest Lake dam, the legal question arose as to whether the commission has power to order a change of the minimum water level of the reservoir which was established in 1915 by the railroad commission. This opinion of necessity must be confined solely to the legal question of the commission's power to make an order changing the level, the function of interpreting the facts and testimony being wholly within the judgment of the commission.

It appears that the dam as originally constructed in 1888 was intended to facilitate logging operations and was permitted to maintain a head of sixteen feet for a short time during each year. By ch. 640, Laws 1911, the Chippewa and Flambeau Improvement Company was authorized to acquire and maintain this dam. Logging had ceased to be of prime importance by that time, and the law of 1911 was known as the reservoir law, the prime purpose of which

was to maintain a uniform flow of water. But, according to subsection 1 of section 2 of the act, this authority was granted also for the purpose of "improving the usefulness of said streams for all public purposes." The charter was expressly made subject to amendment or repeal; and the authority granted thereby was given "subject to the supervision and control hereinafter provided for"; and section 6 provided:

"* * * Such railroad commission shall cause the height to which the water may be raised by any dam to be indicated by permanent monuments and bench marks, *and shall have supervision and control of the time and extent of the drawing of water from the reservoirs*, and power to compel the maintenance of all reservoirs established."

In 1915 the above law was amended by the enactment of ch. 380, Laws 1915, a general law known as the water power act, which contained in sec. 3, creating sec. 1596-2, Stats. 1915 (now sec. 31.02, Stats.), the following:

"Section 1596-2. 1. The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property *is empowered to regulate and control the level and flow of water* in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters;
* * *

"2. The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of 1596-1 to 1596-26, inclusive, of the statutes."

Pursuant to the above laws the railroad commission in 1915 set the maximum level of the Rest Lake Dam at eight

feet six inches and the minimum level at five feet six inches, except that it might be drawn down to two feet six inches in the winter when the reservoir was covered with ice. The authority of the commission to make this order was sustained in *Chippewa and Flambeau Improvement Co. v. R. R. Comm.*, (1916) 164 Wis. 105, 159 N. W. 739.

The levels remained unchanged until 1937, when application was made for an order of the commission to fix a constant minimum level of six feet, in order to prevent injury and destruction of fish and fish food in waters back of the dam. The Improvement Company contends that, once having fixed the maximum and minimum levels, the commission is without power to change them; and that the order changing the minimum level will deprive the company of their property without due process of law. We are now called upon to decide whether the commission has authority to order a change in the minimum level.

There is ample authority for the proposition that, in the absence of congressional action, the state has plenary power over the navigable waters of the state. The right of individuals to the flow of the stream is subject to control and reasonable regulation by the state in the public interest. *Flambeau River Lumber Co. v. R. R. Comm.*, (1931) 204 Wis. 524, 540, 236 N. W. 671.

As an expression of this power to control the use of navigable waters, we find the legislature passing the reservoir act of 1911, and four years later the water power act. In these laws "the legislature has performed the legislative function by declaring that water may not be maintained in any dam in navigable waters at a level which is injurious to the public rights in such waters, or which threatens safety or imperils life, health, and property. Having enacted this general law, the legislature has endowed the Railroad Commission with the power to investigate and ascertain the facts and to make such regulations and orders as may be necessary to carry into effect the law in concrete cases." *Chippewa and Flambeau Improvement Co. v. R. R. Comm.*, (1916) 164 Wis. 105, 118-119, 159 N. W. 739.

The water levels set by the commission are not fixed and immutable. Certainly there is nothing in the statutes upon which to base such a conclusion. On the contrary, it is the

duty of the commission to change them whenever they become injurious to the public interest or threaten safety or imperil life, health, and property.

“To regulate” means to adjust; to govern by rule; to direct or manage according to certain standards or laws. The essence of regulation is adjustment according to circumstances. (New Standard Dictionary.) The function of the commission here is very much like the function of public utility rate making—a change in the factual situation may require a new order by the commission in order to maintain the standard set by the legislature. And the specific water levels or rates designated by the commission must not be confused with the standard set by the legislature. The water levels or rates may change according to circumstances, the standard does not.

We think the legislature intended that the commission should change its order whenever it is shown to be contrary to the public interest. Otherwise, a level erroneously established could not be corrected when discovered and the very purpose of the law would be defeated.

The water levels are regulated not alone for reservoir purposes but for other public purposes as well. Adjustment becomes necessary in order to co-ordinate all the public interests in navigable waters. In *Chippewa & Flambeau Improvement Co. v. R. R. Comm.*, (1916) 164 Wis. 105, 159 N. W. 739, Justice Winslow said, p. 117:

“There seem in these provisions to be quite plain indications that the legislative thought included other public purposes than the mere storage of immense quantities of water for creation of power, and that it was appreciated that there might well arise a conflict between the various purposes, in which event all the public interests were to be recognized and protected so far as practicable.”

It is the duty of the commission to protect the public right of navigation in these waters; and hunting and fishing are incidents of the right of navigation or are independent rights in themselves. *Diana Shooting Club v. Husting*, (1914) 156 Wis. 261, 145 N. W. 816; *Willow River Club v. Wade*, (1898) 100 Wis. 86, 76 N. W. 273. In this case, moreover, the public interest in fishing is unusually

important because it is one of the bases of the great summer resort business in the vicinity of Rest Lake and the Manitowish waters. So it is proper to consider this interest in regulating the water levels. *Nekoosa-Edwards Paper Co. v. R. R. Comm.*, (1930) 201 Wis. 40, 228 N. W. 144.

It cannot be maintained that reasonable regulation deprives the Improvement Company of its property without due process of law. In the first place we have the unquestioned rule of law that a riparian owner can acquire no prescriptive rights to the continued use of navigable waters, the courts saying that a navigable stream is like a public highway in that no private rights can be acquired therein. *Milwaukee Western Fuel Co. v. City of Milwaukee*, (1913) 152 Wis. 247, 258, 139 N. W. 540. Consequently, the mere user of these waters for reservoir purposes for twenty years did not give rise to a prescriptive right to their continued use which the state is powerless to control or extinguish.

Furthermore, in the *Water Power Cases*, (1912) 148 Wis. 124, 134 N. W. 330, the court specifically pointed out (p. 149) that neither the riparian owner nor the state could develop water power by placing a dam in a navigable river resting on its banks without the consent of the other; and that the state might withhold its permission or grant it on conditions.

"If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, thirty years." *Fox River Paper Co. v. R. R. Comm.*, (1927) 274 U. S. 651, 654-655, 47 S. Ct. 669, 670. See also *City of Baraboo v. R. R. Comm.*, (1928) 195 Wis. 523, 218 N. W. 819.

By the very terms of ch. 640, Laws 1911, the Improvement Company was granted authority to maintain the dam subject to the commission's supervision and control of the time and extent of the drawing of water from the reservoirs. No absolute right was granted here. Not only is the company's

charter subject to amendment or repeal, but the right to impound the waters itself is subject to the regulation and control of the commission. This situation is altogether different from that found in *State ex rel. Northern Pac. R. R. v. Railroad Comm.*, (1909) 140 Wis. 145, 121 N. W. 919.

In addition, in *Chippewa & Flambeau Improvement Co. v. R. R. Comm.*, (1916) 164 Wis. 105, 159 N. W. 739, the court definitely disposed of the possibility of the Improvement Company having obtained any vested right which could prevent regulation of the water levels by the commission, and declared that the commission might consider other interests in the water levels besides the interest of the Improvement Company in using water for reservoir purposes.

Our conclusion is that the commission is empowered to change the minimum water level of the Rest Lake dam if it believes such action to be necessary and proper to protect all the public interests involved; that the right of the public to fish in these waters is one of the public interests which may be considered in arriving at a decision; and that the Improvement Company has no vested interest which can interfere with a reasonable order of the commission changing the minimum level of the water.

HHP

Taxation — Exemption — Where church employs two pastors, owns one parsonage, occupied by one pastor, and rents another parsonage to house second pastor both parsonages are exempt from taxation.

July 1, 1938.

TAX COMMISSION.

A church with six hundred voting members and a large congregation employs two pastors. The congregation owns one parsonage, which is occupied by one of the pastors. Another house is rented by the congregation and occupied as a parsonage by the second pastor. You inquire whether the parsonage which is rented by the congregation and used by the second pastor is exempt from taxation, as well as the parsonage owned by the church and occupied by the first pastor.

Sec. 70.11, Stats., provides in part:

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

“* * *

“(4) * * * parsonages, whether of local churches or districts, and whether occupied by the pastor permanently or rented for his benefit, * * *.”

In *Gray et al. v. Lafayette County, et al.*, 65 Wis. 567, the court passed upon the meaning of the exact language of sec. 70.11 subsec. (4), quoted above, and held at page 571:

“* * * * we are impelled to the conclusion that the more reasonable construction of the statute is that the word ‘rented,’ * * * applies to parsonages rented by church associations as lessees, * * *. It follows that the property described in the complaint, when the same was assessed for taxation in 1883, was the parsonage of the Baptist Church Association, rented by it for the benefit of its pastor (who occupied it), and was therefore exempt from taxation in that year.”

The court decided that the statute did not refer to a parsonage owned by the church and rented by it as lessor but referred to a parsonage rented by the church as lessee and used by a pastor.

Sec. 70.11 subsec. (4) does not limit the parsonage exemption to one parsonage for each church. The statute is broadly worded to provide exemption for all parsonages so long as said parsonages are either occupied by the pastor permanently or rented by the church (as lessee) for the benefit of the pastor.

You are advised that both the parsonage owned by the church and the house which is rented by the congregation and used as a parsonage by the second pastor are exempt from taxation.

JRW

Banks and Banking — State Banks — Bank Stations —
Sec. 221.255, Stats., prohibits establishment and maintenance of paying and receiving station by bank where such station is within four miles of another bank or station. Banks affected may not waive this requirement by mutual agreement.

July 5, 1938.

BANKING COMMISSION.

You call our attention to sec. 221.255, Stats., and state that the banking commission has an application before it from a state bank which is desirous of establishing a receiving and paying station in a town which is without banking facilities. The proposed station will be within four miles of an existing and operating national bank, but this bank is willing to enter into an agreement to the effect that it is in favor of this station being established.

You inquire whether this proposed agreement may be entered into despite the four-mile provision contained in the statute.

Sec. 221.255, Stats., provides:

“(1) 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 thousands, 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; * * **"

You are advised that the proposed agreement to operate a receiving and paying station within four miles of an existing one is illegal.

In *Aetna Insurance Co. v. Harvey*, 11 Wis. 394, it was held by the court that a contract made in violation of a statute is void. The imposition by law of a penalty for doing a particular act amounts to a prohibition thereof; and a contract for the performance of such an act, or of one which is expressly prohibited by law, is void.

See also *Pozorski v. Gold Range Commonwealth Corp.*, 142 Wis. 595, 126 N. W. 24.

If an act is prohibited by statute, an agreement in violation of the statute is void. Although the act is not penalized, it is the prohibition and not the penalty which makes the act illegal. *Waugh v. Beck*, 114 Pa. 422, 6 A. 923.

It will be noted that sec. 221.255, Stats., expressly prohibits the maintenance of a receiving and paying station within four miles of any existing bank. Any agreement entered into between the two banks in question waiving or, rather, attempting to waive the requirements of sec. 221.255 would be void under the above authorities.

WHR

Education — Vocational Education — Tuition — Words and Phrases — Day — Nonresident tuition charge provided in sec. 41.19, Stats., for each day or evening of actual attendance is not dependent upon number of hours involved, word "day" there being regarded as indivisible unit of time, including fractions of day.

July 6, 1938.

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

You call our attention to sec. 41.19, Stats., and inquire whether a local board of vocational and adult education may charge a full day's tuition of a pupil who attends school four hours per day, the full time day constituting six hours.

Sec. 41.19, Stats., provides in part:

"The local board of vocational and adult education is authorized to charge tuition for nonresident pupils not to exceed fifty cents for each day or evening of actual attendance. * * *."

Generally speaking, the word "day," when used in a statute, is regarded as an indivisible unit of time. In the case of *Harris County v. Hammond*, (Tex.) 203 S. W. 451, 453, a statute allowed the sheriff forty cents per day for the care and keep of prisoners, and it was held that he was entitled to such allowance where a prisoner was kept in jail for any substantial portion of the day and that it was not necessary that such prisoner remain in jail the whole of the day in order to entitle the sheriff to collect such per diem. This was likewise the holding in the case of *Dallas County v. Reynolds*, (Tex.) 199 S. W. 702, where the court considered that the term "day" means days and fractions thereof.

It is to be noted that sec. 41.19, Stats., bases the tuition charge upon "each day or evening" of actual attendance. The tuition charge is not based upon "hours" of attendance, and since the statute does not provide that any certain number of hours shall constitute a school day for tuition purposes, we conclude that the local board of vocational and adult education may charge tuition for each day or evening

of actual attendance regardless of the number of hours involved.

WHR

Counties — Dance Hall Ordinances — Lake resort hotel consisting of tavern, rooms, cabins, boats, etc., that permits dancing, three nights a week furnishes orchestra to play for entertainment of guests and all others who wish to appear and makes no charges for attending such dances is not required to have license under county ordinance which defines "public dance" as one where dancing is "principal entertainment" and some charge is made or ticket received for attendance or in payment for food or other service.

July 7, 1938.

EARL F. KILEEN,

District Attorney,

Wautoma, Wisconsin.

The county board of your county has adopted an ordinance regulating dance halls and public dances, of which section 2 provides:

"The term 'public dance' as used in this ordinance shall mean: any entertainment at which dancing is the principal entertainment and is generally participated in by those present, providing fifty or more people are present and some fee, ticket, or sum of money or anything of value is charged, demanded, or accepted or received from those present, or some of them, other than the owner of the premises as payment for the privilege of being present, or as payment for the privilege of dancing, or for food, music, or any other service or entertainment furnished to those present."

You state that A owns a small lake resort hotel consisting of a tavern, rooms, cabins, boats, etc. The business of this resort during the summer months is that of the usual small

summer resort but during the balance of the year it is purely a tavern business. Various forms of attractions are offered that might secure increased patronage. No matter what the nature of the entertainment, no charge has ever been made, either directly or indirectly for the privilege of being present and enjoying the same. An orthophonic musical instrument is furnished, which may be used by the patrons as they desire. Two or three nights a week the owner provides a small orchestra, which plays for the entertainment of those present. While the orchestra is playing some of those present dance but the orchestra plays whether anyone dances or not. No portion of the premises is specifically devoted to dancing. The patrons dance where they please but generally in the portion of the dining room not occupied by tables and chairs. At times very few people are present, At other times more than fifty people are present and a few dance. At other times more than fifty people are present and more than fifty people dance. During the course of an evening the number of persons present varies greatly. The area of the dining room is about 1,440 square feet. When the tables and chairs are pushed to one end of the room there remains an area of about 1,000 square feet, of which a platform and other objects take up about 200 square feet, thus leaving an area of approximately 700 to 800 square feet for dancing space.

You state that A has been conducting such dances without a dance hall license as required by the county ordinance, claiming that he is not operating a public dance hall.

You ask whether A is required to secure a dance hall license as required by the county ordinance or under sec. 351.57, subsec. (1), Stats.

Sec. 351.57 (1) provides as follows :

“No person shall conduct any dance to which the public is admitted, or conduct, establish or manage any public dance hall or pavilion, amusement park, carnival, street fair, bathing beach or other like place of amusement in any county in which the board of supervisors has adopted an ordinance or resolution or enacted by-laws in accordance with the provisions of subsection (9) of section 59.08 without first securing a license therefor from the county board. No person required to have such a license shall conduct a dance to

which the public is admitted except in the presence and under the supervision of a county dance supervisor.”

Subsec. (3) of the same section provides a penalty for violation of the above-quoted provisions.

Among the special powers conferred upon the several county boards by the provisions of sec. 59.08, Stats., is the power to:

“(9) Enact ordinances, by-laws, or rules and regulations, providing for the regulation, control, prohibition, and licensing of dance halls and pavilions, amusement parks, carnivals, street fairs, bathing beaches and other like places of amusement. * * *”

Under the power thus granted by sec. 59.08 (9) a county board may or may not, as it sees fit, take the necessary action to regulate and control dance halls and public dances. When a properly enacted ordinance, by-law, rule or regulation to that effect is in full force in a county, then the provisions of sec. 351.57 (1), Stats., prohibit the conducting of a public dance or a public dance hall in that county, except in compliance with such county enactment. It is only the conducting of a public dance or a public dance hall in a county which has adopted some measure pursuant to sec. 59.08 (9), Stats., without complying with such county regulation that is prohibited and made a violation by sec. 351.57 (1), Stats.

In the case of *Stetzer v. Chippewa Co.*, (1937) 273 N. W. 525, our court held that any place to which “the public is admitted and does dance” (p. 529) is a public dance hall subject to regulation by a county under sec. 59.08 (9), Stats. Your county ordinance, however, does not purport to go that far, but merely regulates such public dances as come within the terms of the ordinance. The designation in section 2 as to what is meant by “public dance” as used in the ordinance expressly limits the scope of the ordinance to those public dances which come within such designation.

The test used in some jurisdictions to determine what is a public dance is whether the dance or dancing is incidental to other legitimate business or primary and the other busi-

ness incidental to the dance or dancing. Such test was the basis of the opinion in XXIII Op. Atty. Gen. 478, but the subsequent decision in *Stetzer v. Chippewa County, supra*, shows that such test is not the one to be used in determining what is a public dance within the meaning of sec. 59.08 (9).

The ordinance of your county, however, practically adopts this test by limiting the applicability of the ordinance to only those public dances where dancing is the principal entertainment. It is even more restrictive than that. The ordinance by its express language does not apply to a dance unless certain other factors exist. Fifty or more persons must be present and the dancing must be generally participated in by those present. Also some fee, ticket, money or thing of value must be charged, demanded, accepted or received from the patrons either as payment for the privilege of being present or dancing, or for food, music or entertainment furnished at the dance. Unless the facts are such as to met these prerequisites, a dance is not subject to the provisions of this particular ordinance, even though the dance is a public dance which might be regulated under sec. 59.08 (9), Stats.

While the question may not be free from doubt, it appears to us that upon the facts presented the dancing at A's place of business is not the "principal entertainment." The whole resort is the entertainment. That is its fundamental purpose and function. The dancing is incidental to the resort and tavern business in which A is engaged. The facilities for dancing are merely legitimate means of expanding that business. It would be difficult to conclude that the dancing is primary and the other legitimate business incidental thereto. In addition, it does not appear that any charge is made or ticket received for attending the dances or for food, music or other service furnished in the dining room at the time of the dances.

We therefore conclude that it is not necessary for A to procure a license under the county ordinance in question.

NSB
JEM
HHP

Marriage — Under sec. 245.15, Stats., application for marriage license must be sworn to before county clerk in this state.

July 7, 1938.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You call our attention to sec. 245.15, Stats., which provides, among other things, that each party to an application for a marriage license shall swear to the application before the clerk who is to issue the license or to the clerk of the county where the parties reside. We are asked whether this means, in addition to the clerk in the state of Wisconsin, a clerk in some other state.

Sec. 245.15 was amended by chs. 35 and 260, Laws 1937. In its present form it does not contain that part of sec. 245.15, Stats. 1935, which read:

“* * * Or, the parties intending marriage may, either separately or together, appear before any officer authorized by law to administer oaths in the county (whether in this or any other state) wherein either of the contracting parties resides, or in the county where the marriage is to be performed, who shall require of them a statement under oath as above provided.”

It is a well settled rule of statutory construction that when a statute is amended, any material not included in the amended law is repealed. *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Wis. 127.

Thus, that part of the law permitting either of the parties to appear before an officer authorized to administer oaths in another state has been repealed. In view of such amendment it is our opinion that the present statute applies only to county clerks in this state.

WHR

Counties — Dance Halls — Tavern furnishing orchestra music and permitting thirty to forty couples to dance therein in space provided for that purpose is conducting public dance within meaning of secs. 351.57 and 59.08, subsec. (9), Stats.

July 8, 1938.

JAMES P. CULLEN,

District Attorney,

Prairie du Chien, Wisconsin.

You state that a tavern is operating in your county, adjoining which is a large room, approximately twenty-eight feet by thirty feet, where an orchestra plays three nights a week. In addition to dancing, drinks and lunches are served and there are as many as thirty-five to forty couples dancing at one time. You inquire whether this constitutes a public dance under the statutes.

Sec. 351.57, subsec. (1), Stats., reads as follows:

“No person shall conduct any dance to which the public is admitted, or conduct, establish or manage any public dance hall or pavilion, amusement park, carnival, street fair, bathing beach or other like place of amusement in any county in which the board of supervisors has adopted an ordinance or resolution or enacted by-laws in accordance with the provisions of subsection (9) of section 59.08 without first securing a license therefor from the county board.
* * *”

Sec. 59.08, subsec. (9), Stats., grants power to a county board to:

“Enact ordinances, by-laws, or rules and regulations, providing for the regulation, control, prohibition, and licensing of dance halls and pavilions, amusement parks, carnivals, street fairs, bathing beaches and other like places of amusement. * * *”

These statutes do not specifically set out what is a “public dance” or a “public dance hall.” In XII Op. Atty. Gen. 377 it was said, p. 378:

“* * * ‘public dances’ covered by ch. 222, laws of 1923, are dances where the public generally is admitted without discrimination on payment of a fixed charge or admission fee, whether such dance is operated by or in charge of an organization or a private individual. * * *”

In XIV Op. Atty. Gen. 500 it was held that a hotel that furnishes music and an opportunity to the guests of the hotel for dancing during dinner time in the evening was conducting a public dance, saying:

“Is the public admitted to this dance? * * * A hotel is open to the public. If guests are not selected but are comprised of anyone who desires to be present, and if it becomes known that these dances are given in connection with the dinners it is manifest that the public, by patronizing the hotel and taking their dinners there, would be permitted to dance.

“In other words, practically everyone that pays the price of the dinner could attend the dance. This seems to me is a public dance and in violation of the above statute, unless a license is obtained.”

The test used in some jurisdictions to determine what is a “public dance” is whether the dance or dancing is the primary business and other business conducted is incidental thereto or the dance or dancing is incidental to the other legitimate business. Such test was the basis of the opinion in XXIII Op. Atty. Gen. 478, but the subsequent decision of our court in *Stetzer v. Chippewa Co.*, (1937) 273 N. W. 525, shows that this is not the test to be used in determining what is a public dance within the meaning of sec. 59.08 (9), Stats. The court there held that any place to which “the public is admitted and does dance” is a public dance hall subject to regulation by a county under sec. 59.08 (9). The court there said, pp. 529-530:

“* * * The public is admitted and does dance. An orchestra is in daily attendance to furnish the music. * * * The fact that no charge is made for dancing does not determine the public nature of the dance, nor does the fact that the premises are on some occasions used for other purposes have any bearing on the public dance features of the appellant’s business. That is the only part of the busi-

ness the ordinance in question relates to and regulates. A dance hall is not necessarily a place used exclusively for dancing. Nor is a tavern or restaurant a place used exclusively for the sale of liquor and meals. Any part of the appellant's premises in which public dances are being held is a dance hall within the intent and language of the ordinance. * * *

The circumstances outlined by you are very similar to those in the *Stetzer* case. A substantial number of people are offered an opportunity of dancing in a room specifically devoted to that purpose, although not exclusively used therefor. The guests are not selected and anyone who comes into the tavern is offered the privilege of dancing. The dance is thus open to the public at large and any dancing in which the public generally may participate is certainly a public dance and the place where such dance is held is a public dance hall.

It is therefore our conclusion that the carrying on of business in the manner set out in your statement of facts constitutes the conducting of a public dance within the meaning of our statutes.

AGH

HHP

Municipal Corporations — Beer Licenses — Licenses for sale of malt beverages cannot be issued for period of less than year under sec. 66.05, subsec. (10), par. (d), subd. 2, Stats., but may be granted at any time during calendar year (January 1 to December 31, inclusive) for period of six months during same calendar year under sec. 66.05 (10) (g) 2. If issued under latter section said licenses cannot be renewed during calendar year, although holder of six months' license is not precluded from thereafter securing regular annual license upon payment of full year's fee.

July 8, 1938.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

In your recent letter you submit the following:

"A township, at the annual spring election a year ago, adopted a referendum against the issuing of malt beverage and intoxicating liquor licenses. The taverns ran from April 19th, 1937 to July 1st, 1937 under the old licenses; no new licenses were issued. At the annual spring election of 1938, the township again voted on malt beverage and intoxicating liquor referendums denying the granting of intoxicating liquor and approving the granting of malt beverage licenses."

You state that the question involved is: "May the town board grant licenses for the sale of malt beverages any time between the election and July 1, 1938?"

The local option statute for the granting of licenses to sell intoxicating liquor is sec. 176.38, Stats. The statute providing for a referendum on the question of issuing licenses for the sale of malt beverage is sec. 66.05, subsec. (10), par. (d). Subd. 2 in said par. (d) reads thus:

"2. The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided. Said retailers' licenses shall be of two classes, to be designated as Classes 'A' and 'B.'"

Subd. 3 provides in part as follows:

“The electors of any city, village or town may, by ballot, at the spring election, determine that no license shall be issued. At such election a separate ballot box shall be provided for such ballots. * * *

“Such ballots shall be counted and return made as other ballots and the clerk shall spread upon the minutes of the municipality such returns. The result of such election shall determine the policy of the municipality until changed by ballot.”

Subd. 4 contains the following:

“All licenses shall be granted only upon written application and shall be issued for a period of one year to expire on the thirtieth day of June of each calendar year; provided, that licenses may be granted which shall expire on the thirtieth day of June, 1933, upon payment of one-fourth of the annual license fee. * * *”

There is an express provision in the above statute that the license issued must be for one full year. That can not be done now under your facts submitted, as the license issued must expire on the 30th day of June.

However, sec. 66.05 (10) (g) 2, reads in part as follows:

“The amount of the license fee shall be determined by the city, village or town in which said licensed premises are located, but said license fee shall not exceed one hundred dollars per year, but licenses may be issued at any time for a period of six months in any calendar year for which three-fourths of the license fee shall be paid. Such six months’ licenses shall not be renewable during the calendar year in which issued. * * *”

“Calendar year” as used in the above section refers to the period from January 1, to December 31, inclusive, and does not mean the license year July 1 to June 30. XXIII Op. Atty. Gen. 457. Under the above section, the municipality may issue licenses *at any time* for a period of six months in any calendar year. This section therefore authorizes a six months’ license during any calendar year, but if such a

license is issued, it may not be renewed at any time during the same calendar year.

While it is true that a six months' license is not renewable, there would appear to be no good reason why the holder of such license might not apply for and receive an annual license upon the expiration of the six months' license, although such annual license would expire on June 30th following and would necessitate payment of a full year's license fee for the privilege of doing business for just a few months.

For example, if a town voted at the April, 1937, election for the granting of malt beverage licenses and X secured a six months' license on May 1, he might obtain an annual license on November 1 by paying a full year's license fee.

It is true that sec. 66.05, (10) (d) 4, Stats., provides, among other things, that all licenses shall be issued for a period of one year. However, this would not preclude the issuance of a license on November 1, 1937, for the license year ending June 30, 1938, even though such license year would be partially gone at the time of the issuance of the license. There are numerous illustrations that might be mentioned wherein annual licenses may be secured after the commencement of the license year. In some instances the statutes provide for part-year fees and in other cases they do not. If no provision is made for part-year fees, the full year's fee must be paid.

NSB
JEM
WHR

Public Health — Slaughterhouses — Words and Phrases — Central — Co-operative — "Central" and "co-operative" as used in sec. 146.11, subsec. (1), Stats., in reference to slaughterhouses, are construed.

July 13, 1938.

BOARD OF HEALTH.

You have requested an interpretation of sec. 146.11, subsec. (1), Stats. This statute, which provides that no per-

son "shall erect or maintain any slaughterhouse, or conduct the business of slaughtering, upon the bank of a water-course; nor, unless under federal inspection, within one-eighth mile of a public highway, dwelling, or business building" contains the following exception:

"* * * 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. * * *"

Particularly your question is as to the meaning of the words "central" and "co-operative" as used in the above exclusion provision of the statute. The two words are connected by the conjunctive "or" and therefore must be construed as not referring to the same thing. Each must mean something distinct from the other. A thorough examination of the statutes pertaining to slaughterhouses does not disclose anything to indicate that these words should be given other than their commonly understood meaning.

Thus a "central" slaughterhouse as therein used means one where slaughtering in the city is centralized and concentrated, one available to take care of the needs of all butchers and others in the city desiring to make use thereof. It might be operated as a municipal enterprise or as a private business, for profit or otherwise.

The word "co-operative" in its general sense is not restricted to its technical usage in ch. 185, Stats., but designates the joint endeavor of a number of persons for their common benefit. An illustration would be where several butchers jointly own and operate a slaughterhouse for their common use instead of each having a separate one. A slaughterhouse operated on a co-operative basis would not necessarily be available to others than those interested in it. As the legislature felt that such operations should be exempted from the restrictions of the statute and yet not be within the classification of "central," it was necessary to specifically mention them in the exclusion provisions of the statute. It is possible that there might be more than one of these in a city which would qualify under the exclusion portion of the statute as now worded.

HHP

Public Health — Communicable Diseases — Vaccination — School Districts — Regulation of city school board requiring vaccination of all teachers and other employees is invalid as unreasonable exercise of rule-making power of school board.

July 13, 1938

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

You request an opinion as to the legality of a resolution of a city board of education providing for compulsory vaccination of all teachers and other employees. The resolution makes employment contingent upon the furnishing of a certificate by a licensed physician that he has made a physical examination and finds the employee protected against smallpox, typhoid fever and diphtheria by reason of having had each disease, or else by immunization. Certain persons who do not believe in vaccination protest that the resolution is invalid.

Sec. 40.53, subsec. (16), Stats., gives to a city board of education power to adopt rules and regulations "for the government of the schools, the faculty and other employees of the board." The power thus granted is sufficiently broad to include the making of regulations to safeguard the health of the pupils and teachers which are a reasonable exercise of the power granted. The rule or regulation cannot be arbitrary or unreasonable and must have some reasonable relation to the problem sought to be remedied. *Morrow v. Wood*, 35 Wis. 59, *State ex rel. Beattie v. Board of Education*, 169 Wis. 231.

In *State ex rel. Adams v. Burdge*, (1897) 95 Wis. 390, 70 N. W. 347, it was held that in the absence of a statute authorizing it a rule of the state board of health making vaccination compulsory for attendance at public schools was unreasonable and void. Irrespective of whether the legislature has power to make vaccination of school children compulsory, our statutes do not establish such as the policy of the state. Sec. 143.13, Stats., dealing with vaccination of pupils during times of prevalence of communicable diseases,

does not compel immunization but merely excludes pupils who have not been vaccinated from attendance for a period of time. This is an implied recognition that pupils may refuse to be vaccinated.

In the absence of a statute establishing compulsory vaccination of all pupils, it is our opinion that the regulation in question is invalid as being unreasonable because not necessary for the preservation of the public health. The means adopted is not reasonably directed toward the accomplishment of the purpose. Even though the teachers and employees had all been vaccinated, the presence in the schools of pupils who had not been, and are not required to be vaccinated, would practically destroy the benefit gained in requiring vaccination of employees. In fact the danger of contagion is not that the teachers will spread disease, for they are usually well informed in such matters. The real threat to public health is the possibility that some pupil will spread a contagious disease.

Furthermore, vaccination or immunization involve the introduction of something into the body to produce a certain desired effect and, accordingly, is a form of medical treatment. Thus to compel immunization is to require submission to medical treatment. However, our statutes expressly recognize that a person may not be compelled to submit to medical treatment if he objects thereto. See secs. 147.19 (2), 143.07 (13), 143.14 (4) and 102.42 (1), Stats. The regulation under consideration would thus be contrary to this established policy of the state and therefore unreasonable for that additional reason.

However, this does not mean that the board might not require its teachers and other employees to present satisfactory evidence that they are not presently afflicted with a contagious disease. No medical treatment would be required thereby. It would merely require an examination to determine the absence of existing contagious conditions. The elimination of actual existing contagious conditions would seem to be reasonable.

HHP

Public Health— Upholstering — Under sec. 146.04, subsec. (2), Stats., special tag, specifying filling material, is required on each movable piece of upholstery as well as davenport or chair.

July 13, 1938.

INDUSTRIAL COMMISSION.

In your communication of June 6 you refer to sec. 146.04, subsec. (2), Stats., and you submit the following:

The question has arisen as to whether the law requires a special tag on each removable piece of upholstery and, therefore, requiring each cushion as well as the davenport or chair to have a tag which specifies the filling material used.

Said sec. 146.04 (2) reads thus:

“Any person upholstering or reupholstering any article, or who manufactures for sale, offers for sale, sells or delivers, or who has in his possession with intent to sell or deliver anything containing upholstery, without a brand or label as herein provided or who removes, conceals or defaces the brand or label, shall be punished as provided in subsection (1). The brand or label shall contain, in plain print in English, a statement of the kind of materials used in the filling and in the covering, according to the grades of filling and covering used by the trade, whether they are in whole or in part new or secondhand, and the qualities, and whether, if secondhand, they have been thoroughly cleaned and disinfected. Such brand or label shall be a paper or cloth tag securely attached.”

It is apparent that this statute does not specifically cover the point which you raise. Still the statute as it is worded is not ambiguous. Rules for judicial construction may be resorted to when the statute which is clear on its face presents no ambiguity but when applied to concrete facts ambiguities arise. We may then look to every part of the law, to the intent apparent from the whole, to the subject matter, to the effect and consequence, to the reason and spirit in order to ascertain the ruling idea present in the legislative mind at the time of its enactment. *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 659.

The legislative intent evidently was to inform purchasers of an upholstered article whether it is free from disease germs. It would be an easy matter to change cushions on an upholstered chair and substitute therefore others that have not been renovated although secondhand. The law would thus be circumvented and made ineffective. We are informed that it would be practical to put a tag on each removable upholstered article.

Your question, therefore, must be answered in the affirmative.

JEM

Taxation — Assessment — Where section of land, according to government survey, contains 640 acres "more or less" and on subsequent conveyances by metes and bounds it develops that area actually comprises 647.17 acres, present owners may be taxed on basis of actual acreage and as assessor is not bound by government survey.

July 14, 1938.

TAX COMMISSION.

You state that a certain section of land was designated in the government survey as 640 acres "more or less" and was so conveyed from time to time. About 1900 the owner began to dispose of this land in parcels, and, because of the contours of a limestone ridge, such parcels were described by metes and bounds. In all, 647.17 acres were thus conveyed. Investigation discloses that the parcels are correctly described in the conveyances by metes and bounds and that the area described in each conveyance is correct.

We are asked whether the present owners may be taxed for more acres than are shown in the original government description.

Sec. 70.10, Stats., provides:

"The assessor of each assessment district shall begin as soon as practicable after the April election, in assessment districts where an assessor is elected at such election, and

in other assessment districts as soon as practicable after the first day of January in each year, and proceed to assess *all the real* and personal property liable to taxation in such district. Such assessment shall be completed, if possible, before the day set for the meeting of the board of review in each district but in any event, except in cities of the first class, shall be finally completed before the first Monday in August. *All real* and personal property shall be assessed as of the first day of May in such year except as provided in section 70.13. *All real* property conveyed to any county by tax deed before the first Monday in August of any year shall not be included in such assessment for such year."

Sec. 70.12, Stats., provides:

"*All real property* not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies."

It is apparent from reading the foregoing statutes that all real property not expressly exempt from taxation is to be assessed at the times and places therein provided.

An examination of sec. 70.11, Stats., relating to lands exempt from taxation, discloses neither an expressed nor an implied exemption of lands incorrectly omitted from the government survey, and in passing it might be well to observe that one of the primary rules of taxation is that acts exempting property from taxation are to be strictly construed. *Weston and another v. The Supervisors of Shawano Co. and others*, 44 Wis. 242; *West Wisconsin R. R. Co. v. Supervisors*, 93 U. S. (3 Otto) 595.

The words "all real property" used in secs. 70.10 and 70.12, Stats., mean exactly what they say. The tax assessor is not required to go beyond the descriptions in the deeds of the present owners, which descriptions are conceded to correctly correspond with the physical facts. Nothing in the statutes requires him to check such descriptions against the original government survey; neither is he obliged to assure himself that the purported title of the taxpayer is free from technical flaws. Even an adverse possessor must pay taxes, as he is regarded as the owner for all purposes of taxation. *Link v. Doerfer*, 42 Wis. 391. The court in this case said, at p. 394:

“* * * For he could not be tolerated to claim under one statute that he is owner, and under another statute that he is not. For the purposes of taxation, such a tenant of land might be taken at his word that he is owner.”

Lastly, it may well be that the description of “640 acres more or less” in the government survey is sufficiently correct for present purposes, although we do not wish to be understood as basing our conclusion on this proposition.

The words “more or less” in real estate descriptions have been held to cover a reasonable excess or deficiency in the absence of fraud or gross mistake. *Wisconsin Realty Company v. Lull*, 177 Wis. 53; *Frey v. Etzel*, 160 Wis. 311, 314. In the *Frey* case the description contained 104 acres “more or less” excepting 28½ acres “more or less” sold to a railroad, and the court held that a shortage of about three acres in the property was covered by the words “more or less.” If the words “more or less” cover a variance of about three acres on a farm supposed to contain 75½ acres, it might follow that such words would likewise cover a variance of 7.17 acres on a 640 acre description, although, as above indicated, we would still consider the excess taxable regardless of the sufficiency or insufficiency of the original description in the government survey.

WHR

Taxation — Motor Vehicle Fuel Tax — Wisconsin motor fuel tax imposed under ch. 78, Stats., is levied upon sales of gasoline and other motor vehicle fuels within meaning of Hayden-Cartwright act, permitting state to collect such taxes on motor fuels sold for private use at post exchanges on military reservations. It is only where state has ceded land and exclusive jurisdiction thereof to federal government or where federal government has otherwise acquired exclusive jurisdiction that enabling legislation such as Hayden-Cartwright act becomes necessary in order for state to exercise its jurisdiction and to tax motor fuels sold on reservations for private use.

July 14, 1938.

TAX COMMISSION.

Motor Fuel Tax Department.

You have requested an opinion on the question of whether the Wisconsin motor fuel tax imposed by ch. 78 of the statutes is a privilege tax or a sales tax.

This question arises in connection with the application of the Hayden-Cartwright act, 49 Stats. at Large 1521, 23 U. S. C. A. 55a, to sales of gasoline at post exchanges on United States military reservations where such sales are not for the exclusive use of the United States.

Section 10a of the Hayden-Cartwright act (23 U. S. C. A., 55a) reads as follows:

“(a) All taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.

“(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State,

Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month.”

It is the contention of the judge advocate of the sixth corps area that if the tax imposed is a sales tax the provisions of the Hayden-Cartwright act apply and the state tax must be paid but that if the tax imposed is a privilege tax the act does not apply and the state may not impose the tax within the confines of a military reservation under the jurisdiction of the United States.

The judge advocate bases this contention upon two opinions of the attorney general of the United States, found in volume 38 opinions of the attorney general at pp. 519 and 522. We have carefully read both of these opinions and nowhere do we find any attempt therein to distinguish between a sales tax and a privilege tax. As a matter of fact, no mention whatsoever is made of a privilege tax in these opinions.

There is no such thing as a hard and fast distinction between a sale stax and a privilege tax. A tax may be both a privilege tax and a sales tax, and, as will be hereinafter pointed out, the Wisconsin motor fuel tax is both a sales tax and a privilege tax. Most, if not all, sales taxes tax some privilege.

Fundamentally, there are only three kinds of taxes: property taxes, poll taxes, and excise taxes. *State ex rel. Froedtert G & M. Co. v. Tax Comm.*, (1936) 221 Wis. 225, 232, 265 N. W. 672; 4 Cooley on Taxation, sec. 1670, p. 3376.

Excise taxes and privilege taxes are synonymous terms. *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, *supra*.

There are a great number of privilege taxes, depending upon the particular privilege that is taxed. Thus an occupational tax is a tax on the privilege of engaging in a certain occupation. There is much controversy as to the exact nature of the privilege taxed by a “sales tax.” In *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, the court spoke of a “sales tax” in the following language, p. 232:

“* * * A sales tax in one view is but a tax on the right to buy — to receive — the thing sold, but it is better

viewed as a tax on the right to consummate the transaction of sale."

Gasoline taxes, being generally neither property nor poll taxes, come under the only remaining category, that of excise taxes or privilege taxes. The various state gasoline taxes differ from each other in that different branches are taxed. Some gasoline taxes are taxes on the privilege of engaging in the business of selling gasoline. See *People v. City and County of Denver*, (1928) (Colo.) 272 Pac. 629.

Others are taxes on the privilege of consuming gasoline. *Shanks, Auditor, v. Kentucky Independent Oil Company*, (1928) (Ky.) 8 S. W. (2d) 383. Still others are taxes on the privilege of using the roads, the amount of the use being determined by the amount of gas purchased. *State v. City of Sioux Falls*, (1932) (S. Dak.) 244 N. W. 365.

The Wisconsin gasoline tax probably comes within the third classification, i. e., a tax on the privilege of using the roads, although the tax is measured by "sales" within the meaning of the Hayden-Cartwright act.

By sec. 78.01, Stats. 1931, the gasoline tax was expressly designated as a tax on owners of automobiles for the privilege of using the public roads. The gasoline tax law was revised in 1933 by ch. 312, sec. 2, and the tax is designated now as an "excise or license" tax.

An excise tax includes sales taxes. *Patton v. Brady*, 184 U. S. 608; see also Words & Phrases, Excise, and cases cited.

By sec. 78.02 and sec. 78.14, Stats. 1937, refunds of taxes are granted to motor fuel purchasers who use such fuel for non-highway purposes. These refund provisions would seem to indicate that the Wisconsin gasoline tax is still a tax on the privilege of using the highways of the state.

The Hayden-Cartwright act speaks of taxes levied upon "sales of gasoline and other motor vehicle fuels."

Whether the Wisconsin motor fuel tax be a tax on the privilege of using the roads or a tax on the privilege of purchasing or consummating a sale, we believe it is, nevertheless, a tax on the "sale of gasoline and other motor vehicle fuels," since it is exacted at the time of sale and, in common understanding, constitutes a tax upon "sales of gasoline."

Prior to the Hayden-Cartwright act purchasers of gasoline for non-governmental purposes on government reservations enjoyed all the privileges of a state system of highways free of tax. Those who were unable to buy gasoline on governmental reservations had to pay a tax for the privilege of using the highways.

The act was designed to eliminate this manifest discrimination and there is no sound reason why it should be construed so as to permit gas taxes where they are imposed on the privilege of consummating a sale but as not allowing such taxes where they are imposed on the privilege of using the highways and, as stated before, we do not understand that the attorney general of the United States has attempted to draw any such distinction.

The following illustrates how highly technical the distinction attempted to be drawn between so-called "sales taxes" and "privilege taxes" really is.

If the provisions for refund of gas taxes for non-highway uses were eliminated from the Wisconsin law, the tax would so clearly be a "sales tax" within the provisions of the Hayden-Cartwright act as to preclude any argument.

If, by including these refund features, it is contended that the nature of the tax is entirely changed, then the tax does not come within the provisions of the act. What conceivable reason would congress have in requiring the elimination of the refund provisions as the price for the right to tax gasoline sold on government reservations? The question suggests its own answer and clearly demonstrates that it is immaterial whether the tax is imposed upon the privilege of engaging in the business of selling gasoline or upon the privilege of consuming it or upon the privilege of using the highways. If the tax is "upon sales of gasoline and other motor vehicle fuels" it meets the test of the Hayden-Cartwright act, regardless of the purpose for which the tax upon sales is imposed.

It must therefore be concluded that under this act Wisconsin may tax the sale of gasoline on governmental reservations when such gasoline is not for the exclusive use of the federal government, since our motor fuel tax is for all practical intents and purposes levied "upon sales of gaso-

line and other motor vehicle fuels" as specified in the Hayden-Cartwright act.

In other words, in answering your question we construe the Wisconsin motor fuel tax as a "sales" tax, even though the purpose of such a sales tax is to charge for the privilege of using the highways.

It should also be noted in closing that, even in the absence of federal legislation, the state retains full jurisdiction of military camps, such as, for instance, Camp Williams, and would have the right to tax gasoline sold at post exchanges for other than governmental uses. See sec. 21.04, Stats. It is only where the state has ceded the land and exclusive jurisdiction thereof to the federal government or where the federal government has otherwise acquired exclusive jurisdiction that enabling legislation such as the Hayden-Cartwright act becomes necessary in order for the state to exercise its jurisdiction and to tax motor fuels sold on the reservations for private use.

WHR

Taxation — Occupation Tax — Under sec. 70.42, subsec. (1), Stats., coal stored on dock is exempt from personal property tax only while it is still in transit.

July 14, 1938.

TAX COMMISSION.

Property Tax Division.

You have presented three problems as to the taxability of coal which is received at a coal dock and then stored for use in making briquets. The first and third are similar and will be considered together.

In the first problem A owns a coal dock and does a general business of handling coal. All the coal in question passes over the dock and an occupational tax is paid therefor. On the same property A operates a briquet manufac-

turing plant. Your inquiry is whether coal stored on the dock to be used in the briquet plant can be taxed as "manufacturers' stock" under sec. 70.30, subsec. (7), Stats.

The facts are the same in the third situation except that A rents the portion of the dock property to E who operates a briquet plant and stores coal for its use thereon.

The first consideration is the effect of sec. 70.42 (1), Stats., which provides:

"Every person, copartnership, association, company or corporation, operating a coal dock in this state, other than a dock used solely in connection with an industry and handling no coal except that consumed by such industry, shall on or before December fifteenth of each year pay an annual occupation tax of a sum equal to one and one-half cents per ton upon all bituminous coal, coke and briquettes, and two cents per ton upon all anthracite coal, coke and briquettes handled by or over such coal dock, during the preceding year ending April thirtieth; and such coal shall be exempt from all taxation, either state or municipal."

Your inquiries will thus be fully answered by a determination of whether the last clause of sec. 70.42 (1) renders the coal in question nonassessable as personal property under sec. 70.30, Stats.

The tax provided for in sec. 70.42 (1) is an occupation tax, a tax on the business of operating a coal dock. As was pointed out in *State ex rel. Bernhard Stern & Sons v. Bodden*, (1917) 165 Wis. 75, 160 N. W. 1077, a case construing a statute in most respects identical with sec. 70.42 (1), Stats., this occupation tax is not a property tax on a commodity but rather a tax on the privilege of engaging in the business of handling the commodity, the tax being measured by the amount handled. A personal property tax in nature is very different from an occupation tax. It is well established that the imposition of a property tax and an occupation tax do not constitute double taxation. Cooley on Taxation, Vol. 1, p. 488 (sec. 228).

This case of *State ex rel. Bernhard Stern & Sons v. Bodden*, *supra*, construed a similar exemption clause in sec. 70.41 (1), Stats., which provides for an occupation tax on the operation of grain elevators and warehouses. The court

said that this clause was designed to grant an exemption while the commodity was in the process of handling and was not intended to exempt the property from taxation when it was in the possession of others during the year in which it was handled. On page 80 the court said:

“* * * It is therefore manifest that the legislature did not intend such grain should be exempt from taxation in the possession of others for the year it was handled in the elevator under the foregoing exemptive clause. It appears that the legislature intended to do the practical and possible thing, namely, to exempt the grain actually in such elevators and warehouses on May 1st of each year. * * *”

The force of this decision would seem to be destroyed by the later case of *State ex rel. Consolidation Coal Co. v. Arnold*, (1925) 186 Wis. 609, 203 N. W. 373. In that case there was a contract whereby the dock company stored on its docks coal belonging to a coal company. The dock company agreed to deliver the coal by wagons, trucks or cars to local consumers or for shipment to outside places as the coal company secured buyers for the coal. The city of Milwaukee contended that the exemption clause in sec. 70.42 (1) extended only to coal owned by the dock company on May 1 and that the city had a right to assess coal stored on the dock which was owned by third persons. The supreme court, however, held that the coal was exempt from a personal property tax while it was stored on the docks.

However, the case is distinguishable and the result justifiable. In *State ex rel. Bernhard Stern & Sons v. Bodden, supra*, it was pointed out that grain as a commodity in transit constitutes an entirely different class of property for taxation purposes than does grain in a private warehouse. At page 83 the court said:

“* * * The grain handled in public elevators and warehouses is a commodity in transit from place to place in the channels of commerce, and much of it is in such transit from state to state. In the light of these conditions, such grain constitutes a wholly different class of property for the purposes of local taxation than does grain stored in private warehouses by the producer, and affords ample distinction between them for classification for the purposes of taxation. * * *”

Bearing in mind the distinction referred to, it is clear that the exemption clause in sec. 70.42 (1) Stats., applies when the coal is a commodity in transit and does not apply when the coal has reached its final destination. Thus the coal involved in the case of *State ex rel. Consolidation Coal Co. v. Arnold, supra*, was exempt from taxation because temporarily stored on the docks awaiting transportation to other points.

Applying the above discussion to the facts at hand, it is apparent that when the coal reaches the briquet plant it ceases to be a commodity in transit to which the exemption applies, and becomes subject to a property tax. This coal is subject to a property tax whether A, the owner of the dock, or E as lessee of A, runs the briquet manufacturing plant. For purposes of this opinion, we have assumed that A does not use his dock exclusively for the purpose of supplying coal to his briquet plant. If the dock was used solely as an adjunct to the briquet plant, A would not be obliged to pay an occupation tax for handling coal, but the coal would be subject to a property tax.

In your second problem, A owns a coal dock and does a general business of handling coal. C owns a briquet manufacturing plant nearby. C buys coal from eastern companies and has it unloaded on A's dock, who then hauls the coal by truck to the plant of C. At times C purchases coal from A. You inquire whether C must pay a personal property tax on his stock pile of coal on hand May 1.

In line with our answer to your first question, it must be held that C must pay such tax.

HHP

Marriage — One who assumes position of minister of Gospel but who has not been ordained or appointed by denominational or non-denominational group is not authorized to solemnize marriages.

July 15, 1938.

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

In your communication of June 21 you submit the following:

“We have a group of people in this county who are non-denominational and who have no minister, but who meet for religious purposes and call themselves the ‘Bible Truth Assembly.’ There has been one man who assumed from the group the position of ‘minister of gospel,’ but he has not been ordained nor appointed by the group.”

You ask to be advised whether this person who assumed this position of minister of the Gospel can solemnize marriages.

The answer to your question depends upon the provisions of our statutes. Sec. 245.05 provides:

“Marriages may be solemnized by any justice of the peace, police justice, municipal judge or court commissioner in the county in which he is elected or appointed, and throughout the state by any judge of a court of record, and by any ordained minister or priest in regular communion with any religious society and who continues to be such minister or priest.”

Sec. 245.06 reads thus:

“In addition to the persons named in section 245.05, it shall be lawful for any licentiate of a denominational body or an appointee of any bishop, while serving as the regular minister or priest of any church of the denomination to which he belongs, to solemnize marriage; provided, he be not restrained from so doing by the discipline of his denomination.”

The two sections following are also material. Sec. 245.07 provides:

“Before any person named in section 245.06 shall be authorized to solemnize a marriage, he shall file credentials of license or appointment with the clerk of circuit court of the county in which is located the church under his ministry, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be indorsed upon each certificate of marriage granted by any such licentiate or appointee and recorded with the same.”

Sec. 245.08 reads:

“Ministers or priests, before they shall be authorized to solemnize a marriage, shall file a copy of their credentials of ordination or other proof of such official character with the clerk of the circuit court of some county in this state, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be indorsed upon each certificate of marriage granted by any minister or priest and recorded with the same.”

The group of which you speak under your statement of facts is non-denominational. The person who assumes the position of minister of the Gospel has not been ordained or appointed by the group. It is therefore clear that your question must be answered in the negative. The person in question is not authorized to solemnize marriages in this state.

While we do not know for what purpose you make the inquiry, still, it may be well to direct your attention to sec. 245.33, which provides:

“No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.”

JEM

Memorials — Military Service — Under sec. 45.271, Stats., board of trustees of Camp American Legion may admit as paying patients sick and disabled World War veterans from other states.

July 15, 1938.

RALPH M. IMMELL,
Adjutant General.

You ask whether any statute would forbid the board of trustees of Camp American Legion, formerly Camp Minnewawa, from admitting a limited number of World War veterans from Illinois to the camp under the same rules and regulations as apply to veterans from Wisconsin, save that of residence. The board contemplates admitting twenty-five such veterans, on application and approval of the department service officer of Illinois, and on payment of two dollars per day per person.

Sec. 45.271, Stats., authorized the soldiers' rehabilitation board to transfer \$50,000 from the soldiers' rehabilitation fund to the state department of the American Legion to purchase this camp, and there establish "a restoration camp for sick and disabled veterans of the world war and their dependents." On discontinuance of the camp for such purpose title is to revert to the state.

By virtue of sec. 188.08, Stats., the state department of the American Legion has "full corporate power to transact business in this state."

The state department of the American Legion, in its administration of the camp through the aforementioned board of trustees, acts as trustee of a charitable trust. See 11 C. J. 301.

"The extent of the capacity of a private corporation to take and hold property in trust is the same as that of a natural person except as limited by law, and the extent of its capacity to administer a trust depends upon the extent of the powers conferred upon it by law." Restatement of the Law of Trusts, sec. 378 (3) (e).

In sec. 380 of the same work it is stated that the trustee of a charitable trust can properly exercise such powers only as:

“(a) are conferred upon him in specific words by the terms of the trust, or

“(b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust.”

While sec. 45.27 (2a) (b), Stats., relating to the power of the adjutant general to provide treatment for sick or injured veterans under certain conditions, and sec. 45.275, relating to the power of the rehabilitation board to provide hospitalization of disabled veterans, both require five years' residence in this state as a condition precedent to eligibility, section 45.271 contains no such residence requirement.

The state department may, therefore, make such contracts with the department service officer of Illinois or with the veterans themselves as may be necessary to effectuate the proposed plan, subject only to the general rule that a trustee may not use the trust property for his own benefit. *In re The Taylor Orphan Asylum*, 36 Wis. 534; Restatement of the Law of Trusts, secs. 348 and 378 (3).

WHR

Education — Vocational Education — Under rehabilitation law, sec. 41.71, Stats., state board of vocational and adult education may pay tuition for attendance of physically handicapped person at school having courses especially designed for rehabilitation which is outside district of his residence.

July 16, 1938.

BOARD OF VOCATIONAL EDUCATION.

Attention Geo. P. Hambrecht, *Director*.

You state that the rehabilitation division of the state board of vocational and adult education, in performing its duties under sec. 41.71, Stats., has been furnishing maintenance to each physically handicapped person and paying tuition for nonresident physically handicapped at a rate not exceeding fifty cents per day of actual attendance to local boards of vocational and adult education having courses specifically designed to rehabilitate such persons.

You have asked whether the state board can continue to pay such nonresident tuition fees when such persons are sent to schools of vocational and adult education especially adapted to a course in rehabilitation which are outside the municipality of their residence.

Sec. 41.71, Stats., known as the rehabilitation law, was enacted to co-operate with the federal government in order to “* * * ‘provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment,’ * * *.” Subsec. (1).

Sec. 41.13, Stats., creates a state board of vocational and adult education, and subsec. (4) thereof provides that such board “shall co-operate with the federal board for vocational education in the execution of the provisions of the United States vocational education act, and is hereby empowered with full authority so to co-operate. * * *.”

Because of the varied nature of the educational and vocational needs of the physically handicapped, each case, to a large extent, calling for individual attention, the provisions of the statute must of necessity be broad in their scope and

application. Thus the statute, sec. 41.71, after reciting the purpose of the act, sets out in broad language how the board shall effect that purpose, permitting it wide discretion in the administration of the law. With reference to the cost of such vocational rehabilitation, the act requires the board to "provide such training as may be necessary to insure their vocational rehabilitation; * * *." The board is also empowered to "utilize in the rehabilitation of such persons such existing educational facilities of the state as may be advisable and practicable * * *." Sec. 41.71, subsec. (6), par. (a), Stats. Again, in sec. 41.71 (6) (b) the board shall "Promote and aid in the establishment of schools and classes for the rehabilitation * * *" and under sec. 41.71 (7) "provide maintenance cost during actual training * * *." Thus it becomes the duty of the board to furnish adequate rehabilitation facilities for those persons needing them. The question of what school it is desirable, from the standpoint of his needs, for each individual to attend is for the board to decide in its discretion and the expenses of such education must be paid accordingly.

Thus, while the statute does not specifically provide for the payment of tuition for nonresident physically incapacitated people, it does provide that the board shall furnish educational facilities to such people and pay the cost of such service. If then, the board chooses to pay nonresident tuition fees when the persons are sent to schools outside their district when such schools are particularly adapted to a course in rehabilitation, we are of the opinion that the state board is acting within the scope of its authority.

HHP

Public Printing — School Districts — School Board Proceedings — Provision in subsec. (3), sec. 40.15, Stats., requiring school board proceedings to be published, is mandatory.

July 16, 1938.

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

You have submitted the question whether the provisions in subsection (3) of section 40.15 of the statutes are mandatory.

Said section 40.15 (3) provides as follows:

“The proceedings of all school boards, except in cities of the first class and except school boards included in section 40.60, including a statement of all receipts and expenditures, shall be printed and published within thirty days after the annual school meeting in a newspaper having a general circulation in the school district or in such manner as the board shall direct.”

You will note that the word “shall” is used, which has an imperative and mandatory significance. It has been held by our court that even the word “may” as used in statutes, means “must” or “shall” only in cases where the public interests or rights are concerned and where the public or third persons have a claim *de jure* that the power shall be exercised. *Curry v. City of Portage*, 195 Wis. 35.

You are advised that the publication of the proceedings of the school board as required by subsec. (3), sec. 40.15 is imperative and mandatory.

JEM

Counties — Mortgages, Deeds, etc. — Provision in deed by county restricting cutting of green timber for specified time is valid.

July 16, 1938.

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

You state that the county has acquired title to certain cut-over lands by taking tax deeds thereon, which it wishes to sell. In order to discourage persons from buying the land with the idea of removing the remaining timber and then allowing the land again to revert to the county for nonpayment of taxes, it is proposed that restrictions be put in the deeds upon the sale thereof.

You inquire whether the county could put a restriction in its deeds that for a period of ten years no green timber should be cut on the land conveyed and in the event any is so cut then title to the land shall revert to the county.

Sec. 75.36, Stats., provides:

“When any lands upon which the county holds a tax certificate shall not be redeemed as provided by law the county clerk shall execute to the county, in his name of office, a deed therefor, * * * in like form as deeds to individuals; and such deeds shall have the same force and effect as deeds executed by such clerk to individuals for lands sold for the nonpayment of taxes; * * *.”

Sec. 75.14 (1), Stats., provides:

“If any land sold for nonpayment of taxes shall not be redeemed * * * the county clerk shall * * * execute in the name of the state and of his county, * * * to the purchaser, his heirs or assigns, a deed of the land so remaining unredeemed, * * * which shall vest in the grantee an absolute estate in fee simple in such land, * * *.”

Upon receipt of the tax deed “an absolute estate in fee simple” would be in the county, its successors and assigns to “their sole use and benefit.” See sec. 75.16, Stats. It

would have the same title to the lands in question as in any lands the county might own. Sec. 59.07 gives to the county the following general powers in respect to land:

“(1) Make such orders concerning the corporate property of the county as they may deem expedient.

“(2) Make such leases, contracts or other conveyances in relation to lands acquired for public purposes as in their discretion are in the interest of the public welfare.”

Sec. 59.08 (19), in addition, provides that among the special powers of the county board:

“The county board may delegate *its power* to sell lands acquired by tax deed to a committee * * *.”

See also sec. 59.67.

We can discover no provisions in the statutes which would in any way restrict the right of the county to convey the lands subject to the restrictions you mention. In *Pepin County v. Prindle*, (1884) 61 Wis. 301, the court, in speaking of conditions subsequent, said, p. 309:

“* * * The ownership of an absolute title in fee, with the right of disposition, includes the right to impose any condition not amounting to a restriction upon alienation, and which is not impossible, nor contrary to public policy, nor otherwise illegal. * * *”

The restriction proposed here in no way pertains to the right of alienation, nor is it impossible to perform. As for its being against public policy, it operates, on the contrary, to the public's advantage by putting a stop to a practice which is serving to make the land worthless.

Support for the proposed provision in the deeds is found in *Cobban v. Northern Wisconsin State Fair Asso.*, (1933) 212 Wis. 235, 248 N. W. 463. In that case Chippewa county quitclaimed all its right, title and interest in the certain lands. Restrictions were imposed upon the right to mortgage or encumber the land, with a requirement that the fair be held regularly and the buildings be kept in repair. The deed expressly provided that these constituted conditions

subsequent and not covenants and that upon breach thereof title and the right of immediate possession reverted to the county. The validity of neither the deed nor its provisions was questioned and full operative effect was given thereto in the decision.

In drafting the deeds of conveyance, it would be advisable to make the restriction against the cutting of timber a condition subsequent which would be binding not only on the immediate grantees but upon any subsequent grantees and to specifically provide that upon breach thereof title and the right of immediate possession reverts to the county.

We are therefore of the opinion that the proposed provision in deeds by the county would be within the power of the county and valid.

HHP

Indigent, Insane, etc. — Poor Relief — Minors — Legal Settlement — Under sec. 49.02, subsec. (3), Stats., illegitimate child has and retains legal settlement of his mother at time of his birth, even though mother may have changed her legal settlement.

July 18, 1938.

BOARD OF CONTROL.

You present the following facts: Miss B was born October 14, 1913, in Janesville, Rock county, Wisconsin, where she resided with her parents. She gave birth to an illegitimate child July 30, 1936, which child was committed to the state public school at Sparta on December 10, 1936. Later the court decided to permit the child to remain in a boarding home where its mother was living. From December 10, 1936, to February 14, 1937, the child's board was paid by a private welfare agency in Janesville and since February 14 to date, by Rock county. Miss B went to Milwaukee December 9, 1936, and she is at present employed in that city.

She married Mr. M on September 27, 1937, and is now residing in West Allis, Milwaukee county, Wisconsin.

You assume that the husband has a legal settlement within this state and ask what is now the legal settlement of the illegitimate child.

Sec. 49.02, subsec. (3), Stats., in part reads as follows:

“Illegitimate children shall follow and have the settlement of their mother at the time of their birth if she then have any within the state; * * *.”

The Wisconsin supreme court has never interpreted this statute as applied to the facts you state. However, this statute was taken verbatim from the Massachusetts statutes (see revised statutes, Mass. 1836, ch. 45), which revised Massachusetts statutes of 1793, ch. 34, sec. 2, cl. 3, and at the time of its adoption by the Wisconsin legislature, the Massachusetts courts had interpreted it. The leading case in Massachusetts interpreting this statute is *Boylston v. Princeton*, 13 Mass. 381 (1816). In holding that the illegitimate child's legal settlement does not change with that of the mother, the court said at page 384:

“The word *follow*, in this clause of the act, seems not to have been used technically, nor with any precise meaning. To give it the construction contended for by the counsel for the plaintiffs, viz. that the child is to have the settlement which the mother had at the time of its birth, and shall afterwards follow the mother, when she may acquire a new settlement,—would be doing great violence to the language of the legislature.”

In that case the court in effect held that an illegitimate child had and retained the legal settlement of the mother at the time of its birth, even though the mother should later change her legal settlement and that this was true in spite of the fact that the legislature used the words “follow and have.” The same construction was given an identical statute by the supreme court of the state of Maine in the following cases: *Biddeford v. Saco*, 7 Me. 270 (1831), *Fayette v. Leeds*, 10 Me. 409 (1833), *Milo v. Kilmarnock*, 11 Me. 455 (1834), *Raymond v. North Berwick*, 60 Me. 114 (1871).

In regard to the construction of a statute adopted from another state, the supreme court of this state said in *State ex rel. Rogers v. Wheeler*, 97 Wis. 96, 101:

“Having come to the conclusion that our statute had its origin in the state of New York and that it was adopted here from such state, it follows that the judicial construction given to it in the former state, before and at the time of such adoption, was adopted also, and is the law here even if the courts there have since departed from such construction. * * *”

Again in *Pomeroy v. Pomeroy*, 93 Wis. 262, 266, our court said:

“It is a familiar rule that, if a statute adopted from another state has received an interpretation there, it is to have the same interpretation here. * * *”

See also *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 18, *State v. Pabst*, 139 Wis. 561, *Koepf v. National Enameling & Stamping Co.*, 151 Wis. 302, 312.

This office in a former opinion in regard to the legal settlement of an illegitimate child held that a minor child has no legal power to acquire a settlement by residence of more than one year out of the town, village or city in which its settlement became fixed by its birth, and that the legal settlement of an illegitimate child born in this state is that of its mother at the time of its birth, XII Op. Atty. Gen. 109. It should be noted, however, that this office has also in various opinions, at least by inference, held that an illegitimate child's legal settlement is that of its mother, and that if the mother changes her legal settlement, the child's legal settlement follows hers. XIV Op. Atty. Gen. 348, XXII 977, XXIII 580. In these opinions the question of whether an illegitimate child's legal settlement changes with that of its mother was not actually before this department and was, therefore, not specifically answered. However, we feel that the language used in these earlier opinions is such as to raise the question of the applicability to the present question. In view of the foregoing discussion in this opinion, they are not to be construed as being applicable.

In construction of the statute in question, we feel bound to follow the interpretation placed thereon by the Massachusetts courts and therefore advise you that the legal settlement of the mother at the time of the birth of an illegitimate child fixes the legal settlement of the child and that such child retains such settlement even though the legal settlement of the mother may subsequently change.

If you deem that this interpretation creates an undesirable situation or that it is in anywise contrary to the spirit of the children's code and other advanced social legislation, the remedy is by proper legislation.

NSB
AGH

Appropriations and Expenditures — Board of Control — Contingent Fund — Unexpended balance of "superintendent's revolving fund" provided for in sec. 20.17, subsec. (19), Stats. 1933, which existed on effective date of ch. 535, Laws 1935, became part of "contingent fund" created by said chapter.

Resulting total fund may be disbursed by superintendent of institution subject to conditions and limitations provided for in sec. 20.17 (19) as amended by ch. 535, Laws 1935.

July 18, 1938.

BOARD OF CONTROL.

Sec. 20.17 subsec. (19), Stats. 1933, provided in part as follows:

"Out of the appropriations for the operation of the several institutions under the jurisdiction of the state board of control there is allotted to the superintendent of each institution, subject to the approval of the emergency board, such sums as may be necessary to be used as a revolving appropriation for the payment of current bills of less than fifty dollars * * *. The amount allotted to each superinten-

dent shall be deposited in a separate account to be known as the 'superintendent's revolving fund' in a public depository to be designated by the state board of control. Payment of current bills of less than fifty dollars for the purposes specified shall be made by check drawn by the superintendent against such account, * * *. From time to time the superintendent shall file claim for reimbursement * * *. After approval of such claim * * * the superintendent's revolving fund shall be reimbursed the total amount lawfully paid therefrom * * *. All moneys received in reimbursement for payments made from the superintendent's revolving fund shall be deposited to the credit of said account and are added to this appropriation * * *. The board of control shall require the superintendent of each institution to execute and file a surety bond in such sum as the emergency board may require, conditional upon the faithful discharge of his duties and obligations under this section, * * *."

By ch. 535, Laws 1935, the legislature provided that certain sections of the statute, including sec. 20.17, subsec. (19)," are amended to read:

"(20.17) * * *

"(19) Out of the appropriations for the operation of the several institutions under the jurisdiction of the state board of control there is allotted to each institution, subject to the approval of the emergency board, such sums as may be necessary to be used as a contingent fund for the payment of institutional bills of less than seventy-five dollars, * * *. The amount allotted to each institution shall be deposited in a separate account to be known as the 'contingent fund' in a public depository to be designated by the state board of control. Payment of institutional bills of less than seventy-five dollars shall be made by check drawn by the superintendent against such account, * * *. From time to time the superintendent shall file claim for reimbursement * * *. After approval of such claim * * * the contingent fund shall be reimbursed the total amount lawfully paid therefrom * * *. All moneys received in reimbursement for payments made from the contingent fund shall be deposited to the credit of said account and are added to this appropriation * * *. The board of control shall require the superintendent of each institution to execute and file a surety bond in such sum as the emergency board may require, guaranteeing the faithful discharge of his duties and obligations under this section, * * *."

You inquire whether the "superintendent's revolving fund," which existed by virtue of sec. 20.17 subsec. (19) Stats. 1933, became a part of the respective "contingent fund" provided for by ch. 535, Laws 1935, and if so, whether the total fund so established is now a direct responsibility of the superintendent of the institution.

Both the fund existing by virtue of sec. 20.17 subsec. (19), Stats. 1933, and the fund existing by virtue of sec. 20.17, subsec. (19), as amended by ch. 535 Laws 1935, resulted from revolving appropriations. Sec. 20.77 subsec. (8), Stats. 1937, provides:

"All appropriations or balances of appropriations remaining unexpended and unencumbered at the end of the fiscal year for which they are made, shall revert to the fund from which appropriated, but this shall not apply to revolving appropriations, * * *."

Sec. 20.77, subsec. (7), provides:

"In any case where a nonlapsible, or a continuing, nonlapsible appropriation, is amended, either as to amount or purpose, the balance shall go forward as if the same had not been amended, and shall be available for the purposes, and subject to the conditions or limitations set out in the appropriation as amended, unless otherwise specifically provided by law."

In XXIV Op. Atty. Gen. 741, sec. 20.77 (7) was construed and it was held that money appropriated under an old law was to be disbursed in accordance with the provisions of the law as amended.

While ch. 535, Laws 1935, made some changes in the wording of sec. 20.17 (19), much of the language found in the section was retained *verbatim et literatim*. It is obvious that substantially the same purpose was to be accomplished in sec. 20.17 (19) as amended by ch. 535, Laws 1935, as was to be accomplished by it prior to the amendment.

In *Dallmann v. Dallmann*, 159 Wis. 480, at page 486, it was held:

"In Black on Interpretation of Laws (2d ed.) sec. 168, p. 579, the rule is stated as follows:

“Where an amendment is made by declaring that the original statute “shall be amended so as to read as follows,” retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal, and then re-enact, the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute.’ ”

In view of the foregoing statutes and authority, we conclude that any unexpended balance in the “superintendent’s revolving fund” provided for in sec. 20.17 subsec. (19), Stats. 1933, became a part of the “contingent fund” provided for by the amending act and the total fund is now subject to disbursement by the superintendent of the institution, subject to the conditions and limitations provided in sec. 20.17, subsec. (19), as amended by ch. 535, Laws 1935.
JRW

Corporations — Secretary of state may rescind forfeiture of corporate rights under provisions of sec. 180.08, subsec. (6), Stats., only upon payment of twenty-five dollar fee provided for therein.

July 18, 1938.

THEODORE DAMMANN,
Secretary of State.

Sec. 180.08, subsec. (1), Stats., provides:

“Every corporation organized for profit, under this chapter, shall annually, between the first day of January and of April, file with the secretary of state, a report sworn to by the president, secretary, treasurer or general manager, or if the corporation is in the hands of an assignee or receiver, by such assignee or receiver, as of January first preceding, which shall state:

“* * *

“(b) The name and address of the officers and directors of such corporation, giving the street and number.”

Sec. 180.08, subsecs. (2) and (6), provides:

“(2) In case said report is not filed by July first, the secretary of state shall publish, once a week for three successive weeks, a notice of such failure, in a newspaper, published at or near the location of said corporation; and forward a copy of said notice to the register of deeds of the county in which the corporation is located, and the register shall promptly post the notice in his office. Such corporation shall be allowed to file its said annual report prior to May first on payment of a forfeit of five dollars and thereafter but prior to publication on payment of a forfeit of ten dollars, and after publication on payment of a forfeit of ten dollars and of the costs of publication. In case said report is not filed by the following January, the corporate rights and privileges granted to such corporation shall be declared forfeited by the secretary of state, and he shall enter such forfeiture on the records of his department.”

“(6) The secretary of state may rescind the forfeiture on payment of twenty-five dollars and presentation of an affidavit signed by the president and secretary of the corporation to the effect that such corporation has at no time suspended its ordinary business; or that the corporation at the time of the forfeiture held title to or transferable interests in real estate. The secretary of state may demand such further proof as he may deem necessary.”

On April 26, 1937, the annual report of the X company was received, accompanied by the five-dollar forfeit for late filing. The report as submitted was incomplete in that it failed to show either the officers or directors, but contained in lieu thereof the following: “Unable to ascertain sufficiently certain to state.” Your department returned the report stating that you did not see how the report could be accepted because it did not contain the information required by law. The report was not thereafter filed and, after publication, as required by sec. 180.08 subsec. (2), Stats., the corporate rights of the X company were forfeited on January 1, 1938, and appropriate entry concerning such forfeiture was made on the records of your department.

You are now informed that one, Miss A, as receiver of the assets of the vice president of the X company and as guardian of an incompetent stockholder, and a Mr. B, as guardian of the same incompetent stockholder, elected themselves directors of said corporation and were in due course elected as officers of said corporation.

By a temporary restraining order of the circuit court for Milwaukee county, dated April 21, 1937, A and B were restrained "from attempting to act as officers of the X company." By an order of the circuit court of Milwaukee county dated April 29, 1937, the temporary restraining order was continued in force pending a decision upon the merits of the controversy in which the orders were made. The court action was continued until the 4th day of March, 1938, when an order was made dismissing the action in which the restraining orders were issued.

The officers of the X company submit that in view of the restraining orders they were absolutely prevented from complying with the requirement of sec. 180.08 to the effect that the report shall contain the name and address of the officers and directors of the corporation, although at all times said officers stood ready and willing to make a report prior to the time the corporate rights of the company were forfeited. It appears that the attention of the circuit court of Milwaukee county was called to the need for some officer making a report but that the court disregarded the matter except to indicate that, in view of the fact that a contest existed between two groups of alleged officers, the court was unable to direct either side to make a report.

You have been requested to accept the affidavit for rescission of forfeiture provided for in sec. 180.08, subsec. (6), and to rescind the forfeiture of corporate rights without payment of the twenty-five dollar fee therein provided for. You inquire whether you have authority to comply with this request.

It is to be noted at the outset that the corporate report required by sec. 180.08 (1) should have been presented prior to the first day of April, 1937, and that until April 21, 1937, there was no restraining order in effect which prevented the preparation and submission of this report.

You are authorized to forfeit corporate rights and to rescind such forfeiture only in the manner provided by statute. Sec. 180.08 (2) required that you forfeit the corporate rights of the X company when the report described in sec. 180.08 (1) was not filed by January 1, 1938. Sec. 180.08 (6) authorizes you to rescind that forfeiture only upon payment of twenty-five dollars and presentation of the affidavit therein required. You are therefore advised that you may not comply with the request.

JRW

Public Officers — Alderman — Police Justice — Alderman may be elected to and hold office of police justice provided his term as alderman expires prior to time he takes office as police justice.

July 18, 1938.

O. L. O'BOYLE, *Corporation Counsel*,
Milwaukee County,
Milwaukee, Wisconsin.

You ask whether a member of the city council during the term for which he was elected is eligible for election as police justice in the same city.

Sec. 62.09, subsec. (2), par. (b), Stats., provides:

“Except as otherwise expressly provided in these statutes, no alderman shall during the term for which he is elected be eligible to any other city office except mayor
* * *”

Under sec. 62.24 it is evident that the office of police justice is a “city office.” That being the case, clearly, then, an alderman cannot hold the office of police justice before his term as alderman has expired. A resignation as alderman would fail to remove the disability, for the statute specifically provides that such disability exists “during the term for which he is elected.”

However, the above would go only to his eligibility to hold the office and does not prevent his being elected police justice during his term as alderman. It is the established law of the state that one who is ineligible to hold the office may nevertheless run for and be elected thereto. That he could not qualify would not affect the validity of the election, but merely goes to his right to take and hold the office. *State ex rel. Schommer v. Vandenberg*, 164 Wis. 628, 160 N. W. 1037 (1917); *State ex rel. Barber v. Circuit Court*, 178 Wis. 468, 190 N. W. 563 (1922).

Sec. 62.09 (5) (a), Stats., provides that the regular term of an alderman commences on the third Tuesday of April succeeding his election, and that the terms of other city officers commence on the first day of May succeeding their selection, "unless otherwise provided by ordinance or statute." There is nothing in the statutes in reference to police justices that fixes the commencement of the term of that office, and so the general provisions of sec. 62.09 (5) (a) govern.

Thus, in a case where the city ordinance does not provide otherwise, the term of office of police justice would commence after the expiration of the term of office as alderman. Clearly, then, a person who had been alderman would be eligible to take the office of police justice at the time of the commencement of the term thereof, even though at the time of election he was ineligible because his term as alderman had not expired.

However, if by reason of local ordinances the term as police justice commences before the term as alderman expires, a different question is presented. Under the provisions of sec. 62.09 (4), Stats. he would have to qualify within ten days after notification of his election. Thus, unless the term as alderman expired so he could qualify for the office of police justice within such ten days, the latter office would be vacant under sec. 17.03 (7), Stats., because at no time during which he must take the new office was he eligible.

HHP

Contracts — Public Lands — Taxation — Exemption —
So-called "application to purchase" whereby individual promises to make certain payments in return for which regents of university of Wisconsin agree to convey certain land constitutes contract for sale of land.

Such lands are contracted to be sold by state and are not exempt from taxation under sec. 70.11, subsec. (1), Stats.

July 18, 1938.

TAX COMMISSION.

Sec. 70.11, Stats., provides in part:

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

"(1) That owned exclusively by the United States or by this state except lands contracted to be sold by the state
* * *."

You have submitted a so-called "Application to Purchase," by the terms of which one A "hereby offers to purchase from the regents of the University of Wisconsin hereinafter referred to as the 'regents,' the following described property." Then follows a legal description of a tract of land approximating eighty acres. The instrument recites that A "agrees to pay \$3274.42, as follows: (a) \$50.00 cash, (b) 150.00 April 1, 1936, (c) 150.00 within each succeeding year until he can refinance and pay the balance in full, when warranty deed will be furnished by the regents."

Under the instrument A "proposes, and the regents agree, that no interest is to be paid upon the unpaid balance until April, 1940." The regents are to carry insurance in the state insurance fund and be reimbursed by A the amount of the annual premium. The instrument also recites that A "agrees to make all necessary improvements or repairs at his own expense." The improvements are to become the property of the regents in the event that the agreement is terminated. The instrument also provides:

"Pending the delivery of a deed the applicant shall occupy the premises as tenant at sufferance * * *,"

and in case he becomes in default "agrees to vacate said premises" upon thirty days' notice from the regents. Paragraphs 7 and 9 of the application to purchase provide:

"Upon full compliance by the applicant with the terms of this application to purchase, the regents are to execute and deliver to the applicant a good and sufficient warranty deed excepting only liens or encumbrances created by the act of the applicant together with abstract of title.

"This offer is made subject to the written approval and acceptance of the said regents of the university of Wisconsin."

The instrument is dated and signed by A as applicant and by the secretary of the regents of the university of Wisconsin in the presence of two witnesses.

You inquire whether the real estate described in this so-called application to purchase is owned exclusively by the state and so exempt from taxation, or whether the lands therein described are lands contracted to be sold by the state and hence not exempt from taxation.

Real estate to which title is held by the board of regents of the university of Wisconsin is owned exclusively by the state or by the board of regents on behalf of the state. *Aberg v. Moe*, 198 Wis. 349, pages 357-358. The only remaining question is whether the lands are "contracted to be sold by the state" by virtue of the application to purchase and its acceptance by the board of regents.

"A contract for the sale of land is one in which one party agrees to buy and the other agrees to sell and each would be held responsible for a breach of the contract. It is an executory contract, to be performed in the future, and, if fulfilled, results in a sale." 66 C. J. 479.

In *Capehart v. Hale*, 6 W. Va. 547, it was held that the promise or agreement by one person to convey or transfer land or an interest therein to another and either the actual payment by the latter, of the consideration, or the promise or agreement to pay it, together, constitute a contract of sale.

A contract of sale creates a mutual obligation on the part of one party to sell, and on the part of the other party to purchase. *Range v. Davidson*, 242 Mich. 73, 218 N. W. 789.

Stipulations as to payments on purchase price indicate an intention to sell. *Barnett v. Meisterling*, 327 Ill. 564.

A contract of sale rather than an option to purchase is indicated by an agreement wherein the owner transfers the use and possession of the land at once to the purchaser. *McGregor v. Ireland*, 86 Kan. 426, 121 P. 368. See also *Garvey v. Parkhurst*, 127 Mich. 368.

In *Baraboo Land, Mining and Leasing Co. v. Winter*, 130 Wis. 457, 110 N. W. 413, it was held that there was a contract of sale and not a mere option where the vendor was bound to convey to the purchaser on the terms of the contract agreed upon, and the latter was bound to purchase.

The instrument accompanying your request is denominated an "application to purchase" and has been considered by the board of regents as constituting no more than an option by A to purchase, but it would be construed by the courts according to its content rather than according to its name. Although the instrument contains a number of provisions characteristic of an application to purchase, the body of the instrument refers to itself as an "offer * * * made subject to the * * * acceptance of the said regents of the university of Wisconsin." It was in fact accepted by said regents in writing as attested to by the fact that the regents joined in the execution of the instrument. The so-called "application to purchase" thus became a bilateral contract wherein A agreed to make certain payments and the regents agreed to convey the property upon completion of those payments. By the terms of the instrument A is given possession of the land pending delivery of a deed thereto.

You are therefore advised that the lands involved are "contracted to be sold by the state" and hence are not exempt from taxation.

JRW

Bonds — Counties — Municipal Corporations — Municipal Borrowing — Under provisions of ch. 67, Stats., county may not issue general obligation bonds for purpose of defraying county's share of expense of constructing joint city hall and county building.

July 20, 1938.

LYALL T. BEGGS,

District Attorney,

Madison, Wisconsin.

You state that the city of Madison and Dane county are contemplating the building of a joint city hall and county building and ask whether the county may finance its portion of such a project by the issuance of general obligation bonds under the provisions of ch. 67, Stats.

Counties have only such powers as are specifically granted to them by statutes and such as are reasonably necessary for the purpose of carrying into effect the powers expressly granted. *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798. We find no such express statute authorizing a county to undertake such joint construction. The only remaining question is whether such power may reasonably be implied from express powers granted. It is apparent, from a study of ch. 59, dealing with county powers, and other sections of the statutes dealing with the same subject matter as well as the statutes dealing with municipal powers in general, that where the legislature has intended joint municipal action that power has been specifically authorized by express legislation. Thus sec. 46.20, subsec. (1), Stats. provides:

“Any two or more counties may jointly, by majority vote of all the members of each county board, provide for a county home, asylum for the chronic insane, tuberculosis hospital or sanatorium, house of correction, or workhouse, which shall be established, maintained, and operated pursuant to all the statutes relating to the establishment, maintenance, and operation of similar institutions, respectively, by any single county whose population is less than two hundred and fifty thousand, except as otherwise provided in this section; and in all respects, except as herein specified,

each such institution shall be the county institution of each of the counties so joining."

Counties are authorized to maintain joint normal schools by sec. 41.42, Stats. If the power to build and maintain such joint county institutions existed independent of the statutes above quoted, the statutes would be mere surplusage.

In *Behnke v. Neenah*, 221 Wis. 411, 415 (1936), with reference to power of two cities to jointly own and operate a sewage disposal plant and system under a statute expressly providing for such joint ownership and operation, the court uses the following significant language:

"Prior to the 1935 amendment each municipality, by proceeding under chs. 62 and 67 of the statutes, could have provided for sewers and drains and a sewage disposal plant or system for its city, but not for a system jointly owned and operated with another municipality. It is obvious that the legislative intent in the enactment of ch. 460, Laws of 1935, was to authorize such proceedings as were followed in the instant case. * * *"

Under the general charter law cities have considerably more power with respect to their municipal affairs than have counties. *Hack v. City of Mineral Point*, 203 Wis. 215.

Special powers are given to Milwaukee county by sec. 59.083, Stats., with reference to consolidation of municipal services within the county (joint action by municipalities).

We conclude that a county is without power to join with a city in the joint construction of a city hall and county building. The power to issue bonds can of course be no greater than the power to engage in such an undertaking. Furthermore sec. 67.03 (1) specifically provides as follows:

"Every municipality may borrow money and issue municipal obligations therefor for the purposes specified and by the procedure provided in this chapter, *and for no other purpose and in no other manner*, * * *"

Sec. 67.04 (1) provides the purposes for which counties may issue bonds. The only provision that could conceivably

authorize a bond issue for this purpose is (a) of said subsection, which reads as follows:

“To provide joint county normal school buildings, county buildings, including county poorhouses, county hospitals, county hospitals or asylums for the insane, county tuberculosis sanatoriums, county workhouses and houses of correction; but all outstanding unpaid bonds for these purposes shall not exceed in amount at one time one and one-half per centum of the value of the taxable property in such county.”

You will note that the joint construction authorized is joint county *buildings* and that such buildings correspond to the authorizations contained in secs. 41.42 and 46.20, Stats.

Our conclusion may be and probably is undesirable in result but in our opinion the statutes will permit no other conclusion. The remedy is that of enabling legislation.

NSB

Automobiles — Law of Road — Sec. 85.01, subsec. (4), par. (h), Stats., providing for part year auto license fees, has reference solely to current license year, and in no event should fees computed under this section exceed fee for whole year. Part year fee is computed from date of bill of sale for which license is sought.

July 20, 1938.

THEODORE DAMMANN,
Secretary of State.

You have asked for our opinion on four questions relating to the interpretation of sec. 85.01, subsec. (4), par. (h), Stats. This section reads as follows:

“The registration fees named in this section shall be paid in full on all automobiles, motor trucks, motor delivery

wagons, passenger automobile busses, motor cycles or other similar motor vehicles or trailers or semitrailers used in connection therewith, registered in the state in the previous year excepting vehicles transferred as hereinafter provided. For new vehicles and vehicles not previously registered in this state, the fees shall be computed on the basis of one-twelfth of the registration fee prescribed for such vehicles multiplied by the number of months of the year which have not fully expired on the date of application. When a non-registered vehicle which has not been used in the current license year (as shown by the affidavit of the owner) shall be transferred, the registration fee to be paid by the transferee shall be computed in the same manner as provided above for new vehicles. The legal date of application shall in all cases be the date of the bill of sale. On any new motor vehicle purchased in Wisconsin by residents of other states there shall be paid fees as specified in this section providing that when license plates are returned within thirty days, a fee of only two dollars shall be charged and refund made of any money in excess of two dollars."

Each question will be considered separately.

The first question reads:

"A buys a car in Illinois in August, 1935 and licenses the vehicle in that state for the years 1935, 1936 and 1937. In May, 1938 he applies for license in the state of Wisconsin. Is the license fee in Wisconsin to be figured from August, 1935, the date he purchased the vehicle, or from the date in 1938 when he applies for Wisconsin license?"

In answering this question we are assuming that A was an Illinois resident and moved to Wisconsin in May of 1938.

In Wisconsin, owners of automobiles must annually register and must annually pay a registration fee. Sec. 85.01, subsec. (5), Stats. See also XXV Op. Atty. Gen. 131, 134. Since the registration of motor vehicles is on an annual basis, the license expiring on December 31 of each year, there is no justification for charging any amount other than that required to secure a license for the current year.

Under the provisions of sec. 85.01, subsec. (4) (h), above quoted, the fees for "vehicles not previously registered in this state" shall be computed on the basis of one-twelfth of the annual registration fee multiplied by the number of

months of the year which have not fully expired on the date of application. A's car would be a "vehicle not previously registered" and consequently he would be obliged to pay only a part fee for a 1938 license.

Under the above statute the license fees are computed from "the date of application." As to the meaning of "the date of application," the statute provides: "The legal date of application shall in all cases be the date of the bill of sale." In our opinion this provision is applicable only when the sale has been made in the same year that the license is sought. If, for example, A purchased a car in July of 1938, his license fees would be prorated as of July, even though he did not formally apply for a license until August or September. However, if he had purchased the car in 1937 a 1938 license fee would be calculated solely in reference to 1938, it being unnecessary to go back to the date of the sale in 1937 since such date can have no possible relationship to a 1938 license.

Consequently, in answering your first question, it is our conclusion that A's license fee should be computed from May, 1938.

The second question reads as follows:

"B purchases a vehicle in August, 1937 in the state of Illinois and the retail seller delivers the vehicle to B at his home in that state but for some reason or another B does not license the car. In July, 1938 he applies for a Wisconsin license. Is the license fee figured from August, 1937, or from the date in 1938 when he applies for Wisconsin license?"

In line with our answer to the first question, B's license fee is to be figured from the date in 1938 when he applies for a license.

The third question reads:

"C purchases a secondhand truck in October, 1937. The vehicle is not licensed for the current license year (July 1, 1937 to June 30, 1938). In fact, the plates on the vehicle expired June 30, 1937. The dealer who sold the truck deliv-

ers it on a garage license at C's place of business, which is in accordance with the provisions of section 85.02 of the statutes. The body on the vehicle is not suitable to C's requirements. The old body is dismantled and removed and a new refrigerator body is built on the truck by C in his own work shop to suit his specific transportation needs. The vehicle is not completely equipped to place in operation until the month of May, 1938. Is the license fee figured from the month of May, 1938, when C actually places the remodeled truck in operation, or from the month of October, 1937, when the purchase occurred?"

In line with our answers to the preceding questions, it is our opinion that the license fee in this case should be figured from October, 1937, when the purchase occurred, since such purchase occurred during the current truck license year (July 1, 1937 to July 1, 1938).

Your fourth question reads:

"D buys a new car in July, 1937, and the vehicle is delivered to his home by the dealer on dealer's plates in accordance with the law. The purchaser does not care to use the car until after October, 1937, at which time he applies for license. This vehicle has never been licensed before. Is the license fee calculated from the date of purchase notwithstanding the fact that the car has not been operated by the individual purchaser up to the moment he applies for his license, or is it permissible to calculate the fee from November 1, the date his application is made to the secretary of state?"

In view of the reasons heretofore stated and in accordance with the rule of this department in XXIV Op. Atty. Gen. 717, we conclude that the license fee in this instance is to be calculated from the date of purchase. The statutory provision that the legal date of application shall be the date of the bill of sale must be given effect where both dates fall within the same registration year.

WHR

Contracts — Counties — County Asylum Committee — County Highway Committee — If authorizing resolutions are silent with respect thereto, both county highway committee and county asylum committee may purchase materials and equipment without letting of bids.

July 20, 1938.

MILTON L. MEISTER,

District Attorney,

West Bend, Wisconsin.

You state that your county board pursuant to sec. 82.06, Stats., authorized the local county highway committee to purchase certain materials and equipment, but failed to specify with regard to the purchase whether it would be necessary to let bids. The county asylum committee has also been authorized to make purchases, no reference being made to bids. You ask whether or not these purchases can be made by such committees without the letting of bids.

While it is customary to let bids for all such contracts made by the county boards, it is not compulsory, in the absence of a specific statutory provision. Under sec. 82.06, Stats., the county highway committee is authorized:

“(1) To purchase and sell county road machinery as authorized by the county board.

“* * *

“(3) To enter into such contracts in the name of the county, and to make such arrangements as may be necessary for the proper prosecution of such construction and maintenance of highways and bridges as is provided for by the county board.

“* * *

“(4) To direct the expenditure of highway maintenance funds provided from automobile license fees, or by direct tax by the county board.”

In interpreting this statute the Wisconsin supreme court has explained in *Joyce v. Sauk County*, (1931) 206 Wis. 202, 206:

“It is clear that the county board has the power under sec. 82.06 to determine what highway projects shall be un-

dertaken by the county. It is equally clear that such determination having been made, the county highway committee is expressly vested with power to make contracts binding upon the county for the prosecution of this work.

* * *

Looking to the specific provisions of sec. 82.06, Stats., we find no provisions as to the letting of bids, the legislature apparently leaving such matters to the discretion of the counties themselves. Nor do we find any provisions relating to bids for highway purposes under sec. 59.07, Stats., defining the powers and duties of the county board. That the legislature intended to leave the method of letting contracts in most instances to the counties is further evidenced by the fact that it has specifically provided for bids in regard to certain types of work. See secs. 61.55, 62.15, 59.09, 15.33, Stats.

Since the statutory provisions in regard to county asylums are similar to those discussed above with reference to highway construction and maintenance, there being no "catch-all" provision requiring bids, it is apparent that the county asylum committee can exercise its own discretion in this matter.

We are of the opinion that if the authorizing resolutions are silent with respect thereto, both the county highway committee and the county asylum committee may purchase materials and equipment without letting of bids.

HHP

Counties — County Board — County Board Resolution — Taxation — Tax Collection — Under sec. 74.44, Stats., county has authority to become exclusive bidder for tax certificates. Owners of tax certificates are “lien holders” as that term is used in county board resolution authorizing county treasurer to sell tax certificates to “lien holders.”

July 21, 1938.

FULTON COLLIPP,

District Attorney,

Friendship, Wisconsin.

You state that the county board by resolution authorized the county treasurer to bid in for the county and become the exclusive purchaser of all lands sold for taxes. In the same resolution the board empowered the county treasurer to sell the tax certificates so acquired to “the owner or owners of any of such real estate and to any mortgagee or lien holder on any such lands or to any heir, legatee, devisee, executor or administrator, having an estate or interest therein;
* * *”

We are asked whether the county may become the exclusive purchaser of tax certificates.

Sec. 74.44, Stats., authorizes the county to become the exclusive purchaser of tax certificates. This section reads in part:

“(1) The county board of any county may authorize and direct the county treasurer to bid in and become the purchaser of all lands sold for taxes for the amount of taxes, interest and charges remaining unpaid thereon. * * *.”

This statute was held to be constitutional in the case of *State ex rel. Blockwitz v. Diehl*, 198 Wis. 326. It was contended in that case by a tax certificate holder that he was deprived of the opportunity of bidding in additional certificates and was otherwise denied equal protection of the laws, and that his contract rights were impaired. The court, however, rejected these contentions.

In XX Op. Atty. Gen. 432 this department ruled that a mortgagee of real property which is about to be sold for

taxes cannot be a bidder at the tax sale at which the county treasurer has been authorized to be the exclusive bidder on behalf of the county.

It should be noted that the resolution of the county board authorizes the county treasurer to sell tax certificates acquired by the county to "lien holders." It is our opinion that holders of tax certificates are "lien holders" and that the treasurer therefore has authority to sell tax certificates to such persons. 61 C. J. 1108. *Curtis L. & L. Co. v. Interior L. Co.*, 137 Wis. 341; *State ex rel. Blockwitz v. Diehl, supra*, 331.

You are therefore advised that a county has the authority to become the exclusive bidder for tax certificates and that holders of tax certificates are "lien holders" as that word is used in the county board resolution authorizing the county treasurer to sell tax certificates to "lien holders."

WHR

Intoxicating Liquors — Remonstrances against License
— Where no registration of electors is had, correct enumeration of all electors in district made by any person therein may be used in determining what constitutes majority of electors in district as required by sec. 176.22, Stats.

July 21, 1938.

JACOB FESSLER,
District Attorney,
Sheboygan, Wisconsin.

You ask what basis should be used in determining the number of signers required on a remonstrance, counter petition, or consent to grant intoxicating liquor licenses where a registration of electors is not required in view of that part of sec. 176.23, subsec. (2), Stats., reading:

“* * * If there be no registration of voters, then the last enumeration of the number of electors therein made pursuant to law, may be used to determine the number of electors therein at the time of filing such remonstrances, counter petition, or consent.”

It is your opinion that this statute means a majority of the actual number of electors qualified to vote at the time a remonstrance is filed. “Electors” are not necessarily those who voted at the last election. It is a more comprehensive term and must be held to include those who were qualified to vote as well as those who voted.

The statute provides that “the last enumeration of the number of electors therein [in the town] made pursuant to law” shall be used when determining what constitutes a majority of electors under sec. 176.22, Stats. Clearly, the number of electors voting at the last election may not be used since it is probable that only a portion of the qualified electors participated. It is well known that a large number of electors do not vote, especially at local elections. Therefore, the actual number of electors who may vote must be used when acting under sec. 176.22, Stats.

LEV

JEM

Criminal Law — Labor — One Day of Rest in Seven — Words and Phrases — Factory — Plant or establishment used for artificial production of electricity for sale is not “factory” within meaning of sec. 351.50, Stats.

Power plant maintained as part of factory where goods are manufactured is included in terms of statute.

July 22, 1938.

HARRY R. MCLOGAN, *Commissioner,*
Industrial Commission.

You have requested an opinion as to whether a plant or establishment which is used and operated for the purpose of producing electricity in a condition fit for use, by arti-

ficial means, is a "factory" within the meaning of sec. 351.50, Stats., which requires owners of factories and mercantile establishments to allow employees, with certain exceptions, twenty-four consecutive hours of rest in every seven consecutive days.

Sec. 351.50, Stats., is a penal statute, for subsec. (4) provides that violations shall be punished as provided in sec. 101.28, which provides for a forfeiture of ten dollars to one hundred dollars for each offense.

Penal statutes must be construed strictly, although the obvious legislative intent must not thereby be defeated. See *State ex rel. Shinnors v. Grossman*, 213 Wis. 135, 140 (1933). And it was said in *Jones v. Milwaukee E. R. & L. Co.*, 147 Wis. 427, 435 (1911):

"* * * Where a statute is drastic and its burdens heavy it is not permissible to bring within its terms by latitudinarian construction those not named therein."

In XIX Op. Atty. Gen. 501 this office had occasion to define the word "factory" in ruling that a shipyard and a stone quarry are factories within the meaning of the statute. It appears from the authorities there cited that a factory is a place where something is *manufactured*, usually from raw or partly wrought materials. It is not necessary to consider here whether the product of a factory must necessarily be "goods, wares, or utensils" or "articles of trade" (although this would seem to be the case), since it is considered that the production of electricity is not "manufacturing" in the commonly understood sense of the term.

The term "manufacture of electricity" has not been found elsewhere in the statutes, although sec. 196.01, 196.06 and 197.01 refer to the "*production * * * of * * * light * * * or power,*" and sec. 76.02, subsec. (8), par. (c) refers to "*Generating * * * electric current.*" Nor is electricity referred to in common speech as being "manufactured." Webster's New International Dictionary defines "powerhouse" as "A building in which mechanical, electrical, or other power is *generated.*"

It is considered that to rule that the term "factory" includes electrical powerhouses would be a violation of the

rule of strict construction of penal statutes as well as of the general rule that non-technical words are to be "construed and understood according to the common and approved usage of the language." Sec. 370.01. subsec. (1), Stats. Nor is any reason perceived why a broader construction is necessary to give effect to the legislative intent, since it is perfectly plain that the legislature did not intend to extend the benefit of the statute to persons in all occupations whatsoever.

What has been said applies to establishments engaged solely in the production of electrical energy for sale. Where the power plant is maintained by the owner of a factory where goods are manufactured, and is used to furnish electric current needed in the manufacturing processes there carried on, it is considered that the power plant is as much a part of the factory as is the heating plant and that employees working in the power plant are entitled to the same rest period as are other employees in the factory.

ML

Intoxicating Liquors — Public Health — Pharmacy — City may not by ordinance require registered pharmacist holding permit under sec. 176.18, subsec. (1), Stats., for sale of liquor for medicinal, mechanical or scientific purposes, to take out also "Class A" license for sale of intoxicating liquors.

Municipality has discretion to refuse pharmacist's permit under sec. 176.18, subsec. (1), but such discretion may not be abused.

Municipality may not require that liquor be sold only on prescription for scientific and mechanical purposes.

July 22, 1938.

TAX COMMISSION.

Beverage Tax Division.

You call our attention to the following ordinance adopted by the common council of the city of Edgerton :

“Section 13.08, is amended by the following addition: No registered pharmacist holding a permit issued pursuant to this ordinance shall, unless he holds a retail class ‘A’, license for the sale of intoxicating liquor, sell any liquor without first obtaining a written prescription from a doctor of medicine.”

We are asked whether the holder of a pharmacist’s permit under sec. 176.18, subsec. (1), Stats., may also be required to have a “Class A” license for the sale of intoxicating liquor.

Sec. 176.18 (1), Stats., provides in part:

“In any town, village or city the governing body may, upon written application therefor, grant to any registered pharmacist, as such governing body may deem proper, a permit to sell within such town, village or city, intoxicating liquors in quantities less than one gallon for medicinal, mechanical or scientific purposes only and not to be drunk on the premises. * * *.”

Sec. 176.18 (2), Stats., provides:

“In any town, village, or city no sale for either medicinal, mechanical, or scientific purposes shall be made by any such pharmacist until the person purchasing the same shall for each sale make and file a certificate in writing, dated and subscribed by him and witnessed by such registered pharmacist, stating for what purpose the intoxicating liquor so desired is to be used and that it is not for a beverage; and also stating in case of a sale for medicinal purposes on a physician’s prescription its date and number and the name of the physician issuing the same.”

The only provision in the statutes relating to the licensing of a pharmacist is found in sec. 176.18 (9) (a), Stats., which reads:

“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."

There is no requirement to the effect that a registered pharmacist must have a "Class A" license in order to sell intoxicating liquor for the purposes specified in sec. 176.18 (1) and (2), Stats. However, a pharmacist may, if he desires to do so, obtain a "Class A" or "Class B" license, but he cannot be compelled to obtain such a license for sales made by him for medicinal, mechanical or scientific purposes only.

Secondly, you inquire whether the governing body of a town, city or village may refuse to permit a registered pharmacist to sell intoxicating liquor as provided in sec. 176.18 (1), Stats.

By virtue of this statute the governing body of any town, city or village may grant a permit to any pharmacist upon written application by him if the governing body deems it proper. The phrase "deem proper" used in the statute allows for considerable discretion on the part of the governing body, but the exercise of such discretion may not be abused. In *Guarantee Co. etc. v. Mechanics' Sav. Bank & Trust Co.*, 183 U. S. 402, the phrase "may deem advisable" was construed to provide for a considerable discretion on the part of the person so acting, but it was qualified to the extent that such discretion could not be abused. The same construction would undoubtedly apply to the phrase "may deem proper" as used in sec. 176.18 (1), Stats.

You are therefore advised that the issuance of permits under sec. 176.18 (1), Stats., is discretionary but that such discretion may not be exercised arbitrarily and capriciously.

Thirdly, you inquire whether the governing body may require that prescriptions be filled in order to obtain intoxicating liquor for scientific and mechanical purposes.

Under the provisions of sec. 176.43 (1), Stats., any city, village or town may by ordinance prescribe additional regulations upon the sale of intoxicating liquor not in conflict with the provisions of chapter 176.

If the municipality were to require that a registered pharmacist could sell intoxicating liquor only upon the presentation of a physician's prescription, no liquor could be sold by the pharmacist for scientific or mechanical purposes, since a physician may give a prescription for medicinal purposes only.

It is therefore our opinion that the governing body may not require a prescription for the sale of intoxicating liquor for scientific or mechanical purposes.

WHR

Tuberculosis Sanatoriums — Ch. 285, Laws 1937, does not authorize county which does not have county tuberculosis sanatorium to erect one and include such capital investment as item of cost in computing actual per capita cost of maintenance.

July 23, 1938.

BOARD OF CONTROL.

In your letter you state:

“X county, which does not own a county tuberculosis sanatorium at the present time, is contemplating erecting one and inquiry is made whether chapter 285, laws of 1937, is applicable in that the whole institution could be amortized over a period of twenty years as ‘new additions.’ ”

Charges for a patient in a tuberculosis sanatorium are based upon actual per capita cost of maintenance (ch. 50, Stats.) except in so far as ch. 285, Laws 1937 (sec. 50.07 subsec. (2), par. (d), Stats.) otherwise authorizes, and, except as said chapter otherwise authorizes, capital investment is not part of the annual cost of maintenance.

Ch. 285, Laws 1937, as an emergency measure authorizes capital investment to be included in the annual cost of maintenance, but the situations are limited by said chapter with respect to when capital investment may be included. The chapter in part provides:

“* * * 1. As an emergency measure to encourage the expansion and improvement of the facilities of county tuberculosis sanatoria, * * *.

“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 * * *.

“3. For the purpose of this paragraph, expenditures for the addition to any existing sanatorium * * *.”

The entire tenor of ch. 285, Laws 1937, seems to be to encourage improvement and expansion by counties of existing sanatoria by additions thereto. The statute is by express language so limited in its application.

We are of the opinion that ch. 285, Laws 1937, does not authorize a county which has no tuberculosis sanatorium to build one and include the capital investment as an item of cost in computing the actual per capita cost of maintenance.
NSB

Taxation — Tax Sales — Tax certificates issued in 1921 owned by county and void because of insufficient description may be canceled by county board twelve years after tax certificates were issued. Taxes for such years may be subsequently assessed by county board, charged back to municipality, placed upon assessment roll and tax certificates subsequently issued for failure to pay such subsequently assessed taxes are valid, there being no statute of limitations with reference to sec. 75.25, Stats., and such procedure being authorized by said section.

July 25, 1938.

LOUIS W. CATTAN,

District Attorney,

Shawano, Wisconsin.

You state that application has been made to your county board to cancel two tax certificates, Nos. 5502 and 5503, sale of 1934, which tax certificates are held by Shawano county.

Application is made upon the grounds that the certificates are illegal and void. You state the facts as follows:

"We desire to secure an opinion as to the legality of these tax certificates on the following statement of facts: In 1920 the two parcels of land were assessed by the town assessor in the usual manner. No argument exists upon the justness of the tax levied at that time.

"The description of one assessment was N E $\frac{1}{4}$ of the S W $\frac{1}{4}$ except 12.32 acres, Sec. 34, Township 28, Range 14, 27.68 acres. The description of the second parcel was as follows: N E $\frac{1}{4}$ of the S W $\frac{1}{4}$, beginning 33 rods South of N E corner North 7-16 ft. W. 20 South 7-16 East 28, Section 34, Township 28, Range 14, 1 acre.

"The taxes were not paid. The above two descriptions were sold in the tax sale of 1921 and two certificates were issued to Shawano county, being certificates no. 295 and 296 of the sale of 1921. According to the records all taxes assessed in that forty were paid excepting the two above descriptions.

"In the fall session of the county board in 1933 these two certificates of the sale of 1921, numbered 295 and 296, together with quite a number more, were presented to the county board for cancellation and correction on application of the county treasurer. The certificates were canceled by the board. The board also corrected the descriptions and directed that the tax be charged back to the town under the new description.

"The corrected descriptions are as follows: Description No. 1: The N E $\frac{1}{4}$ of the S W $\frac{1}{4}$ of Sec. 34-28-14 East, excepting therefrom the North 20 rods of the West 8 rods of said forty and also excepting the following: Commencing at the Northeast corner of said forty, thence West 28 rods, thence South 20, East 8 rods, South 20 rods, West 3 rods, South 6 rods and 16 feet, West 7 rods, South 30 rods, East 20 rods, South 50 feet to South line of forty, East 10 rods to Southeast corner of said forty, North 80 rods to beginning. Description No. 2—The East 23 rods of the North 6 rods and 16 feet of the S $\frac{1}{2}$ of the N E $\frac{1}{4}$ of the S W $\frac{1}{4}$, Sec. 34, Twn. 28, R. 14.

"In the tax roll of 1933 special assessments for the tax of 1920 on the above corrected descriptions were made, which special tax was not paid and on the 7th day of August, 1934, these certificates were purchased by the county. It is these two certificates, number 5502 and 5503, of the sale of 1934, that are now sought to be canceled as illegal and void. Taxes on said property had been paid all these years outside of the year 1920 and the owner has had possession of the property."

You have presented a number of questions, all of which relate to the validity of these two certificates.

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.”

In XXII Op. Atty. Gen. 16 we ruled that there was no statute of limitations with respect to action taken by the county board under sec. 75.25 when the certificates are owned by the county. See also *Roberts v. Waukesha Co.*, 140 Wis. 593, XXV Op. Atty. Gen. 57 and XVI 33.

We are of the opinion that the original descriptions were insufficient for taxation purposes. The certificates were owned by the county and were insufficient for taxation purposes. *Head v. James*, 13 Wis. 718. As the void certificates were held by the county and there is no statute of limitations with respect to county action under sec. 75.25, under such circumstances the county board had the power, acting under that section to cancel the certificates and take the action that was taken.

No question is presented with respect to the validity of certificates Nos. 5502 and 5503, sale of 1934, except the

question of the power of the county board to cancel, charge back to the municipality and the municipality's power to place upon the tax roll for the succeeding year. As there is no applicable statute of limitations, we are of the opinion that the cancellation, subsequent charge back and assessment resulting in the sale of the lands for tax delinquency and the issuance of the certificates in question to the county was authorized under the provisions of sec. 75.25, Stats., and that the certificates in question are valid.

The case presented is not a case of assessment of omitted property under sec. 70.44, Stats., where there is a three-year statute of limitations with respect to subsequent assessment, but a case of attempt to assess, levy and tax the original tax certificates thus issued being void by reason of insufficient legal description.

NSB

Contracts — Labor — Wages — Municipal Corporations — Municipal Law — Sec. 66.29, Stats., is inapplicable to construction work carried on by state through its boards and commissions.

July 25, 1938.

CHARLES A. HALBERT, *State Chief Engineer,*
Bureau of Engineering.

You have requested our opinion as to the applicability of sec. 66.29, Stats., to construction work carried on by the state of Wisconsin through its boards and commissions.

Sec. 66.29, Stats., was created by ch. 395, Laws 1933, as part of the municipal law of the state. The state is not a municipality. The state is sovereign and municipalities are created by the state. It would seem to follow that when the legislature attempted to define municipality (sec. 66.29, subsec. (1), par. (b) to "mean and include any county, town, city, village, school district, board of school directors,

sewer district, drainage district, or any other public or quasi public corporation, *board or other public body* * * *," the legislative intent must have been with reference to boards and public bodies of municipalities (creations of the state) rather than of the state itself.

You have noted the variance between secs. 103.49 and 66.29 (6), Stats. As we construe sec. 66.29, Stats., to have no application to state contracts, there is a variance but no conflict between the two statutes. By virtue of sec. 66.29 (6), municipalities have discretion as to whether public contracts shall contain any provision with respect to wage rates, hours of labor, etc. Officers of the state do not have a similar discretion under sec. 103.49. The legislature has spoken and fixed the standard.

NSB

Civil Service — Lay Offs — Where civil service employees are laid off pursuant to rules established by bureau of personnel and in accordance with provisions of sec. 16.24, subsec. (2), Stats., no liability for back pay exists when such employees are subsequently reinstated under revised rules of bureau of personnel.

July 26, 1938.

PUBLIC SERVICE COMMISSION.

You state that in December of 1935 lack of funds necessitated the laying off of ten transportation inspectors. At that time the rules of the bureau of personnel required that lay offs be in inverse order to the length of service within a particular district. After the dismissal of the inspectors the bureau of personnel revised its rules on lay offs, making lay offs depend on seniority throughout the state rather than on administrative district basis. In 1936 eight of the ten inspectors who had been suspended were reinstated. Four of the eight reinstated inspectors claim that they were ille-

gally suspended and demand that they be paid the salary lost because of their suspension. You inquire whether such inspectors are entitled to back salary for the period of their suspension.

The inspectors were laid off under authority of sec. 16.24, subsec. (2), which reads in part as follows:

“* * * In case of a reduction in force because of stoppage or lack of work or funds or because of material change in duties or organization, permanent employes shall be laid off in accordance with rules established by the bureau. * * *.”

By the above quoted part of sec. 16.24 subsec. (2), when lay offs are necessitated because of lack of work or funds or because of reorganization, they shall be “in accordance with rules established by the board.” The ten inspectors who were laid off were laid off because of lack of funds and they were laid off in accordance with the civil service rules in effect at the time of the lay off. The statutory procedure required by sec. 16.24, subsec. (2), was strictly adhered to and consequently their suspension was in all respects legal. A subsequent revision of the civil service rules could not work retroactively and make illegal lay offs which at the time were legal. The change from a district basis to a state-wide basis in determining seniority could operate prospectively only. Such a change could in no wise affect the legality of lay offs which were made under the old rules based on seniority within a district.

It is therefore our conclusion that the public service commission is not liable for back salary of those transportation inspectors who were laid off in the year of 1935 under the circumstances stated above.

WHR

Corporations — Securities Law — Evidence of indebtedness exempt when issued under sec. 189.03, subsec. (3), Stats. 1927, continues to be exempt under sec. 189.03, subsec. (1), par. (k), Stats., from requirements of securities law.

July 27, 1938.

BANKING COMMISSION.

In 1928 the X Paper Mills Company and its wholly owned public utility subsidiary, the X Electric Company, issued certain securities which were the joint and several obligations of both companies. As a public utility the issue of securities of the X Electric Company was regulated by the railroad commission. Thus, by virtue of the provisions of sec. 189.03, subsec. (3), Stats. 1927, that the securities law, chapter 189, Stats., should not apply to "securities of corporations operating * * * public utilities, the issue of whose securities is regulated by the commission, * * *" it was not necessary to obtain a permit from the railroad commission for the sale of said securities at the time of issuance. Subsequently, in November 1936, the X Electric Company was dissolved and X Paper Mills Company acquired all its assets and assumed all its liabilities.

You state that the aforesaid securities are now outstanding and dealers are trading in them from time to time. You ask whether such securities are exempt under sec. 189.03 (1) (k) Stats. 1937, from the provisions of the securities law, chapter 189, Stats., prohibiting the sale of securities unless registered with the commission.

Sec. 189.03, Stats., provides:

"(1) Except as hereinafter provided the provisions of this chapter prohibiting the sale of securities unless registered by the commission shall not apply to the following, which shall be known as exempt securities;

"* * *

"(k) Evidences of debt outstanding prior to the date this act becomes effective which were theretofore exempt under the provisions of the chapter hereby repealed."

This section came into the law by virtue of ch. 158, Laws 1933, and that chapter repealed sec. 189.03 (3), Stats. 1931.

This latter section contained the same provision as the 1927 statutes, namely, that the provision of the securities law should not apply to "Securities of corporations operating * * * public utilities, the issue of whose securities is regulated by the commission, * * *."

The securities in question were "evidences of debt" which were outstanding in 1933 when chapter 158, Laws 1933 (sec. 189.03 (1) (k), Stats. 1933) was enacted. It is not doubted that these securities were exempt from the securities law under the law that was repealed by that chapter. As these securities were exempt under the law that was repealed, they are by express language (sec. 189.03 (1) (k) Stats.) exempt under the revamped securities law.

HHP

Education — Vocational Education — Phrase "board of vocational and adult education" as contained in sec. 41.18, Stats., refers to local board of education, not to state board of vocational and adult education.

July 27, 1938.

BOARD OF VOCATIONAL EDUCATION.

You refer us to sec. 41.18, Stats., and ask for an opinion of this office as to the construction of the following quoted part:

"* * * Any person over the age of fourteen years who shall reside in any town, village or city not having a vocational and adult education school, and who is otherwise qualified to pursue the course of study, *may with the approval of the board of vocational and adult education, be allowed to attend any school under its supervision.* Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

You request a construction of the phrase "board of vocational and adult education," as used in the above quoted

statute, and ask whether the board therein referred to means the state board of vocational and adult education.

Sec. 41.15, Stats., provides for the creation and maintenance of *local* boards of vocational and adult education, and prescribes the duties of said boards. One of the duties therein set out is "to establish, foster and maintain schools of vocational and adult education." Subsec. (4) thereof expressly provides:

"The local board of vocational and adult education * * * with the co-operation of the state board of vocational and adult education, shall have general supervision of the instruction in the local schools of vocational and adult education."

The whole import of sec. 41.15 is to vest the primary control and supervision of the local schools of vocational and adult education in the local boards, this authority to be exercised with the co-operation of the state board. Sec. 41.15 (10) (a) specifically provides:

"Said local board shall have exclusive control of the schools established by it and over all property, acquired for the use of said schools, except as otherwise provided by the statutes. * * *"

The co-operative supervision of the state board of control is state-wide. If any significance is to be attached to the language "under its supervision" in sec. 41.18, the language must refer to the local board. As applied to the state board such language is mere surplusage.

We conclude that the board referred to in the latter part of sec. 41.18, Stats., is the local board of vocational and adult education.

HHP

NSB

Taxation — Exemption — Personal property owned by federal government on real estate used for coast guard purposes, located within township, is exempt from taxation, and local authorities are not authorized to assess it.

July 28, 1938.

HERBERT JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

You have submitted the following question :

“Can the assessor of the township levy a personal property tax against personal property owned by the federal government on real estate used for coast guard purposes located within the township?”

Under article VIII, section 1 of the state constitution, it is provided :

“The rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe.”

It is evident that the legislature, under this provision, may exempt property from taxation. Under this power, the legislature has passed numerous laws exempting certain property, both real and personal, from taxation.

In sec. 70.11 of the Wisconsin statutes, it is provided :

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

(1) That owned exclusively by the United States or by this state except lands contracted to be sold by the state and except state lands hereinafter provided; * * *.”

We take it from your question that the property in question is exclusively owned by the federal government. Under the above quoted provision of our statute and constitution, there can be no doubt but that your question must be answered in the negative. See *Comstock v. Boyle*, 144 Wis. 180, 186.

Furthermore, regardless of sec. 70.11 (1), Stats., neither the state nor the federal government may tax the property or an instrumentality of the other. *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, *Osborn v. Bank of the United States*, 22 U. S. (9 Wheat.) 738.

LEV

JEM

Public Officers — Chairman of Northern Lake States Regional Committee — Director of Regional Planning — State director of regional planning may accept federal appointment as chairman of northern lake states regional committee without jeopardizing state office.

July 30, 1938.

M. W. TORKELSON,

Director of Regional Planning.

You state that you have been selected as chairman of the northern lake states regional committee, which committee was organized through an order of the president of the United States and has for its objective the formulation of recommendations looking to the rehabilitation of the cut-over region included in the states of Michigan, Minnesota and Wisconsin. In the course of this work and in the interests of the committee it will be necessary for you to do a certain amount of traveling in which expense will be incurred. The purpose of the appointment is in order that this expense may be borne by the government of the United States.

You have been requested to subscribe to the oath of office prescribed by sec. 1756, Revised Statutes of the United States, and you wish to be advised whether subscribing to said oath and accepting this office (if it is an office) will jeopardize your present office with this state.

There is no provision in the federal or state constitution that would prohibit your accepting such office nor is there any federal or state statute that would prohibit acceptance of such office. You are therefore advised that you may accept the appointment in question without jeopardizing your state office.

NSB

Tuberculosis Sanatoriums — Items are considered, mostly installations, as to whether said items come within purview of sec. 50.07, subsec. (2), par. (d), Stats.

August 4, 1938.

BOARD OF CONTROL.

Attention A. W. Bayley.

In connection with the Eau Claire county sanatorium addition, you have submitted eight items and inquire whether they come within the purview of sec. 50.07, subsec. (2), par. (d), Stats. The items submitted are as follows:

"1. General Electric X-Ray Corporation—x-ray unit wired in and permanently a fixture in the x-ray room—\$4,000.00.

"2. 1 Scanlan-Morris battery of sterilizers (dressing, bed pan, and instruments.) built into the wall, steam, wire and water connected—\$1,458.70.

"3. H. H. Tanner—Grading for lawn, sowing and planting shrubbery, new addition—\$900.00.

"4. Guy W. Warden—Sidewalk, retaining wall and steps, new addition—\$464.00.

"5. Colson Corporation—Three food conveyors with heated lower compartments, wire and steam connected—\$717.24.

"6. Joesting & Schilling Company—three Colt autosan dishwashers—wire, steam and water connected—\$836.00.

"7. Joesting & Schilling Company—1 Hobart food mixer, slicer and chopper unit wired in—\$549.50.

"8. U. S. Hospital Supply Company—1 Alpine Sun Hanovia lamp for heat treatments wired in—\$250.00."

Assuming that these items were installed subsequent to January 1, 1937, in connection with an addition to the sanatorium which was constructed in whole or in part subsequently to January 1, 1937, we advise as follows:

The expenditures listed as items 3 and 4 are for general ground improvement in connection with the construction of a new addition to existing sanatorium buildings. In an opinion dated May 5, 1938 (XXVII Op. Atty. Gen. 271), it was stated that such expenditures could not properly be included unless they were so related to structural improve-

ments as to be a part thereof. There is no doubt that the erection of new buildings or additions to old ones necessitates also the construction of walks and steps leading thereto and the improvements of the grounds surrounding such structures. This must be done in order that the new additions may in appearance and operation constitute a part of the existing unit. Expenditures made for such improvements are a part of structural improvements and come within the meaning of subsec. (2), par. (d) of sec. 50.07, Stats.

The other items listed in the request are all in the nature of equipment or machinery to be used in the new addition. In an opinion of April 1, 1938 (XXVII Op. Atty. Gen. 201), it was said, p. 202, that "the problem of machinery, equipment, fixtures and furnishings * * * is governed by the law of fixtures, since it is evident that the legislature had in mind 'additions' to sanatorium buildings, rather than to the personal property used in connection therewith."

It has been said of the law of fixtures in general that the question is dependent primarily upon three considerations, physical annexation, adaptability to the use and purpose to which the reality is devoted, and the intention of the parties. See *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36; *Baringer v. Evenson*, 127 Wis. 36, 106 N. W. 801; *People's Savings & T. Co. v. Sheboygan M. Co.*, 212 Wis. 449, 249 N. W. 527. The factor of physical annexation has frequently been said to be of minor importance, however. See *Standard Oil Co. v. La Crosse S. A. Service*, 217 Wis. 237, 258 N. W. 791 and cases cited therein. Thus in *McCorkle v. Robbins*, 222 Wis. 12, 267 N. W. 295, it was held that certain machinery constituted fixtures even though such machinery was not connected to the building except by water pipes and electric wiring. The controlling factor in that case as indicated by the court was the intent of the party making the annexation as evidenced by the fact that the machines in question were clearly adapted to and were put by the owner of the realty and the machines to the use to which he devoted the realty and the installed as an entirety. It would seem that the rule in Wisconsin is that machinery and equipment may be classed as fixtures if the intent of the person installing the same is that such equip-

ment shall be a permanent attachment to the realty, and such is evidenced by physical attachment or adaptability to the use to which the realty is put plus actual use in that way. While physical attachment is frequently minimized as a factor of importance, it is an element which can not be ignored. As evidence of intent, it is exceedingly important and there are no cases in Wisconsin in which it has been held that mere loose, movable tables or furniture are fixtures.

In applying the principles discussed above to the items in question a factor peculiar to these cases should be considered, namely, the purpose of the legislature in enacting the provision. That purpose is clearly indicated by the words of the act itself "to encourage the expansion and improvement of the facilities of county tuberculosis sanatoria." Undoubtedly all the equipment listed will improve the facilities of the Eau Claire county sanatorium and for this reason a liberal application of the law of fixtures would seem justified in order that the legislative purpose may be given effect. Since the law with respect to fixtures is somewhat unsettled, considerations of policy may play an important part in certain cases. In the instant case, the policy is set by the legislature by the portion of the act quoted above.

Applying the principles discussed, it must be held that the items listed as 1 and 6 are fixtures and may be included as part of the new addition. The sterilizer listed as item 2 is also a fixture and its cost may be included in fixing maintenance charges. To the cost of the sterilizer may be added the cost of any accessories necessary to the operation thereof and especially designed as a part thereof. All of the equipment enumerated above appears to be substantially attached to the building and is apparently designed to be permanently fixed in the place attached.

Items 5, 7 and 8 are not fixtures, however, and do not come within the meaning of subsec. (2) (d), sec. 50.07, Stats. Each of those expenditures is for equipment which is readily movable and in the case of the sun lamp and food conveyor is especially designed to be moved about. Such equipment, as well as the food mixer, is much like furniture having little if any physical connection with the realty; it

may be removed from the building with little trouble and no damage.

You are advised that items 1, 2, 3, 4 and 6 come within the purview of the statute; items 5, 7 and 8 do not and should be disallowed.

NSB

Automobiles — Law of Road — Residents of South Beloit, Illinois, whose cars are registered in that state and who are not required by laws of that state to have operator's license must obtain Wisconsin operator's license to operate their cars upon highways of this state in excess of thirty days in any one year.

August 6, 1938.

JOHN MATHESON,
District Attorney,
Janesville, Wisconsin.

You have asked whether the several hundred people living in South Beloit, Illinois, driving cars registered in the state of Illinois and working in Beloit, Wisconsin, hence driving into Wisconsin nearly every day, must obtain a Wisconsin operator's license.

The statutes are perfectly clear on this matter. Sec. 85.08, subsec. (8), Stats., provides:

“A nonresident who has been duly licensed either as an operator or chauffeur under a law requiring the licensing of operators or chauffeurs in his home state or country * * * shall be permitted, without examination or a license under this section to drive a motor vehicle upon the highways of this state, except as hereinafter provided.”

If, under the laws of Illinois, these residents of South Beloit were required to obtain operator's licenses, they would not be required to obtain a Wisconsin operator's

license. However, since the law of Illinois requires only chauffeurs to obtain operator's licenses (see ch. 95½, sec. 33, Ill. Rev. Stats., 1937), these nonresidents would be controlled by sec. 85.08 (8a), Stats. which specifically states:

"It shall be unlawful for any nonresident whose home state or country does not require the licensing of operators or chauffeurs, and who has not been licensed either as an operator or chauffeur in his home state or country, to operate any motor vehicle upon any highway in this state without first obtaining a driver's license, except that any unlicensed nonresident who is over the age of sixteen years and who is the owner of a motor vehicle which has been duly registered for the current calendar year in the state or country of which the owner is a resident, may operate such motor vehicle upon the highways of this state for a period of not more than thirty days * * *"

These provisions rest upon the right of the state in the exercise of its police power to prescribe uniform regulations necessary for public safety and order upon the highways. Under these statutes, it is evident that these nonresidents of South Beloit who operate their cars upon Wisconsin highways in excess of thirty days in any one year must obtain a Wisconsin operator's license. See Berry, *Automobiles*, 7th ed., Vol. 2, p. 243, sec. 2.247, *State v. Chandler*, 131 Me. 262, 161 Atl. 148 (1932).

NSB

Dairy and Food — Public Health — Public Officers — Board of Health — State board of health may make regulations requiring sanitary production of fluid milk, cream, skimmed milk and buttermilk if such regulations are reasonably necessary as health measure or to prevent spread of or to suppress communicable diseases, provided such rules are in aid of or supplemental to legislative standards and not in conflict therewith. Such rules may be enforced by inspectors employed by department of agriculture, this arrangement being with common consent of both departments. If rule is within limits of delegated power, it would not be invalid merely because it is made applicable to certain situations or localities, if classification is consonant with constitutional legislative classification.

August 8, 1938.

DR. C. A. HARPER,
Board of Health.

You wish to be advised whether the state board of health may make regulations requiring the sanitary production of fluid milk, cream, skimmed milk and buttermilk, these regulations to be enforced through inspectors employed by the department of agriculture. This arrangement will be by common consent of both departments.

Milk sanitation regulations are by statute within the jurisdiction of each of these departments. With respect to the powers of the state board of health, sec. 140.05, subsec. (1), Stats., in part provides as follows:

“* * * It shall have power to execute what is reasonable and necessary for the prevention and suppression of disease. * * *”

Sec. 140.05 (3), Stats., in part provides as follows:

“The board shall have power to make and enforce such rules, regulations and orders governing the duties of all health officers and health boards, and as to any subject matter under its supervision, as shall be necessary to efficient administration and to protect health, * * *.”

With respect to the duties of the deputy state health officers, sec. 140.07 (2), Stats., provides for inspection of dairies, creameries, etc.

Powers are given to the board under sec. 143.02 (4) to adopt and enforce rules and regulations for guarding against the introduction of any communicable disease and for the control and suppression thereof.

With respect to the rule-making power of the department of markets, sec. 93.07, Stats., makes it the duty

“(1) To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of the provisions of chapters 93 to 100 and chapter 129, which regulations shall have the force of law.”

Sec. 93.09 (1) provides that the department may establish standards for the grade of food and farm products and for receptacles therefor. Sec. 93.09 (5) provides that the standards and regulations established must not conflict with any standard or regulation promulgated under authority of any other statute.

Sec. 97.36, Stats., sets up what appears to be some rather definite legislative standards with respect to insanitary milk and cream. It is the duty of the department of agriculture and markets to enforce these standards and to make rules and regulations “as are necessary and proper” for the enforcement of these standards.

Sec. 14.65, Stats., requires that the several state departments “shall co-operate in the performance and execution of state work” and, “by proper arrangements” between them “shall interchange such services of employes, or shall so jointly employ or make such assignments of employes as the best interests of the public service require” and that “whenever the employe * * * is assigned or required hereunder to perform services for any other” department, he is “vested with all powers * * * to the same extent * * * as though regularly appointed therefor.”

We are of the opinion that if the rules and regulations to be adopted by the board of health are such that it can be

said that there is a reasonable relationship to the rule and health and that the rule is reasonably necessary as a health measure or to prevent the spread of or to suppress communicable diseases, such rules and regulations are within the rule-making power of the board. We are further of the opinion that sec. 14.65, above quoted, is sufficiently broad in intent and scope to authorize enforcement of the rules and regulations thus adopted by inspectors employed by the department of agriculture, this arrangement being with common consent of both the parties.

It may be well to invite your attention to sec. 93.09 (6), Stats., which in substance provides that the department of agriculture may not adopt a standard or regulation where any other department has authority to adopt such standard or regulation, and that no other department may adopt a standard or regulation where the department of agriculture has the authority to adopt such standard or regulation without the joint action of both departments. For the foregoing reason, if the rules that your department proposes are conceivably within the authority of the department of markets, it would be well for both departments to jointly adopt the rule. This would appear to be a desirable precaution. In any event it can do no harm. At this point it may also be well to observe that neither the board of health nor the department of agriculture and markets or both acting jointly can make rules or regulations in conflict with the state laws with reference to any subject. The legislature by sec. 97.36 has laid down some standards with reference to insanitary milk, cream, etc. Proposed rules and regulations to be established may be in aid of or supplemental thereto but must not be such as would be deemed to be in conflict with the state law.

You further inquire whether the state board of health may make such regulations applicable only to a limited portion of the state, such as cities of 4,000 population or more and the country for two miles surrounding such cities.

It must be conceded that such classification is dangerously close to a nondelegable legislative function. The *legislature* may thus classify if the classification is based upon any difference in situation of the person or the territory that is germane to the purpose of the regulation. If

there is no such substantial distinction germane to the purpose of the regulation, the classification would deny equal protection of the law and would be in violation of the fourteenth amendment to the constitution of the United States. The state may not by any of its agencies disregard the prohibitions of the fourteenth amendment. *Georgia Power Co. v. Decatur*, 281 U. S. 505, 508.

All the law that we have been able to find upon the subject involves the question of constitutional *legislative* classification as distinguished from classification by an administrative board or agency. So far as we can determine, your question has never been passed upon in this state or elsewhere. It is a new question and any conclusion reached must be based upon an analysis of the present state of development of administrative law of this state.

It is apparent from the foregoing observations that classification within constitutional limits is a power that has heretofore been exercised by the legislature rather than by administrative agencies. But it does not follow from this that classification within constitutional limits is an essentially legislative function which may not be delegated to an administrative board or agency. All rules and regulations adopted by any board or commission would be within the power of the legislature to adopt, if otherwise constitutional, so that the fact that the legislature may or has acted exclusively in a particular field is no final criterion by which to determine whether the power sought to be exercised is a sovereign power which may be exercised by the legislature alone and which may not be delegated to an administrative tribunal or agency. *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472 (1928) at 496 where the court says:

“If an executive or administrative officer has authority either by himself or acting with other officers to do the very thing that Congress might have done in the exercise of its legislative power, that is, make a rule of conduct for which a citizen may be penalized if he disobeys it, it is difficult to see how it can be said that the power exercised is in one case legislative and in the other case it is not. The regulation made by the administrative officers answers every definition of law. The regulation prescribes a rule of future

conduct, compliance with which may be enforced in a court of law. An act of Congress can do no more, and if in the making of the rules, as is held in the *Hampton Case, supra*, the administrative officer may be vested with a discretion as to what the regulation shall be, then the two acts become identical. To call one legislative power and the other a power to make rules and regulations does not change the substance of the power exercised in each case. * * *

The above quoted critical and frank analysis marked a milestone in the development of administrative law. Therefore courts had been unwilling to recognize that legislative power could be delegated. That power which the legislature delegated to administrative boards and tribunals was distinguished from legislative power as a "rule-making power" or as "quasi-legislative."

It is now quite freely recognized by our court that legislative power can be delegated. Thus the court in *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279 (1936), at page 286 says:

"The power of the legislature to delegate to administrative officers or boards powers which are legislative is now generally conceded to be proper, if the legislature first declares the policy and sets up sufficient standards for the guidance of the administrative officer or board. (Citing *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837, 843, 97 A. L. R. 947.)"

We seem to have reached a stage in the development of administrative law where it may now be said that it is only that power which is essentially legislative and which may, for lack of a better term, be called sovereign legislative power which cannot be delegated. As to what is sovereign legislative power which cannot be delegated, the following quotation from *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 505-506, probably states the legal concept as clearly and concisely as it can be stated:

"* * * The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the

law shall operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of Chief Justice Marshall 'to fill up the details;' in the language of Chief Justice Taft 'to make public regulations interpreting the statute and directing the details of its execution.' It is legislative power of the latter kind which is oftentimes called the rule-making power of boards, bureaus, and commissions."

Conceding that any law creating an administrative department or agency and delegating rule-making and regulatory powers to the agency sets up sufficient standards and sufficiently prescribes the field in which the agency shall operate so as to meet the test of lawful delegation of legislative power in the first instance, there would seem to be no logical reason why the agency acting within the standards thus set up and within the prescribed field may not classify within the same constitutional limits as the legislature itself. If the rule or regulation is reasonably necessary in some localities or in some situations in order to carry out the legislative purpose, and not reasonably necessary in other situations and localities to carry out the legislative purpose, it would seem rather absurd to make the rule and regulation applicable to the whole state—in other words, regulation where regulation is not necessary, merely to have the rule upheld as an exercise of delegable legislative power rather than nondelegable legislative power. We cannot believe that such is the law and are of the opinion that if the board otherwise acts within the limits of the power delegated, the rule or regulation would not be invalid merely because it is made applicable to certain situations or localities.

But in adopting a rule based upon classification the board must act within the limits of constitutional legislative classification.

As to the suggested territory, such as two miles surrounding cities of certain population, there is no rule of thumb or yardstick for determining the exact area that may

be compassed. The test is whether the entire city and surrounding territory and persons subjected to the rule are so differently situated with reference to the purpose of the regulation that it can be said that the classification is based upon a substantial distinction.

For your guidance we attach hereto as Appendix A the cases most in point which have dealt with the subject of constitutional classification.

NSB

Municipal Corporations — Municipal Law — Water Rates — Twenty-five per cent differential provision in sec. 66.06, subsec. (14), subd. (a), par. 1, Stats., has no application to charges to be made for water furnished to other municipally owned water utilities by city of Milwaukee. If twenty-five per cent differential, where applicable, results in rate in excess of that necessary to produce fair return for service in accordance with commission standards, such excess may be considered for purposes of arriving at fair return on value of used and useful property of utility when establishing rates to be charged to customers within city.

August 10, 1938.

CALMER BROWY, *Director,*

Public Service Commission.

You state that Milwaukee, in its capacity as a public water utility of this state, serves customers outside the corporate limits of the city. Besides serving individual consumers outside the city in the same way it furnishes service to those within the city limits, it also furnishes water to the city of West Allis and the incorporated villages of Shorewood, Whitefish Bay and Fox Point, which water is in turn distributed by these municipalities, in their capacity as public water utilities, to their own consumers, by means of the utility property owned by such municipality.

With reference to charges made by the city of Milwaukee for water furnished outside the corporate limits, sec. 66.06, subsec. (14), subd. (a), par. 6, Stats., provides as follows:

“The commissioner of public works of any such city may issue a permit to the county in which it is located, to any national home for disabled soldiers, or to any other applicant to obtain water from the waterworks in the said city for use outside of the limits of said city; and for that purpose to connect any pipe which shall be laid outside of the city limits with any water pipe in such city. * * * conditioned that the said applicant * * * will pay all charges fixed by said commissioner for the use of such water * * *, which charges, except as to water furnished directly to county or other municipal properties, shall not be less than one-quarter more than those charged to the inhabitants of the city for like use of water. * * *”

You have requested an opinion as to whether the provision for a twenty-five per cent differential in rates is applicable to the service rendered by the city of Milwaukee to the various municipal utilities.

The statute provides:

“* * * which charges, *except as to water furnished directly to county or other municipal properties*, shall not be less than one-quarter more than those charged to the inhabitants of the city for *like use of water*. * * *”

It is our opinion that the utilities of the municipalities in question owned by the municipality are “municipal properties” within the language of the exception. It would seem that this must necessarily be true as the twenty-five per cent differential is to be based upon the amount “charged to the inhabitants of the city for like use of water.” Ordinarily, and so far as we know without exception, municipal utilities have no such like use of water within the municipality. The city of Milwaukee is a water utility and the suburbs to which this service is rendered are water utilities. There is no similar water utility “for like use of water” within the city of Milwaukee. Thus, if these suburb municipal water utilities were held not to be within the exception of the statute, we would have the anomalous situation of a required

twenty-five per cent differential but with no legislative or other standard upon which to base the differential.

You are advised that the twenty-five per cent differential provision in sec. 66.06 (14) (a) 6, Stats., has no application to the charges to be made for water furnished to other municipally owned water utilities by the city of Milwaukee.

You have submitted a further question as follows:

"2. Whether, in your opinion, the excess of rates collected for water service furnished outside the limits of the city of Milwaukee, whether to such municipal utilities or otherwise, by reason of the requirements of the statute, should be deducted from the revenue requirements to be met by the rates charged by the city of Milwaukee to its customers within the city for the purpose of determining whether the city of Milwaukee is receiving a fair rate of return on the value of its used and useful property."

If you mean by this question that the twenty-five per cent differential, where applicable, may result in an excess of rate over that necessary to produce a fair return for the service in accordance with commission standards, we perceive no reason why such excess may not be considered, since, for purposes of arriving at a fair rate of return on the value of the used and useful property of the utility, the utility must be considered as a whole when establishing rates to be charged to its customers within the city.

In view of our answer to your first question, it is unnecessary for us to answer the further questions submitted in another letter of the same date supplemental to submission of the questions herein considered, as those questions are predicated upon a contrary answer to question 1 herein considered.

NSB

Bonds — Courts — Employees' Cash Bonds — Funds deposited by employer under sec. 331.41, subsec. (1), Stats., are trust funds. Five thousand dollar limitation is without reference to employer's individual account and is limitation only upon amount which may be deposited with respect to any one trust or individual employee.

August 11, 1938.

BANKING COMMISSION.

Sec. 331.41, subsec. (1), Stats., in substance provides:

"Where any person, firm, or corporation requests any employe to furnish a cash *bond*, the cash constituting such *bond* shall not be mingled with the moneys or assets of such person, * * * demanding the same, but shall be deposited by such person, * * * in any bank, trust company, or federal savings and loan association whose deposits are insured by a federal agency to the extent of five thousand dollars, as a separate trust fund, and it shall be unlawful for any person, * * * to mingle such cash received as a *bond* with the moneys or assets of any such person, * * * or to use the same. *No employer shall deposit more than five thousand dollars with any one depository.* The bank book, certificate of deposit, or other evidence thereof shall be in the name of the employer in trust for the named *employe*, * * *."

You have submitted several questions involving the construction of this statute as follows:

1. Do funds so deposited belong to the employer?

The statute is specific upon this point. The funds so deposited do not belong to the employer. Each separate bond is required by the statute to be deposited "in the name of the employer in trust for the named employe."

2. If an employer's account with a depository is in excess of five thousand dollars, may the employer nevertheless deposit such a bond or bonds with the same depository?

Title 12 U. S. C. A., page 503, sec. 264 (h) (9) (federal deposit insurance law) provides:

"Trust funds held by an insured bank in a fiduciary capacity whether held in its trust or deposited in any other department or in another bank shall be insured in an amount not to exceed \$5,000 for each trust estate, and when deposited by the fiduciary bank in another insured bank such trust funds shall be similarly insured to the fiduciary bank according to the trust estates represented. *Notwithstanding any other provision of this section, such insurance shall be separate from and additional to that covering other deposits of the owners of such trust funds or the beneficiaries of such trust estates: * * **"

As the employer's own account for insurance purposes is separate and distinct from a trust account in the employer's name for the benefit of a named employee, it is apparent that an employer may deposit such a bond with the same depository in which his own account is carried although his own account is in excess of five thousand dollars.

3. May bond deposits be made with any one depository in excess of five thousand dollars?

The statute provides that "no employer shall deposit more than five thousand dollars with any one depository." This language taken alone and standing by itself without reference to the other language of the subsection would appear to prohibit such practice. However, the language must be read in connection with the subject matter dealt with and what would appear to be the obvious aim and purpose of the legislature. It will be noted that this subsection does not deal with reference to *bonds* of employees but with reference to *a bond* of a single employe. The subsection is in the singular rather than in the plural throughout. The purpose and intent of the legislature would seem to be that of assuring insurance with respect to *a bond* so deposited. The statute requires the bond to be deposited as a separate trust account "in the name of the employer in trust for *the named employe.*" Each separate bond deposit is a separate trust and must be deposited as such and as such each separate trust is insured up to five thousand dollars. As the entire subject matter of sec. 331.41 (1), Stats., is that of *a bond* and *a bond deposit*, we conclude that the five thousand limitation with any one depository must be read in connection

with the subject matter dealt with and refers to the limit of deposit with respect to *a named employe deposit* (one deposit).

NSB

Appropriations and Expenditures — Bridges and Highways — Street Improvement — Appropriations under sec. 20.49, subsec. (2), par. (a), Stats., are to be expended by various municipalities in construction, improvement and repair of highways.

August 11, 1938.

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

Sec. 20.49, subsec. (2), par. (a), Stats., provides:

“On December 15, 1937, and annually thereafter, to each town, village, and city, a privilege highway tax in an amount as herein set forth in lieu of the general property tax heretofore assessed on motor vehicles. Each town, village and city shall receive an amount equal to twenty per cent of the net registration fees derived from motor vehicles customarily kept in such town, village or city in the fiscal year ended the previous thirtieth day of June, but in no case less than the approximate amount collected by said municipalities from the property tax on motor vehicles levied in the year 1930 as computed under chapter 22 of the laws of 1931.”

The section is silent as to whether the money so appropriated must be expended by the towns, cities and villages for highway purposes or whether the appropriation may be used to augment the general fund of such towns, cities and villages. You have requested our opinion with respect to same.

The first appropriation of this nature was made by sec. 3, ch. 22, Laws 1931, creating sec. 20.49 (2) (a) and providing as follows:

“On February 1, 1932, and annually thereafter, to each town, village, and city, a privilege highway tax in an amount as herein set forth in lieu of the general property tax heretofore assessed on motor vehicles. On February 1, 1932, each town, village, and city shall receive approximately the same amount as it collected from the property tax on motor vehicles levied in the year, 1930, such amount to be ascertained as provided in section 85.045. Annually thereafter, each town, village, and city shall receive an amount equal to twenty per cent of the net registration fees derived from motor vehicles customarily kept in such town, village, or city in the fiscal year ended the previous thirtieth day of June, but in no case less than the amount paid it in 1932.”

This same section of said law, creating sec. 84.01 (4), provided as follows:

“The legislature of the state of Wisconsin hereby declares that the purpose and intent of the act of which this subsection is a part, is to give the necessary assent to all federal highway acts and to make provision that will insure the receipt by the state of any federal aid that heretofore has been, or may hereafter be allotted to the state, including all increased and advanced appropriations, to continue highway improvement on a scale commensurate with the needs of the state, to provide emergency relief for unemployment; *to make possible a reduction in property taxes for highway purposes; and and to meet obligations on county bonds as provided by law.* * * * *If the governing body of any town, village, city, or county shall fail or neglect to use any and all increased allotments from the appropriation under section 20.49 for the reduction of highway taxes, the highway commission, on petitions of taxpayers residing in said town, village, city, or county, numbering five per cent or more of the vote cast for governor at the last election, alleging such failure or neglect, shall investigate the matter.* * * *”

Sec. 1, ch. 4, Laws Special Session 1931, provides as follows:

"To enable towns, cities, and villages to begin at the earliest date possible bridge, street, or highway construction projects which they have in contemplation and to make possible the use of the moneys which are payable to these municipalities under the provisions of paragraph (a) of subsection (2) of section 20.49 of the statutes, (created in Chapter 22, Laws of 1931) for the reduction of local taxes levied in 1931 for bridge, street, or highway construction projects either undertaken in 1931 or proposed to be undertaken in 1932 to provide work for unemployed citizens in need of relief, the state treasurer shall pay the amounts due to the respective towns, cities, and villages on February 1, 1932, as soon as possible after the effective date of this act."

In view of this legislative history of similar appropriations, we are of the opinion that appropriations under sec. 20.49 (2) (a), Stats., are to be expended by the various municipalities in the construction, improvement and repair of highways.

NSB

Tuberculosis Sanatoriums — In case of one who has legal settlement in city located in two counties, both counties are liable for one-half actual per capita cost under sec. 50.03, Stats., and in proportion which time lived in particular county during fiscal year in question bears to entire fiscal year.

August 12, 1938.

BOARD OF CONTROL.

Attention A. W. Bayley.

In your letter you state:

"Mrs. M. was admitted to the Forest Lawn Sanatorium and is twenty-seven years of age. Her husband has been living in the city of Watertown continuously from May, 1937, to July 1, 1938, and during that period did not receive public assistance. However, for the period from May,

1937, until February, 1938, the husband and patient lived at 714 Vine Street, Watertown, which is located in Dodge county. For the period from February, 1938, until July 1, 1938, they have lived at 314 South Ninth Street, Watertown, which is in Jefferson county. Prior to May, 1937, and for a period of three years, the husband and patient had been travelling on the road selling for a book company at no definite address at all, merely travelling from town to town in pursuit of an occupation.

"It would appear, according to the provisions of section 49.02 of the statutes, that the husband had established a legal settlement in the city of Watertown by one continuous residence herein, while not being supported as a pauper. The patient, in accordance with the same section, would follow and have the derivative settlement of her husband."

You invite our attention to secs. 50.03 and 46.10, subsec. (1), Stats., and inquire whether this case should be charged to one or both counties or whether it should be charged to the state as a state-at-large case.

Sec. 50.03, Stats., provides:

"One-half of the actual per capita cost of maintenance shall be paid *by the county in which the legal settlement is located*, pursuant to section 46.10 but nothing herein shall prevent the collection of the actual per capita cost of maintenance or a part thereof by the state board of control pursuant to law."

Sec. 46.10, subsec. (1), Stats., provides in part as follows:

"* * * The county in which said legal settlement is located shall be chargeable with the support and maintenance in the manner and to the extent provided by law. If it is found that said person does not have a legal settlement in any town, village or city, in this state, the state may be chargeable with all of the support and maintenance, provided the said court, judge, magistrate or board submits a transcript of the testimony taken for such a finding with respect to legal settlement to the state board of control, and the same is approved by said board and is so certified to the superintendent of the institution to which such person is committed or admitted. * * *"

Under the facts presented, there can be no question but that M had a legal settlement in the city of Watertown at the time of commitment. Sec. 49.02 (1). It seems quite apparent from the above quoted portion of sec. 46.10 (1) that the legislature intended the state to be chargeable only where it is found that the person involved "does not have a legal settlement." No such finding can be made in the instant case. The legal settlement in the instant case is in two counties. Legal settlement within a county is the basis for determining county liability under sec. 50.03, Stats. While that section and sec. 46.10 (1) refer to county in the singular, in view of sec. 370.01, subsec. (2), which provides as follows:

"Every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing; and every word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things, and every word importing the masculine gender only may extend and be applied to females as well as to males,"

it would not appear to be stretching the language of the statute too much to conclude that where the legal settlement is in two counties, each county may be charged for the year's maintenance upon the basis that the time lived in that county during the particular fiscal year in question (sec. 46.10 (2)) bears to the entire fiscal year.

You are advised that, since M has a legal settlement in the city of Watertown, which is located in two counties, both counties are liable for one-half of the actual per capita maintenance cost under sec. 50.03, Stats., and in the proportion which the time lived in a particular county during a fiscal year in question bears to the entire fiscal year.

NSB

Indigent, Insane, etc. — Public Health — Communicable Diseases — Quarantine — Sec. 143.05, subsec. (10), Stats., provides procedure for providing for indigent transient quarantine cases. There should be no conflict between said section and sec. 49.03, subsec. (9), Stats., in practical administration of two.

August 12, 1938.

BOARD OF HEALTH.

Attention Dr. H. M. Guilford.

You call our attention to secs. 49.03, subsec. (9), and 143.05, subsec. (10), Stats., and state that you feel there is a conflict between them.

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*
* * *”

Sec. 143.05 (10), Stats., with reference to quarantine of indigent cases, provides in material part as follows:

“Expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person, shall be charged against him or whoever is liable for his support. Indigent cases shall be cared for at municipal expense. * * * If he is a legal resident of another municipality of this state, the expense of care shall be paid by such municipality, or by the county where the county system for the care of the poor has been adopted, when a sworn statement of such expense is sent to the proper officers within thirty days after quarantine.”

The obvious purpose of the quarantine provision in re indigent cases is to provide a procedure for taking care of that particular kind of indigent case. The statute is specific and must control over any general statute that appears to be in conflict. However, we do not see where there is any particular conflict between the statutes above cited. In the ordinary case of indigency, the county judge upon application therefor must require the indigent to return to the municipality of residence or settlement "*unless it shall clearly appear that such removal would be against his best interests.*" It would be difficult to imagine circumstances justifying quarantine where it could be said that it would be to the best interests of the indigent patient that the patient be returned to the municipality of residence or settlement. Quarantine is an emergency matter and sec. 143.05 (10), Stats., specifically authorizes the municipality in which the quarantine is established (except in counties of five hundred thousand or more) to take care of the indigent case, provide nurses, medical attention, food and other articles necessary for the comfort of the afflicted person and charge same back to the municipality of residence or settlement, provided the sworn statement of such expense is sent to the proper officers within thirty days after quarantine.

As indigent quarantine cases necessarily present a factual situation where it would be most difficult, if not impossible, to find that it is to the best interests of the patient to have the patient removed to the municipality of residence or settlement, it is most difficult to see where there can be any real conflict in the practical application of the two statutes.

NSB

School Districts — School Attendance — Words and Phrases — Employed — Child may be “regularly, lawfully and usefully employed” upon home farm within meaning of sec. 40.70, subsec. (1), Stats., only when there is unusual or peculiar family or farm situation distinguishing case from other cases in district.

Words “regularly, lawfully and usefully employed” as used in sec. 40.70, subsec. (1), par. (a), Stats., and “nor to any child who lives in the country and more than two miles from the school house in his district,” as used in sec. 40.70, subsec. (1), par. (b), Stats., are construed.

August 12, 1938.

JOHN CALLAHAN,

Department of Public Instruction.

You have requested our opinion upon three matters with reference to the compulsory school attendance law as follows:

1. An interpretation of the words “regularly, lawfully, and usefully employed” as used in sec. 40.70, subsec. (1), par. (a), Stats.

These words have no technical meaning and must be construed as commonly understood. The term “regularly” is opposed to “irregularly.” It connotes “steadily” as opposed to “intermittently.” It does not necessarily signify full-time, continuous employment without any interruption whatsoever. It does, however, signify continuity of employment with interruption the exception rather than the rule.

The term “lawfully” is construed as in conformity to all laws with respect to labor and more particularly child labor and applicable to the age of the particular child in question. If an employment is in violation of any law of this state or any rule or regulation of an administrative agency of this state having the force of law, it cannot be said that the child is lawfully employed.

The term “useful” may be distinguished from the term “gainful” as used in sec. 103.05 (4), Stats. “Useful” appears to be a broader term than “gainful.” An employment may be “useful” and yet not “gainful” in the sense of

a monetary return to the person so employed. "Useful" would appear to pertain to the rendering of a service beneficial either to the child, to the parent or guardian or both.

All three terms must be applied to a particular case or situation in order to determine whether the case is within the exception. Cases will arise when it is most difficult to determine whether the child is within the exception however much anyone endeavors to expound or elucidate terms that are in use in ordinary everyday conversation. Each case will have to be determined upon its own peculiar set of facts. It is impossible to lay down any rule of thumb, easy of application in all instances and which, when applied, will automatically produce the correct conclusion.

2. An interpretation of the words "nor to any child who lives in the country and more than two miles from the schoolhouse in his district" as used in sec. 40.70 (1) (b), Stats.

The section referred to exempts children who live in the country and more than two miles from the schoolhouse in the district and for whom no transportation is furnished by the district, from the terms of the compulsory attendance law. When this statute is applied to specific statutes with reference to the duty of various districts to furnish transportation, it results in a number of children being so located with respect to the school in the district that they cannot be compelled to attend school. For instance, in sec. 40.34 (1), Stats., consolidated districts are obliged to furnish transportation to all children in consolidated school districts who live over two miles from the schoolhouse. There is thus compulsory attendance for all children within a consolidated school district in so far as distance of the child from school is concerned. The board, however, can be compelled to furnish transportation only in the case of common school districts for children residing in the district and over two and one-half miles from school and four miles in the case of a union high school. Thus in a case of a common school district, children living between two and two and one-half miles from a schoolhouse and in the case of a union high school, children living between two and four miles from the school are exempt from compulsory attendance un-

less the board furnishes transportation, and the board by statute is not compelled to furnish transportation.

However undesirable this may be in result, sec. 40.70 (1) (b), Stats., is specific and when the statute says two miles we can reach no other conclusion than that it means two miles.

3. On the validity of employment on the home farm of children between fourteen and sixteen years of age when such employment prevents school attendance.

Such employment is permissible and will excuse the child from compulsory school attendance if it otherwise complies with the requirements of sec. 40.70 (1), Stats., and those requirements have been discussed in detail in answer to question 1. Farm employment probably presents the most difficult application of the rule "regularly, lawfully, and usefully employed." In the main, however, school terms are so arranged as to permit maximum employment for rural children upon the home farm without interference with school work. We would be inclined to scrutinize every such case very carefully. Such employment, when there appears to be no unusual need therefor or any peculiar facts or circumstances different from any other family situation, will not excuse the child from compulsory attendance. Unless an unusual or peculiar family or farm situation is presented, we are of the opinion that home farm employment cannot be deemed "regular, lawful and useful" so as to excuse compulsory attendance.

NSB

Courts — Statutes of Limitation — Public Officers — School Districts — School District Treasurer — Taxation — Taxation of Utilities — Electors of school district may not authorize annual compromise of school district's equitable proportion of utility taxes under sec. 76.28, Stats. Any agreement based thereon is void and school district treasurer has duty, under sec. 40.10, subsec. (2), par. (a), Stats., to collect difference between amounts due school district and those which district received under such agreement and with respect to which cause of action accrued within six years.

August 12, 1938.

JOHN CALLAHAN,

Department of Public Instruction.

You advise that school district No. 5 of the town of Lafayette has been operating under the following resolution since 1928:

“Resolved by the electors of school district number five of the town of Lafayette in special meeting duly assembled for the purpose;

“That the school board of the school district are hereby authorized and directed to accept the sum of two hundred dollars per annum for the amount that the school district is entitled to under and by the provisions of section 76.28 (19) of the statutes which provides for the payment by the town board to the school district of an equitable portion of the money derived from the taxation of the public utility in the school district.

“That the sum of two hundred dollars is the sum arrived at by compromise agreement with the town board of the town of LaFayette and is to be received in full settlement each year hereafter as long as such law remains in affect.

“That the payments made by the town are to begin with the payment to be made June 1st, 1928 and annually thereafter and no payments are to be made by the town for any moneys received by the town prior to that date.

“That the school board of the school district are instructed to carry out the provisions of this resolution and the compromise with the town accordingly and the effect of this resolution shall be binding upon the school district and the school board hereafter during the existence of said law.

“The above resolution was adopted by a special meeting of school district number 5 of the town of LaFayette in meeting duly assembled and the notices of such meeting accurately described the purpose of such meeting and such meeting was in all things regularly called and conducted”

and that said school district has been accepting two hundred dollars annually as its equitable share of taxes under sec. 76.28, Stats., since said date. You inquire (1) whether the electors of the school district had authority to make such agreement and (2) if not, whether the district may recover the difference between the amounts which were due the school district under the statute and the amounts received under the agreement.

Sec. 76.28, Stats., provides in part as follows:

“(1) The state shall retain fifteen per cent of the taxes paid into the treasury by any street railway company, light, heat and power company or conservation and regulation company defined by section 76.02, and * * * sixty-five per cent shall be distributed to the towns, cities and villages, within or through which the business of such company was carried on and operated in proportion, as near as may be, to the property located and business transacted within each such town, city and village; * * *.”

Subsec. (3) of sec. 76.28, Stats., provides that this 65% shall be distributed as follows:

“In all counties having a population of fifty thousand or less, fifty per cent of the amount of taxes received by any town or village from the state treasurer on account of the assessment of any street railway, light, heat, power or conservation company shall be retained by the treasurer thereof for general town or village purposes, and the remaining fifty per cent shall be equitably apportioned by the town board or village trustees to the various school districts or parts of school districts in which the property of such company is located, in proportion to the amount which the property of such company within each such school district bears to the total valuation of the property of such company in the town or village or part thereof; provided, that no such school districts shall in any event receive from this fund an amount, which when added to all other aids received from both county and state, shall exceed the actual

cost of operating and maintaining its school. Any excess above this amount shall be retained by and is allotted to the town or village. * * *

Both the town of Lafayette and the school district exceeded the bounds of their authority in making the agreement. Subsec. (3) of sec. 76.28, Stats., says that the remaining fifty per cent "shall be equitably apportioned by the town board or village trustees to the various school districts." This provision has been held to be mandatory in its operation and the town treasurer is permitted no discretion in the determination of the amount to which the school district is entitled. *State ex rel. Carlson v. Kingston*, (1933) 210 Wis. 301, 246 N. W. 318. Moreover, we have the rule of law that the power of the school districts and the town boards is limited and can be exercised only as the statute provides and they are nowhere given power to make any such agreement as is involved here. *Harris v. Joint School District*, 202 Wis. 519, 233 N. W. 97; *Town of Swiss v. United States Nat. Bank*, 196 Wis. 171, 218 N. W. 842.

You are advised that the electors of the school district had no authority to authorize any such compromise or agreement.

As the electors of the district were without authority to authorize such compromise or agreement, the agreement is void and of no force and effect. No question of estoppel is involved. *Town of Swiss v. United States Nat. Bank*, 196 Wis. 171, 218 N. W. 842; *Antigo Water Co. v. City of Antigo*, 144 Wis. 156, 128 N. W. 888.

Sec. 40.10 (2) (a), Stats., with respect to duties of the school district treasurer provides :

"He shall apply for, and receive, and if necessary sue for all money appropriated to or collected for the district, and disburse the same on the order of the clerk, countersigned by the director and not otherwise."

The school district treasurer not only has the power but it is his duty to collect the school district's full equitable share of this tax money from the town, and in accordance with the statutory provision for distribution, sec. 76.28 (3), above quoted. The tax commission assessed the property of

the utility; the state collected the tax and the state treasurer distributed the tax to the municipal units in accordance with the statute. The town treasurer is without discretion in the premises and must distribute the tax thus received in accordance with the provisions of the statute. Where the town treasurer collects taxes belonging to a school district, he acts as agent of the school district. *First Nat. Bank of Neillsville v. Town of York*, (1933) 212 Wis. 264, 249 N. W. 513; *Town of Conover v. Eagle River Jt. Union F. High School Dist.*, (1933) 211 Wis. 470, 248 N. W. 420. Thus that portion of the tax received by the town treasurer would be distributed to the school districts pursuant to the statutory scheme, belongs to the school districts and not to the town. *State ex rel. Carlson v. Kingston*, (1933) 210 Wis. 301, 246 N. W. 318; *Chalupnik v. Savall*, (1935) 219 Wis. 442, 263 N. W. 352.

Sec. 330.19 (4), Stats., provides: "An action upon a liability created by statute when a different limitation is not prescribed by law" shall be brought within six years from the time the cause of action accrues. This section has been held to apply to actions for recovery of money brought by the school district against the county. XXV Op. Atty. Gen. 50. The statute runs against municipalities in the same way it does against individuals, and in an action for back taxes due, the town could plead the statute as a defense against any taxes which became due and payable more than six years ago. Since a separate amount is assessed and collected each year which becomes due and owing to the district on December 1 of the year of assessment and collection by the town, the statute must be held to have run against those taxes which became due and owing more than six years ago.

NCB

Corporations — Securities Law — Stock in A corporation exchanged for stock in B corporation pursuant to reorganization plan, both corporations continuing to do business and neither taking over substantially all of assets of other, is not exempt from registration under secs. 189.05, subsec. (15), and sec. 189.05, subsec. (6), Stats.

August 13, 1938.

BANKING COMMISSION.

Attention Frank H. Bixby.

You advise that the A Society (hereinafter the society) is an Illinois corporation engaged in the business of education in accounting and related subjects by correspondence. The B Institute (hereinafter the institute) is a New Jersey corporation engaged in the production and sale of executive training courses and rendering allied services. The society is now a subsidiary of the institute, the institute owning 99.79% of the outstanding stock of the society.

The institute has had financial difficulties and the society has become involved by reason of its endorsement of promissory notes to a bank in favor of the institute and also by giving a demand note to the institute as security for a loan.

In order to disentangle the present interests and also to place the institute on a more sound financial basis, a plan has been devised whereby the institute will release its present control over the society. The plan is in brief as follows:

The society will issue new stock, which will be deposited with a trust company in escrow under the name of the institute. A management group of the society will then solicit the stockholders of the institute to exchange their stock for the new society stock under the terms of the exchange agreement set forth in the prospectus. If the management group succeeds in obtaining the required number of shareholders to agree to the transfer, the institute stock will be deposited with the trust company, which company will then release the new stock of the society directly to the former institute stockholders. Some of the former stockholders of the institute will thereby become stockholders of the society. The institute stock which is thus deposited will then pass

to the institute, where it will become treasury stock. The old shares of the society, formerly held by the institute, will be returned to the society in return for a fixed proportion of the new stock of the society.

At the completion of the plan, the status of the two companies will be altered to this extent; the two companies will each continue to engage in the separate businesses which they pursued under the old set-up. The institute will own only a fractional part of the new stock of the society and the companies will operate separately and independently of each other. They will be bound by a covenant not to compete with each other in business, such a covenant being included in the plan. Some of the former stockholders of the institute will have become stockholders of the society.

The society will be reorganized outside of Wisconsin and none of its stockholders live in Wisconsin. Some of the stockholders of the institute, however, live in Wisconsin. The management group will solicit all of the present owners of institute stock in an effort to obtain the consent of the required number to the transfer, thus some residents of Wisconsin will be affected. You inquire whether the new securities must be registered or whether they fall within the provisions of sec. 189.05, subsec. (15), Stats., which exempts from registration the following:

“The issue in good faith of securities by a company to its security holders, or creditors, in the process of a bona fide reorganization of the company made in good faith, or the issue in good faith of securities by a company, taking over substantially all the assets and continuing the business of another company, to the security holders or creditors of such other company; * * *”

It is apparent that the plan provides for an exchange of institute stock for stock of the society. The institute is making no reissue of securities. On the contrary, a portion of its outstanding securities will be returned to the institute to become treasury stock and thus decrease its indebtedness. Hence, the first clause of sec. 189.05, subsec. (15), Stats., cannot apply since this does not constitute an issue of securities by the institute as a reorganizing company to its security holders.

The second clause of the subsection above noted is also inapplicable since it is clearly provided in the plan that each company will continue to engage in its individual business independently of the other. The noncompetitive agreement is further evidence of this fact. Nowhere is there any provision for either company taking over substantially all the assets or continuing the business of the other.

A similar question was considered recently in *Associated Gas & Elec. Co. v. Public Service Comm.*, 221 Wis. 519, 266 N. W. 205 (1936), where it was contended that an exchange of new bonds of a corporation for old bonds of a company owning the corporation should be exempt from registration. The court said, pp. 526-527:

"It is also contended that the Company is entitled to exchange the Corporation bonds without registration under the portion of sec. 189.05 (15), Stats., declaring that the provisions of the statutes prohibiting the sale of securities without registration shall not apply to 'the issue in good faith of securities by a company to its security holders, or creditors, in the process of a *bona fide* reorganization of the company made in good faith, or the issue in good faith of securities by a company, taking over substantially all the assets and continuing the business of another company, to the security holders or creditors of such other company.' But the Corporation does not come within this language because the new bonds are not 'issued' to 'its security holders,' but to the security holders of the Company; and the Company does not come within the language because it is not 'a company taking over . . . the assets and continuing the business of the Corporation. The Corporation continues the business, not the Company. It is suggested that the two corporations are so connected that the one is the other. If so, why the other? But even so, on this hypothesis, the language would not apply because the Company would not be continuing the business of another company, but merely continuing its own.

"It is urged that the word 'issue' in the statute should be construed to cover the bonds of the Corporation as well as the bonds of the Company. We do not so regard the matter. The statute was not intended to exempt from registration bonds to be issued by companies not in process of reorganization. The value of the bonds offered in exchange depends on the value of the securities back of them. New bonds of a reorganizing company might rightly be presumed to have back of them the same security that the old bonds had, and

therefore be of the same value as the old bonds. New bonds of another company offered would presumably have different security back of them. They might therefore be of less value than the bonds for which they were offered in exchange. The exchange of such bonds therefore ought not to be permitted without examination by the commission as to how they are secured, while the exchange of new bonds of the reorganizing Company for its old bonds might properly be permitted without such examination."

Since the securities of the institute will be exchanged for securities of the society, it appears that such exchange will amount to a sale which, in view of the above decision, is not exempt from registration.

The plan provides that the new shares of the society will be owned by the institute while on deposit and that such ownership will pass directly to those who choose to make the exchange. It is, therefore, evident that the management group will not be owners of the new shares at any time. Hence, no exemption can be claimed under sec. 189.05 (6), Stats.

The plan submitted with respect to exemption under secs. 189.05 (15) and 189.05 (6), Stats., appears to be squarely ruled by *Associated Gas & Elec. Co. v. Public Service Comm.*, (1936) *supra*. You are advised that the securities are not exempt from registration under said sections.

NSB

Counties — Public Officers — County treasurer is liable for tax misinformation furnished by his deputy to prospective purchaser of land who relies upon information furnished to his damage.

August 13, 1938.

MILTON L. MEISTER,
District Attorney,
West Bend, Wisconsin.

You request our opinion as to the liability of the county treasurer upon the following statement of facts:

“Some one called at his office in the summer of 1938 and inquired whether the real estate taxes on a certain parcel of property for the year of 1936 had been paid. One of the deputies in the treasurer’s office advised the person who made the inquiry that the taxes had been paid, whereas in fact the taxes on this property were delinquent. The person who made the inquiry proceeded to purchase the real estate in question and then later discovered that the taxes actually were delinquent. The person from whom the property was purchased is financially insolvent and the purchaser who was the individual who made the original inquiry in regard to the taxes is now contending that the county treasurer is liable for the amount of the tax because of the advice given.”

The conclusion must be arrived at by a determination of whether a county treasurer is under a duty to furnish such tax information and, if so, whether the treasurer is liable for misinformation furnished by his deputy to a prospective purchaser of land who relies upon such information to his damage.

Sec. 59.20, subsec. (9), Stats., with respect to duties of the county treasurer, provides as follows:

“Make and deliver to any person on demand and payment of the lawful fees therefor a certified copy or transcript of any book, record, account, file or paper in his office and make any certificate which by law is declared to be evidence, and collect as fees therefor ten cents for each folio of any copy or transcript and twenty-five cents for each certificate.”

Upon the basis of the foregoing statute, it may be urged that liability, if any, must be predicated upon a certified statement. However, such would not seem to be the law.

There is a line of cases in Wisconsin which hold that if a landowner in good faith applies to the proper officer for the purpose of paying the taxes thereon and is prevented from making payment by the mistake, wrong, or fault of such officer, such attempt to pay is equivalent to payment and discharges the lands from the lien of such taxes, and he may thereafter prosecute an action to set aside a tax deed granted subsequently to such tender the same as if the tax was paid in fact. The taxes are considered as paid only for

the purpose of placing the landowner in a position to bring suit to have the tax deed canceled however, and he must pay the amount of such taxes plus interest into court before judgment will be entered for him. *Gould v. Sullivan*, (1893) 84 Wis. 659; *Gould v. Killen*, (1913) 152 Wis. 197; *Menasha Wooden Ware Co. v. Thayer*, (1912) 150 Wis. 611; *Nelson v. Churchill*, (1903) 117 Wis. 10; *Edwards v. Upham*, (1896) 93 Wis. 455; *Bray & Choate Land Co. v. Newman*, (1896) 92 Wis. 271; *Randall v. Dailey*, (1886) 66 Wis. 285.

The foregoing cases are grounded upon the proposition that the county treasurer and county clerk owe a duty to a landowner to furnish accurate tax information and that the landowner has a right to rely upon the information thus furnished. The information need not be certified in order to justify the landowner relying upon same. It may be oral or written but without the formality of certification.

The cases above cited are confined to the duty owing to a landowner or person owning an interest in land such as entitles said persons to redeem the lands from delinquent taxes. Such being the duty to a landowner or person owning an interest in land such as entitles him to redeem, what is the duty with respect to a prospective purchaser of land? We do not find where our court has ever ruled upon that duty but there would seem to be no logical basis for a different rule. Sec. 59.20 (9), Stats., supports this view in that the duty to furnish the certified records is to "any person." Where the question has arisen in other states, these states appear to have uniformly held that there is a duty with respect to the prospective purchaser. *Philadelphia v. Anderson*, 142 Pa. 357; *Elizabeth v. Shirley*, 35 N. J. Eq. 515; *Elliot v. Dist. of Columbia*, 3 MacArth. (D. C.) 396; *Carpenter v. Jones*, 117 Mich. 91; *Hough v. Auditor Gen.*, 116 Mich. 663; *Kneeland v. Wood*, 117 Mich. 174; *Martin v. Barbour*, (1888) 34 F. 701, affirmed 140 U. S. 634; *Philadelphia v. Glanding*, 8 Pa. Co. Ct. 367; *Rosecrans v. Dist. of Columbia*, (1886) 5 Mackey (D. C.) 120.

We conclude that the county treasurer owes a duty to furnish a prospective purchaser of land with accurate tax information when inquiry is made with respect thereto and that such information need not be certified in order to en-

able one injured by misinformation to hold the county treasurer liable for resulting damages.

The only remaining question is whether the county treasurer can be made to respond in damages where the misinformation is furnished by a deputy.

It should be noted that sec. 59.22, Stats., specifically provides that a sheriff shall be liable on his official bond for default or misconduct in office of his undersheriffs, deputy, etc. There is no similar provision with respect to liability of a county treasurer in regard to acts of his deputy or assistants. The general rule appears to be that in the absence of a statute imposing liability upon the officer, the officer is not liable for the acts of his deputy or assistants providing the assistants by virtue of the law and the appointment become in a sense officers themselves or servants of the public as distinguished from servants of the officer. 102 A. L. R. 175; 1 A. L. R. 222; *Robertson v. Sichel*, 127 U. S. 507, 85 S. Ct. Rep. 1286 (1888); *United States v. Rogde*, 214 F. 283 (1914); *Murphy v. Emigration Comrs.*, 28 N. Y. 134 (1863).

However, this general rule seems not to have been followed in this state. *Butler v. Milwaukee*, 119 Wis. 526, 97 N. W. 185 (1903). Here the court, in determining whether a city clerk's bond covered the acts of his assistants so as to bring them within a civil service exemption clause, said at pages 522-530:

“* * * That included, in the administration of such office, acts done by deputies and assistants as well as those done by the clerk himself. In legal effect all the acts are those of the responsible head, the city clerk, and so are within the terms of the official bond. A principal officer is always liable for the official misconduct of one of his assistants, and cannot escape liability therefrom upon the ground that it was not a personal fault of his. The law knows only the superior officer in such cases. That is too elementary to require discussion.

“The place of a mere assistant to a superior officer is one of less dignity than that of a deputy (9 Am. & Eng. Ency. of Law, 369), yet the latter, in the absence of some express provision to the contrary, is regarded in law as the mere private agent of his superior. He is supposed to act only in the name of his superior and upon the latter's responsibil-

ity. The principal and his deputy or deputies are regarded as but one officer and that officer the principal. *Russell v. Lawton*, 14 Wis. 202. It is upon that principle that the official bond of an officer is generally regarded as covering all acts of his deputies and assistants within the scope of their authority, the same as if performed by himself personally, though he may be entirely ignorant of their conduct.
* * *

It should be noted that sec. 925-41, Stats. 1898, then as now, sec. 62.09 (11) (i), Stats. 1937, provided that the clerk and his sureties "shall be liable on his official bond for the acts of such deputy." There was no such provision with respect to liability for acts of *assistant* clerks.

While it may be urged that *Butler v. Milwaukee, supra*, is out of harmony with the general rule, nevertheless that case established the rule and established the policy in this state. It is the law until overruled. Further, we are not convinced that the case is wrong in principle. There is more reason for holding an officer liable for the acts of his deputy or assistants as government becomes complex and the duties of the principal officer become so manifold that the public and those having business contacts with the office are literally barred from any direct contact with the principal officer than there was in the early development of the state when population was sparse, the duties of an office not too burdensome and the public thus able to have direct contact with the principal officeholder. If the public is to have any protection at all as duties of office multiply, it would seem that there is more need for the policy established by *Butler v. Milwaukee, supra*, today than there was at the time the rule was established.

Upon the facts stated, we conclude that the county treasurer is liable to respond in damages. *Robinson v. Rohr*, 73 Wis. 436; *Gates v. Young*, 78 Wis. 98; *Johnson v. Brice*, 102 Wis. 575.

NSB

Public Officers — School District Clerk — Town Clerk — Village Clerk — Offices of town clerk and school district clerk are compatible. Offices of village clerk and school district clerk are compatible. V Op. Atty. Gen. 852, XXIII Op. Atty. Gen. 605 are followed. XXII Op. Atty. Gen. 43 is overruled.

Aug. 15, 1938.

JOHN CALLAHAN,

Department of Public Instruction.

You inquire: (1) Are the offices of town clerk and school district clerk compatible? (2) Are the offices of village clerk and school district clerk compatible?

This office ruled in V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605 that the offices of town clerk and school district clerk are compatible. We ruled in XXII Op. Atty. Gen. 43 that the offices of village clerk and school district clerk are incompatible. We are unable to find any duties of a school district clerk and village clerk that so distinguish these offices from that of town clerk and school district clerk as to render the former incompatible and the latter compatible. The reasoning in XXII Op. Atty. Gen. 43 is at variance with the reasoning in V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605. We have accordingly reanalyzed the opinions in question. We conclude that V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605 are sound in analysis and that the opinion in XXII Op. Atty. Gen. 43 is unsound.

You are advised therefore that the offices of town clerk and school district clerk are compatible and that the same is true of the offices of village clerk and school district clerk.

NSB

Public Officers — County Dance Hall Inspector — Under sec. 59.08, subsec. (9), Stats., county dance hall inspector has powers of deputy sheriff and as such may make arrest for any offense, misdemeanor or crime committed in his presence.

August 15, 1938.

P. H. URNESS,
District Attorney,
 Alma, Wisconsin.

You inquire whether a dance hall inspector appointed pursuant to sec. 59.08, subsec. (9), Stats., is limited in authority to that of supervising the dance and making a report on the same to the county clerk or whether he can further make an arrest for any violation of law that occurs in his presence. Sec. 59.08 (9), Stats., provides for the appointment of such dance inspector by the county board and further provides:

“* * * Such persons while engaged in supervising public dances or places of amusement shall have the powers of deputy sheriffs, * * *.”

Our conclusion is that the inspector may make an arrest when a law is violated in his presence. The statute expressly provides:

“* * * Such persons [inspectors] while engaged in supervising public dances * * * shall have the powers of deputy sheriffs, * * *.”

A deputy sheriff is simply the agent or representative of the sheriff, the word “sheriff” generally being used in a generic sense so as to include not only the sheriff proper but the whole class of officers performing duties usually appertaining to the office of sheriff, such as the deputy sheriff, the undersheriff, etc. 57 C. J. 730, IV Op. Atty. Gen. 399. Thus, in respect to the enforcement of the law, a deputy sheriff has the same powers as a sheriff. The sheriff’s office has those generally recognized legal duties and functions

belonging to it at common law, *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870); *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 177 N. W. 781 (1920), and one of the incidents of the sheriff's office at common law was the right to make an arrest without warrant where a breach of the peace, or any other crime or misdemeanor, was committed in his presence. Otis Allen, *Sheriffs*, p. 61; XI Op. Atty. Gen. 242. Thus, the inspector has the authority, as a deputy sheriff, to make an arrest such as the sheriff himself could make.

NSB

Taxation — Exemption — Theater building constructed by lessee under ninety-nine year lease upon property owned by village, lease being silent with respect to ownership other than default provision that upon default buildings, fixtures and improvements "shall be and become the property of said 'lessor' " is property owned by village where lessee has no attributes of ownership and is exempt from taxation under sec. 70.11, subsec. (2), Stats.

August 16, 1938.

JOHN A. THIEL, *Director*,
Tax Commission.

You request an opinion as to whether a certain building constructed upon property owned by a village is exempt from the general property tax under the following set of facts.

On August 6, 1936, the village of Omro, Winnebago county, was the owner of a vacant lot situated in said village. At that time there existed in Omro an unincorporated association known as the Omro Independent Business Men's Association. On that date a ninety-nine year lease of this lot was entered into by and between the city as lessor and the association as lessee. The lease in substance provided

for a dollar a year rental; for the lessee erecting a community theater building and playhouse; for the lessor applying to WPA to have the proposed building approved as a WPA project; for the lessee furnishing all money necessary to supplement WPA funds to erect and complete the building; for the lessee setting aside and fully equipping one large room in the basement of the proposed building for the use of the lessor and the citizens of the village as a community activity room and meeting place for general community purposes and activities; for the lessee keeping the building and improvements insured; for the lessee rebuilding in the event of destruction and for the lessee keeping the building in safe and secure condition.

The lease further provided against assignment except to the Omro Independent Business Men's Association, if incorporated; permits mortgaging, pledging or hypothecating of the lease for the sole purpose of financing the construction and otherwise prohibits absolutely the sale or assignment, such sale and assignment otherwise to void the lease.

Upon default the lessor is entitled to possession "with any and all buildings and improvements which may have been erected thereon, * * * and all buildings, fixtures, and improvements then situate on said premises *shall be and become* the property of the said 'lessor.'"

This lease was duly assigned to the association incorporated and the lessee's leasehold interest was duly mortgaged for purposes of financing the construction of the building. A building was constructed as contemplated and the question now is whether said building so constructed is subject to or exempt from general property taxation.

Sec. 70.11, subsec. (2), Stats., provides for the following exemption:

"Lands owned or occupied * * * exclusively by any county, city, village, town, * * *."

The section above quoted is similar in phraseology to sec. 70.11 (1), Stats., exempting property owned exclusively by the United States or by the state. It was held in *Aberg v. Moe*, 198 Wis. 349, that a leasehold interest with respect to state property does not prevent exclusive ownership by the

state within the meaning of sec. 70.11 (1). It must follow, therefore, that this leasehold interest does not prevent this property from being exclusively owned by the village within the meaning of sec. 70.11 (2), Stats.

Sec. 70.03 defines real property for taxation purposes as follows:

“The terms ‘real property,’ ‘real estate’ and ‘land,’ when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto.”

Prior to the 1933 amendment to sec. 70.17 and in spite of the provision theretofore contained in sec. 70.17, Stats. 1931, providing as follows:

“* * * All buildings on lands under lease or permit,
* * * shall be assessed as real estate to the owners of
such buildings, if known, otherwise as above provided
* * *”

it would seem that, in view of the statutory definition of real estate for taxation purposes, sec. 70.03, Stats., and regardless of ownership of the building upon leased premises, the lands and buildings were taxable as a single unit to the owner of the real estate. *Aberg v. Moe*, 198 Wis. 349; *Langlade v. Crocker Chair Co.*, 190 Wis. 226; *Milwaukee v. Chicago, M., St. P. & P. Ry. Co.*, 223 Wis. 73. By ch. 444, Laws 1933, the legislature amended sec. 70.17 so as to provide:

“* * * Improvements on leased lands may be assessed either as real property or personal property.”

The apparent intent of this amendment was to permit the assessment of buildings upon leased lands as personal property if the ownership of the buildings or improvements was separate from and distinct from the ownership of the lands or real estate. This being true, the question presented is whether the theater building in question is owned by the incorporated association or owned by the village of Omro. If the former, the building is taxable as personal property;

if the latter, it is real estate and exempt under sec. 70.11 (2), Stats.

The only clause in the lease directly touching upon ownership of the building or improvements to be constructed is the clause providing that after default the lessor shall have the right to take possession thereof "with any and all buildings and improvements which may have been erected thereon, * * * and all buildings, fixtures and improvements then situate on said premises *shall be and become* the property of the said 'lessor.'" This language is prospective and might be construed to imply that prior to default ownership of the building and improvements are in the lessee. However, in *People ex rel. International Nav. Co. v. Barker*, 153 N. Y. 98, because of the familiar rule that when structures are erected by persons not owners of land they become part of the realty, and, as such, the property of the landowner, it was held that it requires an agreement to be expressed in order to prevent the operation of this rule and that the right of removal must be expressly reserved to the lessee in order to create such separate ownership. The lease in question in that case contained almost identical language to the effect that the improvements should *become* the property of the city upon expiration. The court did not let such language prevail in view of the fact that the lessee otherwise had not covenanted for the right of removal which was deemed an indispensable attribute of ownership.

In *People ex rel. Day Line v. Franck*, 257 N. Y. 69, 72, the lease contained the provision, that at the end of a twenty-year period the dock "shall revert to and become the property of the party of the first part." Here again the language is prospective and the court citing the *Barker* case, *supra*, with approval, concluded that such language was insufficient to establish ownership in the lessee. The court says, p. 71:

"* * * To establish the exception, clear and explicit language must be employed, indicating with precision that the builder retains the right of removal and remains the owner. 'It requires an agreement to be expressed in order to prevent the operation of this rule.'"

To the same effect see *State ex rel. Potter v. Convention Hall Association*, 301 Mo. 663, where the lease contained the following provision, pp. 671-672:

“The said building, at the expiration of said lease, together with the said tract of land, to belong absolutely to the City of Springfield, however, the use and right of occupancy of said building and said land is to be and remain in the said party of the second part for and during the said full term of fifty years as herein provided, * * *.”

The foregoing cases seem to be in accord with the legal concept of ownership. In 50 C. J. 779 it is said:

“The chief incidents of the ownership of property are the rights to its possession, use, and enjoyment, and to sell or otherwise dispose of it according to the will of the owner, * * *.”

The lessee in the case under consideration did not covenant for the right of removal, in fact the right of removal or sale or disposition of the building is inconsistent with the entire tenor of the agreement and in express violation of the covenants to be performed by the lessee throughout the term of the lease. The lessee has none of the attributes of ownership. The rights which the lessee enjoys under the terms of the lease are similar and analogous to the rights of a lessee of a building if the lessor were the owner thereof.

We conclude that the city is the owner of the building and improvements in question and that as so owned they are exempt from taxation by virtue of sec. 70.11 (2), Stats.

NSB

Banks and Banking — Contract providing for weekly payments to be made to furniture firm up to a specified amount, sum so paid to apply as first payment on merchandise to be selected and which gives customer no right to demand return of all or any part of money so paid in, does not constitute unlawful banking under secs. 224.02 and 224.03, Stats.

August 17, 1938

BANKING COMMISSION.

You state that certain furniture stores have induced customers to sign the following contract:

“In making first payment on this card the holder agrees to pay ----- Furniture Company the amount of \$----- every week until card is completed. The total sum of said payments is then to apply as first payment on merchandise to be selected at our store. The holder of this card, which cannot be transferred or applied on any other card or account, understands that this is a merchandise contract and agrees to waive any and all claims of this contract contrary to the terms as hereby specified. In consideration of the holder making payments as agreed above, the ----- Furniture Company agrees to deliver merchandise to the amount of the total credit shown on this card. After completing payments on this card, the ----- Furniture Company gives the holder the privilege of a 5 per cent discount on all merchandise to be selected from our stock with the exception of goods marked or advertised ‘Special.’”

You state further:

“A number of cases have come to our attention in which the customer, after paying in, for example, \$5.00, wants to buy an article or merchandise and finds that it is not in stock of this store so that the customer cannot buy the merchandise. In other cases the customer, after paying in an amount of money, finds that the store will not extend credit.

“Naturally enough, the customer then demands her money back and the store is unwilling to pay it back insisting that the contract provides that only merchandise can be had for the money.”

You inquire whether merchants engaging in the above procedure are doing a banking business as defined by sec. 224.02 and sec. 224.03, Stats.

Sec. 224.02, Stats., reads:

“The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing,
* * *”

Somewhat similar plans have been considered by this office in XI Op. Atty. Gen. 88, XIII 393, XVIII 406, XX 489 and XXI 999, 294, and by the supreme court in *MacLaren v. State*, 141 Wis. 577. In all of these plans condemned, the customer or depositor was entitled to a return of all or a part of the deposit. That element is lacking in the plan under consideration. In *MacLaren v. State, supra*, in condemning the scheme under consideration in that case and which involved the right of withdrawal, the court says at page 584:

“* * * 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. * * *”

While the court has never decided that such a plan is not banking, the inference is very strong that it is not. Upon the basis of the language above quoted, we have approved as lawful contracts that come within the above exception. XXI Op. Atty. Gen. 999.

We conclude that the plan proposed does not constitute unlawful banking under secs. 224.02 and 224.03, Stats.

NSB

Automobiles — Trailers — Taxation — Exemption —
Only those trailers principal or primary use of which, when used, is in connection with use of motor vehicle are exempt from taxation under sec. 70.11, subsec. (35), Stats. Taxability or nontaxability under ch. 85 does not affect assessment under ch. 70. If trailer is so affixed to land as to become part thereof, it is real estate and assessable as such under sec. 70.12, Stats. If not so affixed to land, it is personal property and assessable as such under sec. 70.13, Stats., unless principal or primary use is use in connection with motor vehicle.

August 17, 1938.

TAX COMMISSION,

Property Tax Division.

Attention R. C. Dubielzig.

You have requested an opinion interpreting the scope and limitations of sec. 70.11, subsec. (35) of the general property tax exemption statute.

Sec. 70.11 (35), Stats., exempts "Every automobile, motor truck, motor delivery wagon, passenger automobile bus, motor cycle, or other similar motor vehicle, or trailer or semitrailer used in connection therewith."

Your questions are addressed to the particular application of this exemption with respect to trailers. You point out that the popularity of so-called house trailers is increasing rapidly and that the use to which such trailers is put varies widely; that in general they are used for touring or camping purposes; that when not upon the highway they are parked for short periods of time along the highways or in public or in private parks provided for such purpose and that when so parked they are used for living quarters; that during the winter season trailers so used are stored in private garages or parked on private lands and subject to no use; that in some cases while so parked for the winter they continue to be used for dwelling purposes.

You further observe that some trailers of a suitable type are used for commercial purposes and are equipped as dental laboratories, merchandise display rooms, as office or field

headquarters for sales and advertising crews, religious uses, commissary and sleeping quarters for road construction crews; that in such use the trailers sometimes acquire a fixed or very nearly fixed location, the wheels, hitching device and tires sometimes being removed; that the trailer may even be placed on a light foundation, connected to water, sewer or electric service.

The particular questions that you have submitted with reference to the application of the exemption statutes above quoted with respect to trailers are: (1) When, if at all, does a trailer cease to be a trailer within the meaning of the exemption? (2) Does their taxability or nontaxability under ch. 85 (licensing provisions) in any way affect their assessment under ch. 70? (3) If the use of the trailer is such as to make it taxable under ch. 70, what criterion for determining the situs for assessment purposes should be established?

(1) When, if at all, does a trailer cease to be a trailer within the meaning of the exemption?

Sec. 70.11 (35), Stats., was enacted by ch. 68, Laws 1931, the purpose of which was stated to be "An act to create subsection (35) of section 70.11 of the statutes, relating to the reconciliation of the exemption statutes *with the provisions of the new highway law.*"

In XX Op. Atty. Gen. 290 this office in construing sec. 70.11 (35) pointed out that this section was enacted because the tax upon gas under ch. 78 of the statutes was increased by ch. 22, Laws 1931, from two cents to four cents per gallon and that the gas tax is levied upon the motor vehicle fuel used in motor vehicles propelled upon the public highways. The expressed intent of the legislature in enacting sec. 70.11 (35) was therefore to bring the exemption statute in harmony with the increased tax imposed upon the motor vehicle users of the highways of this state so that when the legislature in sec. 70.11 (35) used the term "motor vehicle, or trailer or semitrailer used in connection therewith," it would seem that trailers or semitrailers were included in the exemption because the user of the motor vehicle in connection with which the trailer was used was having to pay an increased gasoline tax.

Statutes exempting property are to be construed most strictly against the exemption when room for construction exists. *Armory Realty Co. v. Olsen*, 210 Wis. 281, 246 N. W. 513 (1933); *Ritchie v. City of Green Bay*, 215 Wis. 433, 254 N. W. 113 (1934).

The statute is obviously open to construction. What is meant by the term "used in connection therewith?" Do such words mean that a trailer used throughout the year for living quarters and used once during the year incidentally in connection with a motor vehicle is exempt from taxation? A trailer does not differ inherently from any other item of personal property so as to give rise to a legislative exemption except in so far as it is used in connection with a motor vehicle the user of which was compelled to pay an increased tax, and as it was this increased tax that gave rise to the exemption in the first place, we conclude that when the legislature used the language "used in connection therewith" it intended that the principal or primary use of the trailer (when used at all) should be that of a use in connection with a motor vehicle.

You are advised that only those trailers the principal or primary use of which (when used) is in connection with the use of a motor vehicle are exempt from taxation under sec. 70.11 (35), Stats. Mere nonuse will not render them taxable, if used at all in connection with the use of the motor vehicle.

(2) Does their taxability or nontaxability under ch. 85 (licensing provisions) in any way affect their assessment under ch. 70?

Prior to the passage of ch. 68, Laws 1931 (sec. 70.11 (35) Stats.), automobiles and trailers were subject to tax and were also subject to license (see ch. 85, Stats. 1929). There was no relation to license and nontaxability. The licensing of trailers was not changed in 1931, so that there was no occasion to reconcile any trailer exemption provision with any new licensing scheme. As heretofore pointed out, the exemption provision was enacted because of the increased tax upon gasoline and to bring the reconciliation of the exemption statutes into harmony with the "new highway law." As there never had been any relation to licensing

and taxation prior to 1931 and the exemption statute does not purport to reconcile licensing and taxation, we are of the opinion that the licensing provisions, ch. 85, Stats., have no bearing upon the question as to whether a trailer or semitrailer is exempt under sec. 70.11 (35), Stats.

(3) If the use of the trailer is such as to make it taxable under ch. 70, what criterion for determining the situs for assessment purposes should be established?

If the trailer is so affixed to the land as to become a part thereof (implying a present intention to make it permanently a part thereof), it is real estate and assessable as such under sec. 70.12, Stats. Any fixed intention to make the trailer a part of the land is obviously inconsistent with use upon the highways in connection with a motor vehicle so that any trailer so affixed can obviously present no problem of exemption under sec. 70.11 (35), Stats.

A trailer that is not so permanently affixed to land as to become a part thereof is personal property and, as such, unless the principal and primary use is that of a use in connection with a motor vehicle, is taxable under sec. 70.13, Stats. at the place "where the same is located or customarily kept." See *Wisconsin Transportation Co. v. Williams Bay*, 207 Wis. 265, 270, 240 N. W. 136 (1932).

NSB

School Districts — Taxation — Taxation of Utilities —
Common school district composed of fourth class city does not share in redistribution of utility taxes under sec. 76.28, subsec. (3), Stats.

August 18, 1938.

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

You have inquired whether a common school district composed of a fourth class city is eligible to share in the

redistribution of utility taxes under the provisions of sec. 76.28, (3), Stats.

In answering this question it is advisable to consider first the method of distribution of utility taxes.

Sec. 76.28, subsec. (1), Stats., provides in part as follows :

“The state shall retain fifteen per cent of the taxes paid into the treasury by any street railway company, light, heat and power company or conservation and regulation company defined by section 76.02, and twenty per cent of such taxes shall be distributed to the counties and sixty-five per cent shall be distributed to the towns, cities and villages, within or through which the business of such company was carried on and operated in proportion, as near as may be, to the property located and business transacted within each such town, city and village; * * *.”

Towns, cities and villages receive their share of utility taxes in proportion to the property located and the business carried on by the utility within each town, city or village. It should be noted that under the above statute no provision is made for the payment of any taxes to common school districts.

The only provision for the distribution of utility taxes to common school districts is that contained in sec. 76.28, subsec. (3), Stats., which reads in part as follows :

“In all counties having a population of fifty thousand or less, fifty per cent of the amount of taxes received by any town or village from the state treasurer on account of the assessment of any street railway, light, heat, power or conservation company shall be retained by the treasurer thereof for general town or village purposes, and the remaining fifty per cent shall be equitably apportioned by the town board or village trustees to the various school districts or parts of school districts in which the property of such company is located, in proportion to the amount which the property of such company within each such school district bears to the total valuation of the property of such company in the town or village or part thereof; * * *.”

Under this statute there is a duty to distribute utility taxes to common school districts by any town or village in counties having a population of 50,000 or less. This section makes no provision for a redistribution to school districts

of public utility taxes in counties of more than 50,000 or less than 250,000. XX Op. Atty. Gen. 46. Nowhere in sec. 76.28 (3), Stats., is there any requirement that cities of the fourth class must share utility taxes with a common school district. If the legislature has not seen fit to require cities of the fourth class to pay a certain proportion of the utility taxes to common school districts located within their boundaries, the municipalities, of course, are under no duty to do so. See XXIV Op. Atty. Gen. 728.

It must therefore be concluded that cities of the fourth class are under no duty to pay any portion of utility taxes collected under ch. 76 to common school districts within their boundaries.

WHR

Fish and Game — Riparian owner who is resident of this state must secure rod and reel license required by sec. 29.145, Stats., to fish on lake of which he owns entire shore line.

August 18, 1938.

PAUL E. ROMAN,

District Attorney,

Manawa, Wisconsin.

You ask if a resident of this state must secure a rod and reel fishing license under the following set of facts:

"1. Where a resident owns the property entirely surrounding a small lake, from which the public is excluded, and

"2. Where he is one of four owners of the land surrounding such a lake and secures the consent of the other owners to fish upon said lake.

"The lake in question is Cedar Lake, a non-meandered lake of approximately 40 acres in area located in sections 8 and 9 in the town of Union, this county. The lake varies in depth up to approximately 65 feet. It is entirely private and

surrounded by land owned by four farmers who have agreed with each other that they could fish there and let their individual friends fish there, but the public, in general, is not given access to the lake."

Sec. 29.145, Stats., provides:

"(1) Any person under the age of eighteen years who has resided in this state for one year may without license, take, catch or kill fish or fish for fish with hook and line or with rod and reel, and any person eighteen years of age or over who has resided in this state for a period of one year may without license take, catch or kill fish or fish for fish with hook and line but not with rod and reel, subject, for both classes of persons, to all other conditions, limitations and restrictions prescribed in this chapter.

"(2) Rod and reel licenses shall be issued subject to the provisions of section 29.09 by the conservation commission or by county clerks of the several counties to residents of the state duly applying therefor, who have resided in the state at least one year next preceding the application. The fee for each such license shall be one dollar."

Under this section all persons over eighteen years of age who are residents of Wisconsin are required to secure a rod and reel license and pay the prescribed fee therefor. The age of the person desiring to fish with a rod and reel, not his ownership of land, is the determining factor. No exception is made in the law in the case of resident land owners and no such exception may be read into the law. 37 C. J. 237.

The general rule to be followed in construing exemptions from a license requirement is stated as follows in 37 C. J. 237-238:

"An exemption from license taxation under a constitutional or statutory provision is in derogation of common right and must receive a strict interpretation and no claim to exemption can be sustained unless it is clearly within the scope of the exempting clause. The existence of an exemption will not be presumed, but must be clearly proved, and if there is any doubt the uncertainty will be resolved against the exemption. * * *"

Before a person would be exempt from the requirements of sec. 29.145, an express statutory provision must be found providing for such exemption. We find no such provision.

The fact that a person may own all the land bordering on a navigable non-meandered lake is, therefore, not important in determining whether he must or must not secure the proper license when fishing with a rod and reel. If such a person is eighteen years of age or over and a resident of this state, the proper license must be secured. Nor is it material that the land owner may have to pay taxes on land that is covered by such lake since the ownership of land in any event, whether covered by water or not, does not give a person the right to fish with a rod and reel without securing the proper license.

It is true that a land owner may hunt rabbits and squirrels on his land without securing a hunting license, but this is by reason of the exemption found in sec. 29.24 (2), Stats. See XXIII Op. Atty. Gen. 799, and XXIV Op. Atty. Gen. 664. It was pointed out in XIII Op. Atty. Gen. 165 that hunting without a license on land owned by the hunter is still subject to all other restrictions found in the hunting statutes, and such owner could only use a gun when hunting on his property.

It is unnecessary to determine if the lake in question is navigable or non-navigable as a decision of that proposition is not material in answering your questions.

LEV

JEM

Bonds — Public Health — Cemeteries — Cemetery Memorial Salesmen — Memorial salesman's bond required under sec. 157.15, Stats., should be filed with dealer. XXIV Op. Atty. Gen. 677, 679, adhered to.

August 19, 1938.

THEODORE DAMMANN,
Secretary of State.

In XXIV Op. Atty. Gen. 677, 679, with respect to question 3, in relation to the memorial license law, sec. 157.15, Stats.,

this office advised you that the bond required for salesmen should be filed with the dealer.

A surety company that writes a majority of such bonds has raised the question as to whether said bonds should not be filed with your department in view of the obvious purpose of the statute, which is that of protection to the buying public. You have requested that we reexamine the subject.

We are of the opinion that the former ruling carries out the legislative intent. No reason is perceived why the public will not be just as adequately protected with the bond filed with the dealer as with the bond filed with your department. The statute is notice to the world that there is such a bond. The statute requires the applicant for a salesman's license to furnish your department with an affidavit to be accompanied with the certificate that the applicant has such a bond. If the legislature intended that such bond should be filed with your department, there could be no purpose in such a certificate.

Furthermore, we cannot presume that this statute was drawn wholly without regard to state revenues. The statute requires a two-dollar fee for a dealer and a one-dollar fee for a salesman. No bond is required for a dealer. A bond is required for a salesman. Sec. 157.15, subsec. (3), par. (e), Stats., in part provides as follows:

“* * * Unless the application be withdrawn in writing before the secretary of state shall have made any investigation thereon, neither said fee nor any part thereof shall be returned to the applicant. * * *”

Here we have a very clear indication that the statute was drawn with regard to the revenues necessary to enforce and carry out the law. If it were the intent of the legislature that the obligation of the bonds should run in favor of the state of Wisconsin for the benefit of the parties entitled to receive the same and be filed with your department and thus entailing an immense amount of additional administrative and detail duties, it hardly seems reasonable to suppose that the legislature would have provided a one-dollar fee for the licensing of such applicants and a two-dollar fee for the licensing of the dealer when no such administrative detail

and duty is provided with respect to the licensing of such dealer.

We conclude that the former opinion must be adhered to.
NSB

Intoxicating Liquors — Under sec. 176.05, subsec. (9), Stats., license or permit may be granted to Wisconsin corporation only when all officers and directors of such corporation can satisfy requirements set forth for individual desiring license or permit. XXIII Op. Atty. Gen. 191, 203, adhered to.

Sec. 176.05, Stats., prohibits issuance of retail "Class A" or "Class B" license for sale of intoxicating liquors to any person acting as agent or in employ of another.

August 19, 1938.

TAX COMMISSION,

Beverage Tax Division.

Attention Arthur Pugh, *Chief Accountant.*

Sec. 66.05, subsec. (10), par. (g), Stats., with reference to fermented malt beverages provides in part that Class "B" retailer's licenses shall be issued only "to persons of good moral character, who shall be citizens of the United States and of the state of Wisconsin, and shall have resided in this state continuously for not less than one year prior to the date of the filing of the application." Sec. 176.05 (9), Stats., by plain implication authorizes the licensing of corporations for the sale of intoxicating liquors if the officers and directors thereof can comply with the qualifications necessary if the license were to be granted to an individual and we so held in XXIII Op. Atty. Gen. 191 at 203. Sec. 176.05 (10) (b) provides:

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

In view of the fact that a corporation as such cannot possess the qualifications prescribed by sec. 66.05 (10) (g), you have raised the question as to whether a "Class B" liquor license can be issued to a corporation in that by the terms of the provisions of sec. 176.05 (10) (b) the corporation is required to have a Class "B" license for sale of fermented malt beverages before a license for sale of "Class B" intoxicating liquors can be granted.

The ruling upon the construction to be given to sec. 176.05 (9), Stats., XXIII Op. Atty. Gen. 191, 203, did not give consideration to the apparent conflict between said section and secs. 66.05 (10) (g) and 176.05 (10) (b). Fortunately sec. 66.05 (10) (g) when read in connection with sec. 66.05 (10) (c) 2 has been so construed in *State ex rel. Torres v. Krawczak*, 217 Wis. 593, 5999, as to authorize the issuance of a Class "B" fermented malt beverage license to a corporation. The court says, pp. 599-600:

"* * * It therefore seems to be the intent of the statute that corporations are entitled to a Class 'B' beer license if otherwise so situated as to be entitled to them. It seems to be the intent of said par. (g) 1 that in case of corporations licenses shall be issued in the name of natural persons, for they can be issued only to 'persons of good moral character.' * * *"

Thus when a Class "B" fermented malt beverage license is issued to an officer of a corporation, the corporation must be deemed to be licensed within the meaning of sec. 176.05 (10) (b), Stats., for purposes of determining whether the corporation is entitled to a "Class B" liquor license. The apparent conflict between the three sections of the statutes involved therefore disappears and there appears no good reason why the opinion heretofore rendered in XXIII Op. Atty. Gen. 191, 203, should not be adhered to.

As a separate and distant question, you inquire whether a tavern license can be issued to any person acting as agent for or in the employ of another. You point out that sec. 66.05 (10) (g), Stats., provides that a Class "B" fermented malt beverage license shall not be issued "to any person acting as agent for or in the employ of another, *except that*

this restriction shall not apply to a hotel or to a restaurant,
* * *” You further point out that sec. 176.05, Stats., prohibits without exception the issuance of a retail “Class A” or “Class B” license for the sale of intoxicating liquors to any person acting as an agent for or in the employ of others. You conclude that a tavern license cannot be issued to an agent acting for or in the employ of another.

If by the term “tavern license” you refer to either a “Class A” or “Class B” retail liquor license, we concur in your conclusion. We are unaware, however, that the term “tavern license” is of any particular significance under the statutes. You have apparently used it in the sense that such a license is issued only to those selling at retail both fermented malt beverages and intoxicating liquor.

NSB

Public Officers — Industrial Commission — Sec. 101.10, subsec. (16), Stats., authorizes industrial commission to regulate with respect to existing electric fences and any reasonable regulation made pursuant to such authorization is not subject to constitutional infirmity.

August 20, 1938.

INDUSTRIAL COMMISSION.

In your letter you advise:

“The industrial commission has pending before it for adoption certain general orders on electrical fences under authority of paragraph (16) of sec. 101.10 of the statutes.

“In these proposed orders it is provided, first, that all controllers in use prior to this time shall be made to conform to these orders within twelve months thereafter and, second, controllers, supplied by a primary source of power in excess of 15 volts and which do not provide separation by insulation between the primary source of electric energy and the fence, and those of the continuous vibrator type delivering more than 5 milliamperes shall be prohibited after adoption of these orders.

"The second prohibition applies to a situation that is extremely hazardous while the first might relate to conditions that are sub-standard and dangerous, but probably not so dangerous to life as the second.

"The question we should like to have answered is whether or not under the authority of the statute above mentioned, the commission has the power to make orders with respect to fences retroactive, that is, made to apply to fences already in use."

You further advise that the second prohibition will not render useless existing controllers but will make it necessary to spend money or labor for additional installation and equipment.

Sec. 101.10, subsec. (16), Stats., provides that the industrial commission shall have power, jurisdiction and authority "To ascertain, fix and order such reasonable standards, rules or regulations for the erection, construction, repair and maintenance of electric fences as shall render them safe."

By the above provision the commission is given express authority to make orders regulating the "repair and maintenance" of electric fences. Such authority must be construed to extend to the making of orders in regard to fences already in existence. Any other construction would leave the commission powerless to remedy the very hazards which prompted the legislature to act. It may be assumed that the numerous fences now in existence will be continued in use for some time to come, and to exempt them from commission regulation would substantially defeat the intent and purpose of the legislature. Undoubtedly, conditions connected with the use of electric fences already in existence prompted the legislature to enact the provision under consideration. There is no indication that sec. 101.10 (16) was intended to apply only to fences to be constructed in the future, thus permitting a continuation of existing evils. Since the grant of authority is not by the words of the statute restricted to fences to be erected in the future and since such a restriction would defeat the purpose of the statute, the statute must be construed to give the industrial commission power to issue orders applicable to electric fences already in use.

While it seems quite clear that the statute in question intended to give the commission power to regulate with respect to fences already in use, there remains the question as to whether the legislature may constitutionally so legislate. If the rules and regulations are reasonable, in view of the evil sought to be remedied and the hazards sought to be eliminated, the legislation cannot be condemned as unconstitutional merely because it authorizes regulation with respect to existing fences or because such regulations may exact something from the citizen by way of additional expenditure. Such is not a taking of property without due process of law within the prohibition of the constitution, *Health Department of New York v. Rector of Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710 (1895), and, within the principle announced in the above cited case, if the regulation is unreasonable in view of the hazard and the evil sought to be remedied, or if the exaction is unreasonable as being all out of proportion to same, there is a taking of property without due process of law within the prohibition of the constitution. See also *Cream City B. P. Co. v. Milwaukee*, 158 Wis. 86; *Benz v. Kremer*, 142 Wis. 1; *Bonnett v. Vallier*, 136 Wis. 193; *State ex rel. Finnegan v. Lincoln Dairy Co.*, 221 Wis. 1; *State v. Redmon*, 134 Wis. 89.

NSB

Taxation — Tax Sales — Under sec. 75.35, Stats., county board has full power to prescribe terms of sale of county owned tax delinquent lands and under sec. 59.08, subsec. (19), Stats., this power may be delegated to committee consisting of officials therein named. In absence of restrictions by county board committee may sell privately or publicly, with or without sealed bids, and by parcels or otherwise.

August 20, 1938.

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

You have inquired whether the delinquent tax committee of the county board may sell county owned delinquent tax lands either at private or public sale to the highest bidder, with or without sealed bids, and by parcels or as a whole.

Sec. 59.08, subsec. (19), Stats., provides:

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

We assume that it is this committee to which you refer in your request. Neither this section nor sec. 75.35, Stats., which prescribes an alternative method of sale, makes any provision specifying how such lands must be sold.

Sec. 75.35, Stats., provides:

“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 in substantially its present form first appeared in the revised statutes of 1858 as section 134 of ch. 18. The words "The county board may, by an order to be entered in its records *prescribing the terms of sale* * * *," clearly indicate that the county board in "prescribing the terms of sale" would have the power to prescribe whether the lands should be offered for sale publicly or privately and whether all or only a portion or none of such lands should be sold. In other words, the legislature appears to have placed the entire discretion in such matters with the county board.

Sec. 59.08 (19), Stats., was created by ch. 475, Laws 1933, as subsec. (18), sec. 59.08 [renumbered (19)]: It probably reflects the legislature's recognition of the increased work of selling county owned tax delinquent lands arising out of the depression, and it merely provides that the county board may delegate its power (i. e., the power granted to the county board by sec. 75.35) to a committee consisting of the officials therein named.

Thus, sec. 75.35, Stats., gives the county board the power to prescribe the terms and conditions of sale and sec. 59.08 (19), Stats., gives the county board the authority to delegate such power to a committee consisting of certain officials. It is therefore our opinion that, in the absence of any restrictions by the county board in delegating such power to the committee, the committee would have whatever powers the county board itself had in prescribing the terms of sale, which would include the power to sell publicly or privately, with or without sealed bids, and by parcels or otherwise.

WHR

Indigent, Insane, etc. — Minors — Legal Settlement —
Infant whose father and mother are dead and who is of sufficient age and mental capacity to form intent to change her place of residence may lose legal settlement by voluntarily and uninterruptedly absenting herself from place of her legal settlement for period of one year or more.

Under provisions of sec. 49.04, subsec. (1), Stats., Y county is liable for care of all poor persons in said county who have no legal settlement therein. This includes infants whose parents are dead and who have no legal settlement.

August 22, 1938.

BURTON E. HOFFMAN,
District Attorney,
Montello, Wisconsin.

You state that the father and mother of X, a minor, age seventeen years at present, died having a legal settlement in the town of Buffalo, Marquette county, Wisconsin. X left the town and county and resided in Y, an adjoining county for a period of six months. X then resided in the state of Michigan for a period of six months and then returned to Y county, where she resides at present. A period of more than a year elapsed from the time X left Marquette county until she was granted medical aid by Y county.

We assume that all of the above took place within the last two or three years.

You also state that after X moved to Y county and on the 18th day of June, 1937, her uncle, who resides in the town of Marcellon in Y county was appointed as her guardian. You ask (1) whether X lost her legal settlement within Marquette county.

Sec. 49.02, subsec. (7), Stats., provides:

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

Sec. 49.02 (5), Stats., provides:

“Every minor whose parent and every married woman whose husband has no settlement in this state who shall have resided one whole year in any town, village, or city in this state shall thereby gain a settlement therein.”

In XX Op. Atty. Gen. 1109 it was held that a minor may lose his legal settlement in a municipality by a voluntary and uninterrupted absence from the town, village or city in which a legal settlement had been gained by residence therein for one whole year.

In the present matter the infant was at least fifteen years of age, and assuming that she was of sufficient mental capacity to form an intent to absent herself from the place of her legal settlement in Marquette county, then, under the facts stated, clearly she has lost her settlement in Marquette county because she has been voluntarily and uninterruptedly absent from the municipality therein in which she had a legal settlement for a period of one whole year or more. However, this statement must be conditioned upon a lack of any showing that she was compelled by her guardian to remain away from Marquette county against her will, as a person does not lose a legal settlement where the absence is occasioned by operation of law. XXII Op. Atty Gen. 1041.

You also ask whether Y county, which is on the county system of relief, is liable for medical aid furnished to X.

Sec. 49.04 (1), Stats., provides as follows:

“The county board of each county shall have the care of all poor persons in said county who have no legal settlement in the town, city or village where they may be, except as provided in section 49.03, and shall see that they are properly relieved and taken care of at the expense of the county.”

It is obvious from the facts stated that X has not resided in any municipality in Y county for a sufficient length of time to establish a legal settlement therein. Neither does the case come within the exception, sec. 49.03, Stats. Both by that section and by sec. 49.04 (1) Stats., it is the duty of the county board of Y county to furnish the medical aid requested.

AGH

Police Regulations — Neglected or Abandoned Animals — One who neglects his animals, in violation of law, is liable for cost of taking care of them by public.

Social Security Law — Old-age Assistance — Receiving of old-age pension prevents gaining of legal settlement in accordance with provisions of sec. 49.02, subsec. (4), Stats. (See also XXIV Op. Atty. Gen. 163.)

August 22, 1938.

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

In your communication of July 11 you submit the following:

“We have a case in this county where a man has been sentenced for 60 days to the county jail and is serving time. He is a single man and has a large number of cattle and other stock on the farm and he positively refuses to do anything toward having this stock taken care of in any way, although he has a good income and can take care of the cost easily. I have, of course, advised the town board to have the stock fed and taken care of and I would like an opinion on whether this man would be liable for the cost of taking such care of his stock.”

Section 175.03, Stats., provides as follows:

“(1) Any sheriff, constable, village marshal, police officer or agent of any humane society may remove, shelter and care for any horse or other animal found to be cruelly exposed to the weather, starved, neglected or abandoned, and may deliver such animal to another person to be sheltered, cared for and given medical attention, if necessary; but in all cases the owner, if known, shall be immediately notified; and such officer, or other person, having possession of the animal shall have a lien thereon for its care, keeping and medical attention and the expense of notice.

(2) If the owner or custodian be unknown and cannot with reasonable effort be ascertained, or shall not within five days after notice redeem such animal by paying the expenses incurred as aforesaid, it may be treated as an estray and dealt with as such.”

You will note that the above statute provides that the animal treated cruelly by the owner may be taken care of and treated as an estray and dealt with as such. Under secs. 170.01 to 170.07, Stats., we find the provision as to estrays, and the procedural steps are given as to the treatment of such animals. There is also provided a method of recovering the expense from the owner. We refer you to these sections as they are too lengthy to copy.

You also inquire whether a person would gain a legal residence for support purposes when he is receiving old-age assistance. You refer to an official opinion in XXIV Op. Atty. Gen. on page 163, holding that a settlement may not be gained while receiving old-age assistance. Your board has raised the question of whether said opinion is still controlling in view of the fact that the laws with respect to old-age assistance have been somewhat modified since the opinion was rendered.

It is true that ch. 554, Laws 1935, was not in effect at the time said opinion was rendered, but old-age assistance was already provided for under ch. 49 at the time the opinion was rendered. While the law at that time expressly stated that aid to dependent children should not operate to prevent the gaining of a legal settlement within the county (see sec. 48.33 (5) (c)), there was and is no such provision with respect to old-age pensions.

It is true that sec. 49.02 (4), Stats., was subsequently amended to read in part as follows:

“* * * 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* * * *” (ch. 527, Laws 1935.)

“* * * or *while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program* shall operate to give such person a settlement therein.” (Ch. 16, Laws 1937.)

These amendments can, of course, have no application to old-age pensions or assistance.

You are therefore advised that XXIV Op. Atty. Gen. 163 is still controlling.

JEM

Civil Service — Education — Teachers' Pensions — Public Officers — City Treasurer — Under sec. 42.55, Stats., employees of annuity board are not employees of city or school board and are, therefore, not subject to jurisdiction of city civil service commission.

Commission cannot assume jurisdiction over such employees either upon its own motion or at request of board.

Such employees are not subject to Milwaukee employees' retirement system.

Members of annuity board are personally liable for diversion of funds to employees' retirement system, whether deducted from employee's salary or wage or from funds placed under control of board for purposes mentioned in sec. 42.55, Stats.

City treasurer, as mere custodian of such funds, and whose duties are purely ministerial with respect thereto, would not be liable for such diversion.

August 23, 1938.

JOHN CALLAHAN,

Department of Public Instruction.

You have submitted a "Memorandum in re request for an opinion on status of employees of public school teachers' annuity and retirement fund trustees (section 42.55, Wisconsin statutes) and powers of board of trustees." You advise that the memorandum was submitted by the attorney for the teachers association in Milwaukee and request that we render an opinion upon not less than twelve robust questions therein submitted.

The several questions propounded may be condensed and paraphrased as follows:

(1) Are the employees of the board subject to the jurisdiction of the Milwaukee city commission under the Milwaukee civil service law, secs. 16.45 and 16.765, Stats.?

(a) If the employees are not subject to secs. 16.45 and 16.765, Stats., might the city commission nevertheless assume jurisdiction either on its own motion or upon request of the board?

(2) Are the employees of the board subject to the Milwaukee employees' retirement system, Laws 1937, ch. 396?

(3) If the board should transfer any of the trust funds under its control to the Milwaukee employees' retirement fund, either for the benefit of its employees or for the benefit of the Milwaukee employees' retirement fund, and such transfer should be judicially determined unlawful,

(a) would the members of the board be individually liable to reimburse the teachers' annuity fund, and

(b) would liability attach to the city treasurer as ex officio custodian of the teachers' annuity fund?

Question 1. Are the employees of the board subject to the jurisdiction of the Milwaukee city commission under the Milwaukee civil service law, secs. 16.45 and 16.765 Stats.?

The purpose of teachers annuity and retirement plans is to further the cause of education; thus, the administration of the plan and the persons connected therewith are a part of our educational system. *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326. It has been held that the administration of schools and our educational system is strictly a state function and is not a subject for municipal regulation, and that the board of education of the city of Milwaukee is an administrative arm of the state and not of the city. *State ex rel. Harbach v. Mayor*, 189 Wis. 84; *State ex rel. Nyberg v. Board of School Directors*, 190 Wis. 570. At least in so far as the Milwaukee school system is concerned, it is not deemed that *State ex rel. Geneva School District v. Mitchell*, 210 Wis. 381 and *State ex rel. Board of Education v. Racine*, 205 Wis. 389 have destroyed this concept.

Secs. 16.45 to 16.76, Stats., inclusive, apply to persons in the service of the city. In view of the concept announced in the above cited cases, employees of the school board probably were not employees of the city and therefore were not subject to civil service prior to the enactment of ch. 107, Laws 1937 (sec. 16.765, Stats.). That chapter specifically made employees of the school board, with certain exceptions, subject to the city's civil service rules and regulations.

If it was necessary to legislate in order to make employees of the school board subject to the city's civil service, no reason is perceived why like legislation is not required to make employees of the annuity board subject to civil service unless it can be said that employees of the annuity board

are employees of the school board and hence subject to civil service under sec. 16.765, Stats. But the annuity board is created by sec. 42.55, Stats., and its powers and duties therein defined. Sec. 42.55, subsec. (2), empowers the board to employ counsel and such actuarial accounting and clerical help as it may find necessary to the performance of its functions. In the exercise of its function, such board is free from control of the board of school directors, whose duties with respect to the annuity board and the funds under the latter's control are ministerial only. At no place in sec. 42.55, Stats., is the board of school directors given any power or control over the employees of the annuity board, nor is there any hint that the employees of such board are to be deemed employees of the school board. The annuity board is a separate administrative arm of this state created for the purpose of administering the annuity system established by the legislature. In the absence of a statute making them such, there would seem to be no basis for a holding that employees of said board are employees of the school board. We conclude that employees of the annuity board are not subject to the city civil service commission.

“(a) If the employees are not subject to secs. 16.45 and 16.765, Stats., might the city commission nevertheless assume jurisdiction either on its own motion or upon the request of the board?”

The city civil service commission is one of statutory creation. It has only such power as has been conferred upon it by the legislature. A power sought to be exercised must be found within the four corners of the act or acts by which power is conferred. *State ex rel. Adams v. Burdge*, 95 Wis. 390; *Monroe v. R. R. Comm.*, 170 Wis. 180; *Chippewa Power Co. v. R. R. Comm.*, 188 Wis. 246; *State ex rel. Inspection Bureau v. Whitman*, 196 Wis. 472.

We find no power conferred upon the commission to assume jurisdiction over non-city employees. If the commission has no such power, obviously the annuity board cannot confer it. We conclude that the city's civil service commission is without power to assume jurisdiction over employees of the annuity board either upon its own motion or at the request of the board.

"(2) Are the employees of the board subject to the Milwaukee employees' retirement system, Laws 1937, ch. 396?"

The Milwaukee employees' retirement system, ch. 396, Laws 1937, applies to persons employed by the city or by city agency. Sec. 1 (3) (b) of that act defines "city agency" as "any board, commission, division, department, office or agency of the city government, by which an employe of the city, is paid."

For the reasons assigned in answer to question 1, we conclude that employees of the annuity board are not subject to the Milwaukee employees retirement system.

"(3) If the board should transfer any of the trust funds under its control to the Milwaukee employees' retirement fund, either for the benefit of its employees or for the benefit of the Milwaukee employees' retirement fund, and such transfer should be judicially determined unlawful,

"(a) would the members of the board be individually liable to reimburse the teachers' annuity fund?"

The funds which are committed to the control of the board are public funds. In *State ex rel. Risch v. Trustees*, 121 Wis. 44, it was held that moneys in the hands of the board of trustees of a policeman's pension fund are public funds even though they are acquired through deductions from policemen's salaries for the benefit of such contributors. It is a familiar rule of law that custodians of public funds must hold and keep them inviolate and disburse them only in strict compliance with law. Where a board or commission is entrusted with the care and disbursement of such funds, members who vote for a disposition contrary to law are liable for the sums so expended, *Tritchler v. Bergeson*, 185 Minn. 414, 241 N. W. 578, *School Dist. No. 2 of Silver Bow County v. Richards*, 62 Mont. 141, 205 P. 206, *Consolidated School Dist. No. 6 v. Shawhan*, 273 S. W. 182, *Borger Ind. School Dist. v. Dickson*, 52 S. W. (2d) 505.

Since the annuity board cannot either restrict or enlarge rights obtained under the annuity law, *State ex rel. Murphy v. Board of Trustees*, 168 Wis. 238, and can neither restrict nor enlarge the rights of those entitled to the benefits of the Milwaukee employees' retirement system, and since the employees of the board are not employees of the city or an

agency thereof, it must follow that any payments made to the trust funds of the city of Milwaukee employees' retirement system, either from funds deducted from an employee's salary or wage or from funds placed under the control and management of the annuity board for the purposes mentioned in sec. 42.55, Stats., are unauthorized and the individual members of the board are liable for reimbursement.

“(b) Would liability attach to the city treasurer as ex officio custodian of the teachers' annuity fund?”

Under sec. 42.55 (10), Stats., the city treasurer is a mere custodian of the funds of the board. As such custodian, he would incur no liability for disposing of such funds according to the directions of the board, since his duty is merely that of keeping the funds safe while they are in his hands and disposing of them as the board directs. *Attorney General ex rel. Blied v. Levitan*, 195 Wis. 561.

NSB

Courts — Public Officers — County judge is entitled only to annual salary fixed by county board plus such additional fees and compensation as county board authorizes him to retain under sec. 253.15, subsec. (4), Stats.

August 23, 1938.

WALTER T. NORLIN,

District Attorney,

Washburn, Wisconsin.

You request an opinion as to whether or not a county judge is entitled to collect fees provided for in sec. 253.15, subsec. (3), Stats., in addition to his salary which was fixed by the county board in 1912.

We understand that the salary of this judge was fixed at \$1,500 per year, and no provision was made by the county

board as to whether or not the salary so fixed was to be in lieu of all fees or whether the judge was to be entitled to fees provided by statute in addition to his salary.

At the time that the county board fixed the salary of the county judge in 1912, sec. 694 of the statutes read as follows:

“The county board at their annual meeting shall fix the amount of salary which shall be received by every county officer, including county judge, who is to be elected in the county during the ensuing year, and is entitled to receive a salary payable out of the county treasury, and the salary so fixed shall not be increased or diminished during his term of office.”

The statutes of 1911 also provided, sec. 2454, as follows:

“2. The judge of any county court which is not vested with civil jurisdiction shall be entitled to receive five dollars per day, to be paid from the county treasury, for each day he shall be actually engaged in the examination of any person upon a criminal charge, or engaged upon any other matter, not appertaining to probate business, compensation for which is not otherwise provided.”

Thus it appears that inasmuch as the county board did not expressly provide that the salary fixed at its annual meeting in 1912 should be in lieu of all fees, the county judge was entitled to the salary fixed by the resolution, plus the fees provided in sec. 2454, Stats. 1911.

However, in 1915, sec. 694 was changed by the legislature, authorizing the county board to

“* * * fix the amount of annual salary which shall be received by every county officer, including county judge * * *. The salaries so fixed and paid shall be in lieu of all fees, per diem and compensation for official services rendered by such officers * * *.”

In VIII Op. Atty. Gen. 720, 723, this amendment was construed as follows:

“* * * It is rather a restriction upon, than a grant to, the county officers. Their compensation is not thereby increased, *but if the county judges were at that time receiv-*

ing both fees and the salary, the new statute put a stop to the practice. It said that salaried officers shall no longer receive fees or per diem; the salary shall be their sole compensation. * * *

Sec. 694, Stats. 1911, is now sec. 59.15, Stats., and no material change was made by the legislature.

Sec. 253.15 (4), Stats., provides:

“The county board *may* by resolution provide that the salary fixed shall be in lieu of all fees, per diem or other compensation out of the county treasury for the performance of any official duty imposed upon the county judge by law by virtue of his office which are authorized under the provision of subsection (3) of this section or of any other statute.”

The effect of this statute is to make it optional with the county board whether the county judge is to receive any fees, per diems or other compensation in addition to his fixed salary, and this applies regardless of what statute is involved. Thus, the county board may, if it chooses, permit the county judge to retain fees provided by statute.

To this extent secs. 59.15 (1) and 253.15 (4) are in conflict, and under familiar rules of statutory construction, it must be held that the specific statute is controlling over the general statute. Sec. 59.15 (1) is general, and sec. 253.15 (4) is specific. See *State ex rel. De Forest v. Hobe*, 124 Wis. 8.

Furthermore, ch. 468, Laws 1935, created sec. 253.15 (4), Stats. In so far as secs. 59.15 (1) and 253.15 (4) are in conflict, the latter must prevail.

Since sec. 253.15 (4), Stats., provides that “the county board may by resolution provide that the salary fixed shall be in lieu of all fees * * *,” it may be urged that unless the resolution fixing the salary specifically provides that the salary shall be in lieu of all fees, per diem, etc., the county judge is entitled to fees per diem, etc. However, in so far as it is possible to reconcile and give effect to both secs. 59.15 (1) and 253.15 (4), such construction should be adopted. As sec. 59.15 (1) specifically provides that the salary fixed by the board shall be in lieu of all fees, per

diem, etc., and this statute was in effect when sec. 253.15 (4) was enacted and is still in effect except in so far as in conflict therewith, it would seem that proper construction of sec. 253.15 (4) requires that it be construed to require affirmative action by the board, permitting the collection of fees, per diem, etc., in addition to salary if such fees, per diem, etc., are to be allowed in addition to salary. Such construction makes sec. 59.15 (1) of some significance and also gives significance to sec. 253.15 (4). There obviously can be no object in the county board by resolution under sec. 253.15 (4), Stats, providing that the salary fixed shall be in lieu of all fees, per diem, etc., when such salary was at the time of the enactment of the section in question by virtue of sec. 59.15 (1) *required* to be in lieu of all fees, per diem, etc.

But even though sec. 253.15 (4) were construed to permit the collection of fees, per diem, etc., in addition to salary where the salary resolution is silent with respect thereto, it would seem that in view of the resolution of the board passed at the annual meeting in November, 1929, the county judge would not be entitled to collect fees, per diem, etc., in addition to salary in any event. It appears that the offices of county judge and juvenile judge were at the time of the passage of said resolution and are now held by the same person. The resolution in question reads as follows:

“Be it resolved by the county board of Bayfield county in annual session assembled, that the salary of the juvenile judge of Bayfield county be and the same is fixed at six hundred dollars per annum, same to be paid in monthly installments the same as other salaries to county officers are paid, it being understood and agreed that such salary shall be in lieu of all fees payable to the juvenile judge as well as the county judge, and that all fees collected for certified copies shall be paid over to the county treasurer for the use of the county, this resolution to take effect on December 1st, 1929.”

While the foregoing resolution deals primarily with the subject of salary of the juvenile judge, nevertheless the fair intent of the resolution would seem to be to confine both the juvenile judge and the county judge to salaries in lieu of all other compensation. Since none of the resolutions in ques-

tion provide for compensation in addition to salary, and since the fair intent of the resolution of November, 1929, is to confine both the juvenile judge and the county judge to salaries in lieu of all other compensations, we conclude that the county judge is not entitled to any fees, per diem or compensation in addition to salary.

NSB

HHP

Taxation — Taxation of Utilities — Waterfront land owned by railway company and improvements placed thereon by and at expense of licensee industry, exclusive of office building and land, consisting of office building, track, trestle, dock and dredging, used for unloading logs from barge to rail for further transportation, railway to own trestle and dock upon expiration of license unless it elects otherwise and to have use of track for all purposes, is held to be property "necessarily used" in operation of railroad within meaning of sec. 76.02, subsec. (11), Stats., and assessable to railroad by tax commission as railroad property; otherwise with respect to office building and land upon which it stands. Only those improvements classified as dock property and its approaches and appurtenances is subject to separate valuation under sec. 76.16 and 76.28, subsec. (4), Stats. None of licensed land is subject to such separate valuation under said sections.

August 23, 1938.

TAX COMMISSION.

You have submitted what purports to be a licensing agreement made by and between the trustee of the Chicago and Northwestern Railway Company (hereinafter called the "trustee") and Kimberly Clark Corporation (hereinafter called the "industry"). The agreement is for a period of twenty years unless sooner terminated pursuant to the

terms thereof and calls for an annual rental of \$145.00 payable the first day of July of each year so long as the agreement remains in effect, this rental to be paid by the "industry" for the use of certain water front property of the railroad located in the city of Green Bay. The "industry" is given the use of the property described therein for the purpose of constructing thereon an office building, a track and trestle on which to operate locomotive cranes, and a dock and fill in certain described premises. The "industry" is further given the use of a certain track and the right to use a tractor on a described right-of-way. The "industry" agrees to pay the "trustee" the cost and expense of shifting the track from one position to another and the cost of maintenance of said track; the "trustee" has the right to make repairs and replacements of the track and the "industry" agrees to pay the "trustee" the entire cost and expense thereof; all maintenance, additions, betterments and changes to or on account of the track are to be carried forward and completed in accordance with the "trustee's" standards and requirements and at the expense of the "industry". The "trustee" has the right to use the track *for any and all purposes*. The dock is to be constructed and maintained at the expense of the "industry" and in a manner satisfactory to the "trustee". All dredging in front of the dock is at the expense of the "industry"; upon termination of the agreement *the trestle constructed by the "industry"* and said dock shall become *the property of the "trustee"*, unless he elects to have same removed, in which event removal shall be at the sole expense of the "industry" and removal and restoration must be in a manner satisfactory to the "trustee". Except as above provided, the "industry" has the right of removal of its office building and all construction authorized at any termination of the agreement.

By supplemental agreement made in June, 1937, and for an additional annual rental of \$112.50, the use of other property was included but for the same purposes; this additional use involving an extension of the track, trestle and dock and perhaps some additional excavation to improve the dock.

The land and the improvements are devoted to transferring logs from water to rail and when so transferred are

carried over the lines of the "trustee" to the "industry's" plant at Kimberly. You inquire:

"First, is the land owned by the railroad company and leased to the Kimberly-Clark Corporation to be included in the assessment made by the tax commission or should it be assessed locally?

"Second, are the improvements built by and paid for by the Kimberly-Clark Corporation to be treated as additional property, used and useful in the railroad business, and included in the assessment made by the tax commission or is the same to be assessed locally?

"If the answer to either of the above questions is 'Yes', then is the property, both land and improvements or either, to be classified as property described in section 76.16 of the statutes, commonly known as terminal property, which must be separately valued by the tax commission and the taxes thereon returned to the city of Green Bay?"

You advise that the city assessor takes the position that both the lands and improvements are property "not necessarily used in operating the railway business" within the meaning of sec. 76.02, subsec. (11), Stats., and is, therefore, assessable locally. The assessor claims the situation to be ruled by *Lincoln F. W. Co. v. Milwaukee*, 208 Wis. 70.

The question turns upon whether either or any or all of the real estate or improvements is property "necessarily used" in the operation of the railroad within the meaning of sec. 76.02 (11), Stats. Property so used is exempt from local taxation. Property not so used is assessable locally.

The term "necessarily" as used in said section signifies something more than mere convenience, and may signify something less than that which is inevitable. *Milwaukee and St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271 (1874), and means that which is reasonably required in the exercise of sound business prudence. *Terminal Warehouse Co. v. City of Milwaukee*, 205 Wis. 607; *Lincoln F. W. Co. v. City of Milwaukee*, 208 Wis. 70; and *Chi. St. P. M. & O. R. Co. v. Douglas Co.*, 122 Wis. 273. The railroad purpose or use must be the principal use as distinct from an incidental use. See cases cited *supra*.

We do not deem the situation presented controlled by *Lincoln F. W. Co. v. Milwaukee*, 208 Wis. 70, as contended

by the city assessor, in that the warehouse built by a lessee upon railroad property involved in that case was not principally devoted to a railroad for transportation use. With respect to the great bulk of the products stored therein, transportation had ceased. The principal use was not that of a necessary link in the chain of transportation. The warehouse was only incidentally used for this latter purpose. The same is true of the elevator involved in *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, *supra*, and the warehouse involved in *Terminal Warehouse Co. v. Milwaukee*, *supra*. In this latter case the court says, p. 613:

“The only feature of the case that seems to distinguish the use made by the railroad of the warehouse in any way from the use made by the other roads running into Milwaukee of other public warehouses is its use in receiving and holding water-borne sugar for further transportation by rail. But this use is so small a part of the total use as to make it negligible. It may with propriety be stated that should the railroad’s business as a forwarder or distributor of water-borne freight so increase as to require the plaintiff to devote the property involved principally to the storage or handling of water-borne freight, or render such use necessary to the operation of the road within the terms of the definition last above given, the property will then be exempt from local taxation. It is only present use that brings property within the exemption. * * *”

Where the principal use has been that of a necessary link in the chain of transportation, our court has uniformly held that the property was “necessarily used” in the railroad business within the meaning of sec. 76.02 (11), Stats., and taxable as railroad property, nontaxable locally. *Superior v. Allouez Bay Dock Co.*, 166 Wis. 76; *Chi. St. P. M. & O. Ry. v. Bayfield Co.*, 87 Wis. 188, and the warehouses, sheds and other property in *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271.

Exclusive of the office building and the land upon which it is located, all of the licensed premises involved in the agreement under consideration and the improvements placed thereon would seem to involve a transportation use. Such use is the principal and only use. The use is that of a mere link in a continuous chain of transportation. We con-

clude that all of the licensed premises and the improvements placed thereon, exclusive of the office building and the land upon which it stands, is property "necessarily used" in the operation of the railroad within the meaning of sec. 76.02 (11), Stats., and should, therefore, be assessed to the railroad as railroad property by the tax commission.

This conclusion would not seem to involve a question of assessment to A of property owned by B such as was involved in *Minneapolis, St. P. & S. S. M. R. Co. v. Henry*, 215 Wis. 668, as it is not deemed that the improvements, exclusive of the office building, are owned by the industry. See opinion of this office to director of the tax commission, dated August 16, 1938.* *People ex rel. International Nav. Co. v. Barker*, 153 N. Y. 98; *People ex rel. Day Line v. Franck*, 257 N. Y. 69; *State ex rel. Potter v. Convention Hall Assn.*, 301 Mo. 663.

The office building is in a different situation, both with respect to right of removal by the industry and the use thereof. It is ruled by *Terminal W. Co. v. Milwaukee*, *supra*, and *Lincoln F. W. Co. v. Milwaukee*, *supra*, and the elevator and dwelling houses constructed in *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271. This property is property which is "not necessarily used" in the operation of the railroad within the meaning of sec. 76.02 (11), Stats., and is, therefore, assessable locally.

Under sec. 76.16, Stats., only those improvements which can be classified as "docks, piers, wharves or grain elevators" and under sec. 76.28 (4) "their approaches and appurtenances" are to be valued separately and the taxes derived therefrom distributed to the city. Without knowing more about the exact physical set-up, we are not in a position to advise whether the trestle may be considered as part of the dock. If it is physically connected with the dock, even if not a part of the dock itself, it would constitute an "approach or appurtenance" of the dock and as such would be subject to separate valuation by the commission. We are of the opinion that none of the land included in the licensing agreements is subject to separate valuation under sec. 76.16, Stats.

NSB

*Page 551 of this volume.

School Districts — Neither sec. 40.30, nor sec. 40.68, Stats., authorizes alteration of “city school district” operating under city school plan, secs. 40.50 to 40.60, Stats. XX Op. Atty. Gen. 707 is adhered to.

August 24, 1938.

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

In XX Op. Atty. Gen. 707 (1931), this department ruled that a city under the city school plan provided by secs. 40.50 to 40.60, Stats., is a “city school district” and not a “common school district” nor “high school district” and that neither sec. 40.30 nor sec. 40.68, Stats., authorized alteration of such “city school district.” As there were no other applicable statutes and the matter of alteration and consolidation of school districts is one of statutory authority, there appeared to be no method whereby city school districts could be altered or consolidated and such lack of authority was pointed out in the opinion.

You now direct our attention to a specific instance or case where such authority appears desirable and request that we reconsider the opinion.

Sec. 40.01, subsec. (1), Stats. 1925, provided in part as follows:

“Town boards of supervisors, village boards of trustees and *city councils* are hereby given power, * * *, to alter *school district* boundaries, and to create *school districts*, or to dissolve *school districts* * * *.”

That section was held applicable to a high school district in *State ex rel. Hermanson v. Callahan*, 179 Wis. 549 (1923). In 1927 the school laws were completely revamped, revised and consolidated by ch. 425, laws of that year. That chapter appears to have been an attempt at least to eliminate the hodgepodge school law that theretofore existed. That chapter for the first time classified school districts as common school districts, high school districts and city school

districts and districts are so classified at the present time. Sec. 40.02 (3), Stats.

That chapter consolidated and revised secs. 40.01, 40.02 and 40.04, Stats. 1925 and those sections became sec. 40.30 (1), Stats. 1927, to read as it now reads, as follows:

*“Town and village boards and councils of cities of the fourth class, may, by order, create, alter, consolidate or dissolve common school districts. * * *”*

It thus appears that the legislature in 1927 for the first time classified school districts and by the same chapter changed the phraseology theretofore existing in secs. 40.01, 40.02 and 40.04, Stats. 1925, “school district” to that of “common school district.”

We are unable to conclude that the use of such language in sec. 40.30 (1), Stats., was wholly without significance. This is especially true when it was considered that the school law at that time underwent a thorough revamping, consolidation and modification; that classifications of districts were for the first time set up and the language “common school district” adopted apparently with specific reference to the classifications thus set up. Under the circumstances, for us to rule that “common school district” as used in sec. 40.30 (1) is the equivalent of and means “city school district” or that it is the equivalent of and means “high school district” would be in violation of every known rule of statutory construction.

The opinion heretofore rendered and which we are now asked to reconsider gave thorough study to the question and appears to be essentially sound. You do not direct our attention to any amendments to the applicable statutes since the opinion was rendered which have any bearing upon the subject, nor do we find any. In *Union F. H. S. Dist. v. Union F. H. S. Dist.*, 216 Wis. 102, 106, the court uses the following significant language:

“ * * Since that time two legislatures have come and gone without amending the law; this they would in all probability have done if they had deemed the opinion of the attorney general unsound, and if it had been the legislative intention [otherwise] * * *.”*

This statement seems peculiarly applicable to the question under consideration. Had the prior opinion been contrary to legislative intent, it would seem that over a course of seven years the legislature with the guidance of your department would have acted with reference to the subject.
NSB

Elections — Municipal Corporations — City Ordinances
— Charter ordinance of city initiated under sec. 10.43, Stats., increasing number of wards, changing number of aldermen from two to one per ward and adopted at spring election, may not be resubmitted at fall election, as specific provision of sec. 66.01, subsec. (8), Stats., is applicable and controls over general provision of sec. 10.43, Stats.

August 24, 1938.

RAYMOND P. DOHR,
District Attorney,
Appleton, Wisconsin.

In your letter you advise as follows:

“Prior to the general election of the city of Appleton, which was held on April 5, 1938, a petition was filed by electors of the city, pursuant to section 10.43 of the statutes, for the passage of an ordinance which would redistrict the wards of the city of Appleton by creating six new wards and changing from two to one the number of aldermen representing each ward, which would abolish all offices of alderman and supervisors as they exist on the Monday immediately preceding the third Tuesday of April, 1939, and that on the general election to be held in 1939 the new system would go into effect and one alderman and one supervisor would be elected from each of the new wards. Under the present system Appleton has two aldermen from each ward and one supervisor.

“* * * this was submitted to the electors pursuant to section 10.43 and 66.01 of the statutes of Wisconsin for 1937. The referendum was carried in the spring election which was held on April 5, 1938, but, as stated above, the ordinance is not to take effect until April, 1939.

“The common council of the city of Appleton now proposes to call a special election, pursuant to section 10.40 of the statutes, said special election to be held on the same day as the regular fall election, and to resubmit the question to the electors. Section 10.43 (6) of the statutes definitely provides that the council may submit at any regular or special election for determination by a majority of the electors voting thereon a proposition to repeal or amend such ordinance or resolution. However, section 66.01 (8) provides that when the electors of any city have determined the method of selection of members of the governing board, the question shall not again be submitted to the electors nor action taken thereon within a period of two years.”

You inquire whether, in our opinion, the April submission was with respect to “method of selection” within the meaning of sec. 66.01, subsec. (8), Stats., so as to prohibit the resubmission of said question for two years thereafter.

The April submission was as follows:

“Shall the charter ordinance, providing for the repeal of subsection (3) of section 62.08 and for the amendment of sections 62.08 and 62.09 of the revised statutes of Wisconsin, in so far as the same applies to the city of Appleton, Outagamie county, Wisconsin, thereby redistricting the city of Appleton into eighteen wards and providing for one alderman and one supervisor from each of such wards, be adopted.”

Sec. 62.09 (3) (a) and (b), Stats., provides as follows:

“The mayor, aldermen, supervisors and justices of the peace shall be elected by the voters.

“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.”

The submission in question was pursuant to sec. 66.01 and sec. 10.43, Stats. A submission under sec. 66.01 may be initiated under sec. 10.43. See sec. 66.01 (6).

“Method of selection of members of the governing board” as used in sec. 66.01, Stats., obviously refers to something other than a change from an elective to an appointive basis. There probably is no authority to select the members of the governing body of the city by appointment. This would appear to be the plain implication from a reading of sec. 62.09 (3) (a) and (b), Stats. Thus when the legislature, by sec. 62.09 (3) (a) provides that the mayor, aldermen, etc., shall be elected by the voters and by (b) of said section permits a change in the “method of their selection” as to other officers by following the home rule provision of the statutes, the plain implication is that selection of the mayor, aldermen, etc., by election is a matter of state-wide concern which may not be dealt with locally under the home rule provisions of the statutes. We conclude that “method of selection of members of the governing board” as used in sec. 66.01 (8), Stats., refers to something other than a change from an elective to an appointive basis such as change from an election by wards to a city-at-large basis. But if “method of selection” is limited to the one instance above cited, it would seem that the legislature might aptly have used that instance rather than the term “method of selection” which was probably intended to comprehend any one of a number of changes in “method of selection.” If “method of selection” is a broader term than the one instance above cited and that term does not comprehend a change from two aldermen per ward to one alderman per ward, what does it comprehend? We are of the opinion that “method of selection” as used in sec. 66.01 (8) Stats. comprehends a change from two aldermen per ward to one alderman per ward.

The only remaining question is whether the two-year provision in sec. 66.01 (8) is applicable or whether sec. 10.43 (6), which contains no such provision, is applicable. Sec. 10.43 is a general provision with respect to direct legislation. Subsec. (6) in some form or another has been a part of that law since the law was enacted by ch. 513, Laws 1911. The two-year provision in sec. 66.01 (8) was enacted by ch. 248, Laws 1935, and is specific. It cannot be said that sec. 10.43 with respect to direct legislation is entirely separate and distinct from ch. 66, providing for municipal home rule, as municipal home rule, sec. 66.01 (6), Stats.,

comprehends initiation by direct legislation. Under the circumstances, we are of the opinion that the specific two-year provision under sec. 66.01 (8), Stats., controls the more general provision under sec. 10.43 (6) and that the question submitted in April of this year may not be resubmitted at the fall election. This conclusion is in harmony with sec. 62.08 (1), Stats., with reference to alteration of wards by the common council which provides in part as follows:

“* * * but no further such change shall be made in any such ward for two years except by adding thereto territory newly attached to the city.”

NSB

Contracts — Recovery Act — Codes — Secretary of state and state treasurer are without authority to withhold payment from contractor with state who, in performance of his contract, has violated trade practice standards for industry.

August 24, 1938.

TRADE PRACTICE DEPARTMENT.

You have submitted copy of the trade practice standards for the highway construction industry, and invite our attention to sec. 110.04, subsec. (1), par. (c) of the fair trade practice act, chapter 3, special session 1937, and sec. 31 of the fair trade practice standards for the highway construction industry, which latter provides as follows:

“Upon complaint or upon its own initiative, the department, upon notice and hearing, may secure evidence and determine whether any member of the industry has violated, is violating, or threatens to violate any provision of these standards,”

and request our opinion as to whether the secretary of state can draw a warrant and whether the state treasurer can sign a warrant payable to a contractor who performs a highway contract in such manner as to violate the trade practice standards that have been established for the highway construction industry.

The trade practice act and the codes enacted thereunder create new rights. The statute provides a specific remedy for enforcement, namely, that of giving the circuit courts jurisdiction to prevent and restrain violation of the codes. See sec. 110.04 (5), Stats.

In general, where a statute creates new rights and provides a remedy for enforcement thereof, that remedy must be deemed an exclusive remedy. *Arnet v. The Milwaukee Mechanics' Mutual Insurance Company*, 22 Wis. 516; *Clancy v. Board of Fire and Police Commissioners of Milwaukee*, 150 Wis. 630; *State ex rel. Cook v. Houser*, 122 Wis. 534; *Hall v. Hinckley*, 32 Wis. 362; *Olson v. Town of Curran*, 137 Wis. 380; *Knapp v. Town of Deer Creek*, 162 Wis. 168; *State ex rel. Langen v. Bodden*, 165 Wis. 243; *Hein v. Luther*, 197 Wis. 88; *State ex rel. Allen v. Railroad Commission*, 202 Wis. 223.

The foregoing list of cases is not an inclusive list. Authority in this state upon the same proposition could be considerably multiplied. The citations are sufficient to demonstrate that this rule is firmly established in this state.

It does not seem necessary to determine whether a violation of code standards would constitute a violation of the contract as such, in that even though the code provisions were deemed a part of the contract, a violation of the code provisions would at most constitute an unlawful performance of an otherwise lawful contract. A contract which is lawful in its inception does not become a nullity and therefore void and of no force and effect if it can be performed in a lawful manner but is performed in an unlawful manner. 2 Page on Contracts, sec. 663; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735; *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041; *Stansell v. Roach*, 147 Tenn. 183, 246 S. W. 520; *Phend v. Midwest Eng. & Equip. Co.*, 93 Ind. App. 165, 177 N. E. 879.

We conclude that the secretary of state and the state treasurer are without authority to withhold payment from a contractor with the state who, in the performance of his contract, has violated the trade practice standards for the industry.

This opinion must not be construed as passing upon a question of whether a state may collect a delinquent code assessment from a state contractor by way of offsetting same against the amount owing upon the contract. That question was not submitted and has not been given consideration.

NSB

Corporations — Securities Law — Where builder of boat proposes to finance its construction by selling interests in boat in form of bills of sale transaction comes within purview of Wisconsin securities law, sec. 189.02, subsec. (7), Stats.

August 25, 1938

BANKING COMMISSION.

Attention G. M. Buenzli, *Securities Division*.

You state that one X contemplates construction of a certain type of boat at a cost of \$250,000. The boat will be used for car and passenger ferry service and is expected to operate at a speed of sixty to seventy-five miles per hour. In order to finance the construction of said boat the builder proposes to sell so-called bills of sale. The interest which is sold to a purchaser would be represented by a "bill of sale of enrolled vessel" on a form approved by the United States department of commerce, bureau of marine inspection and navigation. Apparently no other contract is to be used and it is proposed to sell twenty-five hundred shares at one hundred dollars each.

An opinion is requested as to whether the sale of such shares comes within the purview of the Wisconsin securities law.

Subsec. (7), sec. 189.02, Wis. 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 courts in determining whether transactions come within a securities statute, will 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.).

In the case of *State of Minnesota v. Swenson*, 172 Minn. 277, 215 N. W. 177, the defendant sold interests in an invention. The invention had not been completed but the inventor was at work endeavoring to complete it. It was the contention of the defendant that such contracts were not securities, he claimed that there was only a sale of an interest in the motor and not an interest in the profits and that any interest in the profits resulted from the ownership in the motor. The court rejected the argument so advanced and held that the contract amounted to a security within the meaning of the blue sky law.

It was further contended by the defendant in the above case that he was simply selling interests in his own personal property, and that, if the statute included such contracts, it was unconstitutional. To this argument the court stated at p. 282:

“While it is recognized everywhere that the owner has the right to dispose of his property when and to whom he pleases, it is also recognized everywhere that the manner of exercising that right may be regulated by law, and that he may be restrained from making such use or disposition of his property as will be injurious to the community, and may be required to comply with reasonable regulations deemed necessary for the prevention of frauds or the protection of the general public.”

In *State v. Whiteaker*, 118 Ore. 656, 247 P. 1077, the court considered a scheme contrived for the purpose of financing the extraction of gold by means of an electrical device. The court held that the word “securities” in the Oregon law was to be used in a broad sense and that it included the sale of interests in such a device.

In XXVI Op. Atty. Gen. 370 this department considered a situation where a corporation was engaged in taking orders from individuals for peanut vending machines. An agreement was entered into whereby after the sale of the machine to a purchaser, the purchaser would lease the machine back to the vendor, who agreed to service it and remit twenty per cent of the gross intake to the buyer. Thereafter, in accordance with the agreement, a bill of sale was delivered and a lease executed. The machines were not delivered to the purchaser but were placed in various locations by the vendor. It was ruled that such transactions came within the meaning of sec. 189.02, subsec. (7), Stats. The contract was a device for financing a corporation which lacked funds to acquire the necessary machines for itself. It also appeared that the delivery of the machines to the owners was not contemplated nor would it have been practicable. The whole enterprise was speculative in character and the speculator was desirous of an income and entered into the contract for investment purposes. In other words, he was seeking an “interest in the profits of a venture” within the statutory

definition of a security given in sec. 189.02, subsec. (7), Stats.

Applying the reasoning of that opinion to the present instance, X is seeking capital to construct a boat. In order to finance the building of the boat he offers to sell shares therein, evidenced by so-called bills of sale. Just what management of the boat is contemplated upon its completion is not indicated, but for all practical purposes it requires no stretch of the imagination to foresee that the purchasers are interested in the "profits of a venture." Clearly no delivery of the boat to some twenty-five hundred purchasers of shares is contemplated or would be practicable; their only interest would be as investors seeking income in their investment.

You are accordingly advised that the contemplated financing program amounts to a "security" transaction within the meaning of sec. 189.02, subsec. (7), Stats.

WHR

Criminal Law — Sentence for general indeterminate term of not less than one year and not more than ten years, "in addition to the former sentence which you are now serving," is construed to mean that sentence would commence at expiration of sentence which prisoner was then serving. Sentence so construed is within power of court under sec. 359.07, Stats.

August 25, 1938.

BOARD OF CONTROL.

Under date of July 23 you submitted a letter from the Wisconsin state prison, making inquiry as to the correct interpretation of two sentences imposed in two cases on one A.

It appears that on May 10, 1933, A was sentenced for a term of five to seven years for burglary in the nighttime

armed, to the Wisconsin state reformatory, by the circuit court of Jefferson county. Subsequently, he escaped from the reformatory and was charged with being an accomplice in an assault upon an officer on the night of February 13, 1936, in the south cell house at the Green Bay reformatory.

On December 10, 1936, he was given an additional term at the Wisconsin state reformatory of one to ten years by the municipal court at Green Bay. The sentence contained the following:

“You * * * are hereby sentenced to the Wisconsin state reformatory at Green Bay, Wisconsin, at hard labor for a general indeterminate term of not less than one year and not more than ten years, *in addition to the former sentence which you are now serving.*” (Italics ours.)

You inquire whether these two sentences run consecutively. You ask the question in order to be able to determine the time when he should be discharged.

The first question to be determined is that of the intention of the court by the use of the italicized language in the sentence. In a sense every sentence imposed is in addition to a former or any other sentence and hence it may be urged that the language adds nothing to the sentence and is more surplusage. Such construction hardly gives due weight to the presumption that the court intended to accomplish something by the use of the language in question. The only way to give effect to such presumption is to conclude that the court intended that this sentence should begin to run at the expiration of the former sentence, and we so construe the sentence imposed.

The only remaining question is whether the court had power to impose such sentence under sec. 359.07, Stats., and that question is ruled by XXI Op. Atty. Gen. 555, where we held that the court has such power.

You have also stated in your inquiry that the board of control transferred this party to the state prison. That, however, does not change the conclusion arrived at.

NSB

Bridges and Highways — Where county in May voted tax to improve county trunk highway in town of S under sec. 83.03, Stats., and assessed portion thereof to town of S and town of S had voted tax in excess of town's assessment to improve same highway, town levy cannot be used in lieu of assessment against town provided by county.

Town may use tax levied in April as basis for county aid under sec. 83.14, Stats., and under sec. 83.14, subsec. (4), may compel county to appropriate only difference between \$2,000 and county's share of improvement initiated under sec. 83.03, Stats.

County may appropriate such amount, greater amount or amount in excess of \$2,000 but cannot be compelled to do so.

Town petition may request county aid in amount in excess of that which county can be compelled to appropriate.

If town wishes to have construction commenced before town and county funds are in county treasury under sec. 83.14 (6), Stats., it must borrow money in anticipation of its own and county's share of improvement and pay said amount into county treasury.

August 25, 1938.

ALOYSIUS W. GALVIN,

District Attorney,

Menomonie, Wisconsin.

In your letter you state as follows:

"At the May, 1938, session of the county board, an assessment, under sec. 83.03, Wis. Statutes, was made for the improvement of county trunk "FF" in the town of Sheridan. The amount of the assessment including both town and county share was \$1,498.00. This amount is based on two mills on the total valuation of the town of Sheridan.

"The town's share of the \$1,498.00 assessment is 25% or \$374.50 and is to be assessed as a special charge against districts, by the county, in the 1938 tax levy. The county's share of the assessment (75%) or \$1,123.50 is to be assessed against the taxable property of the county in the 1938 tax levy.

"The amount of \$1,498.00 is to be advanced by the county and is to be expended in the 1938 construction season, in

accordance with the enclosed resolution adopted by the county board at the May, 1938 session.

"At the annual spring meeting of the town held in April, 1938, the town of Sheridan voted a tax of \$1,000.00 as the town's share of the construction of C. T. H. "FF" and under the present percentage between the town and county is entitled to \$3,000.00 aid, from the county."

You ask a number of questions as follows:

"1. In lieu of the special assessment made at the May, 1938, session of the county board, can the town of Sheridan petition the county board, at the Nov. 1938 session for county aid under sec. 83.14 Wis. statutes?"

You do not state whether county trunk FF is on the system of prospective state highways. Sec. 83.14, Stats., provides a means for improvement of roads upon the prospective state highway system upon town and village initiative. Under said section, the compulsory features with respect to appropriations by the county are applicable only to roads upon the system of prospective state highways. If the road is not upon such system, the county may appropriate under its general power to "construct or improve or aid in constructing or improving any road or bridge in the county," sec. 83.03, Stats., but cannot be compelled to appropriate.

Assuming that the road in question is on the prospective system, there would seem to be no reason why the town should not use the \$1,000 tax voted as a basis for county aid under sec. 83.14, Stats., but neither this levy nor the petition for aid can be in lieu of the special assessment. The county has already provided for the special assessment, and properly so under sec. 83.03, and neither that section nor sec. 83.14 makes any provision for offsetting one levy against the other. Where an assessment is made against the town under sec. 83.03, the statute provides:

"* * * 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.*"

There is no provision for payment of this assessment by a tax levied by the town wholly independent from the levy required by sec. 83.03, Stats. It must follow that the town tax levy made in April cannot be in lieu of the special assessment levy made by the county in May.

"2. Subsection (4) of section 83.14 is as follows: 'No county shall be required to appropriate, in any year, over two thousand dollars for work in any town or village.' Does this mean that the county is limited to \$2,000.00 aid to any town, in any one year, or can the amount of county aid granted be greater than \$2,000.00 at the discretion of the county board?"

The above section limits the amount which a county can be *compelled* to appropriate. It does not purport to fix the limits of county discretion or power. You are advised that a county may appropriate more than \$2,000 for work in any town or village but cannot be compelled to do so.

The county has already appropriated \$1,498 for work in the town of Sheridan, \$1,123.50 of which is to be paid by the county. While this levy was not in pursuance to a petition under sec. 83.14, Stats., it is our opinion that this expenditure must be considered in determining what sum a county can now be compelled to pay when a petition is presented under sec. 83.14, Stats. Sec. 83.14 (4) is not limited in its scope to appropriations under sec. 83.14 but is broad and all-inclusive in its language. It provides:

"No county shall be required to appropriate, in any year, over two thousand dollars for work in any town or village."

We are of the opinion that the most that the county could be compelled to appropriate under sec. 83.14, if a petition was presented for county aid in view of the prior county appropriation which must be paid by the county, would be \$876.50.

"3. If it is ruled that the town of Sheridan could petition the county board, at the Nov. 1938 session, could they petition for \$3,000.00 county aid, to match the \$1,000.00 voted at the annual town meeting in Apr. 1938 or would they be restricted to the difference between \$3,000.00 and \$1,123.50 (County's share of the assessment made at the May, 1938 session of the county board)?"

There appears no reason why the town should not petition the county for \$1,000 or \$3,000 county aid. The county, however, can be compelled to appropriate only \$876.50.

"4. If the town of Sheridan desired, during the 1938 construction season, to expend the funds which would become available by petitioning the county board, at the Nov. 1938 session, what legal procedure should they follow?

They should follow the only procedure authorized, namely, sec. 83.14 (6) Stats.

"5. Further, in the event of expenditure before funds are available, is the town of Sheridan required to advance both the town and county's share? What amount, if any, would the town of Sheridan, in your opinion, be justified in advancing during the 1938 construction season, under section 83.14 of the statutes, with the assurance that the town of Sheridan would be reimbursed for the county's share?"

The answer to the first part of this question 5 is "yes." Sec. 83.14 (6), Stats., appears to contemplate that construction shall not begin until both county and town funds are available and in the county treasury. If such time is to be anticipated, it can be done only by the town borrowing the amount of both the town levy and the county anticipated levy and paying said amount into the county treasury.

The last part of this question 5 has already been answered in the conclusion reached in question 2.

NSB

Bonds — School district whose territory is coterminous with that of city of fourth class organized as common school district and operating under that plan is separate municipal unit under sec. 40.50, subsec. (2), par. (a), Stats., and bonds issued by such district are not “in the same line” as bonds of city for purpose of determining whether bank may purchase them.

August 26, 1938.

H. F. IBACH, *Commissioner,*
Banking Commission.

You request the opinion of this department as to whether or not a proposed bond issue of Edgerton school district No. 8 may be considered as being in the same line as direct obligation bonds of the city of Edgerton.

Edgerton is a city of the fourth class. Its territory is coterminous with that of the school district.

The present sec. 40.50, subsec. (2), par. (a), Stats., as amended by ch. 183, Laws 1937, provides:

“Any fourth class city whose territory now or any time hereafter, constitutes all or part of one school district and which has at least eighty per cent of the entire population of such school district *may* proceed under section 40.52 or 66.01 to adopt the plan of school administration provided by sections 40.50 to 40.60 [city school plan] *or* may operate or continue to operate under the common school district plan. No action taken by the school board of any such city nor any act of such school district in the levying of taxes, borrowing of money, issuance of bonds, execution of contracts or other corporate acts shall be invalidated by failure to comply with sections 40.50 to 40.60.”

As you state, the school district in Edgerton is under the old plan of school government. Although it qualifies under the statute to adopt the city plan, it has continued to operate as a common school district. Before the amendments by ch. 183, Laws 1937, there was some doubt as to the effect of a city not adopting the city school plan when it was qualified to do so. Prior to the 1937 amendment, this department ruled in XXIV Op. Atty. Gen. 596 that school dis-

tricts coterminous with the boundaries of a city of the fourth class which continued at all times, notwithstanding the enactment of sections 40.50 to 40.60, to act as a common school district in all respects as if section 40.50 had never been enacted are now such school districts *de jure* by virtue of the amendment to sec. 40.50 by ch. 217, Laws 1933.

The statute as now amended clearly provides that the change to the city plan is optional with cities of the fourth class whose territories constitute all or part of one school district, and which have at least eighty per cent of the entire population of such school district.

Common school districts are recognized as separate municipal entities. The school territories of cities under the city school plan are not. See *State ex rel. Board of Education v. City of Racine*, 205 Wis. 389, 236 N. W. 553 (1931). This distinction is recognized and upheld in many respects.

The general school law expressly distinguishes between common school districts and others. Sec. 40.02, subsec. (3), classifies school districts as "common school districts," "high school districts" and "city school districts."

The contracts of the board of education of a city operating under the city school plan are city contracts. *State ex rel. Board of Education v. City of Racine (supra)*.

In determining whether the indebtedness of a common school district exceeds the limit fixed by sec. 3 of art. XI, Wis. Const., the indebtedness of a village within limits coterminous with those of the school district is not to be added to that of the school district. *Lippert v. School Dist. No. 4 of Village of Shorewood*, 187 Wis. 154 (1925).

As stated in XX Op. Atty. Gen. 707, 709:

"* * * The school territory of a city under the city school plan does not continue to be governed in the same manner as a common school district, as the school system of a city under the city school plan is administered by a board of education the members of which are denominated city officers, and school taxes are levied by the city council
* * * The legislative plan 'seems to be to make the city the municipal entity for the administration of school affairs'" (citing the *Racine* case).

It is apparent therefore that the legislature intended that the term "city school district" should connote a system un-

der the direction and supervision of city officials, while the term "common school district" should refer to a separate municipal entity.

Of even greater importance in regard to this particular problem are the statutory provisions as to the ownership of property by the different school districts.

Sec. 40.53, relating to the powers of the city school boards, provides:

"(1) The school board shall have the powers and be charged with the duties of common school district boards as far as the same are not otherwise provided for or limited by statute.

"* * *

"(6) To select and acquire sites and adopt plans for school buildings, but deeds and leases taken shall be in the name of the *city*, and the title to all school property shall vest in the *city*."

Sec. 40.16, relating to common school district boards, provides:

"(1) Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the *common school board* shall have the possession, care, control and management of the property and affairs of the district."

Under these provisions a common school board has the possession and control over the property of the school district even though such district comprises the same territory as that of a city. It is apparent, therefore, that the security for an obligation of a common school district is separate and distinct from that for obligations of a city.

You are therefore advised that the direct obligation bonds of the city of Edgerton are not in the same line as those proposed to be issued by the Edgerton school district.

NSB

Corporations — Securities Law — Under sec. 189.05, subsec. (9), Stats., pledgee may sell in good faith through agent or subagent non-registered securities pledged for *bona fide* debt.

August 27, 1938.

BANKING COMMISSION.

Attention G. M. Buenzli, *Securities Division*.

You state that a Milwaukee bank a pledgee of certain securities which are not registered in the state of Wisconsin, wishes to employ a securities company to act as its agent in the disposal of these securities. The securities company has asked whether it may solicit for the purchase of such non-registered securities. The company further asks whether it might also sell such securities as an agent for an authorized dealer who is in turn acting as an agent for the original pledgee but is unable to perform the service because of having no retail organization. In other words, the securities company would, in the latter instance, be acting as a subagent of the pledgee seller.

There can be no question but that the bank itself, as pledgee, could sell such non-registered securities since sec. 189.05, subsec. (9), Stats., exempts specified sales of securities from other provisions of the chapter. Sec. 189.05, subsec. (9), Stats., exempts

“The sale, by a pledgee in good faith and not for the purpose of avoiding the provisions of this chapter and in the ordinary course of business, of a security pledged for a *bona fide* debt.”

The question to be decided is whether or not the transaction continues to be covered by sec. 189.05, subsec. (9), when the sale is made not directly by the pledgee but by an authorized agent of the pledgee, in this case a securities company. It is to be noted that sec. 189.05 exempts the “sale” of the security, as distinguished from secs. 189.03 and 189.04, which sections exempt the securities themselves. Under the provisions of sec. 189.05, Stats., it is the transaction which is the subject of the provision and not the

security itself or the person dealing with the security. Thus, whether the sale is made directly by the pledgee or through an agent of the pledgee, the transaction would really be a "sale, by a pledgee" within the terms of the statute, since an authorized act of an agent is really the act of his principal. *Rosecky v. Tomaszewski*, 225 Wis. 438, 274 N. W. 259 (1937).

In analyzing sales which are claimed to fall within the provisions of sec. 189.05, Stats., each transaction must be considered separately, keeping in mind the purpose of the securities law which is "to protect the investors of this state and to restrain the flotation and sale of improvident securities, * * *". *Klatt v. Guaranteed Bond Co.*, 213 Wis. 12, 21, 250 N. W. 825, (1933).

The exemption applies when the transaction is made "in good faith" and not for the purpose of avoiding the provisions of this chapter. The fact that the bank chooses to dispose of the securities through a licensed dealer in no way negatives their good faith, such procedure being a not unusual method of disposing of pledged securities.

We are therefore of the opinion that a pledgee can dispose of its securities by means of an agent or subagent as long as it conforms with the requirements of sec. 189.05 (9), Stats., and whether or not it does depends upon all the circumstances surrounding the transaction.

NSB

Criminal Law — Gambling — Lotteries — "New London day plan" is condemned as lottery, in violation of sec. 348.01, Stats.

August 27, 1938.

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

You have asked whether the following scheme, known as the "New London day plan," constitutes a lottery:

The proposed plan, referred to as a new type of community promotional activity, provides for the setting aside of one day in each week at which time the activities of a group of members of the community, organized as a club, are conducted. This so-called club is made up of sponsor members consisting of the business and professional people of the town—most likely retail merchants—and active members, who are all the rest of the members of the community who have joined the club—in effect, the consumers. Upon joining the club, these sponsor members contribute to a fund which is used to offer cash prizes each week to the active members. To become active members, the public fills in application blanks at the place of business of any of the sponsors. No purchase need be made, no fees paid, and no tickets or coupons saved; registration blanks, however, are obtainable only from the sponsors. The names of the active members are placed in a screened mixer and, on the specified day each week, on one of the main streets of the town, midst great fanfare, the winners of the cash prizes are drawn.

Two types of prizes are awarded, the grand prize of fifty dollars or more and the smaller street prizes. The names of the winners of the street prizes are called in the street, but the name of the winner of the grand prize is relayed by messenger to every sponsor who then announces the winner simultaneously at a specified time. The winner must be present at a sponsor's place of business to be entitled to the prize; and in his or her absence the prize accumulates from week to week. The sole function of the club is the promotion of this day, the only feature of which is the drawing and awarding of said prizes.

In XXVII Op. Atty. Gen. 225 we held a plan involving the following elements a lottery and in violation of sec. 348.01 Stats.:

“* * * A promoter distributes registration books among such merchants as pay him a fee for the privilege of ‘representation.’ The merchants display these books in their places of business and invite the public to sign. Each week cash prizes are given away by lot among the class which signs the registers. Announcement of winners is made at a certain hour over the local radio station. A win-

ner thus announced is required to be present in the place of business where his name is registered when the announcement is made in order to be eligible to collect the prize. At no time is it necessary to buy anything."

There is no essential difference between the plan therein considered and the "New London day plan" except that the "New London day plan" is conceived upon a much larger scale and involves much more publicity, enthusiasm and lure. If the plan involves the element of a lottery, it does not cease to be such merely because of the size and magnitude of the undertaking. The size and magnitude merely increase the consideration found to be present in the other scheme above referred to and which necessitated condemnation of the plan as a lottery.

We are of the opinion that the proposed "New London day plan" contains all the elements of a lottery and that the operation thereof constitutes a violation of sec. 348.01, Stats.

We reach this conclusion somewhat reluctantly as the plan is obviously aimed at promoting the business interests of communities and by enthusiasm engendered more or less establishing the communities as trade centers. But if the scheme contains the elements of a lottery, it cannot be approved however meritorious the motive. If there is any widespread demand for exceptions to the anti-lottery statute that demand must be met by the legislature within the legitimate sphere of legislative action, if any, in view of art. IV, sec. 24, constitution.

NSB

Counties — Public Officers — County Treasurer — Clerk in Office of Register of Deeds — County board may not, under sec. 59.15, subsec. (1) Stats., increase salary of county treasurer during his term of office by paying him extra compensation for services performed in connection with WPA project in his office.

Additional clerk hired for WPA project in office of register of deeds when authorized by county board is within authority of county board.

August 29, 1938.

JOHN H. ROUSE,

District Attorney,

Baraboo, Wisconsin.

In your letter you submit facts as follows:

“The work project administration has provided two projects in Sauk county which pertain to the correction of descriptions in the office of the county treasurer and work of certain records in the office of the register of deeds. In each case the county has furnished such funds to pay for certain materials and supervision of the project. In the case of the project involving the register of deeds’ office, during an emergency when the regular supervisor was ill, the register of deeds supervised the work and in turn hired a clerk to perform his duties in the register of deeds office. A statement for such services of the clerk was presented to the county board for its approval, and they wish to know if it is proper to allow this expense. In the case of the project in the treasurer’s office, the treasurer was asked to supervise the work, and it was intended that he would be allowed certain additional compensation out of the funds set up for this work. This work was not a regular part of the duties of his office and required his putting in many additional hours at night in order to take care of the work. He has presented a claim for additional compensation for such supervision which is now before the county board, * * *.”

You have further advised that the clerk hired by the register of deeds was authorized by the county board. You inquire (1) whether the claim filed by the county treasurer is a lawful claim against the county and, (2) whether the clerk hired by the register of deeds was lawful.

Sec. 59.15, subsec. (1), Stats., provides as follows:

“* * * The salary so fixed shall not be increased or diminished during the officer’s term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions: [exceptions not material].”

We can sympathize with the position in which the county treasurer finds himself. Having put in many additional hours of labor outside of office hours, it would seem that it should be permissible for the county board to allow his claim for this work. This would seem particularly so where the county board has asked him to do this work and on the strength of it he has rendered a substantial public service. A public officer takes his office *cum onere*. He is entitled to no salary or fees except what the statute provides. The law, therefore, is very clear that the claim filed is not one which can legally be paid by the county. *Supervisors of Kewaunee County v. Knipfer*, 37 Wis. 496; *Quaw v. Paff*, 98 Wis. 586; *Outagamie County v. Zuehlke*, 165 Wis. 32.

As to the allowance of additional clerk hire to the register of deeds by the county board, that is within the authority of the county board, sec. 59.15, (3), Stats., which reads as follows:

“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, except that the salaries of the undersheriff and of the register in probate may be changed only at the annual meeting.”

You are advised that the claim of the county treasurer is not a lawful claim against the county, and that the additional clerk hired by the register of deeds under authority of the county board was within the authority of the county board.

NSB

Intoxicating Liquors — Posted Persons — Official or body placing name upon blacklist under sec. 176.26, Stats., inadvertently or through mistake has power to correct error.

IV Op. Atty. Gen. 347, in so far as it holds otherwise, is overruled.

Where conditions exist that permit blacklisting under sec. 176.26 official discretion once exercised may not be changed during year.

III Op. Atty. Gen. 507 and XXV Op. Atty. Gen. 547, in so far as they so hold, are approved.

September 3, 1938.

HAROLD M. DAKIN,

District Attorney,

Watertown, Wisconsin.

You state that at the November, 1937, session of the county board of Jefferson county, a resolution was passed requesting the director of outdoor relief and the district attorney to "blacklist" persons who were receiving outdoor relief from Jefferson county and who the director of outdoor relief thought should be blacklisted.

Following this the director of outdoor relief made a list of those who he thought should be blacklisted. After the list had been prepared and served on all the taverns in Jefferson county, it was found that there were at least three persons on that list who should not have been placed on it. At the May 3, 1938, meeting of the county board, a resolution was adopted authorizing the removal of the names of all persons who should not have been placed on the list or who were placed on it inadvertently.

You ask whether the name of a person which, through inadvertence and mistake, has been placed on a so-called blacklist pursuant to the provisions of sec. 176.26, Stats., can be removed from such banned list before the expiration of the required year.

This question was squarely passed upon in IV Op. Atty. Gen. 347 with respect to interpretation of a similar statute and it was held that there was no authority for removing a name from the blacklist even though the name was placed

thereon by mistake or prejudice. For reasons hereinafter stated, we do not consider that conclusion sound.

Sec. 176.26, Stats., confers discretionary power upon certain named officials and bodies to blacklist, and defines the conditions that must exist before such discretionary power may or can be exercised. The officials or bodies have no powers in excess of those conferred by statute and any action taken upon their part, inadvertent or otherwise, which exceeds the statutory grant of power is void. We know of no principle of law that holds that administrative officials or bodies are without power to correct a void act and that error, once perpetrated, must stand perpetrated throughout the year, and whatever the injustice that has been done to an individual as the result of arbitrary exercise of power, albeit inadvertent. Such would not seem to be the ultimate goal of any system of jurisprudence. We find no authority to support such view and unfortunately we find no authority to support the contrary view. We accordingly rest our conclusion upon what seems to us a sound, legal analysis of the problem presented.

If conditions exist which, in the opinion of an official or body named in sec. 176.26, justify the placing of a name upon the blacklist, that discretion once affirmatively exercised by placing the name thereon may not be re-exercised or re-examined within the year, the statute having made no provision for a review or re-examination by such official action. The opinions in III Op. Atty. Gen. 507 and XXV Op. Atty. Gen. 547, so interpreted, are affirmed. But this is quite another matter than that of holding that a public official or body is without power to correct a void act, which was held in IV Op. Atty. Gen. 347, and that opinion, in so far as it so holds, is overruled.

Under sec. 176.26, Stats., only the wife and certain named officials are authorized to blacklist. A county board as such is not included in such list. A county board is, therefore, without authority to blacklist and any action taken upon the part of such board with respect thereto can be only suggestive or directory and without force of law. Such being true, the board clearly can change its action but it can confer no power with respect to taking a name off the blacklist

as it has no power to place a name upon that list in the first instance.

NSB

Criminal Law — Obstructing Execution of Law — Words and Phrases — Disguise — No offense is committed under sec. 346.50, Stats., unless there is some attempt at disguise.

September 3, 1938.

HUGH W. GOGGINS,

District Attorney,

Wisconsin Rapids, Wisconsin.

You have asked for an opinion on the following case:

“A police officer making arrest for disturbance of the peace was interfered with by being pulled away from his prisoner and further interfered with by the holding of his arm in attempting to subdue the prisoner by striking with his club. The justice, when the two obstructors were arraigned, drew up a complaint and warrant under the provisions of section 346.50, Wisconsin statutes. The identity of the obstructors was known by the officer at the time.

“Under the above facts have the obstructors in your opinion violated the provisions of section 346.50?”

Sec. 346.50, Stats., provides:

“Any person who shall in any manner disguise himself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any officer or any other person in the legal performance of his duty or the exercise of his rights under the laws of the United States or of this state, whether such intent shall be effected or not, shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars.”

It is clear from a reading of the statute that the most essential element of the crime is that a person *disguise* himself. Without this element there can be no conviction under this section of the statutes.

There appear to be but two reported cases interpreting statutes of this sort. They both rely on the definition found in Webster's dictionary, where the word "disguise" is defined to mean "to change the customary dress or appearance of, so as to conceal one's identity or counterfeit another's." The cases are *Dale County v. Gunther*, (1871) 46 Ala. 118, 142, and *DarNeal v. State*, (1917) 14 Okla. Cr. 540, 174 Pac. 290, 1 A. L. R. 638.

The facts as stated by you show no attempt whatever on the part of the defendants to disguise themselves. Consequently, they cannot be convicted of the crime forbidden by sec. 346.50, Stats.

We suggest that you proceed under some more appropriate section of the statutes, such as sec. 346.34, subsec. (1), or 346.39.

NSB

Public Officers — Register of Deeds — Public Records — Statistics — Records of births, except illegitimate births, marriages and deaths kept by register of deeds under sec. 59.51, subsec. (7), and sec. 69.56, Stats., are public records open to public inspection by virtue of secs. 18.01 and 59.14 (1), Stats.

September 7, 1938.

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

You ask whether the records of births, deaths and marriages in the office of the register of deeds, kept pursuant to sec. 59.51, subsec. (7), Stats., are public records so as to be open to inspection by the public generally.

Sec. 59.51, Stats., expressly makes it the official duty of the register of deeds to keep such records. This section provides:

“The register of deeds shall:

“* * *

“(7) Register, file and index, as directed by law, all marriages contracted and deaths and births occurring in his county. * * *

“(8) Make and deliver to any person, on demand and payment of the legal fees therefor, a copy duly certified, with his official seal affixed, of any record, paper, file, map or plat in his office.”

It is the duty of the local registrar of vital statistics under sec. 69.55, Stats., to transmit copies of all births, deaths and marriages to the register of deeds and sec. 69.56, Stats., requires the register of deeds to file and index the same.

Sec. 18.01, Stats., provides:

“(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).”

Such records are thus ones that are “required by law to be filed, deposited, or kept” in the office of the register of deeds which “any person” has the right to inspect or copy under the express provisions of sec. 18.01 (2), Stats. See XI Op. Atty. Gen. 7; XX Op. Atty. Gen. 323.

However, in addition, sec. 59.14 (1), Stats., specifically answers the question by providing:

“Every sheriff, clerk of the circuit court, *register of deeds*, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices pro-

vided * * *. All such officers shall keep such offices open during the usual business hours each day, Sundays and legal holidays excepted, * * * and with proper care shall open to the examination of any person all books and papers required to be kept in his office and permit any person so examining to take notes and copies of such books, records or papers or minutes therefrom."

The statutes make the records of birth, death and marriages kept in the office of the register of deeds public records which are open to public inspection. It is to be noted, however, that the foregoing does not apply to certificates of illegitimate births, which, by the express provisions of sec. 69.26, Stats., are not open to the public except upon court order.

HHP

Charitable and Penal Institutions — Board of Control — Public Officers — Board of Vocational Education — By virtue of reorganization order No. 17, power of state board of control under sec. 46.03, subsecs. (1) and (3), Stats., to accept in behalf of state gifts to charitable and penal institutions under its jurisdiction is now vested in state board of vocational and adult education with respect to gifts to Wisconsin workshop for blind.

September 8, 1938.

BOARD OF VOCATIONAL EDUCATION.

Attention George P. Hambrecht, *Director*.

Reorganization order No. 17 issued under the authority of ch. 9, Laws Special Session 1937 provides:

"That the Field Agency for the care of the Adult Blind and the Wisconsin Workshop for the Blind and all the functions, powers and duties, relating thereto, vested in the State Board of Control of Wisconsin under sections 47.05 and 47.06, Statutes of 1937, and any other provision of law,

be transferred and vested in the State Board of Vocational and Adult Education of the State of Wisconsin."

You ask whether the state board of vocational and adult education is authorized by such order to accept bequests to the workshop. The answer to that question depends upon whether the state board of control had the authority to do so prior to the transfer affected by the above order, and, if it did, whether the authority to accept such funds was a function, power or duty relating to the board's supervision and control over the field agency and the workshop for the blind within the meaning of the executive order.

As indicated in your request there is no doubt that the board of control had the authority to accept such funds. Sec. 46.03, subsecs. (1) and (3), Stats., is very comprehensive and clearly indicates the intent of the legislature that the board of control shall take advantage of funds which may be offered to the state for any purpose or use pertaining to the functions of the charitable, curative or reformatory institutions established or maintained by the state.

Whether the power to accept such funds is a power relating to the field agency and the workshop for the blind within the meaning of the reorganization order presents a more difficult problem. The express authority to receive such funds is granted by sec. 46.03, subsec. (3) Stats., which provides that the board of control shall:

"Take and hold in trust, whenever the board may deem the acceptance thereof advantageous, all property, real or personal, transferred in any manner to the state to be applied to any specified purpose, use or benefit pertaining to any of said institutions or the inmates thereof, and apply the same in accordance with the trust."

It will be noted that the statute above quoted does not refer specifically to any particular institution or division thereof but confers upon the board a general power connected with the board's supervision and control over all charitable, curative, reformatory or penal institutions established or maintained by the state. However, there is no indication that the phrase "relating thereto" was used in the

reorganization order in any restricted sense such as "related exclusively thereto," and in view of the purpose of the reorganization act it must be held that the state board of vocational and adult education was given the power by the order in question to accept bequests on behalf of the field agency and the workshop for the blind.

Ch. 9, sec. 4, subsec. (2), Laws Special Session 1937 provides for reorganization. "In order to promote greater efficiency and economy." Reorganization order No. 17 issued pursuant to that section reasserts that purpose. A construction of that order which places the power to accept, control and disburse the funds of the field agency and workshop in a body other than that which directs and controls its function will certainly defeat the intent and purpose of the act and the order issued pursuant thereto. Obviously the power conferred upon the board of control by sec. 46.03 (3), Stats., is "related," in part at least, to the field agency and workshop for the blind in so far as it concerns funds to be used by such agencies. It follows that such portion of that power is transferred to the board of vocational and adult education and the board may accept the bequest.

NSB

Automobiles — Law of Road — Constitutional Law — Criminal Law — Pardons — Public Officers — Governor — Under art. V, sec. 6, Wis. Const., governor may grant pardons any time after conviction and regardless of term of sentence or other penalties imposed.

September 8, 1938.

PARDON BOARD.

Attention Earl H. Munson, *Secretary*.

You have referred to our opinion of May 19, 1938, XXVII Op. Atty. Gen. 331, to the effect that the legal consequences of conviction of crime are absolved by a full pardon and that a person convicted for driving while intoxicated should have

his driver's license restored when pardoned, upon application, without furnishing proof of financial responsibility as required under sec. 85.08, subsec. (10), par. (j), Stats.

In this connection you now ask the following question:

"Has the governor power to grant a pardon in cases where a conviction was obtained, the license revoked, without a definite term of sentence being directed by the court?"

Art. V, sec. 6, Wisconsin constitution, provides in part:

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

It is apparent from reading the foregoing grant of constitutional power to the executive that the exercise of such power is in no way dependent upon the terms of sentence whether definite or otherwise. The only prerequisite is that there be a conviction.

"Unless restricted by the constitution, the power to pardon may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. An offender may also be pardoned after he has served the punishment adjudged for his crime. In a number of states the governor is empowered by the constitution to grant pardons after conviction. * * *." 46 C. J. 1189.

As previously stated, our constitution requires that the pardon be granted after conviction. In the absence of any other constitutional restriction as to time and in accordance with the foregoing quotation respecting the time of granting a pardon, a pardon might be granted after conviction and before sentence. If it may be granted before sentence, then it is immaterial whether or not the sentence is for a definite term.

You are therefore advised that the governor may grant pardons after conviction, though the sentence is without a

definite term and regardless of suspension of driving privileges under sec. 85.08, subsec. (10), Stats., although, as pointed out in the opinion previously referred to, a pardon does not automatically restore a license.

WHR

Bridges and Highways — Law of Road — If speed in excess of thirty-five miles per hour on particular highway is such as to endanger property, life or limb, prosecutions may be had under sec. 85.40, subsec. (1), Stats. Maximum speed in business district is fifteen miles per hour under sec. 85.40 (6) and twenty miles per hour in residence district under sec. 85.40 (7). These limits may be raised by local authorities.

September 9, 1938.

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

You have inquired whether the state highway department or the town of Allouez may regulate traffic from the city limits of De Pere to the city limits of Green Bay at a speed not to exceed thirty-five miles per hour. This request, as we understand it, is prompted by the fact that numerous accidents have occurred on this highway recently, resulting in a number of deaths, these accidents being traceable largely to the fact that the speed of traffic on this highway is excessive when considered in the light of all the surrounding circumstances.

Sec. 85.40, subsec. (1), Stats., provides as follows:

“It shall be unlawful for any person to operate any vehicle upon a highway carelessly and heedlessly, in wilful or wanton disregard of the rights or safety or others, or without due caution and circumspection or at speeds greater than those specified in this section or in a manner so as to

endanger or be likely to endanger the property, life, or limb of any person, or without due regard to the traffic, surface, width of the highway, and any other condition of whatever nature then existing."

If a speed of more than thirty-five miles per hour on the highway in question is such as to endanger or to be likely to endanger the property, life or limb of any person, there is no good reason why the above statute should not be invoked. It would be advisable to have the highway posted with appropriate signs but it must be remembered that prosecution would have to be instituted under the above statute rather than under any town ordinance or highway department posting of a particular speed limit, and that the conviction would have to stand upon the facts of the particular case as proved under sec. 85.40 (1), Stats. See *Baraboo v. Dwyer*, 166 Wis. 372.

You do not state whether the neighborhood traversed by the highway is such as may be classified as either a business or residence district.

Sec. 85.40, subsec. (6), Stats., provides:

"The maximum permissible speed on any highway in a business district shall be fifteen miles per hour; but local authorities may increase this speed as provided in section 85.43."

Sec. 85.40, subsec. (7), provides:

"The maximum permissible speed on any highway in a residence district shall be twenty miles per hour; but local authorities may increase this speed as provided in section 85.43."

A business district is defined in sec. 85.10, subsec. (28), as follows:

"The territory contiguous to a highway when fifty per cent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business."

A residence district is defined in sec. 85.10, subsec. (29), as follows:

“The territory contiguous to a highway not comprising a business district where the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business.”

If the district in question qualifies under either of the above definitions, the maximum speeds would be those fixed in sec. 85.40, subssecs. (6) and (7), unless increased by local authorities. Sec. 85.43, subsec. (1), Stats., specifically authorizes local authorities to increase the speeds specified in sec. 85.40, subssecs. (6) and (7).

We therefore conclude that if, under all the facts and circumstances, a speed of more than thirty-five miles per hour would result in a violation of sec. 85.40 (1), Stats., prosecutions could be had under that section, and if the district is business or residential in character, the maximum speeds would be fifteen and twenty miles per hour, respectively, unless increased by local ordinance. Thus, it is apparent that the state highway department has no special powers to designate rates of speed and the only powers of a town with reference thereto are those found in sec. 85.40, subssecs. (6) and (7), Stats., relating to the increase of statutory rates of speed in residence and business districts.

WHR

Fish and Game — With respect to sec. 29.22, subsec. (1), Stats.:

1. Conservation warden need not, to justify search, have positive knowledge that occupants of car are hunting. He may search “if there exists, at the time of the search, reasonable or probable cause for his belief that the contents of the automobile searched offend against some law which it is his duty to enforce.”

2. and 3. Upon both journey from camp to so-called “hunting grounds” and return journey where loaded gun not knocked down is being carried, question of fact for jury is presented as to whether occupants were in fact hunting

and, therefore, offending against said section of statutes within rule of *Hatton v. Fosnot*, 175 Wis. 343. XXII Op. Atty. Gen. 1024, XXVI Op. Atty. Gen. 14 overruled.

4. Sec. 29.05 (6), Stats., does not authorize warden to search automobile driven upon highway at night in territory frequented by deer without any indication that occupants of car have been or are hunting. He may search only upon conditions specified in 1 above.

5. If evidence can be adduced to effect that in great majority of instances throwing light into woods apparently shining deer is consistent only with unlawful purpose, such shining would in and of itself constitute reasonable and probable cause for belief necessary to justify search and seizure within rule of *State v. Leadbetter*, 210 Wis. 327.

6. Sec. 29.05 (6) does not give conservation wardens power to search automobiles for firearms carried in violation of sec. 29.22 (1), Stats. But if in course of lawful search under said section such firearm is discovered and warden has reasonable or probable cause for believing that it is being or has been used for unlawful purpose, he may, and it is his duty to do so, seize same. Warden's powers with respect to search and seizure for firearms being carried in violation of sec. 29.22 (1) are not limited to such incidental seizure as result of lawful search under sec. 29.05 (6), Stats. Under sec. 29.05 (7) he may search for and seize firearm which he has reasonable or probable cause to believe is being carried in violation of sec. 29.22 (1). Hunting is not necessary element of offense under sec. 29.22 (1) during five-day season preceding opening of deer season in territory that has open season on deer, but is necessary element of offense at all other times of year.

7. Hunting is not necessary element of offense under order number M-40 of conservation commission.

September 10, 1938.

EDMUND H. DRAGER,

District Attorney,

Eagle River, Wisconsin.

You refer to that part of sec. 29.22, subsec. (1), Stats., which provides as follows:

“* * * 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 enclosed within a carrying case. * * *”

and have submitted a number of questions with respect thereto as follows:

(1) Do conservation wardens have the right to search an automobile upon a highway without knowledge that the occupant of the car is hunting from such automobile or has been hunting therefrom previous to the search?

Wardens do not need positive knowledge to justify a search. Neither can they stop any and all cars and search them. At the time of the search there must exist a reasonable and probable cause for the belief of the officer that the contents of the automobile searched offend against some law which it is his duty to enforce. If such reasonable and probable cause does exist, the car may be searched and without a search warrant. *State v. Leadbetter*, 210 Wis. 327. It will be seen from the foregoing that illegal hunting from an automobile, or facts and circumstances which give rise to the reasonable or probable cause for the belief of the officer that there has been illegal hunting therefrom, is not an exclusive ground for search of an automobile. The officer may search without warrant “if there exists, at the time of the search, reasonable or probable cause for his belief that the contents of the automobile searched offend against some law which it is his duty to enforce.” *State v. Leadbetter*, *supra*, p. 330.

(2) Is a person violating sec. 29.22 (1), Stats., while he is leaving camp and going to the hunting ground, with his gun loaded and not knocked down?

In submitting this question you refer to *Hatton v. Fosnot*, 175 Wis. 343 (1921), in which case it was held that there was no violation of the section in question for the mere carrying of an unloaded gun which was not knocked down and which was not enclosed within a carrying case, and that to offend against the statute there must be actual hunting with such gun. There were two dissents from the majority opinion of the court and the subsequent case of *State v. Alt*,

215 Wis. 387 (1934), would indicate that the rule announced in the *Fosnot* case should not be extended but should be confined to the exact facts of that case. The *Fosnot* case was tried upon stipulation, from which stipulation it appears that the parties left the city intending to violate the law, and then “* * * without carrying out the purpose of hunting for wolves, * * * turned about and returned homeward, * * *” (p. 344). Upon this stipulation it appears that they went out with the intention of hunting but abandoned that purpose before carrying it out and never did hunt.

In any case not tried upon such stipulation of facts where a loaded gun which is not knocked down is being carried in an automobile, a jury question is presented as to whether the occupant or occupants of the car were, in fact, hunting. The difficulty with your question is that it impliedly assumes that hunting does not commence until arrival at the hunting grounds. This is not necessarily true. The parties may well be hunting in going to the so-called hunting grounds and even though no shot is fired. It is for the jury to say, under all the facts and circumstances of the case, whether the parties were, in fact, hunting. The facts and circumstances may well be such that the jury may conclude that they were hunting and this even though no shot was actually fired. Each case has to stand upon the particular facts and circumstances of the particular case.

Convictions may be difficult, perhaps impossible to sustain, if no facts can be shown other than the mere possession. But if any facts can be shown, along with such possession, that would justify a jury in concluding that the parties were in fact hunting, and within the rules of evidence necessary to convict in a criminal case, the statute would be violated.

(3) Are persons guilty, under sec. 29.22 (1), Stats., if they have abandoned hunting and are returning to camp with the guns loaded and not knocked down?

We assume that this is the question that was answered in *Hatton v. Fosnot*, that is, going out with intentions to hunt and abandoning those intentions before they are ever car-

ried out. Under such circumstances the statute is not violated. *Hatton v. Fosnot, supra.*

But in answer to this question as well as in answer to the preceding question, district attorneys should be cautioned against stipulations, such as "before commencing to hunt" and "abandonment of the purpose to hunt." Who can say that the parties had not commenced to hunt or that they had abandoned the purpose? It is for the jury to say, under all the facts and circumstances of the case, as to whether they had commenced to hunt or whether they had abandoned the purpose of hunting before commencing. There can obviously be no conviction for a violation of this section of the statutes if the case is stipulated out of court under the rule of the *Fosnot* case.

In XXII Op. Atty. Gen. 1024 and XXVI Op. Atty. Gen. 14 we concluded that carrying a loaded gun in a vehicle, unless the same is unloaded and knocked down or unloaded and enclosed within a carrying case, is a violation of sec. 29.22, Stats., and this without regard to whether such firearms are being or had been used for unlawful hunting. The *Fosnot* case was not cited or mentioned in those opinions. In so far as the opinions conflict with the *Fosnot* case, they are in error and must be overruled.

It should be noted that neither the trial judge in the *Fosnot* case nor the dissenting judges in the case in the supreme court were of the opinion that sec. 29.22 (1), Stats., should be literally construed as was done in XXII Op. Atty. Gen. 1024 so as to make it an offense against the statute by the mere carrying of a gun in a vehicle loaded and not knocked down and under circumstances and in areas where the occupants obviously were not hunting and had no intention of hunting, and under circumstances where such carrying of such arms could have no possible relation to conservation and conservation purposes. On the other hand, both the trial judge and the dissenting judges in the supreme court, speaking through Chief Justice Rosenberry, were of the opinion that the statute was offended against when such arms were carried in hunting territory and that such carrying of arms in such territory in and of itself constituted unlawful hunting and, therefore, an offense against the statute. There is much to be said for this latter view, and were

we free to construe the statute as an original proposition, we would not hesitate to adopt such construction for, as was pointed out by the chief justice in his dissenting opinion, any other construction makes the law most difficult, if not impossible, to enforce. But the majority of the court in the *Fosnot* case concluded that there must be "actual hunting" to be an offense against the statute and that is the law of this state unless or until overruled. As hereinbefore pointed out, the law of the *Fosnot* case should not be extended but should be confined to the exact facts of that case. Normally there is a jury question involved, but there can be no jury question involved when the stipulation is such that the jury question is eliminated.

(4) Does sec. 29.05 (6), Stats., authorize wardens to search an automobile traveling upon a highway at night in a territory frequented by deer, without any indication that the occupants of the car have been or are hunting?

The answer to this question must be No. Wardens may stop and search automobiles only where at the time of the search reasonable or probable cause exists whereby the officer believes that the contents of the automobile offend against some law which it is his duty to enforce. *State v. Leadbetter*, 210 Wis. 327.

(5) If such automobile is throwing a light into the woods, apparently shining deer, would such facts justify a warden in stopping the car and searching it?

In our opinion these facts are such as to give reasonable or probable cause for the officer's belief that the contents of the automobile searched offend against some law which it is his duty to enforce. If the parties are in fact hunting at the time, they are engaged in an unlawful act. Also the possession of such a device while also in possession of firearms, is unlawful. Sec. 29.22 (1), Stats. So shining a light may be consistent with both a lawful and an unlawful purpose, or with lawful and unlawful conduct, but unless we are very much misinformed upon the subject, the percentage of lawful as compared with the percentage of unlawful is so small as to be almost negligible.

Where any question is raised as to the lawfulness of such a search, the conservation warden and others charged with the duty of enforcing the game laws might well testify as to their own experience and that of the conservation commission with respect to such fact or conduct being evidence of unlawful conduct. If such fact or conduct, in the overwhelming number of cases, is found to be unlawful rather than lawful conduct, or consistent with an unlawful rather than a lawful purpose, it would seem that such fact or conduct, in and of itself, gives rise to the reasonable and probable cause that is necessary to justify the search.

(6) Does sec. 29.05 (6), Stats., give conservation wardens power to search automobiles upon the highways for firearms carried in an illegal manner?

Sec. 29.05 (6), Stats., provides for seizure and confiscation “* * * in the name of the state of any wild animal, or carcass or part thereof, caught, killed, * * * transported,” etc., in violation of chapter 29. Authority to stop a car and search for firearms carried in an illegal manner obviously cannot be grounded upon said subsection of the statute. However, it may be pointed out that if facts and circumstances exist at the time of the search whereby the officer has reasonable or probable cause for believing that the automobile contains any wild animal, or carcass or part thereof, caught, killed, transported, etc., in violation of the laws of this state, he may search said car for same without warrant. If, in the course of such lawful search, such officer discovers a firearm which he has reasonable and probable cause for believing is being used in an unlawful manner, he may lawfully seize the same. The fact that he is searching for contraband animals, carcasses or parts thereof, does not suspend the other criminal laws of the state, or limit the authority to seize to that for which the officer had reasonable and probable cause to search in the first place. *Hoch v. State*, 199 Wis. 63; Cornelius, on Search and Seizure, 2d ed., p. 543, sec. 231.

It is believed that, in the great majority of cases, where the facts and circumstances exist which justify a search for animals, carcasses or parts thereof, under sec. 29.05 (6), Stats., within the rule of the *Leadbetter* case, those same

facts and circumstances would give rise to the reasonable and probable cause for believing that any firearm found loaded and not knocked down is being carried in violation of the law within the rule of the *Fosnot* case *supra*, that is, for, and actually being used in unlawful hunting. If the officer has reasonable grounds for believing that the firearm is being used for such purpose, he may seize the same, and whether the firearm may ultimately be confiscated will depend upon whether it was in fact being used for such purpose within the rule of the *Fosnot* case. If an officer is lawfully searching for contraband "A", he may lawfully seize any other contraband which he finds or which he has reasonable grounds for believing is contraband. The officer's duty is to enforce the law and if he makes a lawful search for one contraband, but discovers a different article which he has reasonable and probable cause to believe is contraband, he may, and it is his duty to, seize this other article.

Thus far in the analysis in answer to question (6) we have analyzed the officer's rights and duties with respect to search and seizure under authority of sec. 29.05 (6), Stats., as your question was confined to that subsection of the statutes. We are of the opinion, however, that a warden need not rely upon that subsection for seizure of a firearm which he has reasonable and probable cause for believing is being carried in violation of sec. 29.22 (1).

Under sec. 29.22 (1) the carrying of a gun or rifle, unless the same is unloaded and knocked down, or unloaded and enclosed within a carrying case, if the said gun or rifle is in fact being used for hunting, is an offense; and if the officer has reasonable and probable cause for believing that the automobile contains such gun and it is being used for that purpose, it would seem that he may *search* for the purpose of discovering such a firearm,—probably under authority of sec. 29.05 (7) Stats., — and this without regard to whether the officer has reasonable or probable cause for believing that the car contains contraband wild animals, carcasses or parts thereof, and without regard to whether he is searching therefor. In practice, the reasonable and probable cause that will give rise to the right to search for the one will give rise to the right to search for the other in a great number of the cases. But the officer's right to search for

what he believes to be contraband firearms need not be grounded upon an incidental seizure under sec. 29.05 (6), Stats. (the right to search for contraband animals, carcass or parts thereof).

In *State v. Leadbetter*, 210 Wis. 327, 330, the court says:

“We have no doubt that within the field of the fish and game laws a deputy conservation warden has authority to search an automobile without a warrant if there exists, at the time of the search, reasonable or probable cause for his belief that the contents of the automobile searched offend against some law which it is his duty to enforce.”

It is quite conceivable that cases may arise where officers have reasonable and probable cause for believing that the automobile contains a gun or rifle that offends against sec. 29.22 (1) of the statutes, but without having any reasonable or probable cause for believing that the said automobile contains contraband wild life, or carcass or parts thereof. By virtue of sec. 29.05 (7), Stats., and under authority of *State v. Leadbetter*, *supra*, we conclude that an officer's right to search an automobile for a gun or rifle that offends against sec. 29.22 (1) need not be grounded upon an incidental seizure of same as the result of a lawful search for contraband animals, carcass or parts thereof, under sec. 29.05 (6).

Before leaving this subject we wish to invite your attention to that part of the last sentence of sec. 29.22 (1) which reads as follows:

“* * * nor shall any person have in possession any firearms in territory wherein there is an open season for deer for a period of five days prior to the opening date for deer hunting unless in either case the same gun or rifle is unloaded or knocked down, or unloaded and within a carrying case.”

This part of said subsection was added by ch. 530, Laws 1921, and became effective upon its date of publication, July 13, 1921. This clause was, therefore, part of the law on November 15, 1921, when the case of *Hatton v. Fosnot*, 175 Wis. 343, was decided. But it was not involved in that case,

as the decision of the trial court is dated November 24, 1920.

In territory having an open season upon deer, for a five day period prior to the opening of said deer season, it is an offense to have in one's possession a game gun or rifle unless it is unloaded or knocked down or unloaded and within a carrying case, and this without regard to whether the parties are, in fact, hunting. XXI Op. Atty. Gen. 1087.

Thus, in a territory that has an open season upon deer, for the five day period preceding the opening of said season, game wardens may stop and search automobiles which they have reasonable grounds for believing contain a game gun or rifle that is not unloaded or knocked down, or unloaded and within a carrying case, and without regard to whether they have any reasonable grounds for believing that such firearm is being used for unlawful hunting, this latter fact being necessary to justify a search for such fire arm and seizure thereof at any other season of the year, under the rule of *Hatton v. Fosnot, supra*.

(7) In general, order Number M-40 of the conservation commission provides that it is illegal during certain seasons of the year to carry in the woods any firearm shooting a cartridge of .22 or larger, or any shotgun loaded with larger than number 1 fine shot. You inquire whether it is a violation of this order for a person to be in possession of such a gun, or whether order Number M-40 must be construed in such a manner that the order is not violated unless there has been illegal hunting at the time of such possession.

While order Number M-40 is too long to here set out in full, it is to be noted that sec. 5 of the order provides exceptions to its provisions and sec. 4 of the order provides that the conservation commission may issue permits to individuals to carry firearms which would otherwise violate the provisions of M-40 upon a showing being made to the conservation commission that there is good and sufficient reason for the issuance of such permit. In the case of *Hatton v. Fosnot, supra*, the court stated that sec. 29.22, subsec. (1), relative to the carrying in an automobile of firearms loaded or not knocked down or enclosed within a carrying case, contained no exceptions whatsoever. The court ob-

jected to a strict construction of that statute for the reason that such strict construction might penalize individuals with purely innocent motives for an apparent violation. The court stated in the *Hatton* case that the purpose of sec. 29.22, subsec. (1), and other provisions of the same chapter was to regulate the enjoyment, disposition and conservation of the wild animals and game of this state and that all of its provisions must be construed in connection with the primary purpose of that chapter in view. It is easy to understand, therefore, why the court interpreted sec. 29.22 so that section would not be violated by an individual having a loaded gun in an automobile while he was driving in the center of a thickly populated city, very obviously not hunting and possibly without any intention whatsoever of hunting.

Conservation commission order M-40, however, is not as sweeping in its terms as sec. 29.22, subsec. (1). The order is confined to the possession of firearms in localities and at times, in other words, under conditions, that would make it very possible to use such firearms in violation of the law. Persons having a legitimate reason for carrying a gun that would ordinarily violate the provisions of this order may apply to the conservation commission for a permit to carry such gun. In so far as is possible the conservation commission has sought to prevent innocent persons from being punished for violations of this law. The order is so drafted as to avoid injustices that would have resulted from a strict construction of sec. 29.22 (1). It is our opinion, therefore, that it is not necessary to show that the person was illegally hunting at or about the time when he was possessed of the gun in violation of the provisions of order M-40.

OSL

NSB

Public Officers — Director of Regional Planning — Real Estate — Platting Lands — Answer to second question in XXIV Op. Atty. Gen. 532 is discussed and modified to effect that state director of regional planning in approving plats under sec. 236.06, subsec. (1), Stats., may exercise reasonable discretion as to matters not specifically covered by statute.

September 12, 1938.

PLANNING BOARD.

Attention M. W. Torkelson, *Director of Regional Planning*.

You have referred to our opinion in XXIV Op. Atty. Gen. 532, which, among other things, stated that the approval of the state director of regional planning is required of all plats lying within areas subject to the town form of government in addition to the approval of the other governing bodies provided by statute, and that if the statutory requirements relating to plats are complied with, the state director is therefore under legal obligation to approve the plat.

We are asked to review the second question discussed in this opinion in so far as it relates to the discretion of the director in approving plats, it being your position that sec. 236.06, Stats., vests discretionary power in the director.

Sec. 236.06, subsec. (1), Stats., provides that no plat shall be valid or entitled to be recorded until it has been submitted to and approved by the governing bodies therein mentioned, including, in certain instances, the state director of regional planning. Par. (i) sets up a procedure for hearing objections of those whose approval is required, such objections being heard by the county highway committee, which may require such changes in the plat as the committee may deem necessary as a result of the hearing.

We do not read the opinion to which you refer as denying to the director the exercise of any discretion in the matter of his approval of a plat under sec. 236.06, Stats. However, the question and the answer are so worded in the opinion as to be susceptible to rather narrow application. For instance, on page 534 the second question is worded as follows:

"Question 2. Sec. 236.04, created by ch. 186, Laws 1935, is titled 'Platting requirements to entitle final plat to record.' Various requirements are listed. If these legislative requirements are adhered to, has the state director of regional planning the power to refuse approval?"

After some discussion the following answer to the question is reached at p. 535:

"You must, therefore, approve the plat if the statutory requirements are fulfilled."

The difficulty with this answer is the uncertain reference contained in the words "if the statutory requirements are fulfilled." It is possible to construe this reference to apply solely to sec. 236.04, since that is the section mentioned in the question. However, this cannot be what was meant because there are numerous other requirements besides those mentioned in sec. 236.04, Stats. For instance, sec. 236.03, subsec. (7), Stats., requires each lot to have an average minimum width of forty feet and a minimum area of forty-eight hundred square feet. Obviously, this minimum requirement would have to be met even though it is not mentioned in sec. 236.04. The director would not be at liberty to prescribe a minimum lot width of thirty feet or fifty feet when the legislature has said forty feet. Thus the discretion vested in the approving agencies does not extend to changing the positive requirements of any statute, whether it be sec. 236.04, or any other provision. It is therefore apparent that the prior opinion needs further discussion and some modification.

A further question that should be considered is that of the discretion to disapprove a plat because of factors not governed by statute. For instance, the statute, with certain exceptions, is not specific as to the width of streets. Again there is no provision requiring newly platted streets to connect up with old established highways. The first presumption to be indulged in is that those requirements specified by the statute are exclusive and that others may not be created by implication under the well known doctrine of *expressio unius est exclusio alterius*. Apparently this is what the writer of the former opinion had in mind although it is not expressly stated in the former opinion.

However, there would hardly be any point in requiring the approval of the state director of regional planning if such approval were to be based merely upon a compliance with the minimum requirements of the statute. Any clerk could do that if the legislature had intended to make the approval ministerial only, and the task of checking the plat for compliance with the statute before recording might well have been delegated to the register of deeds.

Furthermore, there would have been no purpose in providing for a hearing of objections by the county highway committee under sec. 236.06 (1) (i), Stats., with a grant of power to such committee to require such changes in the plat as they might deem necessary as a result of the hearing, if the only question to be considered related to compliance with the specifications set up by the statutes. These requirements are very specific as to dimensions, monuments, numbering of lots, type of paper and ink to be used, etc., so that there could be but little or no argument as to whether the proposed plat qualified for recording as far as these matters are concerned.

Lastly, some attention should be given to the legislative purpose in creating the office of director of regional planning. Under sec. 27.20, subsec. (2), Stats., the state director of regional planning is the administrative agent of the state planning board. The purposes of this board are set up in sec. 27.20, subsec. (6), Stats., as follows:

“The studies made by the state planning board shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, efficient and economic development of the state, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience and welfare of the state as well as efficiency and economy in the process of development. All state boards, commissions, departments, and institutions are directed to cooperate with the state planning board to further these ends.”

It could hardly be in accord with the legislative purpose expressed in the foregoing statutes that the state director of regional planning, as agent of the state planning board, is to act in a purely clerical or ministerial capacity in approving plats under sec. 236.06, (1), Stats.

After reading together and construing all of the various statutory provisions hereinbefore discussed, we are of the opinion that, as to matters not specifically covered by statute, the state director of regional planning may exercise discretion in approving plats provided such discretion is exercised reasonably and not arbitrarily or capriciously.

Except as herein further explained and modified, the former opinion in XXIV Op. Atty. Gen. 532 is affirmed.

WHR

Corporations — Securities Law — Interests in gas, oil or mining leases or royalties constitute securities under sec. 189.02, subsec. (7), Stats., regardless of whether interest conveyed is fractional or whole interest.

September 13, 1938.

BANKING COMMISSION.

Attention G. M. Buenzli, *Acting Director,*
Securities Division.

You call our attention to sec. 189.02, subsec. (7), Stats., which provides in part as follows:

“ ‘Security’ or ‘securities’ includes all bonds, stocks, beneficial interests, investment contracts, *interests in oil, gas or mining leases or royalties,* * * *.”

We are asked whether the phrase “interests in oil, gas or mining leases or royalties,” as used in the above statute, would include the sale of a whole interest, or whether it is confined to the sale of a portion thereof.

It is your opinion that the insertion of the italicized phrase in the statute was intended to cover the sale of *any* interest in such leases or royalties.

The purpose of the blue sky law is to protect the investors of the state and to restrain the sale of improvident

securities. The law should receive a liberal construction for the purpose of carrying out the legislative intent. *Klatt v. Guaranteed Bond Co.*, 213 Wis. 12.

The word "interest" refers to and covers whatever the extent or character of the ownership. *Place and others v. Norwich & New York Transportation Co.*, 118 U. S. 468; 4 Words & Phrases (1st ed.) 3696.

By analogy the phrase "interests in oil, gas or mining leases or royalties" would cover any interest therein, whether in whole or in part. Any other construction would clearly give rise to the abuses which the legislature intended to curb.

WHR

Municipal Corporations — Towns — Town Sanitary Districts — If no action is taken within twenty days under sec. 60.304, Stats., to set aside action of board establishing sanitary district, finding of board that sixty per cent of land owners signed petition is conclusive and not subject to attack.

September 17, 1938.

BOARD OF HEALTH.

You advise that a question has arisen as to the legality of a sanitary district embracing most of the unincorporated village of Milton Junction. The proceedings with respect to the formation of this district are set forth in a communication from the president of the district as follows:

"On July 9, 1938 a petition signed by property owners and residents of the town of Milton, Rock county, Wisconsin, was presented to the town board of the town of Milton, Rock county, Wisconsin, praying for the establishment and creation of a town sanitary district under the town sanitary laws of Wisconsin, Section 60.30 to section 60.309 inclusive. That this petition purported to be signed by owners of more than sixty per cent of the property. That attached to said

petition was an affidavit of Paul W. Dunnewald, chief assistant engineer in the office of W. G. Kirchoffer, consulting engineer of Madison, Wisconsin, who had been employed by the petitioners to make a survey of the property in the said proposed district.

"That his computations showed that 2,458,239 sq. ft. of property had been signed for and that 1,468,335 sq. ft. had not been signed for and that the total percentage of area owned by parties signing the petition was 62.6% or more than 60% as the statute requires.

"That following the receipt of said petition the Town Board of the Town of Milton caused to be published notices of a public hearing on said petition, which notices complied with the statute governing the same. That a public hearing was held thereon on July 20, 1938 to hear any objections or criticisms that might be offered for or against the creation of said district; that as a result of said hearing the town board of the town of Milton made its findings and order establishing the sanitary district. That in said findings and order the town board of the town of Milton expressly found the following:

"That the petitions on file are signed by the requisite number of owners of real estate as provided by statute.'

"That the said town board in its order creating the district altered the boundaries somewhat by excluding two small parcels of property that were in the original petition, and that the town board made specific findings as to those which are as follows:

"That it is advisable to vary the boundaries of the district by omitting those portions of the lands of Harry Mullen, H. G. Berg and George Hudson.'

"That the boundaries of the district with these lands omitted will be as in the attached description.

"These findings and order of the town board establishing said sanitary district was duly filed in the office of the register of deeds for Rock county on July 25, 1938 and on or about July 25, 1938 a copy of said order and findings was filed with the state board of health; that more than twenty days have expired since said order and findings were entered and recorded, and that in that time no action has been brought by anyone in any court to review or set aside the order of the town board in creating this sanitary district."

It thus appears that the district has been formed and it further appears that commissioners have been appointed. Two of the commissioners now challenge the correctness of the finding of the town board that sixty per cent of the

property owners in the proposed district signed the petition. You inquire whether this finding of the town board is now beyond challenge.

Sec. 60.304, Stats., provides as follows:

“Any party aggrieved by any act of the town board in the establishment of a town sanitary district may bring action in the circuit court of the county in which his lands are located, to set aside the action of the board, within twenty days after final determination by said board. *Unless action is so taken within such period, the determination by the town board shall be conclusive.*”

The town board had jurisdiction of the subject matter and had jurisdiction to make a finding. If it erred in that regard, the action could be set aside within the twenty-day period provided for under sec. 60.304, Stats., by action commenced for that purpose. The board, having jurisdiction of the subject matter, had jurisdiction to err and the error could be set aside only by action taken as provided by sec. 60.304, Stats. The error, if any, was error within jurisdiction and not jurisdictional error. The findings therefore are not void but were subject to attack only as above stated. *State ex rel. Thompson v. Eggen*, 206 Wis. 651; *Golden v. Green Bay Metropolitan Sewerage Dist.*, 210 Wis. 193; *Stone v. Little Yellow Drainage Dist.*, 118 Wis. 388. See also *Seyfert v. Seyfert*, 201 Wis. 223. And upon the general subject of the conclusiveness of a jurisdictional finding, see *General A. F. & L. Assurance Corp. v. Industrial Comm.*, 223 Wis. 635.

The proceeding is probably legislative rather than judicial. *State ex rel. Thompson v. Eggen*, 206 Wis. 651. The statute having provided a method of judicial review, all requirements of due process are fully complied with. *General A. F. & L. Assurance Corp. v. Industrial Comm.*, *supra*.

We conclude that since no action has been taken within twenty days after the final determination of the board under sec. 60.304, Stats., to review the finding of the board that sixty per cent of the land owners had signed the petition, that finding is now conclusive and not subject to attack.

NSB

Bridges and Highways — Relocation of Highways —
Where county highway committee has made award for right-of-way in accordance with provisions of sec. 83.08, subsec. (2), Stats., highway authorities and their contractors and employees are entitled to immediate possession and may apply for injunction restraining owner from interfering with them in taking possession of such premises.

September 19, 1938.

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

You state that the county highway committee of Grant county, pursuant to the provisions of sec. 83.08, subsec. (2), Stats., made an award to a certain landowner for land which was needed in the relocation of a state trunk highway situated within the county. A copy of the award was personally delivered to the landowner, but he has refused to accept the award and refuses to vacate the property.

An opinion is requested as to the proper procedure to be followed in order to obtain possession of the property so condemned.

Sec. 83.08, subsec. (2), Stats., provides in part:

“* * * When such award shall have been made, approved and filed, the highway authorities and their contractors and employes may take possession of the premises and proceed with the contemplated highway improvement and construction. * * *”

In *The Niagara Falls & Lake Ontario Railroad Co. v. Hotchkiss and others*, 16 Barb. 270 (N. Y.), a similar statute was considered by the court. The statute provided that upon the consummation of the proceedings prescribed for the acquisition of right-of-way by a railroad company, “the company shall be entitled to enter upon, take possession of, and use the land for the purposes of its incorporation.” The company complied with the provisions of the statute, but the owners of the land so condemned refused to allow the agents of the company to take possession. Upon these facts, the

company applied to the court for a writ of assistance, and the court said at pp. 272-273 :

“* * * The company required no legal process to put them in possession. The statute was their warrant for entering upon the land. The owners, having been made parties to the proceedings, were divested and barred of all their interest. They had no longer a legal right to keep the company out of possession. In resisting the agents of the company in their attempt to take possession, they were guilty of an unlawful act.

“But I cannot see that, because the owners of the land have been guilty of an unlawful act in resisting the agents of the company, the company is therefore entitled to legal process to prevent such resistance. It is the right of the company to occupy the land; and if the owners see fit to use force in preventing such occupation, they are amenable to the law for their unlawful conduct; and, besides, the writ of possession or assistance is always awarded in execution of the decree or judgment of the court. In this case, there has been no such decree or judgment. The statute, not the court, has declared the rights of the parties. It is the statute, and not the judgment or decree of the court, that authorizes the company, without suit, to take possession of the lands. It would certainly be a novel thing for this court to issue an execution to enforce a right which it had never declared by its judgment, and which it had no authority to declare. If the company should find itself unable to resist the force which would prevent its exercise of the legal right which the statute confers, of taking possession of and using the land, it may be that, in an action brought for that purpose, the owners might be restrained by injunction from such interference.”

It will be noted that the court suggests injunctive relief as a possible solution of the problem. Consequently one way to meet the situation would be to bring suit for an injunction, using an order to show cause so as to secure an early hearing, and have the order to show cause contain a temporary restraining order restraining the owner from interfering with the highway authorities and their contractors and employees in taking possession of the premises pending the hearing of the order to show cause.

It is apparent that the right to possession follows compliance with the statute above quoted and that no legal pro-

ceedings are necessary to perfect such rights. This would justify the taking of possession, provided it could be done without a breach of the peace.

“Although one may have the title to realty and be justly entitled to the immediate possession thereof, yet if he enters by violence upon the actual peaceable possession of another who has no title or right whatever, he is liable in an action of forcible entry and detainer.” 26 C. J. 815; *Eastman and others v. White*, (Wis.) 3 Pinn. 180.

The reason for the rule is stated as follows in *Davidson v. Phillips*, 17 Tenn. (9 Yerg.) 93, 95:

“* * * If it were otherwise, serious would be the consequences to society; for when the title to land is to be disputed, the possession is a matter of great importance, and, if it were left to be struggled for between the parties by force and violence, the peace of the community would not only be destroyed, but in very many instances bloodshed would be the consequence.”

Since the courts do not favor “strong arm” methods, we would recommend injunctive relief where violence is threatened or imminent. In case of actual assault or breach of the peace by the landowner, he would, of course, be amenable to the criminal statutes.

Other less expedient remedies which might be used are ejectment under ch. 275, Stats., or unlawful detainer under ch. 291. An action of unlawful detainer would lie, since it has been held that a landowner who remains in possession of land which has been taken for public purposes by condemnation proceedings is a tenant by sufferance. *City of Philadelphia v. Miskey*, 68 Pa. St. 49. However, both of these proceedings would be less speedy than the commencement of an action for an injunction coupled with a temporary restraining order.

WHR

Physicians and Surgeons — Public Health — Reputability of medical school does not depend upon whether its examinations are conducted by its own faculty or by some outside agency, and authority to grant diplomas or degrees is not dependent upon such factor.

September 22, 1938.

BOARD OF MEDICAL EXAMINERS.

Attention Henry J. Gramling, M. D., *Secretary*.

You have inquired whether medical schools have a right to accept the results of examinations given by the national board of medical examiners, a voluntary, unofficial body, in lieu of their own findings, and to issue diplomas on that basis.

In answering this question we will confine ourselves to medical schools located in Wisconsin, as we are hardly in a position to examine the statutes of all forty-eight states and the charters of such medical schools as may be located in the various states.

Under sec. 36.02, Stats., the government of the university of Wisconsin is vested in a board of regents, which has broad, general powers to accomplish the objects of the university and to perform the duties prescribed by law. Sec. 36.03, Stats. Sec. 36.13 makes provision for a medical school at the university of Wisconsin and sec. 36.14 provides that it shall consist of courses of instruction in the medical sciences customarily given in medical schools, and may include such additional branches as the regents may determine.

Other colleges in the state come under the provisions of sec. 180.28, Stats., which reads in part:

“Any corporation formed for the establishment and maintenance of schools, academies, seminaries, colleges or universities * * * shall have power * * * to prescribe and regulate the courses of instruction therein, and to confer such degrees and grant such diplomas as are usually conferred by similar institutions or as shall be appropriate to the courses of instruction prescribed. * * *.”

It is to be observed from the foregoing that there are no statutory limitations with respect to the kind of examinations to be given. Hence, if a school wished to accept the national board examination in lieu of its own, there is no reason under the statutes why it might not do so.

We assume, however, that what you have in mind in submitting your request is the effect of such procedure on the reputability of the school which must be passed on by your board under sec. 147.15, Stats. The following language in *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, is pertinent:

“* * * Reputability has no reference whatever to mere submission to rules of the state official board or any other board. It has reference, as before indicated, to the actual facilities it possesses for good work as regards preparing candidates for the dental profession, and the actual use of such facilities so as to accomplish good work.” (P. 538.)

“The second ground of the board’s action has as little to justify it as the first. We search the law in vain for anything in its letter or spirit justifying the board in taking charge of the subject of passing upon entrance qualifications through its representatives, and making submission to such interference with the business of the college a condition of reputability. There seems to be as little support for the board’s third ground of action; its prohibition to the making up, to any extent, of entrance qualifications during the first year of a student’s course, and making submission to that regulation a condition of reputability. As well might the board assume authority to regulate any one of many mere administrative features of dental colleges, such as the ordinary examinations during the course, or the particular persons to be employed as instructors, or the test to be applied as to their capability, or the particular person to apply such test, * * *.” (P. 535.)

Thus, it appears that the matter of giving examinations is a mere administrative feature which is an internal concern of the college itself. We do not mean to say, however, that in the case of gross irregularity or fraud in the conduct of examinations, the board would be powerless to deny recognition to the school involved, but merely wish to indicate

that in the absence of such factors the policy of the college with respect to the manner of giving examinations is not open to question. As a matter of fact, we see no reason why a school might not completely dispense with formal examinations in the accepted sense of the word if, in the judgment of the governing body, the capabilities of candidates for degrees might be more adequately tested by less formal processes, such as on the basis of class room and laboratory work, research, theses, personal conferences with instructors, and the like.

You are therefore advised that the right to grant diplomas and degrees in medical schools is not dependent upon the type of examination given or whether the examining is done by the faculty of the school or some outside agency.

WHR

Intoxicating Liquors — City may not by ordinance set up regulations respecting sale of intoxicating liquors for medicinal or scientific purposes which are in conflict with sec. 176.18, Stats. Requirements or regulations not required by said section are in conflict therewith.

September 27, 1938.

TAX COMMISSION,

State Inspection and Enforcement Bureau.

You inquire as to the validity of the following ordinance enacted by a certain city:

“Liquor may be sold under the authority of this section for mechanical or scientific purposes only after the applicant has filed in duplicate with the pharmacist a sworn affidavit certifying the purpose for which the liquor is to be used. This application must be filed with the pharmacist three days in advance of the sale and the pharmacist must within twenty-four hours after receiving said affidavit file the duplicate copy with the city clerk. No more than one sale may be made on one prescription or affidavit.”

We first call attention to sec. 176.18, subsec. (2), Stats., which provides in part:

“In any town, village, or city no sale for either medicinal, mechanical, or scientific purposes shall be made by any such pharmacist until the person purchasing the same shall for each sale make and file a certificate in writing, dated and subscribed by him and witnessed by such registered pharmacist, stating for what purpose the intoxicating liquor so desired is to be used and that it is not for a beverage;
* * *”

It is also to be noted that 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,
* * *”

Sec. 176.44 (1), Stats., provides:

“The provisions of this chapter shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of liquors.”

In view of this latter provision we are of the opinion that the ordinance in question is in conflict with the provisions of sec. 176.18 (2) quoted above. It is oftentimes most difficult to determine whether an ordinance is in conflict with the state law. Additional regulation to that of state regulation even with respect to subject matter where the state has regulated is not necessarily in conflict. 43 C. J. 219. But in view of the legislature's expressed desire for uniformity, it must be held that where the state has acted with reference to the subject matter municipalities are without power to impose additional requirements. The state by acting has preempted the field. *Baraboo v. Dwyer*, 166 Wis. 372; *State ex rel. Torres v. Krawczak*, 217 Wis. 593.

It appears that the ordinance in question is in direct conflict with the provisions of sec. 176.18, subsec. (2), Stats., quoted above. The ordinance provides that no liquor may be sold until the purchaser has filed in duplicate with the

pharmacist a sworn affidavit certifying the purpose for which the liquor is to be used. This application must be filed three days in advance of the sale and the pharmacist must within twenty-four hours after receiving said affidavit file a duplicate copy with the city clerk. On the other hand, sec. 176.18, subsec. (2), provides that the certificate required of the purchaser need not be filed until the actual time of sale. Furthermore, under sec. 176.18, subsec. (3), such certificate need not be filed with the city clerk more than once a month, whereas the ordinance requires filing within twenty-four hours after the receipt of the affidavit from the purchaser. Sec. 66.01, subsec. (4), Stats., provides:

“Any city or village may elect in the manner prescribed in this section that the whole or any part of any laws relating to the local affairs and government of such city or village other than such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village shall not apply to such city or village, and thereupon such laws or parts thereof shall cease to be in effect in such city or village.”

However, we do not deem this section to be applicable for the reason that sec. 176.18 is of state-wide concern in view of the provision in sec. 176.44, (1), Stats., that the provisions of chapter 176, Stats., are of state-wide concern. Hence, the city could not by ordinance provide that any part of ch. 176 should not apply therein.

WHR

Civil Service — Department of Mental Hygiene — It is immaterial whether sec. 58.38, Stats., applies to institutional employees as well as to administrative staff of board, in that neither institutional employees nor administrative employees having civil service status under old set-up lose that status under new set-up under language of sec. 58.38, Stats.

September 28, 1938.

GRANT C. HAAS, *Director*,
Department of Mental Hygiene.

Under the provisions of ch. 9, Laws Special Session 1937, the jurisdiction, supervision and control of state hospitals for the care and treatment of the insane and mentally defective is transferred from the board of control to the department of mental hygiene. You ask whether employees of those institutions which have been transferred to the department of mental hygiene shall be required to qualify for civil service status.

Sec. 16.02, Stats., defines the civil service as "all offices and positions of trust or employment, including mechanics, artisans and laborers, in the service of the state, except offices and positions in the organized militia." Clearly the employees in the state hospital for the insane and mentally defective come within that classification. Accordingly, such employees have in the past been selected pursuant to the civil service law and rules and enjoy civil service status at the present time.

You are advised, therefore, that, whether sec. 58.38, Stats., enacted by ch. 9, Laws Special Session, applies to the administrative personnel exclusively or to institutional employees as well, such institutional employees must be selected pursuant to the civil service law. The present employees of such institutions, as before stated, occupy civil service status and the transfer of the institution which employs them to the jurisdiction of the department of mental hygiene cannot operate to deprive them of that status. They need not therefore and cannot be required to qualify again for the same or a similar position.

Neither do we find any language in sec. 58.38, Stats., which impels the conclusion that an administrative employee having civil service status under the old set-up loses that status by virtue of the reorganization and transfer to your department. An administrative employee having civil service status under the old set-up retains that status under the new and need not, therefore, and cannot be required to qualify again for the same or a similar position.

The above does not mean that the board, acting in conjunction with the bureau of personnel, may not reallocate duties or assign new duties to retained or newly appointed personnel. On the contrary, it is our opinion that the reorganization act contemplates and authorizes such reallocation and reassignment of duties in the interests of greater efficiency,—the avowed purpose of the act.

Whether the position of either an administrative employee or institutional employee has been so changed as to amount to abolishment of the old position and creation of a new one so that one previously occupying the position under civil service will have to requalify therefor under civil service rules and regulations, is a question in the first instance for the bureau of personnel. The mere assignment of the same or similar or additional duties to a certain position would not constitute abolishment of that position and creation of a new one within any reasonable rule-making power of the bureau of personnel. Unless the old position has been so substantially changed that it can reasonably be said that qualifications for the old are no longer a criterion for qualifications for the new, one occupying that position under civil service status is entitled to that position under the reorganized set-up.

Neither do we mean to infer that all employees, institutional or administrative, who had civil service status must be retained in their present or other employment or position. The bureau must be given the widest latitude in reorganization and in the abolishment of positions or jobs. But with respect to filling of positions which are retained or created, the positions or jobs must be filled by those entitled thereto in the light of existing civil service status and the rules of the bureau of personnel.

NSB

Taxation — Income Taxes — Exemption — Payments made by employees of carriers under carrier taxing act of 1937 are not deductible from gross income under sec. 71.04, subsec. (6), Stats. Benefits payable under railroad retirement act of 1937 are not exempt from income tax under sec. 71.05, subsec. (1), par. (a), Stats., but only amount thereof which exceeds contributions by employee constitutes taxable income under ch. 71, Stats.

September 29, 1938.

JOHN A. THIEL, *Director,*
Tax Commission.

You have requested an opinion as to whether pensions or annuity payments payable under the railroad retirement act of 1937, 45 USCA, secs. 228a-228r, constitute income subject to taxation under ch. 71 of the Wisconsin statutes, or whether such payments are free from taxation by the provisions of sec. 71.05, subsec. (1), par. (a), Stats., which exempt from income taxation "pensions received from the United States."

The railroad retirement act of 1937 provides for the payment of annuities, pensions and death benefits to certain retired employees of carriers. It creates an account in the treasury of the United States to be known as the railroad retirement account, and authorizes the appropriation to such account of an amount sufficient to provide for the payment of the benefits provided for in the act. There is a specific provision that "no annuity or pension payment * * * shall be subject to any tax * * *." 45 USCA, sec. 2281.

At the same time as the enactment of the railroad retirement act of 1937 congress passed the carriers taxing act of 1937, 45 USCA, secs. 261-273, which provides for compulsory contributions, designated as an income tax on employees of carriers and an excise tax on the carriers themselves, the computation of both being based upon the amount of compensation paid to the employees. Collections thereof are made by the bureau of internal revenue and paid into the treasury of the United States as internal revenue collections. 45 USCA, sec. 267.

It appears that the railroad retirement act of 1937 and the carriers taxing act of 1937 together are substantially the same as the railroad retirement act of 1934, which was declared unconstitutional by the United States supreme court in *Railroad Retirement Board v. Alton R. Co.*, (1935) 295 U. S. 330, 79 L. ed. 1468, 55 Sup. Ct. 758. There is a difference, however, in that the later acts provide for payments out of the general funds in the United States treasury into which the compulsory contributions by employers and employees are paid and from which appropriations are made for such payments rather than out of a specific fund created by compulsory contributions by employers and employees.

Art. 441 of Wisconsin income tax regulations, relating to pensions, provides in part as follows:

“Industrial pensions, within the ordinary meaning of the term, are taxable income. They are usually received by an employee after a period of service and are, therefore, considered to represent payment for past services * * *.”

The income tax division of the Wisconsin tax commission took the position that pensions paid to retired employees pursuant to the retirement act of 1934 were to be treated as industrial pensions. We are of the opinion that, in the absence of a judicial construction of sec. 71.05 (1) (a), Stats., the same treatment should be accorded pensions and annuities paid pursuant to the railroad retirement act of 1937 and that the same are subject to income taxation as industrial pensions.

“The taxing power is of such vital importance and so essential to the existence of the government, that the entire country is interested in retaining it undiminished. Exemptions from taxation are in derogation of sovereignty. Few rules of statutory construction are more frequently resorted to than the rule that the taxing power will not be presumed to be relinquished in the absence of unmistakable and unambiguous language which will admit of no other construction. An exemption must be within the express letter or the necessary scope of the exempting clause.” Paul and Mertens, *Law of Federal Income Taxation*, Vol. 1, pp. 60-61.

The pensions paid pursuant to the railroad retirement act of 1937 are neither within the express letter nor the necessary scope of sec. 71.05 (1) (a), Stats. "Pensions" are generally recognized as an additional compensation for past services rendered. *In re Advisory Opinion to the Governor*, (1929) 98 Fla. 843, 124 So. 728; *State ex rel. Hocker et al. v. Nolte*, (1932) 330 Mo. 299, 48 S. W. (2d) 916; *In re Roche*, (1910) 141 App. Div. 872, 126 N.Y.S. 766.

That they are additional compensation for past services rendered to the one who awards the pension is recognized in regulation 94, article 22 (a)—2, under the revenue act of 1936, which provides in part:—" * * * so-called pensions awarded by one to whom no services have been rendered are mere gifts and gratuities * * *." So, it has been ruled that a pension paid by an employer to a retired employee is in the nature of additional compensation, but that payments by one to whom no services have been rendered cannot be compensation for past services and so are gifts, notwithstanding that such payments are denominated "pensions". 3 Int. Rev. C. B. 120; 4 Int. Rev. C. B. 84; XII-1 Int. Rev. C. B. 68.

There is nothing to indicate that the legislature used the word "pensions" in sec. 71.05 (1) (a) other than in its ordinary sense, as meaning a payment by one to whom services had been rendered in the past. It is, therefore, concluded that the exemption of "pensions received from the United States" was intended to include only those payments made by the United States for past services rendered to it. As so construed, the payments pursuant to the railroad retirement act of 1937 do not come within the scope of sec. 71.05 (1) (a), Stats.

But, the payments pursuant to the railroad retirement act of 1937, since they are for and in connection with past services, are none the less "pensions."

"When * * * the act to establish a railroad retirement system, approved on the same day as the taxing act, is considered in connection with it, the reasons for the peculiar provisions of the taxing act are apparent. The two taken together so dovetail into one another as to create a complete system, * * *

“The provisions of the two acts in question are so interrelated and interdependent that each is a necessary part of one entire scheme. This is not only apparent from the terms of the acts themselves but is shown by their legislative history. It was clearly the intention of Congress that the pension system created by the Retirement Act should be supported by the taxes levied upon the carriers and their employees. * * *

“* * * it is clear from the statement of those in charge of the two bills that Congress did not intend to enact them, if the expense was not to be borne in part by the carriers, and that no part of the burden should rest upon the government.” *Alton R. Co. v. Railroad Retirement Board*, (1936) 16 F. Sup. 955, 956-959.

Thus the pension system of the act in substance is a system of industrial pensions sponsored by the federal government. The pensions paid thereunder are not governmental pensions and so are not in a real sense, “received from the United States.” Rather, they are industrial pensions paid through the medium of the United States treasury. That the United States lends the support of one of its agencies to the successful administration of the pension system is not sufficient reason to regard the pension as “received from the United States” within the meaning intended by the legislature. To so regard them would facilitate the achievement by indirection of a result not intended for, clearly, had the carriers paid these pensions to the employees directly the same would have been taxable as income under the Wisconsin statutes.

Notwithstanding that the railroad retirement act of 1937 states that the payments thereunder “shall not be subject to any tax” such payments are nevertheless subject to income tax in Wisconsin. Congress has only such enumerated powers as are given to it; all others are reserved to the states. Cooley, *Constitutional Limitations* (8th ed.), Vol. 1, p. 11. The United States derives its power to tax from art. I, sec. 8 of the constitution of the United States, but nowhere therein is it reasonably possible to find any authority granted to the federal government to limit the mode, form, or extent of the state’s power to tax. It is important that such authority does not exist, otherwise a state might at any time be embarrassed and even obstructed in its opera-

tions at the will of congress. A state's power to tax is limited only by the constitutional inhibitions arising out of our dual system of government.

The imposition of an income tax by a state upon the benefits payable under the railroad retirement act would not be violative of any immunity arising therefrom.

It is a well established rule that tax exemption statutes are to be strictly construed. Accordingly, the provisions of the act exempting the benefits paid thereunder from tax must be given that construction which is within the authority and scope of congressional action. When a statute is reasonably susceptible of two interpretations the courts will prefer a meaning which preserves to one which destroys. *Hopkins Federal Savings & Loan Assoc. v. Cleary*, (1935) 296 U. S. 315, 80 L. ed. 251, 56 Sup. Ct. 235. Thus the act must be construed as intended to exempt payments thereunder from only those taxes imposed by the United States.

You have also requested that, if we conclude that said pensions and annuities are not within the exemption provisions of sec. 71.05 (1) (a), Stats., we then render our opinion as to whether, for purposes of Wisconsin income tax, employees of carriers are entitled to a deduction from gross income in the year of contribution of the amounts contributed by them pursuant to the carriers taxing act of 1937.

Sec. 71.04 (6), Stats., permits a deduction from gross income for purposes of state income tax of income taxes imposed by and paid to the federal government, with certain limitations not here material. It is our opinion that such employees are not entitled to a deduction under sec. 71.04 (6) Stats., for the amounts contributed by them pursuant to the carriers taxing act of 1937. It is true that the carriers taxing act denominates the contributions by the employees as income taxes, but the labeling of a payment or exaction as a tax does not make it such. *United States v. One Ford Coupe Automobile*, (1926) 272 U. S. 321, 71 L. ed. 279, 47 Sup. Ct. 154; *United States v. Constantine*, (1935) 296 U. S. 287, 80 L. ed. 233, 56 Sup. Ct. 223.

The inherent and fundamental nature and character of a tax is that it is a contribution to the support of the government. Any other exaction does not come within the legal

definition of a tax. *Pollock v. Farmers Loan & T. Co.*, (1895) 157 U. S. 429, 15 Sup. Ct. 673; *United States v. Butler*, 1935) 297 U. S. 1, 80 L. ed. 477, 56 Sup. Ct. 312. Disregarding the designation of the exaction, the contributions by the employees are not taxes. It was clearly the intention of congress that the pension system should be supported by the taxes levied upon the carriers and their employees. *Alton R. Co. v. R. R. Retirement Board*, *supra*. Not being intended as an exaction for the support of the government, and not being such in substance, the contributions pursuant to the carriers taxing act by the employees of carriers are not taxes imposed by the federal government and, therefore, are not deductible as such under sec. 71.04 (6), Stats.

A retired employee upon becoming eligible to the benefits of the railroad retirement act receives an annuity which is paid to him monthly. The amount received each month is dependent upon the length of service and the earnings during that time. During the years of employment the employee has made certain contributions from his earnings. In effect then, the retired employee in receiving the monthly benefits under the act is getting back his own money until the total of said monthly payments exceeds his total contributions. In so far as there is a return to the retired employee of his own contributions the monthly benefits do not constitute income to him but are rather a restoration in the nature of a return of capital invested. It is therefore our opinion that the benefits payable to a retired employee under the railroad retirement act of 1937 do not constitute taxable income until the total received exceeds the amount paid in by the employee.

HHP

Appropriations and Expenditures — Public Officers — University — Doctors in service of psychiatric institute are not entitled to per diem when called by state department of mental hygiene to testify as experts in lunacy or sterilization proceedings if such services are within terms of employment. They are entitled to per diem if such services are not within terms of employment.

September 20, 1938.

DEPARTMENT OF MENTAL HYGIENE,

Attention Grant C. Haas, *Director*.

You inquire whether the doctors in the psychiatric institute of the university of Wisconsin may accept a per diem compensation for services rendered your department while serving as a specialist at a hearing in lunacy or sterilization proceedings.

The Wisconsin psychiatric institute was transferred to the university of Wisconsin on July 1, 1925, and has since been maintained as a department of the university. Sec. 36.227, subsec. (1), Stats.

Whether the doctors would be entitled to a per diem when called by your department (the state) to give expert testimony at hearings depends upon the terms of employment of the particular doctor involved. Sec. 14.65, Stats., contemplates inter-departmental cooperation and exchange of employee service. If a particular doctor is employed upon a full-time basis, there would seem to be no reason why the state should not be entitled to his services when testifying at a hearing and without payment of any per diem. This should be a matter of agreement between your department and the board of regents or the psychiatric institute.

On the other hand, if a particular doctor is not employed upon a full-time basis and the state is not entitled to full-time services of the doctor, whether the doctor would be entitled to per diem would depend upon whether this service is within the terms of his employment. If within the duties of his employment, he would not be entitled to the per diem. If not within the duties of his employment, he would be entitled to the per diem. 46 C. J. 1017.

WHR

NSB

Corporations — Securities Law — Public Officers — Banking Review Board — Governor — Reorganization order No. 1 of governor, under ch. 9, Laws Special Session 1937, transferring administration of securities law (ch. 189, Stats.) from public service commission to banking department, does not give banking review board jurisdiction to hear application to review order of banking commission suspending securities dealer's license.

October 1, 1938.

BANKING REVIEW BOARD.

You have referred to us an application of H. M. Byllesby and Company for a hearing before the banking review board to review the order of the banking commission suspending the license of this company to act as a dealer in securities within the state of Wisconsin, and you inquire if the banking review board has any jurisdiction to hear this application.

The securities law, ch. 189, Stats., was formerly administered by the public service commission, but by reorganization order No. 1 of the governor, made pursuant to ch. 9, Laws Special Session 1937, this function was transferred to the banking department and commission as of January 10, 1938, the order reading in part as follows:

“That the Securities Division of the Public Service Commission of Wisconsin *and all of the functions, powers, and duties vested in the Public Service Commission* of Wisconsin under the provisions of chapter 189, statutes of 1937, be transferred to and vested in the Banking Department and Banking Commission of the state of Wisconsin.” (Italics ours.)

The words, “and all of the functions, powers, and duties vested in the Public Service Commission,” clearly limit the banking department and commission to the exercise of the statutory powers formerly exercised by the public service commission. These include no provision for review by the banking review board or any similarly constituted agency.

Sec. 189.14, subsec. (9), Stats., which gave the public service commission jurisdiction to suspend a dealer's license, provides among other things:

“* * * Such suspension shall be final unless, within the time limited in section 189.19, the dealer or agent suspended shall apply for a hearing under the provisions of that section. If a hearing is requested under the provisions of section 189.19, the provisions of said section shall apply with respect to further proceedings with reference to such suspension.”

Sec. 189.19, subsec. (1), Stats., makes provision for what is in effect a rehearing by the commission itself but not for a review by any agency such as the banking review board. It should be noted at this point that such a rehearing of the suspension of the license in question has already been had before the banking commission, the same as if such rehearing had been made under the law prior to reorganization by the public service commission.

The next step under sec. 189.19, Stats., whereby a party aggrieved by order of the commission may seek relief is to commence an action in the circuit court for Dane county as provided in subsec. (3) of sec. 189.19, Stats.

It is true that sec. 220.02 (5), Stats., provides that any interested party may apply to the banking review board to review any order of the banking commission within ten days from the date of the order. However, no similar authority existed under the administration of the securities law by the public service commission, as has already been pointed out, and it is therefore apparent that no such function could have been transferred to the banking department, commission or banking review board by the reorganization order.

You are consequently advised that the banking review board is without jurisdiction to hear the application in question.

WHR

Counties — Mortgages, Deeds, etc. — Social Security Law — Old-age Assistance — County does not have authority to purchase mortgage or real estate for purpose of protecting old-age assistance lien filed subsequently to recording of mortgage against same real estate.

October 3, 1938.

HAROLD M. DAKIN,
District Attorney,
Jefferson, Wisconsin.

Under sec. 49.26 (4), Stats., all old-age assistance paid to a beneficiary under sections 49.20 and 49.51, Stats., shall constitute a lien on the real estate of such beneficiary. In many instances the real estate of the beneficiary is already subject to a mortgage, made, executed and recorded prior to the time when the old-age assistance lien attached. Frequently, the mortgagee is interested only in obtaining the amount due him under the mortgage rather than in acquiring the real estate by foreclosure or other means even where the property theoretically has a value considerably in excess of the amount due on the mortgage.

You inquire whether the county board of supervisors has the power to purchase a mortgage by assignment or purchase property on foreclosure sale for the purpose of protecting an old-age pension lien which was subject to the mortgage to be assigned or being foreclosed.

In 1 Dillon, Mun. Corp., sections 35 and 37 (5th ed.), the following rule is stated:

“* * * Counties are, at most, but local organizations, which, for the purposes of civil administration are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. * * *

“* * * They are purely auxiliaries of the State; and to the general statutes of the State they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject.”

The language above was quoted with approval in *Fredrick v. Douglas County*, 96 Wis. 411, 71 N. W. 798. This proposition was also more recently sustained in *Spaulding v. Wood County*, 218 Wis. 224, 260 N. W. 473, at page 228.

There is no specific statutory provision authorizing a county to purchase a mortgage or real estate for the purpose of protecting an old-age pension lien filed subsequently to the recording of the mortgage. A county is not authorized by statute to purchase a mortgage for any purpose whatsoever. Certain statutes authorize counties to purchase lands for definite purposes but no right is given a county to purchase land to protect a possible county equity therein unless such power can be read from sec. 59.01, Stats., which provides in part as follows:

“Each county * * * is * * * empowered * * * to purchase, take and hold real and personal estate for public uses, including lands sold for taxes, to sell, lease and convey the same * * *, to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the duties charged upon it by law, * * *,”

and sec. 59.07 (6), Stats., which provides that the county board is empowered to “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.”

In the case of *Spaulding v. Wood County*, *supra*, it was argued that the latter part of sec. 59.01, Stats., indicated that the county had certain implied powers. The court held on pages 229 to 230:

“* * * It has been held that if there be a fair and reasonable doubt as to an implied power it is fatal to its being. *City of Fort Scott v. W. G. Eads Brokerage Co.*, 117 Fed. 51 (*certiorari* denied, 187 U. S. 647, 23 Sup. Ct. 846). In *Blades v. Hawkins*, 240 Mo. 187, 112 S. W. 979, 981, 144 S. W. 1198, it was said:

“The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created.”

In XXV, Op. Atty. Gen. 379, it was held that a county could not purchase lands for the sole purpose of avoiding the cost of providing bridges and highways to such lands. Reference was made in that opinion to the limited powers of a county despite the fact that sec. 59.01 and sec. 59.07 (6), Stats., read as they do now.

By ch. 7, Laws Special Session 1937, the legislature revised the statutes relative to claims and liens for old-age assistance and the enforcement thereof. The only statutory method for the enforcement of such lien is found in sec. 49.26 (4), Stats., which states that such lien "shall be enforceable * * * in the manner provided by law for the enforcement of mechanics' liens upon real property." Since this is the only method provided by statute whereby the county can liquidate any equity in real estate which it may have by virtue of an old-age assistance lien, it must be taken to be the exclusive method.

In XX Op. Atty. Gen. 307 we ruled that where lands upon which a county holds drainage assessment certificates are sold at public auction by order of the circuit court under the provisions of sec. 89.37 (4) (d), Stats., a county might not purchase at such sale if it merely held drainage assessment certificates but, although there was no express authority therefor, the county might purchase at such sale if it held a drainage assessment deed or a tax deed upon the lands to be sold. In XXVI Op. Atty. Gen. 20 we further extended that opinion to include the situation that the county might be a purchaser at such sale if it held general property tax certificates upon the land to be sold.

These opinions were based upon the county's interest in the lands to be sold and the necessity of an implied power of purchase to enable the county to protect that interest. The interest arose out of exercise of the sovereign power of taxation and the necessity for an implied power to protect that interest. Governments cannot function without tax powers and powers to preserve and protect interests that arise therefrom.

There is no such necessity and consequent implied power with respect to an old-age pension lien upon real estate. Such lien until death of the beneficiary and thereafter is subject to many contingencies and may be entirely waived

and released. See sec. 49.25 as revised by ch. 7, Laws Special Session 1937. If a county were to buy a prior real estate mortgage to protect such a hazardous lien, it might well find at the conclusion of the matter that it had no claim and no lien to protect and simply find itself in the real estate business.

We conclude that a county does not have the authority to purchase a mortgage or real estate for the purpose of protecting an old-age assistance lien filed subsequently to the recording of a mortgage against the same real estate.

JRW

NSB

Elections — Nominations — Union Party — Nominees of Union Party need not comply with subsec. (1), sec. 5.17, Stats., to entitle them to place on November ballot as candidates of that party.

October 5, 1938.

THEODORE DAMMANN,

Secretary of State.

You ask what percentage of votes is required of Union Party candidates in order that they may have their names placed in the Union Party column on the November election ballot.

Sec. 5.17, subsec. (1), Stats., provides that a candidate for any office on a party ballot must secure five per cent or more of the average vote cast for the nominee of such party for governor at the last two general elections. When considering the applicability of this section to new political groups, our supreme court said in *State ex rel. Ekern v. Dammann*, 215 Wis. 394, 402:

“* * * It can never be applied to a new party. Until a party succeeds in getting a party column on the general

election ballot, it does not have a nominee for governor in the statutory sense, and it never could qualify under sec. 5.17. In other words, such a party can never pass the test prescribed by sec. 5.17 for securing a place on the general ballot until it has had such a place upon the ballot for two successive elections for governor. The mere statement of this indicates the impossibility of ascribing such an intent to the legislature. The conclusion is that sec. 5.17 has no application to new political groups. * * *

The court specifically held that a new political party could never pass the test set out in sec. 5.17 (1) Stats. "until it has had such a place upon the ballot *for two successive elections for governor.*" (Italics ours.) As a new political party cannot comply with this statute until it has participated in two successive elections, it is clear that it could no more comply with its requirements after participating in one election. As the Union Party has had a place on the ballot for only one election for governor, its nominees would not have to comply with the provisions of subsec. (1), sec. 5.17, before they are entitled to a place on the Union ticket. A Union Party candidate may, therefore, have his name placed on the ballot no matter how few votes he may receive, so long as he receives the largest number of votes of all candidates running for a particular office on the Union Party ballot.

We are not unmindful of the opinion reported in XXV Op. Atty. Gen. 603. However, it is our thought that the suggestion contained therein should be directed to the attention of the legislature, rather than the courts.

LEV

Criminal Law — Gambling — Punch board prizes seized with punch board may not be destroyed under sec. 348.17, Stats., unless physically attached to punch boards.

Gambling implements seized must be destroyed. There is no authority for sale of same for benefit of county.

October 11, 1938.

BURTON E. HOFFMANN,
District Attorney,
Montello, Wisconsin.

You ask whether articles of merchandise which may be won on a punch board seized with such board may be sold for the benefit of the county or destroyed pursuant to sec. 348.17, Wis. Stats.

If authority to destroy such articles exists it must be found in the section cited above which provides:

“* * * such justice or other officer * * * shall issue a warrant commanding the sheriff or his deputy or any constable to enter into such house or building * * * and take into their custody all the implements of gaming as aforesaid, and keep the said persons and implements so that they may be forthcoming before such justice or other officer to be dealt with according to law; * * * and it shall be the duty of every judge, justice of the peace and police justice or other officer before whom such prohibited gambling implements, constructions or devices shall be brought to cause the same to be publicly destroyed by burning or otherwise.”

There is no doubt that the punch board itself is a gambling implement within the meaning of the statute. Equally apparent is the fact that a radio, a wrist watch and a camera are not gambling implements or devices *per se*. It has frequently been said that the test is, whether the instrument or device is used to determine who shall win or lose; whether it is an integral part of the actual gambling. *James v. State*, 4 Okla. Cr. 587, 112 P. 944; *Ah Poo v. Stevenson*, 83 Or. 340, 163 P. 822; *People v. Mettleman*, 155 Misc. 761, 281 N. Y. S. 474; *People v. Engeman*, 129 App. Div. 462, 114 N. Y. S. 174. These cases indicate that the term

“gambling implement and gambling device” as used in gaming statutes refers to the objects or instruments used in the playing of the game. Obviously the prizes offered are excluded by such a construction since they play no part in determining the winner nor are they actually used by the players in the process of the game. Thus in *Miller v. State*, 46 Okla. 674, 149 P. 364 and in *Attorney General v. Justices*, 103 Mass. 456, it was held that money seized in a gaming house is not subject to forfeiture under statutes providing for the seizure and destruction of gaming apparatus. Consequently it must be held that the prizes in question are not in themselves “gambling implements, constructions or devices,” even though offered as prizes in connection with a game of chance.

The question remains whether such articles were so connected with the punch board as to be a part of that device, which is undoubtedly a gambling implement. Clearly the radio was not so connected. As regards the watches and the camera, the conclusion seems inevitable that they were a part of the punch board since they were physically attached thereto not to be removed until won by some player. You are advised that such articles should be destroyed with the board but that the radio is not a gambling implement, construction or device nor a part of one and must therefore be returned. It will be noted that sec. 348.09 refers to gambling devices in the following words: “any table, wheel or other construction, or any cards, dice or other device.”

Such words clearly indicate the sense in which the legislature employed the phrase “gambling device,” i. e., an instrument used in the actual playing of the game. It is apparent that the radio was not so used. Furthermore, sec. 348.17 requires that any objects seized as gambling implements be destroyed; this would indicate that the legislature did not intend to include articles absolutely innocent in themselves, not used in the actual process of gambling and conceivably of great value.

You are further advised that any articles seized under sec. 348.17 and found to be gambling implements must be destroyed. No authority to sell such articles for the benefit of the county exists.

NSB

Public Officers — Register of Deeds — Real Estate — Platting Lands — Register of deeds does not have authority to redraft plats for purpose of correcting them.

October 11, 1938.

J. C. RAINERI,

District Attorney,

Hurley, Wisconsin.

You state that in the office of the register of deeds for your county certain plats have been filed which purport to follow a specified scale. As a matter of fact the plats were crudely and incorrectly drawn so that they do not conform to the scale upon which they are supposed to be based. Inquiry is made as to whether the register of deeds may correct these plats by redrafting them so that they will conform to the scale which they purport to follow.

Neither sec. 59.51, Stats., relating to the general duties of the register of deeds, nor any other statute authorizes the register of deeds to correct a plat which is in error because it does not conform to the scale specified in it. Generally, the duty of a register of deeds is to receive and file or record, as the case may be, such instruments as by law are entitled to be filed or recorded. *Weyrauch v. Johnson*, 201 Ia. 1197, 208 N. W. 706. In general, the duties of a register of deeds are those of record rather than of correction. The only duties of the register of deeds in connection with plats is to accept and bind as a permanent record into bound volumes, properly indexed, any final plat made as prescribed in chapter 236. (sec. 236.11), record said plat or cause it to be recorded (sec. 59.51 (1)), and make a copy thereof on demand and payment of the legal fee therefor (sec. 59.51 (8)). The correction or alteration of a public record by the recording officer is without authority of law, *Jennings v. Dockham*, 99 Mich. 253, 58 N. W. 66, except that a recording officer, while in office, may correct mistakes which he has made in not complying with his duties under the statute. *People v. Hartquist*, 315 Ill. 228, 146 N. E. 140. The errors in the plats to which you have referred did not arise because of any mistakes or omissions on the part of the register of deeds in performing his duties under the law.

Changes in public records may be made only by or under official authority. The interests of individuals, as well as the whole public, require that public records should never be altered unless the power as well as the right to alter or amend is clearly shown. *Rodley v. Morris*, 6 Ky. Op. 151; *Hudson v. Kootenai Power Co.*, 44 Ida. 423, 258 P. 169.

A great many conveyances may have been made in which real estate was described by reference to the erroneous plat, which reference enables anyone examining the conveyance to locate the property even though the plat is erroneous. The draftsmen of many of such conveyances may have taken the plat errors into consideration when drawing the conveyances so that a correction of the plat now would result in more confusion than clarity.

Moreover, the drafting of a plat is a task for a person with the technical training of a surveyor or civil engineer.

It is our opinion that the register of deeds does not have authority to correct the plats which do not conform to scale.
JRW

Constitutional Law — Municipal Corporations — Municipal Borrowing — Taxation — Tax Sales — Promissory notes of city of Superior for current and ordinary expenses issued October 1, 1938, due April 1, 1939, secured by tax levy to be inserted in 1938 tax roll, not yet prepared, must be counted in determining five per cent constitutional debt limitation of said city, under art. XI, sec. 3, Wis. Const.

City excess delinquent real estate tax may not be deducted from bonded indebtedness of said city for purpose of determining total indebtedness of city under art. XI, sec. 3, Wis. Const.

October 11, 1938.

ALBERT TRATHEN, *Director of Investments,*
State Annuity and Investment Board.

You have submitted a copy of certain resolutions passed by the council of the city of Superior on September 23, 1938,

together with a statement of the financial condition of that city as of August 31, 1938. These resolutions relate to the issuance of promissory notes of the city of Superior in the amount of \$250,000.00 and a levy of a tax to secure the payment of said notes. You wish to be advised whether said notes would be a legal purchase for the state annuity and investment board.

The resolution relating to the issuance of promissory notes in the amount of \$250,000.00 contained a preambulatory recitation to the effect that the city of Superior was in temporary need of money to pay its current and ordinary expenses in the amount of \$247,500.00. These current and ordinary expenses consisted of warrants outstanding for salaries, maintenance and supplies, and for firemen's and policemen's pensions. The resolution then provided for the issuance of six-month notes of the city of Superior in the principal sum of \$250,000.00, bearing interest at 3½% per annum, said notes to be dated October 1, 1938 and to mature April 1, 1939. The notes themselves were to be in denominations of ten thousand and five thousand dollars and to be in substantially the form specified in the resolution. The form of the note provided, among other things:

"For the prompt payment of this note with interest thereon as aforesaid and the levying and collection of taxes sufficient for that purpose, the full faith, credit and resources of said city are hereby irrevocably pledged."

The resolution relating to the tax provided:

"BE IT FURTHER RESOLVED that to provide for the payment of the principal and interest of said notes on April 1, 1939, there is hereby levied on all the taxable property of said city of Superior, in addition to all other city taxes, the following direct tax, to wit:

"For the year 1938, a tax in the sum of \$254,375.00 for the payment of principal and interest upon said notes. Said tax so levied shall be collected at the same time and in the same manner as other city taxes are collected, and shall be carried into the next tax roll of this city and the proceeds thereof shall be kept in a separate fund and shall be used solely for the purpose of paying the principal and interest on said notes and said tax shall become and continue irrepealable."

Sec. 67.12, subsections (1) to (4), of the Wisconsin statutes, authorizes a city which is in temporary need of money with which to pay its current and ordinary expenses to make a temporary loan for such purpose. The governing body of the city about to solicit such a temporary loan must pass a resolution specifying the purpose and the amount of the loan and levy a tax to provide for the repayment of said loan. Such loan may be evidenced by notes payable with interest on or before the 30th day of August following the next tax levy. In borrowing under this section the resolution must be supported by three-fourths' vote of the members-elect of the city council. The borrowing is limited to such amount as the council deems necessary to the safety and interest of the city. The resolutions of the city of Superior were passed by a three-fourths' vote of the council and, from the language of said resolutions, it would appear that they were passed with the provisions of sec. 67.12 in mind.

By chapter 382 of the laws of 1933 the legislature created section 67.125, subsecs. (1) and (2). Under subsec. (1) a city which is in need of money to pay its current and ordinary expenses may, by a three-fourths' affirmative vote of the members-elect of its governing body "borrow money for such purposes in an amount not exceeding the portion of the uncollected delinquent taxes which are to be returned to such municipality under the provisions of law, when same shall have been collected." Such loans may be evidenced by notes payable not more than five years from the date of the notes. Said notes shall be general obligations of the municipality and, before the issuance of the same, the governing body must levy a direct annual tax sufficient in amount to pay, and for the express purpose of paying the interest and principal of such notes. Except as specifically provided in sec. 67.125, subsec. (1), the provisions of ch. 67, relative to the issuance of bonds, apply to the issuance of notes provided that it is not necessary to submit the question of the issuance of such notes to the electors for approval.

The provisions of sec. 67.125 (1) were not satisfied by the proceedings of the city council of Superior because the provisions of sec. 67.05, subsec. (3), obviously were not followed.

Section 67.125, subsec. (2), provides substantially the same as subsec. (1) except:

(a) It is not necessary to levy any tax to repay the loan.

(b) The provisions of ch. 67 relative to the issuance of bonds are not applicable.

(c) The notes "shall not be the general obligations of the municipality issuing the same."

Art. XI sec. 3 of the Wisconsin constitution provides in part:

"No * * *, city * * * shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any * * * city, * * * incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof * * *."

In 1932 this constitutional provision was amended by adding thereto the following:

"* * * Providing, that an indebtedness created for the purpose of purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility of a town, village or city, and secured solely by the property or income of such public utility, and whereby no municipal liability is created, shall not be considered an indebtedness of such town, village or city, and shall not be included in arriving at such five per centum debt limitation."

Sec. 67.125 was passed at a time when many municipalities were in financial straits, evidently for the purpose of providing a method whereby such municipalities could obtain funds temporarily. The provisions of sec. 67.125 cannot, of course, take precedence over art. XI, sec. 3 of the Wisconsin constitution. Sec. 67.125 added nothing to the provisions of sec. 67.12 except that the loan for current and ordinary expenses might be extended over a period of five years instead of being repayable on or before the 30th day

of August following the next tax levy in cases where the municipality had an excess delinquent tax roll equivalent to the amount of the loan. The only differences between sections 67.12 and 67.125, subsec. (2), were that, under the latter section, no tax need be levied and notes issued thereunder were not to be considered general obligations of the municipality issuing the same in cases where the city had an excess delinquent tax roll equivalent to the notes. If the notes issued pursuant to sec. 67.125 (2) resulted in an indebtedness within the meaning of art. XI, sec. 3 of the Wisconsin constitution, the legislature could not constitutionally nullify the debt limitation or the tax requirement therein provided for. It is to be noted, moreover, that for the payment of the notes with interest thereon, the city council pledged "the full faith, credit and resources" of the city of Superior, which means that said notes constitute general obligations of the city.

In the case of *Earles v. Wells and others*, 94 Wis. 285, it was said:

"* * * The constitution of this state provides that 'No county, city, town, village, school district, or other municipal corporation, shall be allowed to become *indebted in any manner or for any purpose, to any amount* including existing indebtedness in the aggregate *exceeding five per centum* on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness;' that before 'incurring such indebtedness' such municipality must 'provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.' Sec. 3, art. XI, as amended in 1874. It requires the authority of no adjudication to prove that this constitutional limitation means just what it says, and is absolutely binding, not only upon every such municipality and its officers, but also upon the legislature itself. Nevertheless we cite a few of the many cases construing similar constitutional provisions: *Buchanan v. Litchfield*, 102 U. S. 278; *Weightman v. Clark*, 103 U. S. 256; *School Dist. v. Stone*, 106 U. S. 183; *Litchfield v. Ballou*, 114 U. S. 190; *Lake Co. v. Rollins*, 130 U. S. 662; *Lake Co. v. Graham*, 130 U. S. 674; *Doon v. Cummins*, 142 U. S. 366; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610; *Hedges v. Dixon Co.*, 150 U. S. 182." (Pp. 295-296.)

“* * * *In Lake Co. v. Rollins, supra*, the words in the constitution of Colorado, ‘the aggregate amount of indebtedness of any county for all purposes,’ were construed to be ‘an absolute limitation upon the power of the county to contract any and all indebtedness, not only for the purposes named in the act, but for every other purpose whatever, including county warrants issued for ordinary county expenses, such as witnesses’ and jurors’ fees, election costs, charges for board of prisoners, county treasurer’s commissions,’ etc. * * *.” (P. 296.)

“* * * Here the constitutional provision prohibits the city from becoming ‘indebted in any manner or for any purpose to any amount’ exceeding five per centum of the assessed valuation. The same language is contained in the constitution of Iowa: and in *Doon v. Cummins, supra*, it was held, in effect, that negotiable bonds, in excess of such limit, issued by a school district, and sold for the purpose of applying the proceeds of the sale to the payment of an outstanding bonded indebtedness of the district, pursuant to the statute of Iowa, were void as against one who purchased with knowledge that such limit had been exceeded. In that case Mr. Justice Gray, speaking for the court, cites five Iowa cases to the effect that the law, as settled by the supreme court of that state, is that such ‘constitutional restriction includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues.’ 142 U. S. 376. The Iowa cases thus cited support the proposition. See, also, *Kane v. Independent School Dist.*, 82 Iowa, 5; *First Nat. Bank v. District of Doon*, 86 Iowa, 330. In *Prince v. Quincy*, 105 Ill. 138, it was held that, when such constitutional limit had been reached, the municipality is prohibited from making any contract whereby an indebtedness is created, even for the necessary current expense in the administration of the affairs and government of the corporation.” (P. 297.)

“* * * So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit,—even though there may be for a short time some unpaid liabilities. In other words, a municipality’s capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due. But the moment an indebtedness is volun-

tarily created 'in any manner or for any purpose,' with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness." (Pp. 298-299.)

This case was referred to in *Rice v. The City of Milwaukee, et al.*, 100 Wis. 516, at page 521, where it was stated:

"* * * *Earles v. Wells*, 94 Wis. 285, is appealed to as sustaining the claims that these items may be considered as 'revenues in process of immediate collection,' and 'available assets and resources,' convertible into cash, which may be considered as offsets against the city's debt. As already noted, the moneys to be derived from these sources are entirely indefinite and uncertain. They were not in the process of collection, and could be collected only at the will of parties who sought privileges for which license charges were made, and for that reason could not be considered as available assets or resources. The 'revenues' mentioned in this decision had reference only to such revenues as the corporation had levied, and had a legal right to enforce, regardless of anyone's will or pleasure. The 'available assets and resources' referred to means tangible property in the treasury, legally available, and properly applicable to the payment of debts, and readily convertible into money for that purpose."

Taxes voted or levied are not to be offset against indebtedness until they have been spread upon the tax roll and *the roll placed in the hands of the proper municipal officer with authority to collect the tax.* *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132. In this case it was stated, at page 82:

"The theory invoked by counsel in support of the first proposition, as regards what constitutes assets to be counted against liabilities of a municipality in determining whether, in respect to the latter, the constitutional limitation to incur the same has been exceeded, was formulated by this court in *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, in these words: 'Money and assets in the treasury, and current revenues collected or *in process of immediate collection.*' That has since been several times approved. *State ex rel. M., T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 93, 71 N. W. 86;

Crogster v. Bayfield Co., 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; *Rice v. Milwaukee*, 100 Wis. 516, 521, 76 N. W. 341. In the last case cited it was held that the rule under discussion must be restrained to its specific meaning. Taxes in immediate process of collection do not include taxes merely voted. Taxes are not in immediate process of collection till the tax roll shall have been placed in the hands of the proper collecting officer with authority to receive, and with the right of the taxpayer to pay, the tax."

In the case of *Riesen v. School District*, 192 Wis, 283, the court said, at page 292:

"The district had made some temporary loans for which it had anticipated its revenues for the ensuing year. These amounts were likewise indebtedness within the constitutional limitation. The constitution prohibited the district from becoming 'indebted in any manner or for any purpose to any amount' in excess of five per cent of the assessed valuation. *Earles v. Wells*, 94 Wis. 285, 297-299, 68 N. W. 964; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 93, 71 N. W. 86; *Riesen v. School Dist.*, 189 Wis. 607, 208 N. W. 472, 474."

At the time of the amendment to art. XI, sec. 3, of the Wisconsin constitution, made in 1932, the legislature which submitted this amendment to the people presumably had in mind the interpretation which our court had placed upon this section of the constitution prior to this amendment. Had there been any intention of excepting from the five per cent debt limitation indebtedness created for current and ordinary expenses, such exception should have been inserted along with the other exception provided in the amendment. From the fact that no other exception was inserted, it must be concluded that there was no intention to disturb the construction which the supreme court had placed upon this provision of the constitution.

From the tax resolution which is set out in full in this opinion, it was proposed to place the tax for the repayment of the loan, evidenced by the \$250,000.00 worth of notes, in the 1938 tax roll. Obviously the 1938 tax roll has not yet been completed and certainly has not been placed in the hands of the city treasurer with instructions to collect the tax. Hence the 1938 taxes are not in the process of collec-

tion. From the foregoing, it is our opinion that the anticipated loan for current and ordinary expenses, purportedly to be repaid out of the tax collected on the 1938 tax roll, would have to be counted as part of the indebtedness of the city of Superior in determining the five per cent debt limitation of that city.

From the balance sheet submitted, it appears that the "city and school bonded indebtedness" totals \$2,052,439.00. The "last assessment for state and county taxes" referred to in art. XI, sec. 3 of the Wisconsin constitution, means the last assessment of the municipality as equalized by the local board of review for the purpose of general taxation. *State ex rel. Marinette, Tomahawk and Western Railway Co. v. The Common Council of the City of Tomahawk*, 96 Wis. 73.

At the time that the proceedings and financial statement were submitted, the assessment of the city of Superior for the year 1938 was not available, due to the fact that the local board of equalization had not yet completed its work. The state tax commission has furnished the information that the assessment of the city of Superior for the year 1937, as equalized by the local board of review, was \$40,104,596.00. Five per cent of this assessed valuation would be \$2,005,229.80. In the event that the city of Superior did not have cash or other resources not earmarked for a specific purpose which could be used as an offset against the bonded indebtedness of \$2,052,439.00, then the city of Superior was indebted as of August 31, 1938, over its debt limit to the extent of \$47,209.20.

The financial statement submitted does not show any substantial assets which could be deducted from the bonded indebtedness to give the city a borrowing power of \$250,000.00, or more, unless the excess delinquent real estate and personal property tax of the city of Superior for the years 1928 to 1936 can be considered such an asset. The city has no excess delinquent personal property or real estate tax for the year 1937. A serious question probably exists as to the collectibility of the personal property taxes over six years old. To simplify the question, however, it may be stated that the excess delinquent real estate tax for the years 1932 to 1936 aggregates \$783,453.54. Even if the excess delin-

quent real estate tax for the year 1932 were eliminated, there would still remain an excess delinquent roll of more than \$650,000.00. The question then arises as to whether this excess delinquent real estate tax may be considered "money and assets in the treasury, and current revenues collected or in process of immediate collection." The excess delinquent real estate tax obviously does not constitute money and assets *in the treasury* or current revenues collected. The question is thus narrowed to whether such excess delinquent tax constitutes "current revenues * * * in process of immediate collection." Current revenues in the process of immediate collection are treated as money which is constructively in the treasury. The excess delinquent real estate taxes of the city of Superior for the years 1932 to 1936 inclusive, are now, and for some time have been, in the hands of the county treasurer of Douglas county for collection. This excess delinquent real estate tax is in the form of tax certificates, most of which are probably held by the county. No duty exists upon the county to pay to the city of Superior any of the delinquent taxes collected for any year until the county has realized from such collection all of the money which it levied for county purposes that year (sec. 74.19, subsec. (3)). This is true even when the county takes a tax deed (sec. 75.36), which it may do when the tax certificate becomes five years old (sec. 75.01, 75.12, 75.14).

Whether Douglas county has now collected from the city of Superior's delinquent tax roll for the years 1932 to 1936, inclusive, sufficient to satisfy the county levy so that all amounts henceforth collected on said tax rolls will be returned to the city of Superior does not appear from the papers accompanying the request for an opinion. Practically it does not seem that the excess delinquent real estate tax roll could be considered a liquid asset or the equivalent of cash in the treasury. Neither does it seem that said taxes for the years 1932 to 1936, which have gone to tax sale and are in the form of tax certificates probably in the hands of Douglas county, can be said to be taxes or current revenues "in process of immediate collection." If these taxes can now be said to be in the process of immediate collection, then it must follow that the taxes for the year 1932 have

been in the process of *immediate* collection for the past five years and nine months, inasmuch as they first became payable in January of 1933. So far as the city of Superior is concerned, its taxes are in the process of immediate collection when the tax roll has been delivered to the city treasurer and he is given instructions to collect the taxes listed therein.

It is extremely doubtful that it can be said that this excess of delinquent taxes is in process of "immediate collection" within either the meaning or language of the cases upon the subject.

The city of Superior, through its legal counsel, has urged us to adopt a view that "current and ordinary expenses" are not within the constitutional debt limitation. A legitimate and forceful argument can be made in support of this view. See article by A. C. Hirschboeck, Vol. 19, *Marquette Law Review*, page 59 (1935). It is possible that this view may ultimately prevail if and when our supreme court is confronted with the problem. But this view has not yet prevailed and there is nothing in the language of the cases that would indicate that such view will ultimately prevail. The language of the cases is quite to the contrary. This office cannot do other than entertain serious doubt as to whether such view will ever prevail. Under such circumstances, it is our plain duty to resolve the doubt in such manner as to safeguard public funds. *State ex rel. Bashford v. Frear*, 138 Wis. 536, 541.

Municipalities so circumstanced as the city of Superior should devise some means of getting a judicial interpretation of the constitutional clause in question. Unless or until the supreme court resolves the doubt in favor of the city's present position in the matter, we must necessarily entertain a substantial doubt as to the legality of such a proposed loan. In view of the present uncertainty of the law upon the subject, a city desiring a loan from the annuity board should first establish the legality of such a loan. The state cannot and should not be asked to gamble with trust funds where the legality of a proposed loan is as doubtful as is this one.

JRW

Elections — Nominations — Public Officers — Filing of declaration to serve if elected, required under sec. 5.10, subsec. (2), Stats., is applicable only to candidates for city offices to be voted for throughout city who are nominated at, or by virtue of, primary or who would be required to be nominated at primary were it not for fact that not to exceed two times number of candidates placed in nomination filed for office under sec. 5.10 (2), Stats.

Person may run for more than one nonpartisan city office on same ballot at same primary or election.

October 13, 1938.

THEODORE DAMMANN,
Secretary of State.

You request our opinion upon two city election questions as follows:

(1) Is a city-wide candidate, filing under section 5.26, subsec. (6), (other than in Milwaukee county under subsec. (8) of said section), required to file a declaration to serve, if elected?

You direct our attention to sec. 5.10 (2), Stats., which reads as follows:

“The name, including given and surname, of each nonpartisan candidate placed in nomination for a city primary as provided by section 5.06, and no others, shall be printed under a designation of the office for which he is named on the official ballot used at such primary, which ballot shall be so arranged as to admit of any other person being voted for by the elector if he so desires. *Each candidate for a city office to be voted for throughout the city, in addition to filing nomination papers, shall file, not later than five days after the last day for filing such papers, and not later than ten o'clock P. M. on said last day, a declaration of intention to serve if elected.* Whenever a primary is held and the number of candidates placed in nomination for any city office whether the same is to be voted for throughout the city or only in wards does not exceed two times the number of persons to be elected to any such office, no primary election shall be held for such office and the names of such candidates shall be printed upon the official ballot for the ensuing election.”

The italicized portion of the above section is all-inclusive and comprehensive in language and, therefore, might be construed to apply to all candidates for city office to be voted for throughout the city regardless of whether such candidates are nominated at a primary or by nomination papers filed pursuant to sec. 5.26 (6), Stats. However, the italicized portion of sec. 5.10 (2) is found in that section of the statutes dealing exclusively with ballots for primaries and with primary elections. It was added to sec. 5.10, Stats., by chapter 466 of the laws of 1933. It imposed a new condition upon candidates not theretofore required of them. If meant to apply to all candidates to be voted for throughout the city—those who are nominated by filing nomination papers pursuant to sec. 5.26 as well as to those who are nominated by virtue of a primary, sec. 5.10 (2), Stats.,—it will have to be conceded that it was placed in a most unfortunate position in the statutes.

Secs. 5.025, Stats., and 5.26 (8), Stats., specify when city primaries are necessary, and sec. 5.025 further provides that “when no primary election is held, the candidates for such offices shall be nominated in the manner provided in section 5.26.” Sec. 5.025 was enacted by chapter 433, sec. 4, Laws 1933. It was thus enacted the same year that the italicized portion of sec. 5.10 (2) was enacted. The legislature had both provisions up for consideration at the same session. By sec. 5.025, candidates for city office or to be voted for throughout the city (other than in Milwaukee county under sec. 5.26 (8), Stats.), unless the electors have voted otherwise, are not required to be nominated at a primary but are nominated pursuant to sec. 5.26, that is, by the filing of nonpartisan or independent nomination papers. Sec. 5.26 does not require a candidate nominated in that manner to file a declaration to serve, if elected, whether the candidate be a candidate for city office or to be voted for throughout the city, such as county supervisor, or to be voted for throughout the state. No legislative reason is perceived why a candidate for city office to be voted for throughout the city and nominated pursuant to sec. 5.26 should be required to file a declaration to serve, if elected,

when all other candidates, state-wide or otherwise, who are nominated in that manner are not required to file such a declaration.

When the legislature in 1933, by sec. 5.025, Stats., dealt with the subject of nomination for city office other than by primary, and provided that candidates should be nominated in the manner indicated by sec. 5.26, and that section requires no declaration to serve, if elected, it seems only reasonable to conclude that the legislature imposed all the conditions that it meant to impose upon candidates nominated by that method of nomination, and that when the same legislature imposed the declaration-to-serve condition by adding it to that section of the statutes dealing exclusively with ballots for primaries, and primaries, it meant to impose that condition only upon those candidates nominated at, or by virtue of, a primary and possibly those candidates who would have to be nominated at a primary but with respect to which offices no primary need be held for the particular year in question in view of the fact that the number of candidates placed in nomination for the office does not exceed two times the number of persons to be elected to such office under sec. 5.10 (2), Stats. We so construe the statutes.

(2) May a person run for more than one nonpartisan city office on the same ballot at the same primary or election?

We find no constitutional or statutory provision that would prohibit such running. In the absence of such a provision it would seem that a candidate has such right, even though the two offices may be incompatible and it would be illegal for the candidate to hold both offices. I Op. Atty. Gen. 231; 9 R. C. L. 1056, par. 72; *State ex rel. Barber v. Circuit Court*, 178 Wis. 468 (1922); *State ex rel. Ekern v. Dammann*, 215 Wis. 394 (1934); *State ex rel. McGrauel v. Phelps*, 144 Wis. 1 (1910).

You are accordingly advised that a person may run for more than one nonpartisan city office on the same ballot at the same primary or election.

NSB

Bonds — Police Regulations — Detectives — Copartnership may be licensed as detective agency under provisions of sec. 175.07, Stats., upon filing of but one bond and payment of two hundred dollar fee as principal.

Members of copartnership operating private detective agency who act as private detectives in their individual capacities must secure individual licenses under sec. 175.07, subsec. (5).

October 14, 1938.

THEODORE DAMMANN,

Secretary of State.

You state that doubt has arisen as to the bonds required by sec. 175.07, Stats., of a partnership acting as a detective agency, and ask the following questions:

1. When there are two or more members of the copartnership, will one fee of two hundred dollars, one license, and one bond of ten thousand dollars suffice?

2. Or, will each copartner be required to have a separate license as a principal and also to pay the regular fee of two hundred dollars and post a corresponding bond of ten thousand dollars?

3. If each copartner must so file and be licensed as a principal, will he also require a license as an agent?

4. If question No. 1 be answered in the affirmative, will each partner require in such case license as agent or employee?

Sec. 175.07, Stats., provides in part as follows:

“(1) No person shall act or hold himself out as a private detective, private police, or private guard, nor shall any person solicit business or perform any service in this state as a private detective, private police, or private guard, or receive any fees or compensation whatever for acting as private detective, private police or private guard for any person, firm or corporation, without first having obtained the license and filed the bond provided for in this section. * * *

“(2) * * *

“(3) The provisions of this section shall apply to copartnerships and corporations, and to the agents, servants and employees of any copartnership or corporation or person. Every person, whether acting as a private detective, private

police or private guard in his individual capacity, or as the agent, servant or employe of another, shall take out the license provided in subsection (5) hereof. * * *

"(4) Any person intending to act as a private detective, private police, or private guard, for hire or reward, or to conduct the business of a private detective agency, or of any agency supplying private police, private guards, or to advertise or solicit any such business in this state, shall first file with the secretary of state a written application duly signed and verified. In cases of an individual such application shall be signed and verified by the applicant for such license; in case of copartnership by all of the individuals composing such copartnership; and in case of a corporation by the president or secretary and manager of such corporation. * * *

"(5) The secretary of state, after the application has been approved as provided in subsection (4), when satisfied from an examination of such application and such further inquiry and investigation as he shall deem proper, of the good character, competency and integrity of such applicant, shall issue and deliver to the applicant a license, upon payment to the state of a license fee of two hundred dollars, in the event that the applicant conducts the business as principal owner, and two dollars in the event the applicant is an agent, servant or employe of a principal.

"(6) Such license shall not be issued by the secretary of state unless there is executed, delivered and filed in his office, a bond in the sum of ten thousand dollars by such applicant if a principal owner, and two thousand if an agent, servant or employe, * * *."

From a reading of the statute, it appears that there are two things contemplated by it: First, acting as a private detective; second, conducting the business of a private detective agency.

A partnership is merely "an association of two or more persons to carry on as co-owners a business for profit." Sec. 123.03, Stats. A partnership, by virtue of its very nature, has no existence as a physical substance or entity but is merely a legal relationship. The activities of a private detective necessarily are of a physical character. The acts which one does in acting as a private detective necessarily are physical acts of a type possible only to be performed by a human being. It seems clear that it is physically impossible for a legal relationship to do things which are physical ac-

tivities. A partnership could avail itself of the physical activities of persons but cannot act in a physical manner itself. The only way a partnership could render the service of a private detective would be through the physical acts done by its members, agents or employees. The partnership would not then be acting as a private detective but would be directing, superintending or conducting detective activities, that is, making use of the physical acts of human beings. Being unable to do the physical acts that would be involved in acting as a private detective, a partnership therefore could not have a license to act as a private detective.

As before stated, a partnership may direct or employ persons to do the necessary detective activities and thereby would be operating a business rendering private detective service. This would be conducting a private detective agency. Therefore, a license to conduct a detective agency could be issued to the partnership. Such license would be the property of the partnership and would not be the individual property of any of the partners. Such license would not authorize the doing of any acts as a private detective but merely the operation of a detective agency. Thus, the only rights that the members of the partnership would have pursuant to said license would be to participate in the operation of a detective agency. Such license would give them no authority to go out as individual persons and act as private detectives. A member of the partnership could not be one who "conducts the business as principal owner" because the partnership would be the owner of the business. A partner has no title to any specific partnership property, but merely certain rights in respect to the partnership such as to profits and surplus, etc. See ch. 123, Stats. The license to conduct a private detective agency would not include the right of an individual member of the partnership to perform the physical acts of a detective. When acting for the partnership, it would be the individual member who would be acting as a private detective. Each partner is an agent of the partnership for the purposes of this business. Sec. 123.06, Stats. The partnership would be the owner of the license to conduct the agency rather than the individual partners.

The license to the partnership being not sufficient to authorize an individual partner to act as private detective, it necessarily follows from the fact that the statutes require every person who acts as a private detective to have a license that the individual members must have a license to act as a private detective if they are to be employed as such by the partnership.

It is, therefore, our opinion that the partnership must have a license and file a bond as the principal owner in conducting the business of a private detective agency, but that such license merely authorizes the conducting of such business and that if the individual members of the partnership desire to act as private detectives, they must procure a license and file a bond as an employee or agent of the partnership.

It may be urged that the conclusions herein reached appear to give to a partnership a legal entity which partnerships do not in law possess, in so far as we conclude that a partnership as such may be licensed as an agency. The answer to such contention must be that the statutes contemplate such licensing. The statutes are specifically made applicable to copartnerships and it seems quite apparent that the copartnership is the "applicant" although in the case of a partnership the application must be signed and verified by the individual members thereof. But the license is to the applicant and the applicant is the copartnership. Sec. 175.07, subsecs. (3) and (5), Stats.

AGH

Counties — County Ordinances — Fireworks — County board may not pass ordinance prohibiting sale and use of fireworks within county.

October 18, 1938.

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

You inquire whether the county board may pass an ordinance prohibiting the sale and use of fireworks within the county.

The statutes confer upon counties all the powers which they possess. *Frederick v. Douglas County*, 96 Wis. 411.

A municipal corporation has no power except that expressly conferred or what is necessarily implied from the power conferred. *Superior v. Roemer*, 154 Wis. 345; *Flanagan v. Buxton*, 145 Wis. 81, 129 N. W. 642; *Butler v. Milwaukee*, 15 Wis. 493.

Sec. 59.07, Stats., enumerates the general powers of a county board and sec. 59.08 lists the special powers of a county board. Neither of these sections grants to a county board any specific power to regulate or prohibit the use or sale of fireworks, or any general power which could be construed as giving the county board such authority.

Sec. 340.70, Wisconsin statutes, relates to the sale, storage and use of fireworks throughout the state of Wisconsin. That section, by implication, allows the use of some fireworks therein described and prohibits the sale, storage or use of some kinds of fireworks anywhere in this state. It regulates the sale, storage and use of other fireworks and authorizes their display only under authority of a permit which may be issued by the Fourth of July commission, or the mayor of the city, president of the village or chairman of the town wherein the display is to be given. Sec. 340.70 further provides that the officers issuing the permit may require a bond and gives such issuing officers police power to enforce the provisions of the section, including restrictions on the use of fireworks under a permit. Penalties are provided for violations of the section. The legislature has here

sought to enact a statute specifically regulating fireworks. It has classified fireworks into those which it evidently considered harmless or relatively so, those which it considered so dangerous and hazardous that they should not be used in this state under any circumstances, and those which it considered so dangerous that they could be sold, stored or used only under certain conditions. See *Beckman v. Bemis-Hooper-Hays Co.*, 212 Wis. 565, 250 N. W. 420.

The absence of any statute granting authority to a county board to prohibit the sale and use of fireworks, together with the evident legislative intent largely to preempt the field in the matter of fireworks regulation, impels us to the conclusion that a county board does not have authority to pass an ordinance prohibiting the sale and use of fireworks within a county.

JRW

Public Officers — County Treasurer — Taxation — Tax Sales — County treasurer has no duty to notify holder of tax certificate that such certificate has been redeemed except as such notice is conveyed in tax redemption notice.

Neither county nor county treasurer is liable to holder of tax certificate for interest on redemption money from time of redemption.

October 19, 1938.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

One X purchased a tax certificate at a delinquent real estate tax sale held several years ago. On June 1, 1933, the owner of the land described in the certificate paid to the county treasurer, for the use of the purchaser of the certificate, sufficient money to redeem said certificate. The county treasurer did not notify X that the tax certificate

had been redeemed. You inquire whether Vernon county, or the county treasurer personally, is liable to X for interest on the redemption money from the time that the same was paid to the county treasurer and, if so, at what rate of interest.

Your inquiry does not state for what year the taxes were unpaid or when the tax certificate was issued. Sec. 75.01, Wisconsin statutes, now reads, and for many years past has read, in part, as follows:

“The owner or occupant of any land sold for taxes or other person may, * * * redeem the same or any part thereof or interest therein by paying to the county treasurer of the county where such land was sold, for the use of the purchaser, his heirs, or assigns, the amount for which such land was sold and all subsequent charges thereon authorized by law * * * with interest on the amount of purchase money * * * from the date of such certificate, and all other taxes and charges thereon imposed subsequent to such sale and paid by such purchaser or his assigns prior to such redemption, with interest thereon * * *.”

Under this statute the county treasurer holds the redemption money in trust for the purchaser of the certificate. *Knudtson v. Leary*, 108 Wis. 203, 84 N. W. 166.

There is no statute which requires the county treasurer to notify the holder of the tax certificate that said certificate has been redeemed by the owner of the land other than to publish the tax redemption notice provided for in sec. 75.07, Stats. The holder of the tax certificate must assume the responsibility of informing himself whether the tax certificate redemption money has been deposited for his benefit. Under sec. 75.05 as it exists now, and as it has existed for many years, the owner of the tax certificate which has been redeemed is entitled only to the amount of money paid for the redemption even when such money has remained on deposit more than six years.

Without knowing for what year the taxes were delinquent or when the tax certificate was issued, it cannot be known whether the tax redemption notice was published or not. Inasmuch, however, as your question relates to interest from the date of the redemption, it does not appear that any

question is involved concerning failure to publish the tax redemption notice. Because of the fact that no statute imposes a duty upon the county treasurer to notify the holder of the tax certificate concerning redemption of such certificate, other than by publication of the tax redemption notice, it is our opinion that neither the county nor the county treasurer is liable to the purchaser of the tax certificate for any interest from the date of the redemption of such certificate.

JRW

Taxation — Exemption — Residences situated upon seminary grounds and occupied rent free by instructors are exempt under sec. 70.11, subsec. (4), Stats.

October 25, 1938.

L. B. KRUEGER,

Wisconsin Tax Commission,
Property Tax Division.

You have requested an opinion as to the assessability of certain property. It appears that the Evangelical Lutheran Seminary of Mequon, Wisconsin, owns property consisting of a seminary and three or four residences occupied rent free by the instructors of the seminary, all of which are included in ten acres. The town assessor has placed the residential property upon the assessment roll, and you inquire whether this is permissible in view of sec. 70.11, subsec. (4), Stats., which provides for exemptions from property taxation:

“Personal property owned by any educational institution * * * which is used exclusively for the purposes of such association, and the real property *necessary* for the location and convenience of the buildings of such institution or association and embracing the same, not exceeding ten acres; provided such real or personal property is not leased or otherwise used for pecuniary profit; * * *.”

For the purpose of this opinion it is assumed that the seminary is such an educational institution as is eligible to exemption under sec. 70.11 (4), Stats.

Although exemptions from taxation are to be strictly construed against those claiming exemptions, this rule of strict construction is to be applied in the light of the purposes to be furthered by the exemptions, so as not to thwart those purposes. Here the purpose is to encourage and assist educational activities to the end that the community may benefit from the moral, social and cultural betterments consequent upon these activities. *Matter of Syracuse University*, (1925) 124 Misc. 788, 214 App. Div. 375; *Saint Barbara's Roman Catholic Church v. City of New York*, (1935) 277 N. Y. S. 533, 243 App. Div. 371. This being the end to be attained, the meaning of the law must be ascertained by a fair and liberal construction so as to promote that purpose. *Phillips Academy v. Andover*, (1900) 175 Mass. 118, 55 N. E. 841.

Sec. 70.11 (4), Stats., exempts "the real property *necessary* for the location and convenience of the buildings of such institution." What is "necessary" is relative but in *McCullough v. Maryland*, 17 U. S. (4 Wheat.) 316 Chief Justice Marshall said, speaking of the term "necessary," p. 413:

"* * * Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without the other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find it frequently imports no more than that one thing is convenient, or useful, or essential to another."

That it carries the same connotation when used in statutes similar to sec. 70.11 (4) is evident from *Griswold College v. State*, (1877) 46 Ia. 275, 282, where the court said that "the true inquiry should be not what is actually necessary, but what is proper and appropriate to effectuate the objects of the institutions." See also *Bishop, etc. v. Treas.*, (1901) 29 Colo. 143, 68 Pac. 272.

So the rule has evolved that where the dominant consideration in acquiring a residence for a school employee is to

promote the efficient administration of the institution rather than to furnish a habitation for the employee, the residence is considered as being used for educational purposes. *State v. Waggoner*, (1931) 162 Tenn. 172, 35 S. W. (2d) 389; *Burris v. Tower Hill School Ass'n.*, (1935) 6 W. W. Harr. 577, 179 Atl. 397.

Thus, the fact that parts of otherwise exempt educational buildings are partially occupied by instructors or professors does not render them liable to taxation, for a use incident to the main purpose for which the property is held is not one which falls within the prohibitions contemplated by the statute. *Bishop v. Treas., supra*; *Church of Saint Monica v. Mayor*, (1887) 55 N. Y. Super. Ct. (23 J & S) Rep. 160, 13 N. Y. St. Rep. 308.

By the same reasoning a separate building in close proximity to the schoolhouse and on the same grounds is as much devoted to school purposes as the main school buildings. V Op. Atty. Gen. 716. The majority of cases hold that buildings for the housing of instructors and professors of an educational institution are exempt from taxation under statute similar to ours. *State v. Ross*, (1854) 24 N. J. L. 497; *Northhampton County v. Lafayette College*, (1888) 5 Pa. Co. Ct. Rep. 407; *Trustees of Griswold College v. State*, (1877) 46 Ia. 275; *Ramsey County v. Macalester College*, (1892) 51 Minn. 437, 53 N. W. 704; *Phillips Academy v. Andover*, (1900) 175 Mass. 118, 55 N. E. 841; *State v. Carleton College*, (1923) 154 Minn. 280, 191 N. W. 400; *Saint Barbara's Roman Catholic Church v. City of N. Y. supra*.

In view of the aforementioned weight of authority, the buildings housing the instructors of Evangelical Lutheran Seminary must be deemed in effect a part of the school system and, therefore, devoted to a use for educational purposes and exempt from taxation under sec. 70.11 (4), Stats. Further, the maintenance of instructors' residences in close proximity to the student body for inspirational, supervisory or disciplinary purposes, or as a convenient place for holding meetings and social affairs in connection with the institution is proper and appropriate within the meaning of "necessary" as used in sec. 70.14 (4), Stats.

It is our opinion that the residences occupied rent free by the instructors of the seminary are exempt under sec. 70.11 (4), Stats.

HHP

Taxation — Tax Sales — County may not sell to town tax certificates which are invalid because of improper descriptions.

October 26, 1938.

O. M. EDWARDS,

District Attorney,

Racine, Wisconsin.

You have inquired whether the county treasurer may sell to a town tax certificates which are invalid because of improper descriptions.

Sec. 75.22, Stats., reads in part as follows:

“If after the sale or conveyance of any lands sold for the nonpayment of taxes and within the time hereinafter prescribed it shall be discovered that the sale or the certificate issued thereon was invalid, the county board shall make an order, briefly stating the reason therefor, directing that the money paid for such certificate on the sale, and all subsequent charges thereon, and all subsequent taxes paid on the lands described therein by the purchaser or his assigns, be refunded with the interest to such purchaser or his assigns, upon the delivery of the certificate or deed to be canceled;
* * *”

As indicated in your letter, this department ruled in XVI Op. Atty. Gen. 33 that the above statute applies in cases where the county has purchased the tax certificates, the same as if the certificates had been purchased by an individual. Sec. 75.25, Stats., reads in part 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 de-

scribed in such certificate or deed were justly taxable for such tax or some portion thereof; * * * 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, * * * 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.*"

In XXV Op. Atty. Gen. 57 this office, in construing the above statute held that the county might collect in the next assessment of county taxes the amount of taxes illegally assessed plus interest at the rate of eight per cent since the date when the taxes were due and payable, where it appeared that the assessment was illegal by reason of the fact that the lands sought to be taxed were erroneously described. See also *Roberts v. Waukesha County*, 140 Wis. 593.

We therefore concur in this opinion that the county treasurer has no alternative other than to follow the mandate of the above mentioned statutes, and that he consequently has no authority to sell to a town county owned illegal tax certificates. There is involved, of course, the further question of the power of town boards to purchase tax certificates, valid or invalid. There appears to be no express nor implied statutory authority for such practice, but in view of the conclusion already reached, it is unnecessary to discuss this question further.

WHR

Trade Regulation — Conditional Sales — Conditional sale contract of rolling stock to railroad must be accepted by secretary of state for filing if executed in either of alternative methods provided by sec. 122.08, Stats. That section is controlling and independent of secs. 190.10 and 190.11, Stats.

Even if this is not true, secretary of state as ministerial officer should not refuse to file conditional sale contract so executed as such refusal would have to be based upon exercise of judicial judgment involving interpretation of several statutes, which function is beyond duty of ministerial filing officer.

October 27, 1938.

THEODORE DAMMANN,
Secretary of State.

You request our opinion upon two questions as follows:

“1. Where an instrument covers the leasing or conditional sale of locomotives to a railroad which uses same in interstate commerce and which locomotives come into the state of Wisconsin, does section 122.08 control and can the instrument be filed if it is acknowledged and not executed in the manner that a deed to real estate is executed, or is it necessary that it be both acknowledged and executed in the manner that a deed to real estate is executed.

“2. Do sections 190.10 and 190.11 refer to conveyances and leases made by railroads of property which they own or does it also cover the purchase and leasing of property by the railroad.”

A contract for the conditional sale of rolling stock to a railroad need not be acknowledged and attested as a deed of reality in order to render it valid and entitle it to be recorded in the office of the secretary of state. Sec. 122.08, Stats., deals specifically with such contracts and requires only that they be acknowledged *or* attested as a deed of real property. Therefore, unless secs. 190.10 and 190.11, Stats., are applicable, such contracts may be recorded if they have been either acknowledged or attested.

Sec. 190.10, Stats., provides:

"All rolling stock of any railroad corporation used and employed in connection with its railroad and all fuel necessary to the operation of the same are declared to be appurtenant to the real property; * * *"

While the above quoted statute is unambiguous, it clearly does not apply in the present case. The statute makes the rolling stock of any railroad employed in the operation of the road a part of the reality of such road; obviously such stock does not acquire the status of realty prior to its acquisition by the railroad corporation. It follows that a sale of such stock by the manufacturer to a railroad corporation is not a sale of real property and need not be executed as such. Many machines and appliances are purchased with the intent on the part of the purchaser to immediately attach them to real property and make them a part thereof; yet it could scarcely be argued that the sale of such machinery constitutes a sale of real property. Thus sec. 190.10 does not apply to a contract for the sale of rolling stock to a railroad corporation.

Sec. 190.11 provides:

"Every conveyance or lease, deed of trust, mortgage or satisfaction thereof made by any railroad corporation shall be executed and acknowledged in the manner in which conveyances of real estate by corporations are required to be to entitle the same to be recorded, and shall be recorded in the office of the secretary of state, * * *"

It will be noted that sec. 190.11 refers only to conveyances made *by* a railroad corporation. The ordinary meaning of such language excludes conveyances made by another party to a railroad corporation. There is no indication that the legislature employed those words in any other sense. Apparently this statute was designed to eliminate all doubt as to the validity of instruments purporting to dispose of corporate property by setting forth specifically how such instruments shall be executed in order that they may be effective. This is also the evident purpose of the statute governing the execution of instruments conveying the real property of any corporation, sec. 235.19, Stats., to which sec. 190.11 refers. Examination of these two statutes reveals that

the latter was intended to supplement sec. 235.19 and was designed to accomplish the same ends. It follows that sec. 190.11 does not apply to conveyances *to* a railroad corporation but only to conveyances *by* such corporation. Therefore the contract in question, since it is not a conveyance of realty or governed by the provisions of sec. 190.11, need not be acknowledged and attested as a deed of real property.

Sec. 122.08, Stats., provides an alternative form of execution, that is, either by acknowledgment or attestation. If either form is employed, the instrument is valid and may be recorded. It cannot be argued that sec. 122.08 was enacted with a view to sec. 190.10, and therefore the second form of execution mentioned is not a true alternative but was intended as the only form of execution allowed where the sale is that of rolling stock. In the first place, sec. 122.08 is part of the uniform conditional sales act and follows the words of sec. 8 of that act verbatim. It would be somewhat presumptuous to contend that the uniform conditional sales act was drafted to conform to the provisions of sec. 190.10 of the Wisconsin statutes. Secondly, sec. 122.08 requires either acknowledgment or attestation; in no case does it require both.

If the legislature intended, in sec. 122.08, to require a special form for the execution of conveyances of rolling stock in view of sec. 190.11, which makes such stock part of the realty, it would certainly have provided for both acknowledgment and attestation as in a deed of realty. The conclusion is that conditional sales of rolling stock to a railroad are governed by sec. 122.08 exclusively and the contract is valid and entitled to be recorded if it is either acknowledged or attested.

Even if both acknowledgment and attestation were necessary for the validity of the instrument, it is doubtful whether the secretary of state is authorized to refuse to record such instrument on that ground. The function of a recording officer is purely ministerial. It has been held that it is not within the province of such an officer to determine whether in a given instance the parties have executed a valid instrument. Thus in *People v. Fromme*, 54 N. Y. S. 833, the register of deeds was denied the right to refuse to

record an instrument because the parties had failed to affix thereto a United States revenue stamp. In *Weyrauch v. Johnson*, 210 Ia, 1197, 208 N. W. 706, it was held that the county recorder was not authorized to refuse to record an instrument on the ground that it was not an instrument involving realty. In *People v. Fromme, supra*, it was said that to permit a recording officer to determine the validity of an instrument is to constitute him a judicial officer. It appears that such an officer may refuse to record an instrument only if the instrument is by statute not entitled to recording and such fact may be determined without the exercise of judicial discretion. This is necessarily largely a question of degree. Thus, if the statute permits the recording of chattel mortgages and a promissory note is offered as such, it is clear that it might be rejected. On the other hand, if a mortgage is submitted which is designated as chattel mortgage but which might conceivably be held to be a real estate mortgage, it is not the province of the recorder to determine which it is and reject it on the basis of that decision. In the case in question, it is certainly not clear that the contract must be acknowledged and attested. A determination of that question necessitates the construction of several statutes and the determination of the effect of these statutes upon each other. This would certainly seem to call for the exercise of judicial discretion. Consequently the secretary of state should accept such contracts if they conform to the provisions of sec. 122.08, which deals specifically with conditional sales of rolling stock.

NSB

Intoxicating Liquors — Words and Phrases — Premises — Wisconsin cases construing term “premises” as used in former state prohibition statutes apply with equal logic to present statutes relating to issuance of licenses for sale of fermented malt beverages and intoxicating liquors. Test as to whether particular room or space comes within term rests upon accessibility and dominion as disclosed by particular facts in each case.

October 28, 1938.

INSPECTION AND ENFORCEMENT BUREAU.

Attention George M. Keith, *Supervisor*.

You have asked for a definition of the term “premises,” as used in the statutes relating to the issuance of licenses for the sale of fermented malt beverages and intoxicating liquors.

No definition is provided by these statutes, and in the absence thereof the term, as used in the statutes, is to be construed and understood according to the general and approved usage of the language. Sec. 370.01, subsec. (1), Stats.

The word “premises” has been defined as including lands and tenements. Century Dictionary. According to Webster’s New International Dictionary it means in general a piece of land or real estate.

The term, as used in connection with the sale of intoxicating liquor, has heretofore received consideration by the Wisconsin supreme court in connection with our former prohibition law which was created by ch. 441, Laws 1921. It should be noted that this statute, like the present statute, made no attempt to define the term.

In the case of *Vaivada v. State*, 182 Wis. 309, a barroom in which the sale of nonintoxicating liquors had been licensed adjoined a kitchen which in turn adjoined a bedroom, the bedroom being used by the defendant who was the proprietor of the barroom, and, the kitchen being leased to another, it was held that if the control and dominion of the defendant over the kitchen was such that he could keep intoxicating liquors therein and dispense the same to his cus-

tomers, the kitchen constituted part of the "premises" within the meaning of the statute which prohibited the possession of intoxicating liquors on premises licensed for the sale of nonintoxicating liquors. It was further held that the question of whether or not the defendant had such control and dominion was one of fact.

Again, in *Bombinski v. State*, 183 Wis. 351, the court said at p. 354:

"* * * Under the ruling of this court the premises were subject to search without a warrant, and the search must be held to have been legal, and the evidence obtained by the search was properly admitted on the trial. This in no wise violates the sanctity of the home, because it is a condition upon which a party obtains his license, and he is presumed to have consented to search of his residence if his residence is so connected with the drink parlor as to make the connected rooms easy of access from one to the other. *In permitting his wife to occupy the lower rooms as a licensed drink parlor, defendant is presumed to have known the law that the whole premises were subject to search, and to have consented thereto.*" (Italics ours.)

In the case of *Wyss v. State*, 192 Wis. 619, it was held that an automobile belonging to the defendant and located on his premises about twenty feet from the rear of a building used as a soft-drink parlor under license was a part of the licensed premises, which an officer could search without a warrant.

Thus, the test appears to be one of accessibility and dominion, depending upon the particular facts in each case. For example, in the case of *State v. Becker*, 201 Wis. 230, 231, it was held that the term "licensed premises" did not include the living quarters of another person in the absence of a showing that the entire building was used by all occupants in common.

There appears to be no good reason why the rule of the foregoing cases should not be applied in construing the term "premises" as used in our present liquor statutes.

WHR

Public Officers — City Supervisor — Removal of supervisor from ward from which he was elected vacates his office but, unless vacancy is filled, he may act on county board as *de facto* supervisor for such ward.

November 7, 1938.

HAROLD M. DAKIN,

District Attorney,

Jefferson, Wisconsin.

At the city spring election one A was duly elected as supervisor from one of the wards. Since his election he has removed from the ward from which he was elected, to another ward within the same city. You inquire whether A may act at the November meeting of the town board as the representative of the ward from which he was elected. It does not appear that any attempt has been made to appoint anyone as supervisor to succeed A.

Sec. 17.03, subsec. (4), Stats., provides in part:

“Any public office, including offices of cities, * * * shall become vacant upon the happening of either of the following events:

“* * *
“(4) * * * if the office is local, his [incumbent's] ceasing to be an inhabitant of the * * * ward * * * for which he was elected * * *.”

A county board supervisor elected from a ward in a city is a city officer. Sec. 62.09, Wis. Stats. XIX Op. Atty. Gen. 268.

Under sec. 62.09, subsec. (5), par. (b), the term of a supervisor is one year. The statutes do not provide that he serve until his successor is elected or appointed and qualified. The office of supervisor held by A could be, and was, vacated by his action in removing from the ward. V Op. Atty. Gen. 607.

Although the office became vacant, no effort has been made to fill the vacancy. Until the vacancy is properly filled, there is no *de jure* supervisor from the ward from which A was elected. If A continues to perform the duties of the of-

fice of supervisor, he is a *de facto* supervisor. *State ex rel. Kleinstauber v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

The acts of a *de facto* officer while in office are valid as to the public and third persons. *The Chicago & Northwestern Railway Company v. Langlade County et al.*, 56 Wis. 614, 14 N. W. 844; *Cole v. President and Trustees, Village of Black River Falls*, 57 Wis. 110, 14 N. W. 906.

In XXVI Op. Atty. Gen. 432 it was held that where a village assessor ceases to be an inhabitant of the village, under sec. 17.03, subsec. (4), Stats., a vacancy is thereby created in his office, but his assessments as a *de facto* officer are nevertheless valid.

Lastly, it may be pointed out that the law abhors a vacancy in office. See *State ex rel. Schroeder v. Feuerstein*, 159 Wis. 356, 150 N. W. 486.

It is our opinion that A may, at the November meeting of the county board, represent as a supervisor the ward from which he was elected unless prior to such meeting a *de jure* supervisor for that office exists.

JRW

Fish and Game — Hunting — Municipal Corporations — Towns — Town board has no power to prohibit or regulate hunting, this power being vested in conservation commission under sec. 29.174, Stats. XVIII Op. Atty. Gen. 511, written before enactment of sec. 29.174, Stats., is no longer applicable to extent that it is inconsistent herewith.

November 9, 1938.

CONSERVATION DEPARTMENT.

You have inquired whether a town has power to prohibit or regulate hunting or fishing within its borders.

Title to fish and game is in the state as trustee for the people. The state can prohibit or regulate the taking of game and fish in any reasonable way it sees fit. *Krenz v.*

Nichols, 197 Wis. 394. It has delegated this power within certain limits to the conservation department in sec. 29.174, Stats., as follows:

“(1) There shall be established and maintained, as hereinafter provided, such open and close seasons for the several species of fish and game, and such bag limits, size limits, rest days and conditions governing the taking of fish and game as will conserve the fish and game supply and insure to the citizens of this state continued opportunities for good fishing, hunting and trapping.

“(2) It shall be the duty of the conservation commission and it shall have power and authority to establish open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game, in accordance with the public policy declared in subsection (1). Such authority may be exercised either with reference to the state as a whole, or for any specified county or part of a county, or for any lake or stream or part thereof.”

The rule that municipal corporations have only such powers as are delegated to them by the legislature applies with especial force to towns, which are merely *quasi* corporations. *First Wis. Nat. Bank v. Catawba*, 183 Wis. 220.

There being no statutory grant of power to towns with respect to regulating hunting and fishing as such, it must be concluded that they have none, particularly in view of the fact that such regulatory power has been expressly delegated to the conservation commission under sec. 29.174, Stats.

In XVIII Op. Atty. Gen. 511, it was stated that under sec. 60.29, subsec. (18), Stats., a town board in a town of less than three hundred inhabitants and containing one or more unincorporated villages, could, when authorized at a town meeting, prohibit the use of firearms in the town or any sale thereof, thus practically prohibiting hunting.

Sec. 60.29, subsec. (18), Stats., reads:

“To establish a fire department in any town which contains a population of not less than three hundred and which has therein one or more unincorporated villages, when authorized by resolution adopted by ballot at any town meeting; to appoint the officers and members thereof, and prescribe and regulate their duties; to provide protection from

fire by the purchase, use and maintenance of fire engines and other necessary apparatus for the extinguishment of fires, and by the erection or construction of cisterns and reservoirs; to erect engine houses; to compel the inhabitants of the town to aid in the extinguishment of fires, and to pull down and raze such buildings in the vicinity of fire as shall be directed by them or any two of them who may be at the fire, for the purpose of preventing its communication to other buildings; to establish fire limits or the limits within which wooden or other combustible buildings shall not be erected; to require the owners or occupants of buildings to provide and keep suitable ladders and fire buckets which shall be appurtenances to the realty and exempt from seizure and forced sale; and after reasonable notice to such owner or occupant and refusal or neglect by him to procure and deliver the same to him, and in default of payment therefor to levy the cost thereof as a special tax upon such real estate, to be assessed and collected as other taxes in such town; to regulate the storage of gunpowder and other dangerous materials; to require the construction of safe places for the deposit of ashes; to regulate the manner of putting up stove pipes and the construction and cleaning of chimneys; to prevent bonfires and the use of fireworks and *firearms* in the town or any part thereof; to authorize fire wardens, at all reasonable times, to enter and examine all dwelling houses, lots, yards, inclosures and buildings of every description in order to discover whether any of them are in a dangerous condition and to cause such as may be dangerous to be put in safe condition."

It is to be noted that the foregoing statute is general in its scope and that it is directed to fire prevention and suppression. By no stretch of the imagination can it be construed as a grant of power to regulate hunting.

Obviously there would be a conflict between a town ordinance adopted under sec. 60.29, subsec. (18), Stats., prohibiting the use of firearms and a conservation commission order adopted pursuant to sec. 29.174, setting up an open hunting season in such town.

It thus becomes necessary to resort to rules of statutory construction in order to reconcile such conflict.

It is well settled that in the construction of statutes specific provisions relating to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. *Kollock v. Dodge and others*, 105 Wis. 187, 195.

Applying this rule, it seems clear that the special provisions of the statutes pertaining to hunting would prevail over the general powers of town boards outlined in an omnibus fire prevention and suppression statute such as sec. 60.29, subsec. (18), Stats., so far as they are in conflict.

It should be noted that the attorney general's opinion above mentioned was rendered in September 21, 1929, prior to the enactment of sec. 29.174, which was created by ch. 152, Laws 1933. Consequently, there was no mention of the conflict between that section and sec. 60.29, subsec. (18), which we have discussed here. However, such opinion is no longer applicable in view of the enactment of sec. 29.174 and it should be disregarded to the extent that it is inconsistent herewith.

WHR

Indigent, Insane, etc. — Poor Relief — Hospitalization — Public Health — Wisconsin General Hospital — Under provisions of sec. 142.01, Stats., one who does not have legal settlement within county as provided for by sec. 49.02, Stats., although he may have resided in county year or more, may not petition county court for hospitalization.

November 9, 1938.

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

You state that Mr. H has lived in Rock county for one year and six months without receiving any public aid whatsoever. During this period of time, he lived in Clinton township for six successive months, in the city of Beloit for six successive months and in the city of Janesville for the following six months.

You inquire whether Mr. H has acquired a legal settlement in Rock county for the purpose of applying to the

county judge thereof for hospital care at the Wisconsin general hospital under the provisions of ch. 142 of the Wisconsin statutes.

Sec. 142.01, Stats., provides in part as follows:

“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, * * *.”

With the exception of the legal settlement referred to in sec. 48.33, Stats. (aid to dependent children), we know of no legal settlement in the state of Wisconsin other than the legal settlement provided for by sec. 49.02, Stats. The legal settlement provided for by that section must be the legal settlement referred to in sec. 142.01, Stats. This conclusion is further supported by the provisions of sec. 142.03, Stats., which in part, provides as follows:

“* * * The county judge shall make investigation and the supervisor for the town, village or ward of the legal settlement of the person shall apply to the court, * * *.”

This office in XXIV Op. Atty. Gen. 416, 417, held:

“There is no such thing as a legal settlement in a county even when a county is on the county system of relief. A person gains a legal settlement by residing within ‘any [one] town, village or city in this state one whole year’ without receiving poor relief. Sec. 49.02 (4). If he does not acquire a legal settlement in a town, city, or village he has no legal settlement * * *.”

We conclude that the legal settlement referred to in ch. 142, Stats., is the legal settlement provided for by sec. 49.02.

Under the facts as stated by you, H has not continuously resided in any one municipality within Rock county for a period of one whole year and has therefore not gained a legal settlement in any municipality within Rock county.

Since H has not gained a legal settlement in any municipality in Rock county and since sec. 142.01, Stats., specifically provides that he must have a legal settlement in the county to enable him to apply to the county court for the relief requested, you are advised that your county court should not grant the order requested in the petition.
NSB

Counties — Public Lands — Parks — Under provisions of secs. 27.015 to 27.05, Stats., counties may acquire and maintain park properties, and such powers are broad enough to authorize construction, operation and maintenance of public fee golf courses on county-owned property.

November 10, 1938.

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

You inquire whether a county board may appropriate funds for the construction, operation and maintenance of a public fee golf course on park property now owned by the county.

Under the provisions of secs. 27.015 to 27.05, Stats., the county may acquire parks and playgrounds. Sec. 27.015 provides for the organization of a "rural planning committee," whose duty it is to acquire lands to be devoted to recreational activities. In counties having a population of 150,000 or over, the functions of the "rural planning committee" are transferred to a "county park commission." Sec. 27.02. In counties having less than 150,000 population the county board may, by resolution, provide for a county park commission.

Sec. 27.05, Stats., enumerates the powers of this commission and reads in part as follows:

"The said commission shall have charge and supervision of all county parks, and all lands heretofore or hereafter acquired by the county for park or reservation purposes; and shall have power subject to the general supervision of the county board and to such regulations as it may prescribe:

"(1) To lay out, improve, maintain and govern all such parks and open spaces; to lay out, grade, construct, improve and maintain roads, parkways * * *

"* * *

"(3) To acquire, in the name of the county, by purchase, land contract, lease, condemnation, or otherwise, with the approval and consent of the county board, such tracts of land or public ways as it may deem suitable for park purposes; but no land so acquired shall be disposed of by the county without the consent of said commission, and all moneys received for any such lands, or any materials, so disposed of, shall be paid into the county park fund hereinafter established."

In the absence of a county park commission acting through a rural planning committee, sec. 27.015 (10), Stats., makes the following provision relating to the county board:

"Any county in which there does not exist a county park commission acting through its rural planning committee may acquire by gift, grant, devise, donation, or purchase, condemnation or otherwise, with the consent of the county board, a sufficient tract or tracts of land for the reservation for public use of river fronts, lake shores, picnic groves, outlook points from hilltops, places of special historic interest, memorial grounds, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same, and to develop and maintain the same for public use."

In *Booth v. City of Minneapolis*, 163 Minn. 223, 203 N. W. 625, the city, through its park board, entered into a contract to purchase land for a public golf course. The city charter gave to the city the authority to maintain parks. The court said at page 225:

"* * * In fact a municipality has a peculiar interest in the recreation or the pleasure of the public. 19 R. C. L. 721. Public parks in all the metropolitan cities contain golf courses. The public courses in parks are within financial

reach of all. The golf course being a place of recreation must be included in the terms 'parks and parkways' as used in the city charter * * *. A park is a pleasure ground for the recreation of the public to promote its health and enjoyment. A public golf course is for the same purpose. Parks are used for public recreation by indulgence in tennis, pitching horseshoes, croquet, baseball, kitten ball, golf, walking, horseback riding, picnicing, skating, bathing and general out-door exercise, * * *. If ground be acquired for these purposes, it may be acquired for a part of them. It follows that the city has authority, under its charter, * * * to acquire and maintain a public golf course."

The same reasoning is contained in *Sutcliffe Co. et al. v. City of Louisville*, 205 Ky. 718, 266 S. W. 375, and in *Capen v. City of Portland*, 112 Ore. 14, 228 P. 105.

An opinion to the contrary is found in *City of Bradentown v. State*, 88 Fla. 381, 102 So. 556. However, this case may readily be distinguished on the ground that the proposed golf course was to be leased by the city to a private corporation. It was in no sense a *public* recreational enterprise.

In view of the foregoing authorities, it is our opinion that the county may appropriate funds for the construction, operation and maintenance of a public fee golf course on park property now owned by the county.

WHR

Counties — Public Officers — County Surveyor — No registered engineer of state may record private survey in county surveyor's record books unless he is also county surveyor or deputy duly appointed.

November 12, 1938.

SIDNEY J. HANSON,

District Attorney,

Richland Center, Wisconsin.

You inquire: (1) Has a registered engineer in the state of Wisconsin who is not the county surveyor the right to make the survey of private lands and then record such survey in the county surveyor's record books in the register of deeds' office without authorization from the county surveyor? (2) Would the authorization from the county surveyor change his rights, if any, in this respect?

Secs. 59.60, 59.63, 59.635, Stats., vest in the county surveyor certain duties which he is required to perform. The failure to perform such duties is an offense for which he may be punished under Sec. 59.66. I find no provision in the statutes which authorizes any other engineer to register in the county surveyor's record books the result of his finding. Your first question must, therefore, be answered in the negative.

Sec. 59.635, subsec. (3), provides that in counties where there is no county surveyor or where the county surveyor, because of illness or other infirmities, does not commence to work within the required period of time, a petition may be made to the county judge to appoint a surveyor to act in the capacity of county surveyor. It is clear that the legislature intended that the county surveyor must act in regard to the above matter and there is no authority given in the statutes for other persons, either private or official, to record surveys in the county surveyor's record book. You will note that under sec. 59.59 the surveyor may appoint and remove deputies at will on filing a certificate thereof with the county clerk. Your second question must be answered to the effect that the authorization from the county surveyor would not

change the rights unless the person authorized is duly appointed deputy under sec. 59.59. See XXIV Op. Atty. Gen. 500.

JEM

Insurance — Life and accident insurance company, incorporated as assessment association in Nebraska, which satisfies solvency and expense requirements imposed by this state upon domestic mutual companies, may be licensed to transact business in Wisconsin.

Failure to issue such license places director of insurance of Nebraska in position to invoke retaliatory insurance law authorizing him to cancel licenses of Wisconsin insurance companies doing business in that state.

November 16, 1938.

H. J. MORTENSEN,

Commissioner of Insurance.

The Mutual Benefit Health and Accident Association, of Omaha, Nebraska, has made application to you for license to operate in Wisconsin as a health and accident insurance company. You inquire:

“1. Is the association entitled to a license to transact business in Wisconsin?

“2. If it is denied this authority, will the Nebraska retaliatory insurance law apply to Wisconsin companies doing business in that state?”

This insurance company is not incorporated under any Nebraska legal reserve law similar to our mutual insurance laws, but is incorporated under the assessment association laws of that state. The company actually maintains a one hundred per cent unearned premium reserve, but is not a stock company. The charter of the corporation, in addition to the customary provisions, contains article IV, reading as follows:

“The business of the corporation shall be conducted upon the mutual assessment plan. The Board of Directors may levy such assessments in such amounts and at such times as may be provided in the certificate of membership.”

Article VII of the by-laws provides that the board of directors shall levy such assessments as are agreed upon in the membership certificates and that assessments shall be of two types—regular and special. Section 3 of article VII defines regular assessments as follows:

“Regular assessments shall be the estimated amount of the members’ pro rata share of losses and expenses for the terms for which they are levied. All regular assessments shall be for the amounts, and payable at the time fixed in the certificate of membership and shall be payable in advance of the period covered thereby.”

It will thus be seen that the company does not depend, for payment of a loss, upon assessments levied after the loss has occurred.

Article VII further provides for special assessments in the event that the regular assessments shall be insufficient to provide the necessary funds for claims and expenses. The policy which the company issues provides for a fixed premium or assessment payable in advance and is issued subject to a special assessment thereon—“should the premium provided for herein be insufficient to meet the requirements of the Association.”

Sec. 201.32, subses. (1) and (3), Wisconsin statutes, provide as follows:

“(1) No foreign insurance company shall directly or indirectly transact any insurance business in this state except upon compliance with the requirements of this section.”

“(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies.”

It does not appear but that the association has satisfied the requirements as to solvency and limitation as to expenses exacted of a like domestic mutual company. If the

association is a "mutual company", within the meaning of sec. 201.32, subsec. (3), Wis. Stats., apparently it is entitled to a license to do business in this state.

The Nebraska statutes limit the meaning of the term "mutual company" to companies which issue nonassessable policies and defines an "assessment association" as "one that meets its losses and expenses from assessments levied upon its members." The Nebraska law further permits an assessment association to levy its assessments in advance.

Our insurance laws contain no definition of a "mutual company" but our supreme court has stated, in *Keenan v. Rundle*, 81 Wis. 212, 222, 51 N. W. 426:

"* * * This *mutuality* of liability to assessment, and obligation to pay *pro rata* for losses and expenses, are the essential and distinguishing characteristics of a *mutual* insurance company."

See also 1 Couch, Cyclopedia of Insurance Law, 63.

The Wisconsin statutes, however, do not differentiate between mutual companies, which issue assessable policies, and those which issue nonassessable policies.

The character of a corporation when it seeks a license to do business in Wisconsin is to be determined by Wisconsin and not by Nebraska law. *State ex rel. National Life Assn. v. Matthews*, 58 O. St. 1, 49 N. E. 1034; *Federal Union Surety Co. v. Flemister*, 95 Ark. 389, 130 S. W. 574.

In *State ex rel. National Life Assn. v. Matthews, supra*, the court stated, p. 15:

"An examination of sections 3604 and 3630 Revised Statutes, before referred to show that, for the purpose of granting certificates of authority to transact the business of life insurance in this state, the general assembly has divided life insurance companies created under the laws of other states into such as insure lives on the assessment plan, and such as do not. And while, as we have seen, *supra*, the powers of a corporation of this kind, and the scheme of insurance it may pursue, must be ascertained by an inspection of its charter, nevertheless, where it seeks a license to transact business in this state, the question whether that scheme falls within one or the other of those two classes must be determined according to our own laws."

It is our opinion that the Mutual Benefit Health and Accident Association, of Omaha, Nebraska, although classified in Nebraska as an assessment association, in contrast to a mutual company, is a mutual company within the meaning of sec. 201.32, Wisconsin statutes, and inasmuch as it has satisfied Wisconsin requirements as to solvency and limitations on expenses exacted of like domestic mutual companies, may be issued a license to transact business in this state.

The so-called retaliatory insurance law of Nebraska provides as follows:

“* * * Whenever it shall appear to the Director of Insurance for the Department of Insurance that permission to transact business within any state of the United States or within any foreign country is refused to a company organized under the laws of this state after a certificate of the solvency and good management of such company has been issued to it by the said Director of Insurance for the Department of Insurance and after such company has complied with all laws of such state or foreign country, then and in every such case, the Director of Insurance for the Department of Insurance may forthwith cancel the authority of every company organized under the laws of such state or foreign government and licensed to do business in this state, and may refuse a certificate of authority to every such company thereafter applying to him for authority to do business in this state, until his certificate shall have been duly recognized by the government of such state or country.”
Sec. 44-217, compiled statutes of Nebraska, 1929, as repealed and recreated by ch. 100, Laws 1937.

It is our understanding that the Mutual Benefit Health and Accident Association of Omaha, Nebraska, has had issued to you a satisfactory certificate of solvency and good management. Inasmuch as this association may be issued a license to transact business in the state of Wisconsin, a refusal of such license would place the director of insurance for the department of insurance of the state of Nebraska in a position to exercise his discretion to cancel the authority of every Wisconsin insurance company to do business in Nebraska.

JRW

Insurance — Fraternal Benefit Societies — Labor — Sec. 208.01, subsec. (1), Stats., applies to labor organization which provides for death benefit plan included in monthly dues at no extra cost. Mere fact that there is no enforceable obligation on part of organization to make any payments of death benefits is immaterial.

November 16, 1938.

H. J. MORTENSEN,

Commissioner of Insurance.

You have referred to us for examination a death benefit plan proposed by the Milwaukee joint board of the Amalgamated Clothing Workers of America, and you inquire whether such plan may be operated without complying with the laws applicable to either life insurance companies or mutual benefit societies.

The joint board is the governing body of all of the local unions of the Amalgamated Clothing Workers in Milwaukee. About thirty-four hundred persons are under its jurisdiction. To participate in the plan, a person must be a member of one of the local unions and pay two dollars per month dues. If the local requires less than that amount, its members cannot participate.

Two hundred dollars is payable within thirty days after receipt of the official notice of death of any member, provided he has been a member for a year or more and is not delinquent in his dues. The benefit is payable to the wife, husband, children, grandchildren, parents, grandparents, brothers or sisters of the deceased member, "which said board of directors shall consider most deserving to receive said gift." The payments are to be made out of the general treasury of the board, and it appears that members of the unions pay their dues to the board, which has control of all funds. If, in view of its financial condition, the board deems it advisable to stop benefit payments, it may do so on thirty days' notice to all locals.

Paragraphs 2 and 3 of art. VIII of the plan read:

"At no time and in no manner shall the dues of the class members whose families may be entitled to the gift benefit payments above referred to be increased or apportioned for

payment of such gift, and further, no member, as a matter of right or law, nor the families entitled to such death benefit gift, have any right, either at law or in equity, to demand payment of such gift as a matter of law.

"The Milwaukee Joint Board of the A. C. W. A. hereby declares a moral obligation to observe the terms and provisions of the gift payments above provided, but does not, by the creation of this death benefit gift, intend to become obliged or become obligated to make such payments to anybody in any particular case; and no member nor family thereof has any vested right or interest to receive payment thereof, the creation and maintenance of the gift payment being at all times a unilateral and voluntary act on the part of the Milwaukee Joint Board of the A. C. W. A."

On May 2, 1938,* this office rendered an opinion to your department in which it was held that a labor union composed of more than five hundred members not restricted to persons engaged in hazardous occupations and maintaining a sick and death benefit plan, is a mutual benefit society within the scope of ch. 208, Stats., and subject to the regulations prescribed by that chapter.

With your present request you submit a copy of a communication from counsel for the board, in which he explains that the plan now under consideration is "different" and, therefore, not subject to ch. 208, Stats.

In view of the grounds on which this opinion is based, we assume the existence of certain necessary facts, viz., that the Amalgamated Clothing Workers is organized without capital stock, for the mutual benefit of its members, and operates on the lodge system with ritualistic form of work and with representative form of government, as provided in sec. 208.01, Stats.

The basis for counsel's conclusion are:

1. The two dollar monthly payments are regarded as dues rather than as assessments or premiums, the members having paid the same amount before as well as after the adoption of the benefit plan. Therefore there is no consideration for the benefit.

2. The plan is not to be regarded as insurance but as a system of gifts, because there is no enforceable obligation on the part of the board to make any payment.

*Page 260 of this volume.

With respect to the first of these grounds, you call to our attention the recent case of *Hunt, Insurance Comm. of Pennsylvania v. Pub. Mut. Benefit Foundation*, (Feb. 9, 1938) 94 Fed. (2d) 749. The plan there involved death, hospital and maternity benefits for each person buying goods to a certain value from selected stores. The foundation sought to enjoin the insurance commissioner from interfering with this practice, on the ground that the scheme did not constitute an insurance business, because the participants paid only the normal retail price for their merchandise and that there was, therefore, no consideration. The court looked through the scheme and found that the promise of benefits was intended to be an inducement to buy at the specified places of business and that a purchase in response thereto was therefore consideration. This is in line with the common view of consideration as any benefit to the promisor or detriment to the promisee. *Eycleshimer v. Van Antwerp*, 13 Wis. 546; *Dohr v. Wolfgang*, 151 Wis. 95. The Pennsylvania case is directly in point and we have no hesitation in concluding that the act of a union member in paying his dues in response to a promise of death benefits is consideration for the promise. That the death benefit plan is intended as an inducement to pay dues is clearly evident from the communication from counsel for the board.

We consider counsel's second contention as equally without merit. It is true that a provision for purely voluntary benefits is valid, if not expressly or impliedly prohibited by regulatory legislation. *Huff v. Grand Lodge, B. R. T.*, 97 Neb. 848, 151 N. W. 979; *Pool v. Grand Lodge, B. R. T.*, 143 Cal. 650, 77 Pac. 661; *Knowlton v. Bay State Ben. Ass'n.*, 171 Mass. 455, 50 N. E. 929. However, we fail to find any suggestion in these cases or in others that such a provision renders the organization involved any less a mutual benefit society. So far as we know there is no case either affirming or denying this proposition.

Under our statutes it is not essential that the provision for death benefits take the form of an enforceable promise. Sec. 208.01, subsec. (1), Stats., reads in part:

"Any corporation, society, order or association, without capital stock, organized and carried on solely for the mutual

benefit of its members or their beneficiaries and having a lodge system with ritualistic form of work and representative form of government, *and which makes provision for the payment of death or disability benefits* or for both is hereby declared to be a 'Mutual Benefit Society,' * * *."

The term "death benefits," being unqualified, would seem to cover any provision for payment to a beneficiary upon death of a member. We therefore conclude that the plan you have submitted is within the scope of the former opinion and must be conducted subject to the provisions of ch. 208, Stats.

WHR

Bonds — Courts — Employees' Cash Bonds — Sec. 331.41, Stats., is not retroactive in effect and does not apply to moneys deposited by employees prior to its effective date.

November 17, 1938.

HERBERT STEFFES,

District Attorney,

Milwaukee, Wisconsin.

You ask whether sec. 331.41, Stats., applies to money deposited by employees prior to its enactment.

Sec. 331.41, Stats., enacted by ch. 117, Laws 1937 and effective upon its publication May 7, 1937, provides:

"(1) Where any person, firm or corporation requests any employe to furnish a cash bond, the cash constituting such bond shall not be mingled with the moneys or assets of such person, firm or corporation demanding the same, but shall be deposited by such person, firm or corporation in any bank, trust company or federal savings and loan association whose deposits are insured by a federal agency to the extent of five thousand dollars, as a separate trust fund, and it shall be unlawful for any person, firm or corporation to mingle such cash received as a bond with the moneys or assets

of any such person, firm or corporation, or to use the same. No employer shall deposit more than five thousand dollars with any one depository. The bank book, certificate of deposit or other evidence thereof shall be in the name of the employer in trust for the named employe, and shall not be withdrawn except after an accounting had between the employer and employe, said accounting to be had within ten days from the time relationship is discontinued or the bond is sought to be appropriated by the employer. All interest or dividends earned by such sum deposited shall accrue to and belong to the employe and shall be turned over to said employe as soon as paid out by the depository. Such deposit shall at no time and in no event be subject to withdrawal except upon the signature of both the employer and employe or upon a judgment or order of a court of record.

“(2) * * *

“(3) Any person who shall violate *any* provision of this section shall be guilty of a misdemeanor * * *.”

An intention to have a statute apply retroactively is not to be taken from the mere fact of usage of general language which might include past transactions as well as those of the future. *Seamans v. Carter*, 15 Wis. 548.

The general rule of statutory construction is that, except as to some merely remedial statutes, laws are not to be given retroactive effect unless the intention of the legislature that they have such effect clearly appears. *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.*, (1912) 151 Wis. 555, 139 N. W. 393; *Town of Bell v. Bayfield County*, (1931) 206 Wis. 297, 239 N. W. 503.

Sec. 331.41, Stats., is not remedial in the procedural sense so as to be within the exception to the general rule. *Estate of Pelishek*, (1934) 216 Wis. 176, 256 N. W. 700. Rather it is substantive in nature as prescribing new duties and prohibitions. It is a regulatory measure, which, by depending for its enforcement upon penalties provided for noncompliance, is penal in character and subject to strict construction.

There is nothing that we find in the statute which evidences any intention that it should be given retroactive effect. The manifest purpose of the law is to prevent the commingling of employee bond deposits with the assets of the employers. The existing abuses at which the statute was aimed subjected the employe to the hazards of business and

other difficulties in getting back his deposit. The deposit requirements are designed to prevent commingling and are not separable from the prohibitory provisions, but incident thereto as a part of the whole protective scheme.

The language used is that employee bond funds shall not be mingled with moneys or assets of an employer *but shall be deposited* as therein set forth. It does not say that an employer who received employee bond funds prior to the passage of the act and commingled them with his own assets shall segregate the same and make a deposit thereof. Rather, what is said is that instead of commingling the funds with those of the employer a special deposit shall be made in lieu thereof. Had the legislature intended to require a segregation and deposit of previously received funds it could have very easily so provided. The language that was used clearly can apply only to future transactions. Thus if the evil to be prevented is the commingling of the funds there not only is an absence of a clear indication that the statute should be retroactive in operation but it appears that the character of its requirements and the purpose to be accomplished are such that it can operate only in the future.

It is therefore our opinion that sec. 331.41, Stats., is not retroactive in operation and accordingly has no application to moneys deposited by employees prior to the effective date thereof.

HHP

Taxation — Tax Sales — In so far as XVIII Op. Atty. Gen. 590 and XXIV Op. Atty. Gen. 399 suggest or hold that loss sustained by county in proceeding under sec. 75.61, subsec. (2), Stats., may be charged back to town, city or village and collected in next tax roll, they are in error, and are overruled.

In so far as said opinions suggest or hold that county should charge itself only with amount actually collected under sec. 75.61, subsec. (2), Stats., in accounting to town, city or village for delinquent taxes collected, said opinions should be, and are, adhered to.

November 18, 1938.

RICHARD W. ORTON,

District Attorney,

Lancaster, Wisconsin.

In XVIII Op. Atty. Gen. 590 (1929) and XXIV Op. Atty. Gen. 399 (1935) it was ruled that the loss occasioned by a finding by a town or village board or city council of value on delinquent real estate to be less than assessed value, under chapter 148, Laws 1929, (sec. 75.61 (2), Stats.), should be charged back by the county to the respective town, village or city. You state that it has been forcibly presented to you that, since the statute in question does not specifically authorize the county to charge back such loss, the county has no right to do so, and you request that the problem be reconsidered.

The term "charged back", as used in the opinions, seems to be used in the sense that the difference between the delinquent tax and the tax computed upon the reassessed valuation, under sec. 75.61 (2), Stats., represents a loss to the county which the town, city or village owes to the county and which the county may pass on to such town, city or village in the next tax roll, and the municipal accounting division now attached to the secretary of state's office, but previously attached to the tax commission, has so interpreted the opinions. We will accordingly so use the term in this opinion.

Sec. 75.61, subsec. (2), Stats., provides:

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

It has been held that legislative acquiescence in the attorney general's construction of a statute, while not controlling, is persuasive upon the question of legislative intent. *Union Free High School District v. Union Free High School District*, 216 Wis. 102, 106, but the prior rulings do not involve a question of legislative intent. Under no stretch of the imagination can it be said that sec. 75.61 (2), either expressly or by implication, authorizes any such charge back. The statute being silent with respect thereto, the real question that was decided in the prior opinions was that the county possessed inherent power to make such charge back. Certainly, there is no statute that in any wise confers such power. The foregoing being true, the prior opinions do not involve any problem of statutory interpretation, or of legislative intent. Legislative acquiescence in an exercise of municipal power can never constitute a grant of power, if such power has, in fact, never been granted. Nor can erroneous rulings of this office constitute a grant of power where such power has, in fact, never been granted.

The real question is: There being no express grant of power to make such charge back, does a county have such power—inherent power?

It is fundamental that counties are creations of the legislature; that their powers are statutory; that they have no common-law authority and no implied powers except such as are fairly incident and reasonably necessary to the exercise of express powers. *Town of Crandon v. Forest County*, 91 Wis. 239.

There is no indication in the statutory scheme of tax collection that the matter of charge back is one of county discretion, that the county may exercise if and when it pleases and in accordance with county ideas as to what is just and equitable. The statutory scheme is quite to the contrary. See, for instance, sections 74.64, 74.66, 74.72, 74.73 and 75.25—all of which deal with the special authority of charge backs, credits on municipal accounting or reassessment in the event of refunded money. The statutory scheme would seem to be quite comprehensive. It would seem like a rather dangerous presumption to assume that all provisions with respect to charge back are mere surplusage, yet such must be the presumption if a county has such power without statutory authority.

Nor do the cases lend any support to the proposition that the matter of charge back is other than statutory. They are quite to the contrary.

In *Bear Bluff v. Knutson*, 189 Wis. 353, 358, 207 N. W. 700, with reference to when a county owes a town, under sec. 74.19, Stats., and, in commenting upon the language of the court in *Marinette v. Oconto County*, 47 Wis. 216, 225, 2 N. W. 314, as follows:

“If the town treasurers do not collect money and town orders enough to pay the state and town taxes, the town will have a claim for the balance against the county when the same is collected under the provisions of sec. 1114 [now sec. 74.19]; and if they cannot be collected by the county, there would seem to be no injustice in saying that the loss should fall equally upon the town and county, instead of upon the county alone.”

the court says, pp. 358-359:

“While there may be no injustice in saying so, we find no authority whatever in the law to support the proposition that as between the town and the county, after the delinquent return has been made by the town treasurer, that any sum will thereafter become due to the town treasurer until a sufficient amount has been collected thereon to satisfy the claims of the county, * * *”

And, in the *Town of Bell v. Bayfield County*, 206 Wis. 297, 304, with reference to the last citation, the court says:

“The converse of this upon like reason is true—that no sum is due from the town to the county because no provision that renders any sum due exists in the statutes. If no sum is due, no sum can be subject of offset or credit.”

Pursuing the same line of reasoning, it would seem to follow that in the absence of a statute making some amount due from the town to the county as a result of action taken under sec. 75.61 (2) no amount can be claimed to be due or collected by the charge back method.

It is stated in XVIII Op. Atty. Gen. 590 that there is statutory authority for charging back to towns, in case an illegal tax is compromised by the district attorney, the county treasurer and the county clerk (sec. 75.60, Stats.). We find no such statutory authority.

There is an indication in *Spooner v. Washburn County*, 124 Wis. 24, 34, that in an accounting between county and town, where a town has returned delinquent taxes in excess of the county levy, the county would be obliged to charge itself only with the amount actually received, where taxes have been compromised pursuant to sec. 75.60, Stats. This is the equivalent of saying that, in arriving at the amount of taxes “collected” under sec. 74.19, Stats., the county need charge itself only with the amount actually received pursuant to an authorized compromise. This is an entirely different matter than saying that the town *owes* the county as a result of such compromise.

By the same logic as that in *Spooner v. Washburn County*, *supra*, where the county collects a tax less than that returned delinquent as a result of a proceeding under sec. 75.61 (2), Stats., in an accounting between county and town, the county would charge itself only with the tax actually collected, that being an authorized collection.

The foregoing does not mean that the county is going to take the loss in all cases. It will take the loss only in those cases where the excess delinquent return of the town treasurer over a county levy for the year in question is not sufficient to absorb such loss, and in those cases where there is no excess delinquent tax return over that of the county levy. This may be illustrated by two examples, as follows:

Example 1: County A levies a tax against town B in the sum of \$25,000.00. In making return to the county treasurer, under sec. 74.19, Stats., the town treasurer turns in and receives credit for \$35,000.00 of delinquent taxes. Under our system of tax collection, none of these delinquent taxes collected by the county treasurer are owing to the town until the county treasurer has collected in full the county levy. In an accounting between county and town, with respect to any excess delinquent tax return, the county does not owe the town anything until it has collected all county taxes levied for the year, and the county need charge itself only with sums actually collected pursuant to an authorized compromise. *Spooner v. Washburn County, supra.*

Thus, under the circumstances outlined in example 1, the county would charge itself only with the amount of tax collected as the result of a proceeding under sec. 75.61 (2), Stats. The county will go on collecting delinquent taxes and it will owe the town only when the full county levy has been collected. Under example 1, the loss will ultimately fall on the town. This will follow automatically and without any question of charge back as that term appears to be used in the prior opinions. Under our system of taxation, towns, cities and villages are preferred over the county while the tax roll is in the hands of the treasurer thereof for collection (sec. 74.15, Stats.), but after return of delinquent taxes, the county is preferred over the towns, cities and villages (sec. 74.19 (3)). *Town of Bell v. Bayfield County*, 206 Wis. 297. Accounting between municipalities is without regard to a particular levy with respect to particular property. The town satisfies its levy out of moneys collected prior to paying in any part of the county levy to the county. The county does likewise with respect to its levy after the taxes are returned delinquent and it does not owe the town anything until its levy has been collected in full.

Example 2: County A levies a \$25,000.00 tax against town B. At the time of making return to the county treasurer, the town treasurer turns in \$10,000.00 cash and \$15,000.00 in delinquent tax returns. In such case there is no excess delinquent tax return over the county levy remaining unpaid. Loss in tax revenue, as a result of decreasing the

tax payment under sec. 75.61 (2), will, in such case, fall upon the county as the legislature has not authorized any charge back. It is not provided that the town shall owe the county as the result of a proceeding under sec. 75.61 (2). As a consequence, there is nothing owing. *Town of Bell v. Bayfield County*, 206 Wis. 297. Under such circumstances we can only leave A county where we find it and where the legislature left it.

There is no question of depriving the county of its property without due process of law in contravention of the constitution under example 2. Money raised by taxation, even after it is collected, does not constitute property held by the counties in their proprietary capacities which is subject to constitutional protection. *Town of Bell v. Bayfield County, supra.*

We conclude that in so far as the prior opinions suggest or hold that the loss sustained by a county in a proceeding under sec. 75.61 (2), Stats., may be charged back to the town, city or village and collected in the next tax roll, they are clearly in error. In so far as the opinions suggest or hold that the county need charge itself only with the amount actually collected under sec. 75.61 (2), in accounting to a town, city or village for delinquent taxes collected, the opinions should be, and are, adhered to.

NSB

Banks and Banking — State Banks — Bank Stations — Banking commission may not waive provision of sec. 221.255, subsec. (1), Stats., prohibiting establishment of bank receiving and paying station within four miles of any other existing bank or station.

November 21, 1938.

BANKING COMMISSION OF WISCONSIN.

A state bank wants to establish a receiving and paying station under sec. 221.255, Stats., in the village of Caroline. It appears that the site for the proposed station is within

four miles of a national bank in the village of Marion. In a former request involving this same situation, you asked whether it would be proper for the commission to recommend that a permit be issued if the national bank is willing to waive the four-mile-limit requirement. In an opinion published July 5, 1938, XXVII Op. Atty. Gen. 431, this office stated that it would be improper to do so.

You now renew your request on the basis of a surveyor's finding that the distance between the bank and the proposed station lacks only one-twentieth of a mile of the required four miles.

Perhaps a different approach to this problem will make our position more clear.

The legislature provides that such stations may be established under certain conditions. It sets up the machinery by which they may be established. An application must be filed with the banking commission; the commission conducts investigations, makes findings of fact, and on the basis of those findings makes its report to the licensing authority, the banking review board. The report includes the commission's recommendation. The board may conduct further investigations, and on these bases make its decision. Neither the commission nor the board has a free hand. The legislature has set up standards for their determinations. Some of these involve the exercise of discretion and sound judgment: whether public convenience and advantage will be promoted; questions relating to the management and solvency of the applicant bank; the adequacy of existing banking facilities, and the probable patronage from the surrounding area. Sec. 221.255 (3), Stats. Others involve no discretion whatsoever. The applicant must be a bank; if the station is proposed to be located in an adjoining county, that county must have less than 16,000 population; if in any other county, that county must be in the trade area and not more than twenty-five miles from the home office of the bank; and "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." Sec. 221.255, subsec. (1), Stats.

The powers of the commission and of the board of review are purely statutory. Their jurisdiction to act in administration of the law is derived from the legislature. Neither a waiver by the national bank nor an act of the commission or board itself can enlarge that jurisdiction. Where a board is authorized to act on the basis of certain findings of fact, those facts are jurisdictional facts. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 524-525. And an act done by such a body beyond its jurisdiction is void. *State ex rel. Adams v. Burdge*, 95 Wis. 390. The legislature having set the standards by which the commission may obtain jurisdiction to recommend that a permit be granted, and by which the board may obtain jurisdiction to issue a permit, neither can extend that jurisdiction by changing the standards, even to the extent of one-twentieth of a mile. Neither the commission nor the board is a lawmaking body. And though the decision of the board is made final by subsec. (4), this is true only if the board acts within its jurisdiction.

“* * * the decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; *it cannot itself conclusively settle that question and thus endow itself with power.* * * *” *Borgnis v. Falk Co.*, 147 Wis. 327, 359. (Italics ours.)

Whether the four-mile provision is wise or foolish is no concern of the commission. It can no more disregard that requirement than it could, for example, the requirement that the applicant be a bank. We know of no way whereby three and nineteen-twentieths miles can be made to equal four miles and must conclude that when the legislature said “four miles” it did not mean a lesser distance.

WHR

Peddlers — Peddlers' license law, ch. 129, Stats., applies to dealer in household supplies such as extracts, spices, coffee, toilet articles, medicines and the like, where sales are made from house to house from stock carried in truck, regardless of fact that permission to call has been previously granted.

November 21, 1938.

GEORGE M. KEITH,

Inspection & Enforcement Bureau.

You ask whether, on the basis of agreed facts which you have submitted to us, a certain dealer in Watkins products is engaged in the business of peddling within the meaning of sec. 129.01, Stats., so as to require a license.

The dealer sells a wide variety of goods purchased from the J. R. Watkins Company of Minnesota within an exclusive territory assigned him by the company. Three or four times a year the dealer loads a truck with these products, a large supply of which is always stored at his home. He travels from house to house within his territory, making spot sales to those who have previously granted permission to call, filling orders previously made, and soliciting new customers either by taking orders for future delivery or by obtaining permission to call in the future. No spot sales are made to new customers. When a person has granted permission to call or has ordered goods, he is listed in a route book kept by the dealer, and is thereafter notified in advance of the dealer's coming.

Persons so desiring may also call at the dealer's home and buy these goods, if they chance to find the dealer or some member of his family there.

There are certain exceptions to the above practice, none of which we deem it necessary to discuss.

In *Dewitt v. State*, 155 Wis. 249, 251, it was said:

“* * * A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him. * * *”

In so far as the dealer in question makes spot sales, he would seem to come clearly within this definition and thus require a peddlers' license. However, you have called to our attention the recent case of *National Baking Co. v. Zabel*, (Wis. 1938) 277 N. W. 691, on which the dealer here involved bases his contention that a license is not necessary.

That case involved the practice of certain baking companies in distributing their products directly to the consumer by means of trucks traveling established routes. A driver would load his truck each morning with his supply of bakery products, call on his more or less regular customers and supply their needs for the day. In some cases, this amounted to filling a previous order; in most cases it was a spot sale. The drivers were paid a salary and a bonus depending on volume of sales.

It was held that the companies were not engaged in the business of peddling by reason of this method of distribution, which is "an evolution of regular business bearing superficial resemblances to peddlings." (P. 693).

In the opinion of the court, there is some language which, read independently of what precedes and what follows it, might justify the layman in concluding that the business conducted by the dealer here involved is not peddling.

As we view the decision, however, it is no more than an application of the established principle that one who himself produces or processes a perishable article of food at an established place of business is not engaged in the business of peddling simply because he sells the product at retail from place to place or from door to door. Thus, such method of selling farm products is regarded as but an incident of farming, even in the absence of express statutory exception from regulatory statutes. *Lansford Borough v. Wertman*, 18 Pa. Co. Ct. 469; *St. Louis v. Meyer*, 185 Mo. 583, 84 S. W. 914; 29 C. J. 225, citing cases from many jurisdictions; VI Op. Atty. Gen. 618. So, with respect to the dairyman who uses this method of distributing milk, *State v. Hayes*, 143 La. 39, 78 So. 143; *South Easton v. Moser*, 18 Pa. Co. Ct. 343; Op. Atty. Gen. for 1908, 602. And the butcher who slaughters on his own premises and goes about selling meats from his wagon, *Commonwealth v. Roenick*, 10 Pa. Dist. R.

51; *State v. Kumpel*, 2 Marv. (Del.) 464, 43 Atl. 173; Op. Atty. Gen. for 1908, 607; VII Op. Atty. Gen. 560.

That this same principle applies to such distribution by the producer of bakery products was recognized by this office in XV Op. Atty. Gen. 537.

This principle recognizes that the return from sale of goods of one's own producing is in part a return for the expense and labor involved in production. See *Roy v. Schuff*, 51 La. Ann. 86, 24 So. 788, 789. That it applies in the case of perishable foodstuffs is due to the nature of the product and the more or less fixed daily need of the consumer.

The same considerations do not apply to one who buys goods for resale, and sells them from door to door, even in the case of foodstuffs. *Commonwealth v. Deinno*, 20 Pa. Co. Ct. 371; *Flournoy v. Walker*, 126 La. Ann. 489, 52 So. 673.

In such cases the business consists entirely of selling. If the sales are made by peddling, the salesman is engaged in the business of peddling. It is not, in such cases, merely a more or less necessary incident to another business, but is the very essence of the business conducted by the salesman.

The fact that the dealer here involved has a fixed place of business is not controlling. *Dewitt v. State*, *supra*. The fact that he covers a regular route is not controlling. *Johnston v. State*, 16 Ala. App. 425, 78 So. 419; *Davis & Co. v. Mayor & Council*, 64 Ga. 128; 21 R. C. L. 184 and cases cited. These facts are important only if they lead inferentially to the conclusion that the method of sale practiced in the particular case is not the kind referred to in the statute.

The ultimate fact to be determined is, as stated in the opinion in the bakery case, "whether the practice dealt with in particular cases was an outgrowth of peddling or an evolution of regular business bearing superficial resemblances to peddling" (277 N. W. 691, 693).

The method practiced by the dealer in Watkins products does not come within the principle of the bakery case. The dealer buys the products, does not produce or process them. The products themselves are not perishable foodstuffs of which regular customers require a fresh supply day after day or every few days. In fact, most of the wide variety of goods dealt in by him are not foodstuffs at all—medicines, toilet articles, machine oil, moth crystals, etc.—and those

which are foodstuffs— baking powder, coffee, shredded coconut, extracts and spices—are not perishable within a short period of time. Even if they were, however, it is clear that this business does not come within the principle of the cases cited. The practice of the dealer is not an outgrowth of a business involving production or processing. If he is not engaged in the business of peddling, we are at a loss to know what business he is engaged in. We conclude that a license under ch. 129, Stats., is necessary to conduct such business as described.

WHR

Municipal Corporations — Beer Licenses — Under sec. 66.05, subsec. (10), par. (g), subd. 1, Class “B” retail license for sale of fermented malt beverages may be issued to manager of particular hotel, restaurant, club, etc., that applies for license, but may not be issued to so-called “manager” of that part of hotel devoted to sale of fermented malt beverages only.

November 21, 1938.

JOHN A. THIEL, *Director,*
Wisconsin Tax Commission.

A number of resort hotels in this state are owned and managed by persons who are nonresidents of Wisconsin and who, for that reason, are not eligible to secure Class “B” retailers’ licenses for the sale of fermented malt beverages. If a nonresident owner of such a hotel appoints as the manager of that portion of the hotel devoted to the sale of fermented malt beverages a Wisconsin resident otherwise eligible to receive a license, and gives such manager complete direction and control over such portion of the premises, you inquire whether a license may be issued to such manager or whether the license must be issued only to the general manager of the hotel.

Section 66.05, subsec. (10), par. (g) 1, Wisconsin statutes, provides in part:

“Class ‘B’ retailers’ licenses shall be issued only to persons of good moral character, who shall be citizens of the United States and of the state of Wisconsin, and shall have resided in this state continuously for not less than one year prior to the date of the filing of the application. * * *. No such license shall be issued to any person acting as agent for or in the employ of another, except that this restriction shall not apply to a hotel or to a restaurant not a part of or located in or upon the premises of any mercantile establishment, or to a bona fide club, society or lodge that shall have been in existence for not less than six months prior to the date of application. Such license for a hotel, restaurant, club, society or lodge may be taken in the name of an officer or manager, who shall be personally responsible for compliance with all of the terms and provisions of this subsection.”

In *State ex rel. Torres v. Krawczak*, 217 Wis. 593, 259 N. W. 607, the court stated, at page 600:

“* * * It seems to be the intent of said par. (g) 1 that in case of corporations licenses shall be issued in the name of natural persons, for they can be issued only to ‘persons of good moral character.’ This is borne out by the later provision in the same paragraph that in case of a restaurant or other specified places the license may be taken ‘in the name of an officer or manager.’ However, in case of a corporation, *the word ‘manager’ in this connection must be taken as meaning the general manager of the corporation, as distinguished from the manager of a particular place.* * * *.” (Italics ours.)

In *Wheeler & Wilson Manufacturing Company v. Lawson*, 57 Wis. 400, 15 N. W. 398, the court, in speaking of a general manager, stated at pages 404-405:

“* * * The very term implies a general supervision of the affairs of a corporation in all departments; perhaps to a greater extent than is implied by the term, any other single officer so called, such as president, cashier, secretary, treasurer, etc. General manager is usually understood to designate the person who really has the most general control over the affairs of a corporation, and who has knowledge of all of its business and property, and who can act in emer-

gencies on his own responsibility. It is really a very high office, and is so generally understood to be, and I think it is the principal office, and the incumbent the 'principal officer;' * * *. The affiant in this case does not pretend that he is the general manager of the corporation plaintiff, but only 'the general agent' or 'the managing agent' *within this state*.

"The managing agent,' as defined in *Upper Miss. Trans. Co. v. Whittaker*, 16 Wis. 220, is an agent having a general supervision over the affairs of the corporation, and as defined in *Carr v. Commercial Bank*, 19 Wis. 272, he would seem to have all the powers of the general manager of a corporation. But the affiant's duties and authority were not *general*, but limited to this state. He is not *the* managing agent, but *a* managing agent of the corporation. There may be, and probably are, many such managing agents of this corporation. A person may be the managing agent in a county or other defined district only, but would fall short of being the managing agent of the corporation, having supervision over all of its affairs. He would only have supervision over a small part of the affairs of the corporation. Both designations are used in the affidavit, such as 'general agent and managing agent,' and he was nothing more than the agent of the company within this state, with perhaps general powers within such district, and he may have but little to do with the general concerns of the company at large. He is in no sense an officer of the corporation, such as the general manager may be, and probably is. * * *"

The law thus appears to be that if within the scope of the powers of a particular corporation under consideration, any domestic corporation may be licensed if the officer or manager is otherwise eligible, the license running to such officer or manager and "manager" meaning the general manager of the corporation as distinguished from the manager of a particular place. *State ex rel. Torres v. Krawczek, supra*.

If any meaning at all is to be given to the exception in favor of hotels, restaurants, clubs, etc., in sec. 66.05 (10) (g) statutes, the term "officer or manager" must mean something less than general manager of the hotel, club, etc., if a corporation, otherwise the hotel, restaurant, society or club, etc., would have no greater licensing privileges than would any corporation. It must follow that the term "officer or manager" as used with reference to hotels, res-

taurants, clubs, societies, etc., in sec. 66.05 (10) (g), Stats., means something less than "general manager" of the corporation.

It is our opinion that the term means something more than manager of that particular part of the hotel devoted to sale of fermented malt beverages. The exception reads

" * * * this restriction shall not apply to a hotel or to a restaurant not a part of or located in or upon the premises of any mercantile establishment, or to a bona fide club, society, or lodge that shall have been in existence for less than six months prior to the date of application."

In such excepted cases, "such license for a hotel, restaurant, club, society or lodge may be taken in the name of an officer or manager." Officer or manager of what? It would seem that he must be the officer or manager of the hotel in question, as the exception is in favor of and in reference to the hotel, restaurant, club, etc., and is not in favor of or in reference to any manager or officer other than the manager or officer of the excepted class, namely, the hotel, restaurant, club, etc.

Any more liberal construction of the term "officer or manager", with reference to hotels, restaurants, bona fide societies, etc., would open wide the doors for abuses which the act intended to guard against, namely, that of breweries and other corporations setting up chains for retail dispensing of fermented malt beverages.

We conclude that the term "officer or manager", as used in the last sentence of sec. 66.05, subsec. (10) (g) 1, with reference to the hotel, restaurant, club, etc., exception means something less than "general manager", the meaning ascribed to it with reference to other corporations in *State ex rel. Torres v. Krawczek, supra*, and something more than manager of the particular part of the hotel devoted to sale of fermented malt beverages and that the term must be held to refer to the manager of the particular hotel, restaurant, club, etc., that is applying for the license.

JRW

NSB

Counties — County Ordinances — Courts — County Judge — Words “all fines, forfeitures and receipts” contained in county traffic ordinance adopted pursuant to sec. 59.07, subsec. (11), Stats., includes costs and fees.

Five-dollar per diem for county judges under sec. 253.15, subsec. (3), Stats., applies only where no other provision has been made by law for compensating county judge.

November 23, 1938.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

We are informed that in May, 1936, the county board of Vernon county adopted a traffic ordinance as provided in sec. 59.07, subsec. (11), Stats. You state that sole jurisdiction over violations of the ordinance was granted to the county court. You state further that no provision was made for taxing costs and fees and that in the fall of 1936 the salary of the county judge to be elected in the spring of 1937 to take office January, 1938, was fixed at \$3,000.00 per year.

We are asked whether the county judge may tax costs and fees as in justice court, and retain such fees in addition to his salary. If these fees must be paid into the county treasury, you ask whether the county judge is entitled to the five-dollar per diem as provided in sec. 253.15 (3), Stats.

The county board has no power to enlarge the jurisdiction of the county court, or restrict the jurisdiction of justices of the peace. XXVI Op. Atty. Gen. 100. Such power rests solely in the legislature by virtue of sec. 2, art. VII, Wis. Const.

The county court obtains its jurisdiction over civil and criminal matters from ch. 385, Laws 1917, entitled “An act to confer additional jurisdiction on the county court of Vernon county.” This act was amended by ch. 410, Laws 1919.

Sec. 1, subsec. 1, par. (a) of this act, as amended, reads:

“Said court shall have and exercise jurisdiction in all civil actions and proceedings at law wherein the amount in-

volved does not exceed five hundred dollars and may hear, try and determine all such actions and proceedings in the same manner and pursuant to the same rules and practices now applicable to courts of justices of the peace. Said court shall have all the jurisdiction, powers, authority and rights given by law to justices of the peace and be subject to the same privileges and penalties. Nothing in this subsection contained shall be so construed as to prevent justices of the peace from exercise of the powers and duties now conferred upon them by law in all civil and criminal actions and proceedings."

Subsection 2 of sec. 1 of the act reads :

"The practice before said county court, pursuant to the jurisdiction hereby granted, shall in all respects be in harmony with the practice, rules and procedure now prevalent in courts of justices of the peace, *costs shall be taxed in the same amount and manner, and said court may, until the county board of said county shall otherwise determine, charge the same fees now chargeable by justices of the peace and collect and retain the same. The county board may at any time increase or decrease the salary of said judge, whether during his term or otherwise, and provide for the payment of the fees collected by him, by virtue of the additional jurisdiction hereby granted, into the treasury of said county.*" (Italics ours.)

Section 2.07 of the county ordinance reads :

"All fines, forfeitures and receipts collected under and by virtue of this ordinance shall be paid into the county treasury of Vernon county to the sole credit of the county,
* * *."

The word "receipts" was probably intended to include costs and fees. The "receipts" of an office have been held to include the fees of officers. *McCord v. Page County*, 171 Iowa 546, 151 N. W. 1062. If "receipts" as used in this ordinance was not intended to include costs and fees we are at a loss to understand what it does mean.

Therefore, with respect to your first question, you are advised that costs and fees are to be taxed as in justice court and that such costs and fees belong to the county.

Sec. 253.15, subsec. (3), Stats., reads:

“The judge of any county court where no other provision is made by law shall be entitled to receive five dollars per day, to be paid from the county treasury, for each day he shall be actually engaged in the examination of any person upon a criminal charge, or engaged upon any other matter, not appertaining to probate business, compensation for which is not otherwise provided.”

The manner in which the county judge of Vernon county is to be compensated for his civil jurisdiction having been provided in ch. 385, Laws 1917, it is clear that the above quoted provision has no application.

Therefore, with respect to your second question, you are advised that the county judge in question is not entitled to five dollars per diem for this work.

WHR

Corporations — Securities Law — Sec. 189.05, subsec. (14), Stats., requiring security dealers to furnish information to banking commission relative to amount of certain securities to be offered for sale, is not satisfied by stating amount to be “various” or “indefinite”. Quantity or amount must be specified.

November 25, 1938.

BANKING COMMISSION.

Attention H. F. Ibach.

You call our attention to sec. 189.05, subsec. (14), Stats., which provides for the sale of securities which were issued prior to, and have been outstanding in the hands of the public since, August 1, 1919. The statute provides that these securities may be sold if notice is given to the public service commission (now banking commission) in advance of sale. Included in the information to be given the commission is a statement as to the amount of securities to be offered for sale.

Certain dealers have contended that information as to the "amount" of securities to be offered for sale is supplied by stating the amount to be "various", "indefinite" or some other expression. The reason that these dealers do not state a definite amount is due to the fact that they do not at the time have such securities in their portfolios but intend to buy them for future sale.

You ask whether the word "amount" as used in sec. 189.05 (14), Stats., should be construed to mean a *specified amount*.

Words found in a statute are to be accorded their usual and ordinary meaning. *Mesar v. Southern Surety Co.*, 197 Wis. 578, 222 N. W. 809. See also sec. 370.01, (1), Stats.

Funk & Wagnalls New Standard Dictionary contains the following definition of the word "amount":

"A sum total of numbers or quantities; specif., * * *
2. A quantity viewed as a total; aggregate; totality;
* * *."

Under the above definition of the word "amount" it is our opinion that as used in the statute the word means a *specified number or quantity*.

In *Klatt v. Columbia Casualty Co.*, 213 Wis. 12, the court stated at page 21:

"* * * 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. * * *"

Unless the commission has definite information as to the amount of securities being offered for sale under the provisions of sec. 189.05 (14), Stats., it is clear that the protection to investors sought to be accomplished by the "blue sky law" is unavailing.

WHR

Labor — Public Officers — Bureau of Purchases — Fair labor standards act of 1938 does not apply to state in purchasing materials through bureau of purchases.

November 25, 1938.

BUREAU OF PURCHASES.

Attention F. X. Ritger, *Director*.

You inquire as to what effect the federal wage-hour bill, which was recently enacted by the congress of the United States, will have upon the bureau of purchases. Specifically, our opinion is asked as to whether it will be necessary for your bureau to require some sort of certificate from vendors to the effect that they have complied with the provisions of the act.

The act to which you refer is known as the "Fair labor standards act of 1938." 29 U. S. C. A. secs. 201—219, ch. 676, 3d session, 75th Congress. It provides in part as follows:

Sec. 215:

"(a) After the expiration of one hundred and twenty days from the date of enactment of this chapter, it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207, * * *."

Sec. 203:

"(k) 'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Sec. 203:

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof * * *."

Sec. 216:

“(a) Any person who wilfully violates any of the provisions of section 215, shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. * * *”

Sec. 203 (a) defines “person” as follows:

“‘Person’ means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.”

There is no provision in the act which places any liability or responsibility upon the purchaser of goods from a seller who has not complied therewith. The liability for violation of the act attaches to the seller and not to the buyer. Inasmuch as the bureau of purchases does not engage in the sale of any goods, wares, or merchandise which have been produced in violation of the act, no liability would attach to it as a purchaser of such products.

We are unable to find any provision in the act which requires the vendee to insist upon or require a vendor’s certificate as to compliance therewith. Furthermore, the state is not included under the provisions of sec. 203 (a), *supra*, defining “person” for the purpose of prosecution. It follows that the bureau of purchases, as an arm or agency of the state government, would in no way be liable for violation of the act.

WHR

Banks and Banking — Public Deposits — Public Officers — Mayor — School Districts — Mayor of city is without lawful authority to demand that athletic association of local high school deposit its receipts with city treasurer and render financial statements to mayor respecting same.

November 25, 1938.

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

You have inquired whether the mayor of a city may lawfully demand that the athletic association of the city’s high

school deposit its funds with the city treasurer and render financial statements to the mayor.

Under sec. 40.52, subsec. (3), Stats., relating to the city school board, it is provided that the city treasurer shall be treasurer of the school board. Sec. 40.10 (2) (b), Stats., provides that the school district treasurer may receive all money raised from any source for extracurricular activities.

It is to be noted that sec. 40.52 (3), Stats., relates to city school boards and sec. 40.10 (2) (b) Stat., to common school districts. However, sec. 40.53 (1) provides:

“The school board shall have the powers and be charged with the duties of common school district boards as far as the same are not otherwise provided for or limited by statute.”

Thus, it would appear that the city treasurer as school board treasurer under sec. 40.52 (3) would have the powers of a school district treasurer under sec. 40.10 (2) (b) and “may receive all money raised from any source for extra curricular activities.”

Since the funds of the high school athletic association are derived from extracurricular activities, they are probably subject to the provisions of sec. 40.10 (2) (b).

The next question which arises, however, is as to whether the provisions of the statute are mandatory or permissive, that is: Do the words “may receive money” mean “shall receive all money?”

Sec. 370.01 (1), Stats., requires that all words and phrases in the statutes shall be construed according to the common and approved usage of the language. As ordinarily used, the word “may” is permissive in character. *Mitchell v. Hancock*, (Tex.) 196 S. W. 694, 700; 5 Words and Phrases (3 ser.) 38. It has also been held that the word “may” as used in the statutes means “must” or “shall” only in cases where the public interests and rights are concerned and where the public or third persons have a right that the power should be exercised or where the legislative intent requires that it be so construed. *Foutch v. Zempel*, 332 Ill.

192, 163 N. E. 546, 549; 2 Words and Phrases (4th ser.) 664.

However, assuming the provisions of sec. 40.10 (2) (b) to be mandatory in imposing the duty upon the city treasurer to receive the money raised from extracurricular activities where such funds are offered to him for deposit, it still falls short of being a command upon anyone to turn such receipts over to him. There is nothing to indicate a legislative intent that it should be so construed. Sec. 40.10 (2) (b), Stats., was created by ch. 435, Laws 1933, which related to public deposits and which contained numerous other provisions designed to extend protection of the public deposits law to various funds, including private funds held in trust by a public officer for private persons, corporations or associations of individuals.

As we see it, the sole purpose of sec. 40.10 (2) (b) was to extend the benefit of the protection of the public deposits law to funds arising out of extracurricular activities where those in charge of such activities might desire to have such protection by depositing the funds with the public officer designated in the statute.

Furthermore, we find no statute which gives the mayor of the city any control over the funds in question regardless of where or with whom deposited.

You are therefore advised that the mayor may not lawfully demand that the high school athletic association deposit its funds with the city treasurer or render financial statements to the mayor respecting such funds, although such funds may be deposited with the city treasurer and when so deposited are protected by the public deposits law.

WHR

School Districts — Common school district board may not employ attorney at stipulated fee per month to handle actions or proceedings in which district is not at time interested.

December 2, 1938.

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

You inquire whether the school board of a common school district has authority to enter into a contract with an attorney at a stipulated fee per month for periods of time represented by a school year. You have referred us to sections of the statutes relating to legal actions, and it is assumed that you are concerned with the prosecution and defense of legal actions and proceedings.

Sec. 40.04, subsec. (12), Wisconsin statutes, provides:

“The annual common school district meeting shall have power:

“* * *

“(12) To give direction and make provision for the prosecution or defense of any action or proceeding in which the district is interested.”

A special district meeting has the same powers as an annual meeting excepting the power to elect officers (sec. 40.06).

Under sec. 40.09, subsec. (2), it is the duty of the district director

“To appear on behalf of the district in all actions brought by it and against it, when no other direction shall have been given by a district meeting.”

Under subsec. (3), of sec. 40.09, it is the duty of the director

“To prosecute an action for the recovery of any forfeiture incurred under the provisions of this chapter, and in which his school district is interested, * * *.”

Under sec. 40.10, subsec. (2), par. (a), it is the duty of the treasurer of the school district to "apply for, and receive, and if necessary sue for all money appropriated to or collected for the district."

Sec. 40.16, subsec. (1), provides:

"Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district."

The foregoing statutes are the only ones relating to the commencement or defense of an action by a common school district, the school board, or the officers of such district. In *School District No. 8, etc., v. Arnold, et al.*, 21 Wis. 657, it was held that, under a statute similar to sec. 40.16 (1), giving the district board the care and keeping of the schoolhouse and other property belonging to the district, the school board might, without any directions from the electors, bring suit for an injury to the schoolhouse. This holding was made upon the reasoning that as an incident to the proper discharge of their duty to take care of the school property, the school board must be deemed to have authority to bring an action to recover damages for illegally entering and injuring the schoolhouse.

In the case of *State ex rel. Geneva School District v. Mitchell*, 210 Wis. 381, our supreme court quoted in the order named, section 40.04, subsec. (12) and section 40.16, subsec. (1), and then stated at pages 385-386:

"In *School District No. 8 v. Arnold*, 21 Wis. 657, 665, it was held that this provision authorized the school board to maintain an action for trespass to recover damages done to the schoolhouse. It was said that the power to maintain such action was but an incident of the power vested in the board to control and manage the property of the district. This reasoning is not difficult to sustain. The proper control, management, and conservation of the property of the district might at times require speedy application for the process of courts, the benefit of which would be lost if the board could not take action in the absence of specific directions from a school district meeting.

“However, it is not the property of the district that is involved here. It is something more tangible, and * * * we must conclude that the decision in the *Arnold Case* approaches the limit of the authority that can be recognized as existing in the school district board to maintain actions in the absence of specific directions from the school district meeting.”

The *Mitchell* case, *supra*, decided that it was not within the power of the school board itself to authorize the commencement of that action for a *writ of certiorari* and definitely limited the power of the school board to commence actions on its own motion to cases involving injury to school property.

It is our opinion that under the foregoing statutes and the *Mitchell* case the electors of the school district at a regular or special meeting, rather than the school board, may direct the retention of an attorney to prosecute or defend each action in which the school district is then interested, except that the school district board, of its own motion, may retain an attorney to conduct an action for the protection of the school district property. A school district board may not employ an attorney at a stipulated fee per month to prosecute or defend actions or proceedings in which the school district is not at the time interested.

JRW

Taxation — Tax Sales — Under sec. 75.01, subsec. (1m), Stats., resolution of county board authorizing county treasurer to accept original amount of tax plus expenses of sale and interest at one per cent per annum, all penalties being waived, in full of county-owned tax sale certificates is invalid.

December 3, 1938.

P. H. URNESS,
District Attorney,
Mondovi, Wisconsin.

You have submitted a resolution adopted by the county board of your county at the November, 1938 session, au-

thorizing the county treasurer "to accept up to December 31, 1938, the payment of tax sale certificates sold to the county at the original amount of tax plus the expense of sale, and the interest at 1% per annum, and that all penalties are hereby waived." An opinion is requested as to whether the county treasurer may accept the face of county-owned certificates issued prior to 1937, plus interest at the rate of one per cent per annum.

In XXIII Op. Atty. Gen. 529, it was held that a county board, under sec. 75.01 (1m), Stats., may waive most of the redemption interest on tax sale certificates owned by the county but that the county cannot accept less than the face value of such certificates plus some interest thereon from the date of sale, although the rate of interest may be fixed very low. See also XXIV Op. Atty. Gen. 32. As to certificates of sale of taxes of the levy of 1937 or subsequent years, this applies only to the redemption interest which accrues after two years' delinquency. Sec. 75.015, Stats.

Thus the county board could have authorized the treasurer to accept the face amount of county-owned tax sale certificates (other than those relating to the 1937 levy) plus interest thereon from and after the sale at the rate specified in the resolution. It, however, did not do this but attempted to go further. The resolution authorizes the treasurer to accept merely the unpaid tax, plus the expenses of sale and interest on the tax at one per cent per annum, in full payment of such certificates. Under the resolution the treasurer would not collect the penalties and interest accruing before sale and included in the face of the certificate. Therefore, this resolution operating to waive interest and penalties accruing prior to the sale and included in the face of the certificate attempts to do something that the county has no authority to do, and is, therefore, in our opinion, invalid as in excess of the power possessed by the county.

HHP

Indigent, Insane, etc. — Poor Relief — Social Security Law — Old-age Assistance — Where county has taken title to personalty under sec. 49.26, subsec. (1), Stats., or taken lien on real estate under sec. 49.26 (4), either or both of which are sufficient to satisfy claim for old-age assistance, claim filed pursuant to sec. 49.25 as amended by ch. 7, Laws 1937, Special Session, has priority even as to claims having priority under sec. 313.16, except administration expenses and allowances made from personal property under sec. 313.15, Stats. Court has full power to waive any such claim or part thereof or release real estate lien as provided by sec. 49.25 and sec. 49.26 (4), Stats.

Where claim for old-age assistance cannot be satisfied out of personalty or realty to which county has title or lien or where no such title or lien has been taken as permitted by sec. 49.26, subsecs. (1) and (4), Stats., such claim or excess not covered by lien is treated as unsecured claim, except claims for funeral expenses paid pursuant to sec. 49.30 and expenses of last sickness. As to funeral and last sickness county has priority by reason of sec. 313.16 (1) under doctrine of equitable subrogation.

December 5, 1938.

P. D. FLANNER, *Acting Director,*
Department of Social Adjustment.

You request our opinion as to whether a claim for old-age assistance filed in an estate is entitled to priority, and if so, to what extent.

Sec. 49.25, Stats. 1937, 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.”

This section was amended by ch. 7, Laws Special Session 1937, so that sec. 49.25 now reads as follows:

“On the death of a person who has been assisted under sections 49.20 to 49.51, the total amount of assistance paid, including medical and funeral expense paid as old-age assistance, but without any interest, shall be allowed as a claim against the estate of such person by the court having jurisdiction to settle the estate; provided, however, that such claim shall not take precedence over the allowances under section 313.15; and provided, also, that such court may disallow such claim or any part thereof if it is satisfied that the amount of such disallowance is necessary to provide for the maintenance or support of a surviving spouse or surviving minor children, and thereupon the claim shall be deemed waived to the extent of the amount thus disallowed and assigned to such spouse or minor children for maintenance or support. 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, and the remainder shall be paid into the treasuries of the state and its political subdivisions, in the proportion in which they respectively contributed to the old-age assistance recovered. It shall be the duty of the county judge of the county from which the deceased beneficiary has received old-age assistance to file the claim herein provided.”

This same chapter also amended sec. 49.26 so as to provide that the county judge may require, when he deems it necessary, that all or any part of the property of an applicant, except real estate situated in Wisconsin (and other personal property exceptions, not material to this discussion), be transferred to the county court.

Subsec. (2), sec. 49.26, Stats., now reads:

“If in the event that the old-age assistance is discontinued during the lifetime of the beneficiary the property thus transferred to the county court or said manager of county institutions exceeds the total amount of assistance paid, including medical expense paid as old-age assistance, but without any interest, the remainder of such property shall be returned to the beneficiary; *and in the event of his death such*

remainder, less funeral expenses paid as old-age assistance, shall be considered as the property of the beneficiary for proper administration proceedings. The county judge or said manager of county institutions shall execute and deliver all necessary instruments to give effect to this subsection."

This same chapter added two new subsections to sec. 49.26, namely subsecs. (4) and (5), so as to provide for the county obtaining a lien upon the real estate of the applicant for all aid furnished under the statute, and providing for the county reconveying to the beneficiary real estate previously conveyed to it under the old law and for the establishment of a lien for the amounts previously or thereafter paid, in lieu of the taking of title thereto,—this latter being the method afforded for county protection under the law prior to the amendment.

Your question must be answered with reference to two distinct situations, as follows:

Situation 1. Where the county has title to personalty conveyed under sec. 49.26, subsec. (1), Stats., or where it has a lien upon real estate under sec. 49.26, subsec. (4) or (5), Stats., either or both of which are sufficient to satisfy the claim.

Situation 2. Where there is an excess claim that cannot be satisfied out of personalty or real estate to which the county respectively has title or a lien, or where the county has no title to personalty under sec. 49.26, subsec. (1), Stats., or a lien upon real estate under sec. 49.26, subsec. (4) or (5), Stats.

With respect to situation 1, there seems to be a clear legislative intent that the county should be preferred to the extent that it has title to personalty or a lien upon real estate, except as otherwise provided in sec. 49.25, Stats. It will be noted that sec. 49.26, subsec. (2), Stats., in making provision for disposition of the personalty to which the county has title, provides that, in the event of death "such remainder, less funeral expenses paid as old-age assistance, shall be considered as the property of the beneficiary for proper administration proceedings." "Such remainder" is

referable to the preceding portion of this subsection, which is the property, minus "the total amount of assistance paid, including medical expense paid as old-age assistance, but without any interest, * * *." There is thus manifest a clear legislative intent that only the remainder of the personalty, to which the county has title after satisfying the county's claim, is available for administration as the property of the beneficiary, but, with the exception provided in sec. 49.25, Stats., hereinafter referred to.

The same legislative intent is manifest in sec. 49.26, subsec. (4), Stats., with respect to the county's lien upon the real estate but with the exceptions provided in that subsection, such as that no lien or claim under sec. 49.25, Stats., shall be enforced against the homestead of the beneficiary while it is occupied by the surviving spouse or any surviving minor children of the beneficiary and the further exception provided for in sec. 49.25, Stats.

The exceptions in sec. 49.25, Stats., hereinbefore adverted to, appear to be as follows: Sec. 49.25, after providing for the filing of the full claim without interest against the estate of the beneficiary, provides:

" * * provided, however, that such claim shall not take precedence over the allowances under section 313.15; and provided, also, that such court may disallow such claim or any part thereof if it is satisfied that the amount of such disallowance is necessary to provide for the maintenance or support of a surviving spouse or surviving minor children, and thereupon the claim shall be deemed waived to the extent of the amount thus disallowed and assigned to such spouse or minor children for maintenance or support.
* * *"*

The italicized portion of the above quoted language of the section must be deemed to refer to personalty to which the county has title under sec. 49.26, subsec. (1), Stats., as allowances under sec. 313.15, Stats., can be made only out of personalty and the net income from real estate. *Niland v. Niland*, 154 Wis. 514, 143 N. W. 170. Thus, while the county is entitled to satisfy its claim out of the personalty to which it has title and prior to the satisfaction of any other claim against the estate entitled to priority under sec. 313.16,

Stats., except expenses of administration, it is not entitled to priority as against allowances made under sec. 313.15, Stats.

It will be noted that that portion of sec. 49.25 above quoted and which is not italicized is without reference to allowances under sec. 313.15, Stats. It was undoubtedly inserted for the purpose of permitting the court to provide for the maintenance or support of a surviving spouse or surviving minor children out of real estate with respect to which the county has a lien by virtue of sec. 49.26, subsec. (4) or (5), and we so construe this proviso. In the absence of such proviso and such lien, the county court would be without authority to provide for the maintenance or support of a surviving spouse or surviving minor children out of the real estate of the deceased, for, as hereinbefore noted, the statutory allowances under sec. 313.15 for said purposes must be made out of personalty and net income of real estate. The real estate of the deceased under said section is not available for such purpose. *Niland v. Niland, supra.*

So construed, sec. 49.25, Stats., gives the court full power to provide for the maintenance and support of a surviving spouse or surviving minor children out of either the personalty to which the county has title under sec. 49.26, (1), Stats., or the real estate to the extent of the county's lien thereon by virtue of section 49.26, subsec. (4) or (5), Stats. Considering the beneficent purposes of this law, we believe this construction to be in harmony with the legislative intent.

Situation 2. Under situation 2, it is our opinion that the claim must be treated as any unsecured claim of general creditors and, except as to funeral expenses paid by the county under authority of sec. 49.30, Stats., and that part of medical expenses paid attributable to expense of last sickness, is entitled to no priority.

That portion of the claim ultimately collected that is paid to the federal government under sec. 49.25 (fifty per cent) is in no sense a claim of the United States entitled to priority under U. S. C. A., Title 31, ch. 6, sec. 191, which reads as follows:

“Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in

the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (R. S. sec. 3466.)”

The federal social security act, Title 42 U. S. C. A., ch. 7, sec. 302, in making provision for state plans for old-age assistance before the state is entitled to federal aid, provides as follows:

“* * * (7) * * * 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. * * *.” 42 U. S. C. A. sec. 302 (a) (7).

Under this provision the state is under no obligation to collect against the estate of a beneficiary any old-age benefits paid and, *a fortiori*, is under no obligation to provide for any priority of payment, but if the state does provide for repayment or for priority, the state is obliged to provide that one-half of the amount collected shall be paid to the federal government. That is the state's full obligation in the premises. The federal government has no claim at all until the state or some of its subdivisions have collected.

We find no language in the state old-age pension act, secs. 49.20 to 49.60, Stats. 1937, as amended by ch. 7, Laws Special Session 1937, which would entitle this claim to priority, unless it can be said that the following language, “provided, however, that such claim shall not take precedence over the allowances under section 313.15” impliedly infers priority.

In the analysis under situation 1, we have stated what we conceive to be the purpose of the above language. This negative method of expressing priority is consistent with that purpose and is apt language to express that purpose. It is apt language to express a priority where one already exists, as it does where the county has title to personalty under sec.

49.26, (1), Stats. It is not apt language to express a priority where none would otherwise exist. We conclude that this language was not meant to have and does not provide for a priority.

There remains to be considered the question as to whether an old-age pension claim is a claim of the sovereign (the state of Wisconsin) and therefore entitled to priority without any express statutory provision therefor under the common-law doctrine that the sovereign is entitled to priority.

Our court has never passed upon the question of whether this common-law doctrine is in force in this state. For purposes of this discussion we will assume that it is. Upon principle, there would seem to be no reason why it is not in force. Art. XIV, sec. 13, Wis. constitution. *Coburn v. Harvey*, 18 Wis. 147; *Schwanke v. Garlt*, 219 Wis. 367, 370, 371; *Marshall v. New York*, 254 U. S. 380, 65 L. ed. 315. None of the applicable statutes relative to priority would seem to abrogate the doctrine. See secs. 128.16 (administration of property of insolvent debtor or voluntary assignment), 268.17 (receiverships), and 313.16 (administration of insolvent estates).

Assuming the common-law doctrine of priority of the sovereign to be the law of this state, we are of the opinion that an old-age pension claim is not a claim of the sovereign in a sense which would entitle it to priority as such. The common-law doctrine of priority of the sovereign is confined to the sovereign and does not extend to the various subdivisions of government. See notes, 51 A. L. R. 1360; 65 A. L. R. 1332, and *United States Fidelity & Guaranty Co. v. Carter*, 161 Va. 381, 170 S. E. 764, 90 A. L. R. 191, at 206.

The state has only a thirty per cent interest in the claim. See sec. 49.38, subsec. (2), Stats. While sec. 49.25, Stats., is very inartfully drawn and does not provide who the claimant shall be, it is apparent from reference to sec. 49.26, subsec. (4), Stats., that the claim is that of the county, as the liens upon real estate are liens of the county "in whose favor such lien exists."

We conclude that under situation 2 such a claim must be treated as an unsecured claim of a general creditor and entitled to no priority, except as follows: Under sec. 313.16,

subsec. (1), Stats., funeral expenses and the expenses of last sickness are entitled to priority. To the extent that these expenses are paid as a part of the old-age pension, we are of the opinion that the old-age pension claim is entitled to priority. The county has enriched the estate to this extent and as they are expenses which the estate should properly bear and pay in priority to payment to general creditors, it would seem that the county should be entitled to priority for these items under the equitable doctrine of subrogation. *Iowa County Bank v. Pittz*, 192 Wis. 83, and cases therein cited.

In view of the conclusion we have reached herein, we do not believe that there is any question of unconstitutional order or priority, such as was involved in *Guardianship of Banski*, 226 Wis. 361, 276 N. W. 626 (1937). The county receives the same priority that any lien holder or equitable mortgagee would receive and priorities are determined upon that basis with the exceptions herein noted, and those exceptions do not appear to involve constitutional questions.

NSB

Public Health — Birth Certificates — Public Officers — Registrar of Vital Statistics — If state board of health rules with respect to filling out birth certificates by attending physician or midwife are consonant with evidentiary rules of public policy making married man or woman incompetent witness to testify to nonaccess where child is born or conceived in wedlock, state board of health and state registrar of vital statistics have no investigational duty under sec. 69.08, Stats., where A is divorced from B November 17 and August 15 of following year child is born to A and birth certificate shows B to be father thereof, although B claims otherwise.

State registrar may not determine judicial questions of disputed parentage of child or change or alter birth certificate to conform to what upon investigation he believes to be truth in matter.

December 6, 1938.

BOARD OF HEALTH.

Bureau of Vital Statistics.

On August 15, 1938, A gave birth to a child at the Salvation Army Hospital in Wauwatosa. The attending physician filed a birth certificate naming as the father one B of _____, Wisconsin. Upon discovering that such a certificate had been made, B denied that he was the parent of the child and asserted that he had not seen the mother since December 24, 1935. The record shows that A obtained a preliminary divorce decree from B on November 17, 1937. B asserts that under sec. 69.08, Stats., it is the duty of the state registrar to investigate and if the registrar concludes that B is not the father the state registrar should correct the records accordingly and take such further action with respect to criminal prosecution for violation of secs. 69.01 to 69.59, Stats., inclusive, as is contemplated by sec. 69.08, Stats. The state board of health and the state registrar of vital statistics request an opinion outlining their duties under the circumstances.

Sec. 69.08, Stats., charges the state registrar with the thorough and efficient execution of the law pertaining to the collection of vital statistics. It further provides that he shall investigate all cases of irregularity or violations and, when he shall deem it necessary, report violations to the prosecuting attorney of the proper county. Sec. 69.26, Stats., requires all physicians and midwives in attendance at any birth to file a certificate of birth properly and completely filled out according to the provisions of ch. 69, Stats. Under the facts outlined above, there is some reason to believe that A did not correctly advise the doctor as to the actual father of the child. What, if anything, should the board of health and the state registrar of vital statistics do about it?

It will be noted that the dates of the divorce and the birth of the child are such as to be within a permissible period of gestation preceding the divorce. Under such circumstances B, the divorced husband, is presumed to be the father of the child. The child is presumed to be legitimate, and neither A, the divorced wife, nor B, the divorced father, could bastardize the child by testifying as to nonaccess. They would be incompetent witnesses upon such point. Their lips would be sealed. The rule which forbids such testimony is one based upon public policy. *Koenig v. State*, 215 Wis. 658; *Mink v. State*, 60 Wis. 583; *Watts v. Owens*, 62 Wis. 512; *Shuman v. Shuman*, 83 Wis. 250; *Riley v. State*, 187 Wis. 156; *State ex rel. Reynolds v. Flynn*, 180 Wis. 556; *Estate of Lewis*, 207 Wis. 155.

The most clear and conclusive proof of nonaccess is required to bastardize a child born during a period of lawful wedlock or born at a time when it may have been conceived during lawful wedlock and, as hereinbefore noted, that clear and conclusive proof must be proved by witnesses other than the husband and wife. See cases above cited.

Such being the law, what would have been the attending physician's duty had A named some one other than B as the father of the child? That duty would probably be based upon rules established by the board of health with respect to the filling out of birth certificates. It would seem that that rule might well conform to the public policy of the law, namely, that when a child is either born or conceived in lawful wedlock, a parent cannot by her or his own lips bastardize the

child. It would seem that the same rule of public policy might well require an attending physician or midwife at childbirth to ignore any assertions of the mother with respect to illegitimacy and place upon the birth certificate the name of the husband as being the father of the child if the birth occurs either during wedlock or at such time that the child may have been conceived during wedlock. If any other rule has been or is established by the board, a parent may bastardize the child of public record and these records are admissible in evidence and are *prima facie* evidence of all facts therein stated. See sec. 69.11, Stats. A parent would thus accomplish indirectly through the instrumentality of her own lips that which she would be prohibited from doing were she to attempt to bastardize the child in court.

If the foregoing is sound analysis, then it must follow that the state board of health and the state registrar of vital statistics have no further duty in the case presented. The presumptive father has been named in the certificate and it seems extremely questionable whether the attending physician should have named anyone else as the father under the facts with respect to this birth, even though the mother had named someone else.

There is but one further question that need be considered. If the state registrar were to make an investigation and should conclude that B is not the father of the child, could he then correct the certificate in order to conform to what he believes to be the truth?

It seems fairly clear that the state registrar has no power to make such an alteration. There is no indication that the legislature intended to give the registrar the power to decide contested cases concerning the parentage of any child and in conformity with that decision alter certificates which by statute are given evidential force in cases involving that question. Unless the intent of the legislature is clearly revealed, such power should be withheld.

It has quite generally been held that a recording officer while in office may alter or amend this record by correcting mistakes or supplying omissions so as to make it conform to the facts. See 53 C. J. 618. However, an examination of those cases reveals that the principle has been applied only where the mistake in question was one made by the record-

ing officer and the correction was made on the basis of facts within such officer's own knowledge. It has never been held that records may be altered or canceled by an officer upon the suggestion of private individuals and upon the basis of evidence submitted by contesting parties.

Thus, in *State v. Jacobs*, 92 N. Y. S. 590, the court denied a writ of mandamus to compel the county clerk to cancel the registration of a certain individual as a licensed physician on the ground that he had not fulfilled the statutory requirements. In its opinion the court said, p. 594:

“* * * It would be dangerous to assume that clerks of courts and of counties, without special statutory authority or regulation or the judgment of a court therefor, are authorized to physically erase and destroy records and remove papers from their files, made by them or their predecessors in office, upon the suggestion of an individual or of a quasi public corporation that the record or entry should not have been made, or the paper filed.”

No such authority is given the registrar of vital statistics by our statutes. In fact, there are positive indications that the legislature intended to deny such authority.

Sec. 69.59, Stats., provides for a special court proceeding to effect corrections in marriage records. This would indicate that the legislature was of the opinion that the registrar had not been given the authority to make such corrections. The facts in the case of *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 A. 97, present a situation very similar to the case under consideration. It appeared that A and his wife had been separated for two years, during which time the wife had been living in adultery with a third party. Subsequently she gave birth to a child and informed the attending physician that A was the father; the certificate was made out accordingly. The New Jersey statute failed to provide for the correction of birth certificates. A, therefore, commenced an action in equity for correction of the certificate invoking the power of equity to prevent fraud. The court overruled a demurrer to the petition on the ground that the fraud of the wife seriously threatened the property rights of A since the false certificate, by statute given evidential force, might be used to establish a claim against A

for support or a claim against his estate at his death to the prejudice of his rightful heirs. Had the court been of the opinion that the certificate could be corrected by the recording officer, it is doubtful if equitable relief would have been granted. At no time was it suggested that a correction might be effected in any other way. It should be noted that the New Jersey statutes were very similar to ours in that they required the filing of a birth certificate and gave it evidential force; they provided for the punishment of violators of the law pertaining to vital statistics but failed to prescribe a means of correcting the records. The *Vanderbilt* case was distinguished in a subsequent case but its principle was upheld. *Aimone v. Garardi*, 108 N. J. Eq. 339, 155 A. 12. These cases not only indicate that in such a case the registrar has no power to alter the certificate but they reveal a possible form of relief available to B if he desires to and can establish by competent testimony of witnesses that he is not the father of this child.

It is true that sec. 69.07, subsec. (2), Stats., provides that the state registrar "shall carefully examine the certificates received from the local registrars and if any such are incomplete or unsatisfactory he shall require such further information as may be necessary to make the record complete."

It need hardly be observed that the foregoing authority is one of requiring supplementary information and is not one that sets the state registrar up as a jurisdictional officer with authority to determine facts of parentage and correct the records accordingly.

NSB

Criminal Law — Gambling — Lotteries — Trade Regulation — Trading Stamps — “Multiple-dividend” condemned as lottery under sec. 348.01, Stats. Plan not deemed in violation of trading stamp act, sec. 100.15, Stats.

December 6, 1938.

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

You ask if the scheme called “multiple-dividend plan” violates the anti-lottery or trading stamp law. The plan operates as follows:

“The owner of the plan or his agent canvassed the city where the drug store is located and obtained about 1500 registrations on what is called a multiple dividend certificate. Each registrant wrote his name and address on an individual card which was then placed by the canvasser in a depository located in the drug store. Registration was free of charge. No purchase was necessary.

“After the initial registration, if there was anyone who had not been registered by a canvasser and who wished to do so such person could register free of charge by obtaining a registration card, signing the same and depositing the signed registration card at the drug store. It is not necessary that the registrant go to the store to register. Anyone can obtain the registration card for him free of charge and return it to the store after it has been signed.

“Each morning before 9:00 A. M. one card is drawn and \$1.00 is delivered to the home of the registrant before noon of that day. If the registrant has a daily coupon, this amount is paid. In the event that the registrant does not have a daily coupon or cannot be located at the address given, this fact is *posted in the store* and the money is added to the sum to be given the next day.

“In order to be entitled to the money, it is necessary that he have at his home a daily coupon which was issued the previous day. These daily coupons are distributed *free of charge at the store*. No purchase is necessary to receive a daily coupon. The coupon is not earmarked in any way, so that it is not necessary for the registrant to receive the same personally. Anyone can receive the coupon for the registrant.”

Lotteries are prohibited by sec. 348.01, Stats., which section does not define a lottery. The three essential elements of a lottery are consideration, prize, and chance. 38 C. J. 289, 17 R. C. L. 1222, 48 A. L. R. 1116, 103 A. L. R. 866.

It is clear that the elements of prize and chance are present in the plan described above. The only question is whether there is consideration within the meaning of the anti-lottery law.

The practical effect of this plan is to induce large numbers of people who never did so before to come into and buy at the drug store. It is this increased patronage that supports the plan and makes prizes possible. Without it the distribution of prizes would quickly cease.

Analysis of the element of consideration is ruled by two prior opinions of this department, XXVII Op. Atty. Gen. 190, and 225, holding that the schemes therein involved constitute lotteries. We conclude that this so-called "multiple-dividend plan" likewise must be condemned as a lottery under sec. 348.01, Stats.

It is very doubtful that the scheme can be condemned as a violation of the trading stamp act, sec. 100.15, Stats., as the symbols used do not appear to be used "in connection with the sale of any goods, wares or merchandise." That is an essential element of an offense under the trading stamp act. *Rice v. Green*, 199 Wis. 518.

NSB

Elections — Citizenship — Child born abroad in 1913, whose father at time of such birth was citizen of United States and had resided therein, is American citizen.

December 6, 1938.

HENRY J. GRAMLING, M. D., *Secretary,*
Board of Medical Examiners.

Your board has received from a young woman physician an application to take an examination. This young woman was born in France of American-born parents, who were

American citizens at the time of her birth. You inquire whether the fact that her parents were American citizens at the time of her birth in France would automatically make the young woman physician a United States citizen.

From an affidavit submitted to this office by the father of the young woman, it appears that the father and mother were both born in a village in the state of New York. The father and mother resided temporarily in Grenoble, France, while the father took postgraduate studies in a university in that city; and it was during this time that the young woman in question was born, November 17, 1913.

At the time of the birth of the young woman physician, and until 1933, Title 8, chapter 1, section 6, U. S. C. A., provided as follows:

“All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. All such children who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority. Duplicates of any evidence, registration, or other acts required by this section shall be filed with the Department of State for record.”

From your statement and the affidavit submitted it appears that the father resided in the United States prior to pursuing graduate studies in France. Inasmuch as the young woman physician's father had resided in the United States and was a citizen of the United States at the time of her birth, she became a citizen of the United States by virtue of the statute above quoted. *Wolff v. Archibald*, 14 Fed. 369; *Ware v. Wisner*, 50 Fed. 310; *Buckley v. McDonald*, 33 Mont. 483, 84 Pac. 1114; *State ex rel. Phelps v. Jackson*, 79 Vt. 504, 65 Atl. 657.

JRW

Criminal Law — Gambling — Lotteries — “Multiple-dividend” daily coupon scheme violates sec. 348.01, Stats., prohibiting lottery.

December 6, 1938.

INSPECTION AND ENFORCEMENT BUREAU.

You have submitted a circular denominated a “multiple-dividend” daily coupon and inquire whether the scheme described therein constitutes a violation of the lottery law.

The scheme or plan of operation is used by a retail store. An individual obtains from the retail store a so-called multiple-dividend registration certificate, which he signs and deposits with the store. This certificate constitutes a permanent registration for that individual and is deposited in a receptacle from which a drawing is made every day before nine o'clock, A. M. The registration certificate is included in every drawing. The individual then secures from the store each day, without the necessity of making any purchase, a “multiple-dividend” daily coupon which is valid for twenty-four hours. Between nine o'clock, A. M., and noon, a representative of the retail store calls at the address given on the registration certificate which was drawn that morning. If the individual whose certificate was drawn is present and has a signed daily coupon valid for that day, or has left such a coupon in anticipation of the call, a “dividend” of \$1.50 in cash is paid to, or left for, the individual whose registration certificate was drawn. In the event that the money is not paid because the individual has not complied with the rules and regulations, such fact will be posted in the retail store and the \$1.50 will be added to the “dividend” for the succeeding day. The “dividends” accrue in multiples of \$1.50 until awarded.

By art. IV, sec. 24 of the Wisconsin constitution the legislature is prohibited from authorizing a lottery. Sec. 348.01 of the Wisconsin statutes provides a penalty for “Any person who shall set up or promote any lottery for money, or shall dispose of any property of value, real or personal, by way of a lottery * * *.”

The statutes do not define "lottery." The word "has no technical meaning distinct from its popular signification," and may be defined as "a scheme whereby one or more prizes are distributed by chance among persons who have paid or promised a consideration for a chance to win them." *State v. Williams*, 108 Vt. 7, 182 A. 202; *State v. Wersebe*, 107 Vt. 529, 181 A. 299.

It is clear that the elements of prize and chance are present in the plan described above. The only question is whether there is consideration within the meaning of the anti-lottery law.

The practical effect of this plan is to induce large numbers of people who never did so before to come into and buy at the store. It is this increased patronage that supports the plan and makes prizes possible. Without it the distribution of prizes would quickly cease.

Analysis of the element of consideration is ruled by two prior opinions of this department. XXVII Op. Atty. Gen. 190 and 225, holding that the schemes therein involved constitute lotteries. We conclude that this so-called "multiple-dividend plan" likewise must be condemned as a lottery under sec. 348.01, Stats.

NSB

Banks and Banking — Unemployment Insurance — Unemployment compensation payments due from bank prior to time it was closed and taken over by banking commission for purposes of liquidation constitute preferred claims in liquidation by terms of sec. 108.23, Stats.

Special deputy banking commissioners in charge of liquidation of state banks and their assistants are employees of commission and not of bank under provisions of sec. 220.08, subsecs. (4) and (7), and sec. 108.02, subsecs. (3), (4) and (5), Stats.

December 9, 1938.

H. F. IBACH, *Commissioner,*
Banking Department.

You state that at the time the X Bank was placed in liquidation the bank had already sent in its check for its current unemployment compensation payment due under the Wisconsin unemployment compensation act, but that the check did not clear before the bank closed and was returned. You state also that there were certain other contribution payments due which accrued prior to the time the bank closed which have not been paid. You ask whether these constitute general or preferred claims against this liquidation.

Sec. 108.23, Stats., provides :

“In the event of an employer’s dissolution, reorganization, bankruptcy, receivership, assignment for benefit of creditors, judicially confirmed extension proposal or composition, or any analogous situation including the administration of estates in courts of probate, the payments required of the employer under this chapter shall have preference over all claims of general creditors and shall be paid next after the payments of preferred claims for wages.”

Since the bank, as an employer under ch. 108 of the statutes, has been placed in the hands of the banking commission for liquidation, the provisions of the above statute are controlling and the unemployment compensation payments due from the bank prior to the time it was closed constitute

preferred claims in the liquidation after the payments of preferred claims for wages.

You inquire also concerning the status under the unemployment compensation act of special deputy commissioners employed in the liquidation of delinquent state banks and as to the status of any persons they might employ to assist in the liquidation.

Sec. 220.08, subsec. (4), Stats., provides in part:

“The commission may, under its hand and official seal, appoint one or more special deputy commissioners, as agent or agents, to assist it in the duty of * * * liquidation, * * *. The commission may from time to time authorize a special deputy commissioner to perform such duties connected with such * * * liquidation * * * of the assets of such banks or banking corporations * * *.”

Sec. 220.08, subsec. (7) provides that the compensation of the special deputy commissioners, and other employes and assistants, and all expenses of supervision and liquidation shall be fixed by the commission subject to the approval of the local circuit court and that such compensation and expenses shall be paid out of the funds of the bank being liquidated.

The terms “employe”, “employer”, and “employment” for purposes of the unemployment compensation act are defined by sec. 108.02, subsecs. (3), (4), and (5).

Sec. 108.02, subsec. (3), Stats., provides:

“‘Employe’ means any individual employed by an ‘employer’ and in an ‘employment’ both subject to this chapter.”

Sec. 108.02, subsec. (4) par. (a), Stats., provides in part:

“‘Employer,’ except where the term by its context applies to each employer of one or more individuals in Wisconsin, means any person, partnership, association, * * * including this state and any municipal corporation or other political subdivision thereof, * * *”

Sec. 108.02, (5) (a), Stats., provides:

“‘Employment,’ subject to the other provisions of this subsection, means any service performed by an individual for pay, including service in interstate commerce, under any contract of service for pay or contract of hire, written or oral, express or implied, whether such individual’s contract was directly made with and paid by the employer or through a person in his employ, provided the employer had actual or constructive knowledge of such contract; and each individual thus engaged by any employer to perform services for pay shall for the purposes of this chapter be treated as in an ‘employment,’ unless and until the employer has satisfied the commission that such individual has been and will continue to be free from the employer’s control or direction over the performance of his work both under his contract of service and in fact, and that such work is either outside the usual course of the employer’s enterprise or performed outside of all the employer’s places of business, and that such individual is customarily engaged in an independently established trade, business, profession or occupation.”

In view of the above provisions, this department is of the opinion that special deputy commissioners and such assistants as they may employ with the authorization of the banking commission are employees of the banking commission for purposes of the unemployment compensation act, even though such employees are paid out of the funds of the bank in liquidation.

It is obvious that the banking commission is an employer within the meaning of sec. 108.02, (4) (a) and that the special deputies and their assistants have been employed by the employer to perform work in a covered employment. They are performing services under contracts of hire made directly with the employer. It is not necessary under the language of the statute that the pay come directly from the employer, the only requirement being that they perform “services for pay”. The presumption that these deputy commissioners and their assistants are employees is therefore created. Furthermore, this presumption has not been overcome inasmuch as they do not perform their services free from the direction and control of the employer. Also, these services are performed in the usual course of the employer’s enterprise and in the employer’s places of business. Likewise, there is no showing that they are customarily engaged

in an independently established trade, business, profession or occupation.

The special deputy commissioners are appointed by the banking commission as its agents. The commission determines the amount of their compensation subject to court approval. It has the complete right to control and direct the work of such deputy commissioners and assistants and it may discharge them or transfer them to other liquidations at will. Conversely, the bank which is being liquidated has no control over the special deputy commissioners or their assistants.

Since the banking commission is charged with the duty and responsibility of liquidating delinquent state banks and is vested with complete authority over the entirety of such proceedings; subject only to a supervisory control by the circuit court of the county in which the bank is being liquidated, it must be regarded as the employer of special deputy commissioners and such assistants as may be employed for the purpose of carrying on the liquidation. Furthermore, such individuals cannot be excluded from the employer's defined pay roll under sec. 108.02, subsec. (5) (f) 2. of the statutes inasmuch as they are not employed on an annual salary basis. It is contemplated that the duration of the employment shall not exceed the period necessary for the liquidation of the bank, and in any event, these people are subject to discharge by the commission at any time. As the employer, the banking commission is liable for the contributions due under the unemployment compensation act in respect to such employees. However, since the employment of special deputy commissioners and assistants is a necessary incident to the liquidation of a bank, these contributions are expenses of liquidation under sec. 220.08, subsec. (7), Stats., and may be charged back to the bank as such under the provisions of that section.

NSB

Appropriations and Expenditures — Trade Practice Department — Recovery Act — Codes — Pre-code expense and obligation that became fixed under 1935 fair trade practice statutes but which was not legal obligation at time act expired by express terms thereof, but which was capable of ripening into legal obligation upon happening of contingency and which contingency was fully met after passage of ch. 3, Laws Special Session 1937 (new trade practice act), is "fixed obligation" within meaning of sec. 110.09, Stats., as amended by ch. 3, Laws Special Session 1937, and is therefore obligation which present trade practice commission may and should pay.

December 9, 1938.

TRADE PRACTICE DEPARTMENT.

You have requested an opinion as to whether your department is liable for or can pay a bill rendered to your department by one A. F., a lawyer who performed services and incurred expenses for travel and other items in connection with the formulation of a proposed code of trade practice standards and methods of fair competition for beauticians. It appears from the file submitted to us and from conferences which we have held with the claimant and members of the old trade practice commission that these services were performed and the expenses incurred during the months of March and April of 1936, and with a definite understanding existing between the old trade practice commission and the claimant that if a code was subsequently promulgated and established for the industry, the claimant would be reimbursed a reasonable fee for his services and for expenses incurred.

The old trade practice commission customarily paid a reasonable amount for such services and expenses as a pre-code expense under sec. 110.08, subsec. (1), Stats. 1935, which provided as follows:

"Every code prescribed or approved by the governor shall contain provisions for assessing against and collecting from all persons, firms and corporations subject to the code, as

employers, on a fair and equitable basis therein set forth, (a) assessments sufficient to reimburse the state for the expenses incurred by it in connection with the initial promulgation of the code and its administration, to be paid to the state treasurer at such times and upon such certifications by the governor as may be prescribed in said code; and (b) assessments sufficient to pay the expenses incurred by any code authority or administrative agency established by such code when covered by a budget of such code authority or administrative agency approved by the governor."

With respect to the claim under consideration, the claimant does not rely upon this custom, but rather upon a definite understanding that existed between him and the old trade practice commission, which understanding has been confirmed by the members of that commission.

A code was not established or promulgated before the expiration of the 1935 act. Sec. 110.02, Stats. 1935, provided as follows:

"This chapter shall cease to be in effect and any agencies established thereby shall cease to exist on July 25, 1937
* * *"

By ch. 3, Laws Special Session 1937 (effective October 17, 1937), ch. 110, Wis. Stats. 1937, was re-enacted subject to the changes made by the act of re-enactment (ch. 3, Laws Special Session 1937). By the terms of sec. 1 of ch. 3, Laws Special Session 1937, the expiration date of the 1935 act was changed to April 1, 1939, and the 1935 act re-enacted as above stated.

A code was established under the 1937 act. It is conceded by all that the services performed by the claimant were extremely helpful in the formulation of the code that was formulated and promulgated. The bulk of the preliminary investigational work had already been performed as a result of the services performed by the claimant (and, possibly some others), and the claimant had submitted a tentative code prior to the expiration date of the 1935 act. That tentative code, with minor modifications, was the code that was ultimately promulgated. The claimant did not submit the statement for services until after the industry had been as-

sessed and as a consequence there is no room in the budget of the trade practice commission for payment of the bill submitted. The budget is necessarily an elastic budget based upon pre-code expenses and prospective state revenue needs for administering the code for the particular industry. Sec. 110.08, as amended by sec. 5, ch. 3, Laws Special Session 1937, provides as follows:

“* * * The estimated cost of investigation, administration and enforcement not otherwise provided for shall be assessed upon an equitable basis against those regulated.”

There is no question but that the revenues on hand from assessments collected against the industry are more than sufficient to pay the claim in question. The revenues on hand may be adequate to pay the claim and all costs for administering this particular industrial code, depending upon whether there is sufficient elasticity in the budgetary estimates of the department to absorb this particular item.

In XXVI Op. Atty. Gen. 565 you were advised by this department that code assessments due and payable under the 1935 act could be collected under the 1937 act. On June 28, 1938* this department advised you that a bill for telephone service during the period from July 25, 1937, to October 17, 1937, was not a proper item for payment, since there was by law no trade practice department in existence during that interval of time.

It is apparent that the present claim is not ruled by the opinion of June 28, above referred to, since the services in question were performed and the expenses were incurred during a period when the trade practice department was by law in existence.

Sec. 110.09 evidences a clear legislative intent on the part of the legislature that any obligations which became “fixed” under the old law should be recognized as valid binding obligations.

The main question for determination would seem to be whether this claim for services and expenses is such a claim as “became fixed” within the meaning of sec. 110.09, Stats., as recreated by ch. 3, Laws Special Session 1937.

*Page 418 of this volume.

The claimant's right to reimbursement, in so far as there was anything for him to do, had become "fixed" several months before expiration of the 1935 act. The claim became "fixed" under the old law subject to becoming a legal obligation upon the happening of a contingency. When that contingency happened, whether under the new or old law, it is our opinion that the claim then became a legal obligation.

It will be noted that sec. 110.09, as amended, refers to "obligations that became fixed". The language is not with reference to "fixed legal obligations", but rather "obligations that became fixed". Language with reference to "fixed legal obligations" would be entirely surplusage, as no legislation was needed with respect to the state having to honor "fixed legal obligations" under the old code. A "fixed legal obligation" under the old code was binding in any event. No amount of legislation could make it more binding. It would seem to follow, therefore, that when the legislature in sec. 110.09, as amended, used the term "obligations that became fixed", the legislature referred to something less than a "fixed legal obligation" under the old code. A fixed obligation under the old code subject to ripen into a legal obligation under the new upon the happening of the contingency, would seem to be within the legislative intent of "obligations that became fixed", as used in sec. 110.09, Stats., as amended.

It is our opinion that the present trade practice department not only can, but should, pay the claim in such amount as was customary for the allowance of similar services as a pre-code expense by the old commission.

NSB

Indigent, Insane, etc. — Poor Relief — Various farm aids administered by rural rehabilitation division of FSA analyzed from standpoint of nature of specific form of aid and whether it is essentially pauper aid and evidentiary value of such aids appraised as bearing upon question of legal settlement under sec. 49.02, subsec. (4), Stats.

December 17, 1938.

PUBLIC WELFARE DEPARTMENT.

With respect to the various aspects of the farm security administration (FSA), formerly the resettlement administration (RA), you inquire what effect the various farm aid activities of that administration have upon the question of legal settlement under sec. 49.02, subsec. (4), Stats.

For purposes of this discussion, the various agricultural aids administered by the rural rehabilitation division of FSA may be roughly grouped into four classifications as follows:

1. FSA and corporation standard loans
2. FSA and corporation emergency loans
3. Grants not supported by a work agreement
 - a. Grants to standard loan borrowers (1 above)
 - b. Grants to emergency loan borrowers (2 above)
 - c. Grants to others (non-borrowers)
4. Grants supported by a work agreement when made to any class of borrowers or non-borrowers

At the outset, it may be observed that it is difficult and impossible to lay down any rule of thumb that will be applicable to all cases. Whether or not a person is a pauper and receiving aid as such is a question of fact and that question of fact oftentimes cannot be determined by reference alone to the aid which is received and the source from which it is received. A determination of this question of fact oftentimes requires a critical analysis of the status of the individual (pauper or non-pauper), not only at the time of receiving the aid but for some considerable period of time prior thereto, and an analysis of all the evidentiary facts which would have any bearing upon the ultimate question

of fact (support as a pauper) sought to be determined. *Ellington v. Industrial Comm.*, 225 Wis. 169, *Rolling v. Antigo*, 211 Wis. 220, *Town of Saukville v. Town of Grafton*, 68 Wis. 192.

All that we can do is analyze these various farm aids administered by FSA from the standpoint of the nature of the specific form of aid and whether it is essentially a pauper aid, and appraise its evidentiary value as bearing upon the ultimate question of fact (support as a pauper) in what for lack of a better term we will call the average or run of cases.

With respect to all forms of rural rehabilitation or relief within the scope of the rural rehabilitation program of the FSA, it should be noted that the borrowers or clients of this agency are confined to relief or near relief cases. A borrower, to be eligible, must come from those occupying that economic status and must be unable to obtain financing or credit from any other loaning source, governmental or private. The same is true of a recipient of a grant.

Having the foregoing in mind, we proceed to analyze the various loan or grant activities of this agency as above classified for the purpose of determining what effect, if any, a particular type of loan or grant has upon the question of support while a pauper.

1. FSA AND CORPORATION STANDARD LOANS

Neither of the above types of loans is such as to have any particular significance with respect to the problem under consideration. Certainly it cannot be said that they constitute support or relief as a pauper. Such loans are made upon the basis of a supposedly sound farm and home management plan whereby prospective income from a farm unit is weighed and measured against prospective operating expenses. A loan in sufficient amount is made so as to set up the borrower upon an economically sound farm unit and operating basis. The loans are amortized over a period not to exceed five years, except in exceptional cases, and barring unforeseen emergencies, the loans contemplate that the borrowers will become economically self-supporting farmers. Such loans are in no sense relief. They are secured by the property purchased with the proceeds of the loan and other

property, if the borrower has any. That the borrower may become a rehabilitated farmer, the loans and the borrowers are supervised throughout the life of the loans by a county rural rehabilitation supervisor. As such loans are made for rehabilitation purposes and the very purpose and object of the program is that of rehabilitation, it is apparent that such loans, in so far as they are of any significance upon the question of support while a pauper, militate against any concept that the borrowers are paupers or are receiving support as such as the result of receiving such a loan.

2. FSA AND CORPORATION EMERGENCY LOANS

The above loans are made as indicated by the classification as the result of an emergency or under circumstances when the borrower's economic status is such that a sound farm and home management plan as a basis of rehabilitation cannot be worked out for him. Emergencies may arise out of sudden floods, droughts or any of the innumerable emergencies that are created by the elements beyond the control of the borrower. Loans made under such circumstances are of little significance in determining the question here under consideration. It is not deemed that any loan, repayment of which is contemplated, constitutes "support as a pauper" within the language of the statute. Such support probably must be in the nature of a gift or grant rather than in the form of a repayable loan in order to be of any particular significance upon the problem presented.

3. GRANTS NOT SUPPORTED BY A WORK AGREEMENT

a. Grants to borrowers classified in 1 above (FSA and corporation standard borrowers)

It is not deemed that such grants are of any particular significance upon the problem. They are made to the borrowers where either the farm plan, which forms the basis for the loan, was faulty or, because of unforeseen circumstances, the income for a particular year was less than contemplated. The grant is made to supplement the farm plan and is made to act as a buffer between rehabilitation and relief. It is made for the purpose of ultimately achieving the objective of rehabilitation and during the rehabilitation

period. To some extent and in some cases it does indicate that the particular borrower is lower down in the economic scale than the average run of such borrowers. The extent to which such a grant has significance can be arrived at only by examination into the circumstances under which the particular grant was made and consideration of the number of times that a particular borrower has had to supplement his rehabilitation loan with grants in order to enable him to maintain himself and family at a subsistence level. Probably in the average run of cases, grants to this class of borrowers are of no great amount of significance. In other cases they may be of significance especially when accompanied with other facts tending to establish a definite pauper status.

b. Grants made to borrowers classified in 2 above
(emergency loan borrowers)

Grants to such class of borrowers are of significance. If the emergency loan borrower is not also a standard case, the chances are that the borrower is so far down in the economic scale that a sound farm plan cannot be written for him—so far down that rehabilitation has been considered a hopeless task, taking into consideration the whole economic set-up of such borrower. A grant made under such circumstances is outright relief—outright support. The whole picture is very apt to indicate a rather definite relief or pauper status.

c. Grants made to others (non-borrowers)

Such grants are of significance. If there were a possibility of repayment, the aid would probably have been extended in the form of an emergency loan rather than a grant—although this does not necessarily follow in all instances. The grant program is a difficult one to control or to administer one hundred per cent perfect. Certain areas in the state are decidedly “relief”-minded and in such areas you will undoubtedly find that the grant program has been somewhat abused. Individuals may have received grants when they were eligible for and could have received a standard loan or at least an emergency loan and so that, in a particular case under consideration, there would appear little or no excuse

for the individual's becoming the recipient of a grant. Under such circumstances, the grant is of no particular significance. It does not establish a relief or pauper status. Such cases will not be large in number but undoubtedly they do exist. Where they exist, they will have to be appraised accordingly. By and large, where the program has been properly administered, a grant made to the class here under consideration is of significance. In the great majority of instances, such grant made in connection with all the other facts and circumstances of a case will probably lead to the conclusion that the recipient was being supported by government aid while occupying a pauper status.

4. GRANTS SUPPORTED BY A WORK AGREEMENT WHEN MADE TO ANY CLASS OF BORROWERS OR NON-BORROWERS

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

"Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village or city while supported therein as a pauper or while employed on a federal works progress administration project or while enrolled in the civilian conservation corps or while residing in a transient camp *or while employed on any state or federal work relief program* shall operate to give such person a settlement therein. * * *"

It is apparent from the above section that the effect of a grant being supported by a work agreement with reference to the problem under consideration cannot be determined by a consideration of the individual's status as a pauper only. Consideration must also be given to whether the individual was "employed on any state or federal work relief program". If so employed during a year in question, the effect is the same upon the question of "legal settlement" as if the individual were a pauper and receiving support as such and without regard to this latter question.

FSA has established a works program in connection with the grant program for a number of reasons, three major ones of which are: (1) to prevent the recipient from feeling that he is an object of charity or relief—to prevent his feeling that he is a pauper. As a condition of making the grant,

the applicant therefor, if able-bodied, must sign a work agreement whereby he agrees to work on such public projects as are approved by the administration if and when the county in which he resides, or any subdivision thereof, sets up projects of needed public improvements and agrees to employ the applicant at the prevailing wage scale for the type of work for which the applicant is later employed. The daily wage at which an applicant is later employed is then applied upon the work agreement which represents the total amount of the grant or grants given to an applicant. The grant is thus based upon a consideration which is converted into a wage paid by the government when the applicant is employed. The applicant thus does not get something for nothing but gets the grant only upon consideration that he will furnish labor to the extent of available employment when employment is offered to him. He thus does not become the recipient of charity but agrees to and does earn dollar for dollar that which he receives; (2) the grant money expended in the state by this agency represents a reservoir of potential employment which can well be converted into something lasting and of public benefit as well as furnished in the form of relief as an outright grant which would be of no significance to this or coming generations; and (3) the program affords a ready means of appraising applicants from the standpoint of whether their financial condition is due to a combination of economic forces beyond their control or whether it is due to indifference—a willingness to receive without giving value therefor. The test comes when employment is offered a signer of a work agreement. Upon that test, the merit of future applications by the same individual may be readily appraised and the program — a meritorious one when properly administered — kept within control.

With such major considerations in mind, the administration established a works relief program in connection with the making of grants. The work agreements are not voluntary work agreements but are rather involuntary work agreements. Any able-bodied applicant must sign such a work agreement before he is eligible for a grant. The grant or relief thus furnished is distinguishable from the relief in *West Milwaukee v. Industrial Comm.*, 216 Wis. 29, where

the proposition of work or no work was left entirely optional with the recipient of relief.

The work program of this agency has been very carefully set up in all of the counties that have adopted the program so as to establish an employer-employee relationship between the county or other unit of government that does the employing and the signers of these work agreements. The government, by virtue of these work agreements, pays the wage of the signers thereof when employed. The set-up is very carefully worked out so as to make the signer a compensable employee within the rule established by *Marathon County v. Industrial Comm.*, 218 Wis. 275.

As the work agreement is thus capable of being and is converted into a wage when the signer is employed, it must follow that a grant supported by such work agreement is of no particular significance in determining the question of a pauper status. The recipient furnishes consideration for that which he receives. The foregoing is true as applied to all class of borrowers or non-borrowers.

The grant supported by a work agreement is of even less significance upon this question when made to any class of cases listed in 3 above than when not supported by a work agreement and for the obvious reason that the grant is based upon a consideration.

The foregoing is an analysis of the effect of the work agreement as such upon the question of a determination of pauper status—support as a pauper. We will now consider the effect of *employment* under the work agreement upon the question of legal settlement.

It is our opinion that the program is a “federal work relief program” within the meaning of the statute. The statute is with reference to “employment” upon a federal works relief program and not with reference to an agreement that contemplates future employment, i. e., not with reference to signing of a work agreement. If, under the statute, the borrower is actually employed as a result of signing this work agreement during a year under consideration, then without regard to his status as a pauper, the effect would be the same as if he had received support as a pauper during that year in question.

NSB

Public Health — Basic Science Law — Whether or not there has been substantial compliance with sec. 147.09, Stats., relating to granting of basic science registration, is primarily question of fact for state board of examiners in basic sciences.

December 20, 1938.

BOARD OF EXAMINERS IN THE BASIC SCIENCES.

Attention Robert N. Bauer, *Secretary*.

Our attention is called to the fact that sec. 147.09, Stats. 1925, provided for the granting of basic science certificates, on the basis of previous practice, upon application within sixty days after the statute went into effect. Some applications were received after the expiration of the sixty-day period and the attorney general was asked for an opinion respecting the right of the board to act upon such tardy applications. In XIV Op. Atty. Gen. 570 it was ruled that the statute was directory rather than mandatory, and that since many persons would probably not have knowledge of the enactment of the law within the time so limited it would be reasonable for the board in its discretion to permit registration at a later date.

This opinion was rendered on December 8, 1925, and the board consequently extended the time for making applications to August 12, 1926, this being one year from the original expiration date for filing applications. Since that time other applications have been refused and on May 20, 1932, the attorney general rendered another opinion to the effect that the statute did not authorize the board to accept or consider applications not presented until 1932. It was there pointed out that even in the case of a directory statute there must be substantial compliance and that compliance with a statute seven years after its enactment when the time set for compliance was sixty days would amount to unreasonable delay. See XXI Op. Atty. Gen. 500, 504.

You inform us that since the expiration of the extended date one X has made several applications for basic science registration upon the basis of previous practice, and urges

as a reason for considering his application that he was ill and out of the state during the time set by the statute and extended by the board for making application.

In view of the holding of this office in XIV Op. Atty. Gen. 570 that the provision relating to the application within the sixty-day period is directory rather than mandatory, the question presented to the state board of examiners in the basic sciences is, with respect to each application, whether there has been a substantial compliance with the statute and that presents the question of whether a particular application has been presented within a reasonable time under all the facts and circumstances of the particular case. Whether there has been substantial compliance must be determined in the first instance by the board as a *question of fact*. If the board should determine that in view of the circumstances in any particular case there has been substantial compliance with the statute, the board may then request an opinion from this department on the question of whether as a *matter of law* the action of the board was so clearly unreasonable as to be in contravention of the statute. Until the board has determined the factual question as to whether one X has substantially complied with the statute, this department is in no position to pass upon the legal question as to whether the finding of the board is so clearly unreasonable as to be in contravention of the statute.

It is noted that the submission does not show for how long a period the applicant had practiced his profession in this state prior to February 1, 1925; when he left the state and ceased practicing it; when he first returned to the state after February 1, 1925; when he first made application for license upon his return; whether his health was such that he could practice upon his return and when he first had knowledge of the requirements under sec. 147.09, Stats., all of which are deemed essential material facts upon which the board must base its finding as to whether under all the facts and circumstances of the case the applicant has substantially complied with the statute.

WHR

NSB

Corporations — Securities Law — Purchase by issuer from dealer of his own unregistered bonds, which were originally properly registered but which were subsequently suspended and registration was canceled by commission, is not in violation of blue sky law, ch. 189, Stats. Such purchase is not sale within meaning of sec. 189.02, subsec. (6), Stats.

December 27, 1938.

BANKING COMMISSION.

Attention G. M. Buenzli, *Acting Director*,
Securities Division.

You ask whether under the securities law a dealer may sell the bonds of a building to the owner or debtor of the particular issue under the presumption that such a transaction is a redemption. You state that these bonds were properly registered at the time they were issued but that subsequently, after sale to the public, the issue was suspended and the registration canceled by the banking commission. The particular transaction in question, then, involves the purchase by the issuer, or one similarly situated, of his own unregistered securities from a licensed dealer. From your statement it appears that there is no principal-agent relationship between the issuer and the dealer.

Sec. 189.02, subsec. (6), Stats., defines a sale for purposes of the securities law as follows:

“ ‘Sale’ or ‘sell’ includes every disposition, offer, negotiation, agreement, or attempt to dispose of a security or interest in a security for value, and every solicitation of a subscription or order for the purchase of a security and every exchange of a security for property, but shall not include the execution of orders for purchase of securities by a licensed dealer provided such dealer acts as agent of the purchaser, has no direct interest in the sale or distribution of the security ordered, receives no commission, profit or other compensation from any source other than the purchaser, and delivers to the purchaser written confirmation of the order which clearly itemizes his commission, profit or other compensation. * * *.”

The securities law was enacted as a protective measure against the sale of worthless or unsound securities to the investors of this state. The securities division of the banking commission is charged with the responsibility of investigating the financial background of each new security proposed for sale to the general public and only upon the approval of that commission is the security granted registration. Except for certain exemptions which are not important here, such registration is a necessary prerequisite to the legal "sale" of the new security to the investing public under the provisions of sec. 189.06, subsec. (1), Stats.

In *Klatt v. Columbia Casualty Co.*, 213 Wis. 12, 21, 250 N. W. 825 (1933) the court said:

"* * * 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."

The definition of a "sale" contained in sec. 189.02, subsec. (6), Stats., is stated in very broad language. However, considering the purpose of the securities law and the legislative intent in enacting it, such a transaction as you describe must be construed as being entirely outside those which constitute a "sale" within the meaning of the act. Since in this particular instance the purchaser is the person who originally issued the securities and who has direct control over the financial structure which determines their true worth, there is no substantial reason for compliance with the usual requirement of registration. This buyer, being the issuer, is the *only* private person in the state as to whom registration cannot serve its intended purpose.

It appears that the transaction to which you refer occurred prior to the call date of the bonds. It is possible therefore that, after his purchase, the issuer may re-issue the bonds. Unless registration is granted in the meantime, however, the unregistered bonds may be sold only to licensed security dealers as an exemption under sec. 189.06, subsec. (1), Stats. Any sale or solicitation to the general public would still be prohibited by the provisions of sec. 189.06,

subsec. (1), Stats. Thus the entire intent and purpose of the securities law is accomplished and at the same time the bonds which cannot be further issued to the public have been taken out of circulation among private investors.

You are therefore advised that the disposition of unregistered bonds by a licensed security dealer to the issuer or owner of the particular issue is not a "sale" within the purview of chapter 189 and that such a transaction is not a violation of the securities law as it is now written.

NSB

Municipal Corporations — Taxation — Special Assessments — Sec. 62.21, subsec. (1), par. (h), subds. 1 and 2, Stats., do not authorize county treasurer to assign to city delinquent special assessment tax certificates where city has paid bond payments secured by special assessment out of its general fund and returned special assessments to county as part of its excess delinquent tax roll and where county's interest in excess roll has been satisfied and county is now paying all delinquent tax money being collected for years in question to city.

December 27, 1938.

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

You have requested an opinion upon the following facts:
For the years 1932 and 1933 the city of Madison returned to the county treasurer in lieu of cash under par. (d), subsec. (1), sec. 62.21, Stats., certain special assessments. The city of Madison had an excess delinquent tax roll with the county for the years 1932 and 1933 and these special assessments became a part of such excess roll. Subsequently the special assessment certificates were bid in at the tax sale by the county. The county's interest in the excess roll has

been satisfied and the county is now paying all moneys collected on the taxes of 1932 and 1933 to the city.

The question has arisen as to whether the city may by passing a resolution require the special assessment certificates for the years 1932 and 1933 to be assigned by the county treasurer to the city.

Under the provisions of sec. 62.21, subsec. (1), par. (d), Stats., special assessments which are unpaid may be returned to the county as delinquent and then may be accepted and collected by the county in the same manner as delinquent general taxes on real estate.

If special assessment certificates are bid in at the tax sale and are not sold or otherwise disposed of in three years, they may be charged back as a tax to the proper city, town or village under sec. 62.21, subsec. (1), par. (h), subd. 1, Stats., which reads in part as follows :

“* * * If certificates issued under the provisions of this section are necessarily bid in at the tax sale by the county and are not sold, redeemed or otherwise disposed of within three years of the date of the sale thereof, the amount of the redemption value thereof at the time may be charged back as a tax to the proper city, town or village; but the county shall retain such certificates and if at any time thereafter the same shall be sold, redeemed or otherwise disposed of, the county treasurer shall pay the city, town or village which returned the same the full amount received therefor including interest and fees, or if the county shall take tax deeds upon such certificates the amount of the redemption value of said certificates shall be credited to the respective town, city or village which returned the same.”

After the charge back has been made in accordance with the foregoing statute, the governing body of a town, city or village may, under sec. 62.21, subsec. (1), par. (h) 2, require the county treasurer to assign to the town, city or village the special assessment certificates which have been charged back. Sec. 62.21, subsec. (1), par. (h) 2, Stats., reads in part as follows:

“* * * The county treasurer after the delinquent special assessments have been charged back to the municipality upon demand by resolution of the governing board of the

municipality shall assign to the municipality all certificates which have been thus charged back. The certificates which have been thus assigned to the municipality shall be subject to sale by the municipal treasurer at such prices as the local governing body shall determine or said certificates may be used as collateral or as a trust fund for loans thereon from any bank, corporation or individual. * * *.”

This is the only provision which we have found that gives any authority to the county treasurer to assign delinquent special assessment certificates to a town, city or village. However, on the facts presented the delinquent special assessments were never charged back as a tax but rather were placed on the excess delinquent roll.

In the absence of a charge back, we can find no statutory authorization permitting the county treasurer at the request of a governing body of a municipality to assign to such municipality delinquent special assessment certificates. Without such authorization, we must conclude that a county treasurer has no authority to assign delinquent special assessment certificates to a city.

WHR

Education — Public Officers — Liability of Teachers — Negligence — Tort — Granting of field lesson permit for educational tour by superintendent of schools does not lift any liability for injury to pupils from teacher and lodge it upon superintendent.

Such permit does not in any manner make board of education liable for such injuries.

Act of taking children from building for educational purposes does not in and of itself under ordinary circumstances constitute negligence.

Written consent of parent would bar parent's recovery for negligence predicated upon hazardous nature of particular trip, but would not bar his right to recovery for any superadded negligence upon part of teacher that approximately results in injury. Consent of parent affects his own cause of action only and not that of child.

December 27, 1938.

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

You state that teachers in the public schools frequently take class groups on educational tours. Specifically, you ask: (1) Does the granting of a field lesson permit for such tours by the superintendent lift all or some of the liability for injury to pupils from the teacher and lodge it upon the superintendent? (2) Does the act of the superintendent lift the liability off the teacher and place it upon the board of education? (3) Is the act of taking children away from the building for any of the numerous educational purposes not best served inside the school building itself an act of negligence? (4) Will the written consent of a parent in any way affect a teacher's liability for injury to a pupil while engaged in an educational tour?

In an opinion to the state superintendent of schools dated June 10, 1938, XVII Op. Atty. Gen. 395, this department ruled that both an officer of a school and a teacher, who is an employee of a school system, are liable for torts committed while engaged in the performance of their duties.

It should be noted, however, that it was pointed out in said opinion that both officers and employees can be made to respond in damages that are proximately caused as the result of actionable negligence on their part and that the liability for actionable negligence is the same as that of any individual. It is our opinion that the fact that the superintendent granted a permit for an educational tour to be conducted by a teacher would not relieve said teacher from liability for injury to a pupil which was the proximate result of actionable negligence upon the part of the teacher.

Since the act of the superintendent in authorizing the conducting of an educational field trip would not lift the liability off the teacher in the event of negligent injury to the pupil, no liability would attach therefor to the board of education. It was held in the opinion hereinbefore referred to that as a matter of public policy it is the law of this state that the state and the municipal subdivisions thereof are not liable under the doctrine of *respondeat superior* when engaged in the exercise of a governmental function for the torts committed by officers and employees thereof. In *Apfelbacher v. State*, 160 Wis. 565, 576, it was said:

“A denial of the application of the doctrine of *respondeat superior* to the state when exercising a governmental function does not leave a person injured remediless. *He has his cause of action against the person or persons actually committing the wrong.* * * *.” (Italics ours.)

The rule is that, the public corporation not being liable for the reason stated, the members constituting it cannot be charged with liability unless it be shown that they were guilty of such misconduct in the discharge of their duties as would render them liable as individuals. See *Morrison v. Fisher*, 160 Wis. 621.

It is our opinion that the mere act of taking children away from the school building would not, ordinarily, be an act of negligence upon the part of the teacher or upon the part of the superintendent.

However it should be pointed out that in certain cases the mere act of taking the children from the building to hazardous places might constitute negligence. If in such a case the parent has given his consent to the proposed trip, it is

the opinion of this department that his cause of action against the teacher is barred if the injury to the child results, not from any superadded negligence, but solely from the act of taking the child upon the trip in question.

Prior to the passage of our comparative negligence statute, sec. 331.045, Stats., it was well settled that a parent's right of action for injury to his child is barred by the contributory negligence of the parent. *Matson v. Dane County*, 177 Wis. 649, 189 N. W. 154.

It is not deemed that the comparative negligence statute would affect this particular situation, as under the statute the parent would still be barred if the negligence of the parent is as great as the negligence of the one against whom recovery is sought. In the problem under consideration, the act of negligence, if any, of consenting to the child going upon a particular hazardous trip would seem to be as great, as a matter of law, as the act of negligence of the school teacher in taking a child upon a particular trip. The negligence in each instance is predicated upon the same set of facts. As a consequence, it would seem that as a matter of law the parent's negligence must be equal to that of the negligence of the teacher. *Manitowoc Trust Co. v. Bouril*, 220 Wis. 627.

Furthermore, when a parent, knowing the nature of the proposed trip, consents thereto he must be held to have assumed the risks inherent in such an excursion. The situation is similar to that in which a parent consents to the employment of his child in a dangerous occupation. The courts have uniformly held that in such cases the parent assumes the risks due to such employment and can not recover for injuries resulting therefrom. 46 C. J. 1298 and cases there cited.

It should be pointed out, however, that the parent's consent to the trip affects only the liability arising from the act of taking the children upon the trip. The parent does not and can not waive or agree to waive any superadded negligence on the part of the teacher. In any case the consent of the parent can affect only his own cause of action and not that of the child.

AGH

NSB

Copyright — Corporation to which performers have assigned their alleged property rights in performances as recorded mechanically must comply with provisions of ch. 177, Stats.

December 27, 1938.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You request our opinion as to whether the activities of the National Association of Performing Artists, a New York corporation, come within the provisions of ch. 177, Stats. The corporation is an assignee of the rights, if any, of a number of performing artists in their respective performances as recorded mechanically. The corporation proposes to license the use of these performances and restrain unlicensed uses of them.

Sec. 177.01, subsec. (1), Stats., provides:

“No person, firm, association or corporation, other than the true or original composer, shall, either directly or indirectly, issue licenses or other agreements, for the public-rendition of copyrighted musical numbers by persons within this state unless said person, firm, association or corporation shall first obtain a license from the secretary of state to transact such business within this state.”

The theory upon which the corporation operates is that a performing artist has a property right in his own performance similar to common law literary property and that this right can be reserved by appropriate notice (e. g., “not licensed for radio broadcast”, etc.), upon sale of the disc upon which the performance has been recorded. In answer to your question, we will assume two situations: (1) that the performers have no property right and (2) that the performers have a property right in the production.

Situation (1). If the performers have no property right in the production. This alleged right must be regarded at the present time as an extremely nebulous one. In England,

where a criminal statute has been enacted prohibiting unauthorized recording for trade purposes, it was held in *Musical Performers' Protective Ass'n. Ltd. v. British International Pictures, Ltd.*, 46 T. L. R. 485 (1930), that the statute did not create a property right. The rationale of the case is that a performer had no property right at common law in his production and that the statute did not create such property right. The right, so far as we have been able to determine, has been upheld in but one decision in this country, *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937). In that case it was held (with some reservations not necessary to discuss here) that a performer has a property right in his recorded performance, that such right can be reserved at the time the records are sold by appropriate notice on the record label, and that a use contrary to the terms of that notice will be enjoined. The Pennsylvania court dismisses the English decision above cited in that the decision primarily involved construction of a criminal statute. That may be conceded. But if a performer had a property right at common law in his artistic production, it would not have been necessary to interpret the statute to determine whether a property right had been created. The rationale of the case is that no property right exists unless the statute created one. No cases are cited in the Pennsylvania decision based upon common law that would indicate that there is any such right at common law and we have been unable to locate any cases that would support such a right. If the right does not exist at common law and has not been created by statute, from whence cometh it? The Pennsylvania court supports the position reached in that it is but the application of common law principles to changed conditions. It impresses us that it might be argued with considerable merit that the court created a new right—a right that has neither common law nor legislative recognition.

Thus, if a performing artist has no property right in his production, what is the situation that is disclosed when he attempts to license that right and where the production is with respect to a copyrighted musical number? He obviously cannot license that which does not exist. What he is actually doing is relicensing a copyrighted number and

without any claim of purported ownership of the right to so license. It must stand to reason that a performer cannot, by purporting to license that which does not exist, actually restrain or restrict the use of a copyrighted number with respect to which there are rights and which the performer does not own and does not claim to own. The corporation as assignee of that which does not exist can have no greater rights.

If the law with respect to this alleged right is as assumed in situation (1), what the corporation is actually doing in so far as the production is based upon a copyrighted number, is either directly or indirectly licensing that number. This they cannot do without complying with the licensing provisions of sec. 177.01, Stats.

On the other hand, assuming situation (2) to exist, namely, that the performers have a property right in their production in so far as those productions are based upon a copyrighted number in protecting the right of the performers as assignee thereof, the corporation must be "indirectly" licensing the use of the copyrighted number within the language of the statute. The performer's right being superimposed upon that of the owner of the copyright, the former right may not be and cannot be protected without "indirectly" licensing or otherwise affecting the use of the copyrighted number. Such being true, the corporation must comply with the provisions of ch. 177, Stats.

NSB

Corporations — Collection Agencies — Person engaged in collection business on effective date of sec. 218.04, Stats., relating to licensing of collection agencies, is subject to provisions thereof regardless of fact that certain assigned claims have been reduced to judgment.

December 28, 1938.

BANKING COMMISSION.

You state that an individual who was engaged in the collection business prior to the passage of section 218.04, Stats., relating to the licensing of collection agencies, secured a number of judgments in justice court on claims which he held as assignee.

We are asked whether he may proceed to enforce collection of these particular judgments without securing a license under sec. 218.04.

Sec. 218.04 was created by chapter 358, Laws 1937, and section 3 of chapter 358 provides that the act shall take effect July 1, 1937.

Sec. 218.04 (1) (f) reads:

“‘Collection agency’ means any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness. It shall not include attorneys at law authorized to practice in this state and resident herein, banks, express companies, building and loan associations organized under the laws of Wisconsin, insurance companies and their agents, trust companies, or professional men’s associations collecting accounts for its members on a nonprofit basis, where such members are required by law to have a license, diploma or permit to practice or follow their profession, real estate brokers, real estate salesmen and justices of the peace whose principal business is not collections.”

No exception is made as to accounts in the process of collection on the effective date of the act nor is any exception made as to accounts which have been assigned to the collector for purposes of collection in his own name. Attention is also called to sec. 218.04 (11) which reads:

“The provisions of this chapter shall apply to any licensee or other person who, by any device, subterfuge or pretense whatever, shall make a pretended purchase or a pretended assignment of accounts from any other person for the purpose of evading the provisions of this section.”

By implication the act would exclude the actual purchase or actual assignment of accounts made in good faith and not for the purpose of evading the provisions of the act. This implication arises out of the doctrine of statutory construction that the expression of one results in the exclusion of others, *expressio unius est exclusio alterius*. *State ex rel. Owen v. Reisen*, 164 Wis. 123.

Thus it would appear that only bona fide assignments and not those made merely for purposes of collection would be excluded from the operation of the act. It is to be noted, of course, that assignments made prior to the passage of the act can hardly be said to have been made for the purpose of evading its provisions, but such transactions nevertheless are to be viewed in their true light, and, as previously indicated, if they were made to one engaged in the collection business for purposes of collection, they are subject to the act on its effective date.

WHR

Intoxicating Liquors — Municipal Corporations — Beer Licenses — Public Officers — Town Board Member — Sec. 176.05, subsec. (1), Stats., does not apply to members of town board indirectly engaged in sale of beer.

December 28, 1938.

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

You inquire whether X, a town chairman, employed by a beer distributor, violates the provisions of sec. 176.05, subsec. (1), Stats. X's duties consist of distributing beer, re-

ceiving orders and keeping books of account. His employer's distributing agency is not located in the town where he is chairman, but his employer does operate a licensed tavern therein.

Sec. 176.05, subsec. (1), Stats., provides as follows:

"Each town board, village board, and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business."

In XXIII Op. Atty. Gen. 69, it was ruled that this section of the statutes, which was enacted by the special session of the legislature in 1933-34, was intended to regulate the sale of hard liquors within the state.

Sec. 176.01, subsec. (2), Stats., defines "intoxicating liquors" as follows:

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

In view of the foregoing, it is our opinion that X does not violate the provisions of sec. 176.05 (1), Stats., by being employed by a beer distributor. He is not engaged in the sale of "intoxicating liquors" within the meaning of sec. 176.05 (1), Stats.

WHR

Appropriations and Expenditures — Grain and Warehouse Commission — Under sec. 20.77, subsec. (5), Stats., any indebtedness incurred under appropriation which reverts to general fund, where such indebtedness is incurred prior to time such fund reverts, is to be paid from appropriation or balance thereof which reverts unless otherwise specifically provided by law.

December 28, 1938.

GRAIN AND WAREHOUSE COMMISSION.

You have inquired whether expenditures contracted for during the latter part of any fiscal year by your commission are to be charged to that year and are to be deducted from any of the balance which under the statutes reverts to the general fund as of July 1 of each year.

Sec. 20.52, Stats., reads in part:

“All moneys collected or received by each and every person for or in behalf of the grain and warehouse commission shall be paid within one week of receipt into the general fund, and are appropriated therefrom to said commission for the execution of its functions; but any balance in excess of sixty thousand dollars standing to the credit of said commission on July first of any year shall revert to the general fund. * * *”

In X Op. Atty. Gen. 1125 it was ruled that where goods are ordered by a state department and the order is accepted during a certain fiscal year but not delivered until the ensuing fiscal year, the bill is payable out of the appropriation for the fiscal year in which they are ordered. See also X Op. Atty. Gen. 1084.

You are therefore advised, as far as the first part of your question is concerned, that materials ordered during one fiscal year and delivered during the ensuing fiscal year are to be charged to the appropriation of the fiscal year in which ordered.

However, a further question arises in this case because of the peculiar provision of the above statute contained in the words “but any balance in excess of sixty thousand dollars

standing to the credit of said commission on July first of any year shall revert to the general fund."

We are informed that the books of the secretary of state are kept on a cash basis, and assuming, for instance, that your appropriation had sixty-five thousand dollars standing to its credit on the books of the secretary of state as of July 1, five thousand dollars of this sum would revert to the general fund regardless of the fact that there might be outstanding orders of five thousand dollars against the appropriation for goods purchased in May or June but not yet delivered and paid for.

Therefore the real question which arises is whether the bills totaling five thousand dollars are to be paid out of the sixty thousand dollars standing to your credit or out of the five thousand dollars which reverts to the general fund.

The answer to this question is found in another section of the statutes, sec. 20.77, subsec. (5), which reads :

"Where any appropriation is repealed or any balance of an appropriation is caused to revert, any indebtedness incurred under the authority of such appropriation or balance prior to the time as of which such repeal or reversion of balance is to take effect, shall be paid from the appropriation or balance thus repealed or reverted as the case may be unless otherwise specifically provided by law."

It seems perfectly clear under the wording of the foregoing statute that materials ordered prior to July 1 should be paid for, under our assumed set of facts, out of the five thousand dollars which reverts to the general fund on July 1 rather than out of the sixty thousand dollars standing to your credit under sec. 20.52, Stats.

WHR

Bridges and Highways — Town Highways — Action of town board in laying out highway pursuant to petition under sec. 80.02, Stats., is discretionary.

December 28, 1938.

SIDNEY J. HANSON,

District Attorney,

Richland Center, Wisconsin.

You have inquired whether a town board is required to construct and maintain a highway at public expense, which highway will serve only the farms adjacent to the public highway and running from the public highway to the buildings on such premises where the town board has been petitioned to lay out such a highway under sec. 80.02, Stats.

Sec. 80.02, Stats., provides that six or more resident freeholders or homesteaders may petition the town board to lay out a town highway. If the laying out of such highway requires the construction of a bridge costing more than one thousand dollars, exclusive of donations, an order of the town board laying out the same is not effective until approved by the town electors. XIV Op. Atty. Gen. 511. Upon the filing of a petition, the town board shall make out a notice fixing the time and place to decide on the application of sec. 80.05, Stats. The supervisors are then required to meet at the time and place fixed in said notice and upon being satisfied that proper notice has been given shall hold a hearing on the application. Under sec. 80.06 the board "shall decide upon the application and shall grant or refuse the same as they shall deem best for the public good; * * *."

If the town board fails to file an order as required by sec. 80.07 within ten days after a hearing, it is deemed to have decided against the application. *State ex rel. Thompson v. Eggen*, 206 Wis. 651 and *Ruhland v. Supervisors of Hazel Green*, 55 Wis. 664.

Any person aggrieved by such an order may appeal as provided in secs. 80.17 to 80.22, Stats. I Op. Atty. Gen. 52.

By the terms of sec. 80.06, the town supervisors have discretion to lay out a town highway, since such supervisors "shall *grant or refuse* the same [application] as they shall

deem best for the public good." This construction is supported by the case of *Florsheim v. Patterson*, 208 Wis. 590.

In that case action was brought to restrain the town board of the town of Flambeau from hearing a petition to lay out a highway. The court refused to grant an injunction and in so doing, said, at page 594:

"* * * A town board may, in its discretion, decide against an application, and the commissioners, on appeal, if an appeal be taken, may affirm the order of the town board. Until an order laying out a highway is made, the aid of a court of equity may not be invoked to restrain action by a town board. No one can foretell whether an application will be granted or denied. In such a situation equity should not restrain a town board from acting. Obviously, until a town board has acted and has ordered a highway to be laid out no injury or harm can be said to be threatened and equity should not interfere with the duty of the town board to meet and decide."

The court again indicated that the town board has discretion to deny or grant a petition to lay out a town highway when it said in *Moll v. Benckler*, 30 Wis. 584, at page 585:

"* * * It is probably true, as argued by the counsel for the defendant, that when the supervisors of a town lay out a public highway, the courts cannot inquire whether the same was required by the public wants or necessities. It may well be held in such case that the supervisors are the ultimate judges of the public necessity or the utility of the highway thus laid out and established by them."

In view of the express language of sec. 80.06, Stats., and what was said in the above cases, it is clear that a town board has discretion in laying out a town highway upon a petition being filed pursuant to sec. 80.02, Stats.

WHR

Taxation — Inheritance Taxes — County is not entitled to seven and one-half per cent or any other portion of emergency tax on property transfers imposed by sec. 4, ch. 14, Laws Special Session 1937, nor of transfer tax imposed by sec. 72.50, Stats.

Public administrators are entitled to no fees out of tax collected under sec. 4, ch. 14, Laws Special Session 1937.

December 28, 1938.

SOLOMON LEVITAN,
State Treasurer.

You call our attention to sec. 4 of chapter 14, Laws Special Session, 1937, which imposes an emergency tax upon all transfers of property which are taxable under the provisions of chapter 72 of the statutes, and you inquire whether counties are entitled to seven and one-half per cent of this tax and if public administrators are entitled to any fees therefrom. You have also inquired in a subsequent communication whether the county is entitled to seven and one-half per cent of the estate tax imposed by sec. 72.50, Wis. Stats.

Chapter 72 provides for the levying, collection and distribution of inheritance taxes. Sec. 72.20 reads:

“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.”

Subsec. (1), sec. 11, ch. 490, Laws 1935, imposes an emergency tax for relief purposes upon all transfers of property taxable under the provisions of ch. 72. Subsec. (2), sec. 11, provides for the administration, assessment and collection of such taxes and specifically provides as follows:

“* * * The entire proceeds of said tax shall be paid into the general fund for emergency relief purposes.”

By virtue of sec. 4, ch. 14, Laws Special Session, 1937, the above quoted portion of the statute now reads :

“* * * provided, however, that the entire amount of said emergency tax shall be collected and paid into the general fund.”

The language of the two enactments is practically the same so far as your inquiry is concerned and in XXVI Op. Atty. Gen. 288, in construing the law as it existed under the 1935 statute, it was ruled that inasmuch as this was a special emergency tax and there was no provision in the law authorizing the county to retain any part of the tax so collected, the entire proceeds should be paid into the general fund.

Nor is there any provision in the statute either before or after the change made by chapter 14, Laws Special Session, 1937, which entitles public administrators to claim any fees from such taxes. The entire amount collected by the county must be paid into the general fund of the state.

Turning now to the estate tax imposed by section 72.50 Stats., we call attention to the last sentence thereof which reads :

“* * * The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19.”

Thus it becomes necessary to refer to the provisions of sec. 72.19 on the question of disposition of the proceeds of the tax. Sec. 72.19 reads :

“Each county treasurer shall make a report under oath, to the state treasurer, on and prior to the fifth day of January, April, July, and October of each year, of all taxes received by him under the inheritance tax laws, up to the first day of each of said months, stating for what estate and by whom and when paid. The county treasurer shall also set forth in such report the fees of the public administrator paid in each such estate, as well as expenses of collection. The form of such report shall be prescribed by the state

treasurer. *He shall at the same time pay the state treasurer all the taxes received by him under the inheritance tax laws and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury, within the times herein required, he shall pay interest at the rate of ten per cent per annum.*"

The words "all the taxes" used in the foregoing statute permit of no exceptions and leave no room for construction.

Sec. 72.20, previously referred to, makes provision for retention by the county of seven and one-half per cent of the taxes collected under secs. 72.01 to 72.24 inclusive, but this provision may not be enlarged by construction so as to include any portion of the tax imposed by sec. 72.50. If the legislature had intended to include such tax in the provisions of sec. 72.20 it could easily have said so, and under familiar rules of statutory construction its inclusion of the taxes collected under secs. 72.01 to 72.24 results by implication in the exclusion of taxes levied under any other sections of the statutes. You are, therefore advised that the county is not entitled to any portion of the proceeds of taxes imposed by sec. 72.50.

WHR

Dairy and Food — Article may not be sold as "table spread" if it lacks any of ingredients essential to its use as such.

December 29, 1938.

DEPARTMENT OF AGRICULTURE & MARKETS.

Attention Harry Klueter, *Chief Chemist*.

You call our attention to the sale of a product under the name of "Cali-Bear". The label describes it as a "Two-in-One Table Spread". It is composed of lactose (milk sugar), salt, vegetable gum, sodium bicarbonate and U. S. certified color.

The product in the form in which it is sold is not an edible article of food but is to be mixed with butter, margarine and milk.

We are asked whether this product may be sold as a table spread when in fact it is not usable as such.

The product as described is clearly subject to the provisions of ch. 97 of the statutes. A compound intended to be used as an ingredient in the composition of food is an article of food within the definition contained in sec. 97.01, Stats. *McCarthy v. State*, 170 Wis. 516.

Sec. 97.25, after stating that no person shall offer for sale any article of food that is adulterated, covers the subject of adulteration under seven different specifications. These specifications are contained in subsec. (3) and one proviso reads:

“* * * provided, that any article of food which is not adulterated under the provisions of the fourth, fifth, sixth and seventh specifications of this section, and which does not contain any filler or ingredient which debases without adding food value, shall not be deemed adulterated in the case of mixtures or compounds sold under their own distinct names or under coined names, if the same be so labeled, branded or tagged as plainly to show their true character and composition * * *.”

Lacking information which would indicate that “Cali-Bear” violates any of the provisions contained in the fourth, fifth, sixth and seventh specifications in sec. 97.25, subsec. (3), Stats., we are of the opinion that the product comes clearly within the protection of the proviso above quoted when so labeled as to indicate its true character and composition unless by the use of the coloring matter the product is intended to imitate the genuine color of another substance.

However, when labeled “Two-in-One Table Spread,” this product does not come within the terms of the above proviso and violates the provisions of the third specification of subsec. (3), which reads:

“* * * third, if any valuable or necessary ingredient has been wholly or in part abstracted from it, or if it is be-

low that standard of quality, strength or purity represented to the purchaser or consumer; * * *.”

When a product is labeled as a table spread and ingredients necessary to make it a table spread are missing, such elements are subtracted from the product within the intention of the statute. Thus the product is not of the quality represented to the purchaser or consumer and therefore may not be legally sold as a table spread.

OSL

WHR

Bridges and Highways — Signs — Elections — Campaign material in form of placards and posters, advertising candidacy of individual, are signs and when placed within limits of public street or highway violate sec. 86.19, Stats.

December 29, 1938.

JACOB A. FESSLER,

District Attorney,

Sheboygan, Wisconsin.

You state that several candidates for state and county offices have fastened their campaign material on trees and posts along the highways within Sheboygan county. This campaign material was not placed upon structures erected by the candidates or their agents, but only upon trees and posts already located within the boundaries of the highway. You inquire whether the fastening of campaign material on trees and posts within the highway constitutes a violation of sec. 86.19, subsec. (1), Stats., which provides in part as follows:

“No sign shall be placed within the limits of any public street or highway except such as are necessary for the guidance or warning of travel or as provided by section 66.45.
* * *.”

Sec. 66.45, Stats., relates to the erection of barriers across streets for play purposes and is not here material.

Subsec. (2), sec. 86.19, Stats., provides:

“The state highway commission shall prescribe regulations with respect to the erection of signs on public highways. Such regulations shall be published in the official state paper and shall have the full force of law within thirty days after such publication. No advertising sign shall use prominently any words, or combination of words, commonly used for the guidance or warning of travel, nor shall any advertising sign be erected or be permitted to remain in any place or manner so as to be a cause of danger to travel on the highways, either by reason of causing an obstruction to the view or otherwise.”

Subsec. (3), sec. 86.19, Stats., provides a fine for violation of sec. 86.19.

Subsec. (4) permits the erection of monuments or markers within the limits of public streets and highways, if approved by the state highway commission.

The signs referred to in the first sentence of sec. 86.19, subsec. (2), Stats., are those signs which “are necessary for the guidance or warning of travel * * *.” It may be urged that political signs in the highway are signs that “are necessary for the guidance or warning” of travelers, but it probably goes without saying that such signs are not such necessary guidance and warning signs for travel as are contemplated by sec. 86.19, subsec. (2), Stats.

If the political advertising referred to comes within the meaning of the word “sign” as used in sec. 86.19, Stats., it seems apparent that the advertising does not come within any of the statutory exceptions with respect to signs that may be placed in the highway without the consent of the state highway commission. The statutes contain no definition of the term “sign” and the word has not acquired any technical, peculiar, or other appropriate meaning in the law. It must be construed and understood according to its common and approved usage, unless such construction would be inconsistent with the manifest intent of the legislature. Sec. 370.01, subsec. (1), Stats. “Sign” is defined in Webster’s International Dictionary:

“That by which anything is made known or represented;
 * * * something serving to indicate the existence, or
 preserve the memory of, a thing; a token * * * a pub-
 licly displayed token or notice * * *.”

In the same dictionary “notice” is defined as follows:

“Intelligence, by whatever means communicated; infor-
 mation * * * announcement; * * * a written or
 printed sign, or the like, communicating information
 * * * as, to put a notice on a door * * *.”

You do not describe in detail the campaign material referred to in your letter. Presumably you refer to cardboard and cloth posters and placards, such as are commonly used by candidates. The obvious purpose of such posters and placards is to notify, advertise and remind the public in general of the fact that certain individuals are candidates for public office. These placards and posters are a means or method by which the information as to the candidacy is communicated to the public. In our opinion these campaign placards and posters are signs, and their placement within the limits of any public highway or street is prohibited by sec. 86.19, Stats.

JRW

NSB

Banks and Banking — State bank may not issue preferred stock containing “cut back” provision.

December 29, 1938.

H. F. IBACH, *Commissioner,*
Banking Commission.

You inform us that a certain state bank which has issued and has outstanding capital debentures, now held by the Reconstruction Finance Corporation, desires to retire the debentures and to issue in their stead preferred stock pursuant

to the provisions of sec. 221.047 Stats. As a part of the plan the bank desires that the preferred stock have a par value of \$50.00 per share, but expressly provide that in the event of liquidation it will have a liquidating value of \$100.00 per share. This feature is referred to as a "cut back".

Sec. 221.047, subsec. (6), Stats., provides in part as follows:

"* * * If the bank is placed in liquidation, no payment shall be made to the holders of the capital stock until the holders of the preferred stock have been paid in full the *par value* of such stock plus all cumulative dividends."

In view of this provision of the above statute, you inquire whether or not a state bank is authorized to issue preferred stock with a "cut back" provision as outlined above.

In dealing with transactions involving the manipulation of capital stock great care must be exercised to see that the banking laws of the state are complied with in every respect. The capital stock of a bank is a trust fund for the benefit and protection of the depositors and creditors of the bank. Therefore, it is of the highest importance that the funds should be kept unimpaired, 7 Am. Jur. 50. The proposed "cut back" provision is intended to have the effect of reducing the outstanding book capitalization of the bank, so as to make available for the purpose of writing off certain debts and other assets of the bank of uncertain value which cannot be done under the present capital structure because it would impair the capital stock.

Under sec. 221.047 (5) the common stockholders of bank shares are liable to an assessment when a deficiency of assets exists while the preferred shareholders are not liable to any such an assessment. If the effect of the plan in question would be in fact to reduce the bank's liability to the holders of capital debentures or preferred stock, then the preferred, rather than the common, stockholders of the bank would be making good an impairment of the bank's capital. This result is not contemplated by the statutes, and undoubtedly would not be acceptable to the present holders of the capital debentures. On the other hand, if the inclusion

of the "cut back" provision in the proposed preferred stock issue has the desired effect of guaranteeing to the preferred stockholders a liquidating value of twice the listed par value, the listed par value of the stock would not correctly reflect the financial structure of the bank. The bank's true liability to its preferred shareholders would not be apparent from an examination of its financial statements. To permit this would be no different than permitting a bank to list as its liability to its shareholders the amount realized upon the sale of its stock, although the par value was greater. Yet the latter is not allowed because the bank's true liability to its shareholders is not properly reflected in its financial statements. It necessarily follows then that the proposed "cut back" provision is not permissible for the same reasons.

Therefore, it is our opinion, that a state bank is not authorized to issue preferred stock containing a "cut back" provision.

HHP

Oil Inspection — Oil inspectors may measure devices and pumps used in measuring gasoline to determine whether they comply with rules and regulations of department of agriculture and markets.

Cost of inspecting gasoline measuring devices, pumps and equipment necessary therefor may not be included in oil inspection fees which may be collected under sec. 168.16, Stats.

December 29, 1938.

INSPECTION AND ENFORCEMENT BUREAU.

You inquire whether oil inspectors have authority to measure gasoline pumps and whether the services and equipment necessary for measuring said pumps may be paid for out of oil inspection fees.

Sec. 168.14, Stats., provides in part as follows:

"* * * if * * * gasoline, benzine, naphtha or other like product of petroleum is sold by a dealer for immediate use in a motor vehicle, then delivery shall be made from underground containers or tanks by means of a hose, through a measuring device or pump complying with the rules and regulations of the dairy and food commissioner, * * *. It shall be the duty of the state supervisor of inspectors and his deputies to enforce the provisions of sections 168.03 to 168.14, inclusive."

The oil inspectors referred to in your letter are deputies of the state supervisor of inspectors (sec. 168.01).

The aforementioned provision, relating to rules and regulations governing gasoline measuring devices and pumps, was enacted by chapter 438, Laws 1927, when there was a dairy and food commissioner, who had authority to make said rules and regulations. By chapter 479, Laws 1929, the duty of preparing rules and regulations concerning gasoline measuring devices and pumps was placed upon the department of agriculture and markets in chapter 98, Wisconsin statutes, and such duty is still so placed, under sec. 98.02, subsec. (5), Stats.

A part of ch. 479, Laws 1929, created what was formerly sec. 98.01 and read as follows:

"Whenever in this chapter or elsewhere in the statutes the terms 'dairy and food commissioner' or 'superintendent of weights and measures' or the term 'commissioner' referring to the dairy and food commissioner are used, the said terms shall be understood and construed to refer to the department of agriculture and markets."

In connection with the provisions contained in the statutes relating to authority to prepare rules and regulations, the former dairy and food commissioner and the present department of agriculture and markets have promulgated a number of rules and regulations. As a practical proposition, in order for an inspector to determine whether a dealer is complying with those rules and regulations concerning gasoline measuring devices and pumps, it is necessary for the inspector to measure such devices and pumps.

Although sec. 168.14 refers to rules and regulations of the dairy and food commissioner, and at present there is no

dairy and food commissioner, it is obvious from the provisions of sec. 98.01, Stats. 1929, quoted above, that the legislature intended that sec. 168.14 be read with the words "department of agriculture and markets" inserted in place of "dairy and food commissioner." Only in this way does the statute make sense. Moreover, it is presumed in determining the legislative intent in enacting a statute that the law-making body intended to pass a workable and practical statute and one which would not lead to absurd results. *Weiberg v. Kellogg*, 188 Wis. 97, 205 N. W. 896. Where a statute, although itself unambiguous in language, provides absurd results when applied to actually existing conditions, the court must seek the legislative intent by considering the relation of the statute to the general scheme of statutes of which it forms a part, and from such consideration determine how the statute was intended to be applied. *State ex rel. Morgan v. Dornbrook*, 188 Wis. 426, 206 N. W. 55.

A statutory grant of power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete. 59 C. J. page 973; *Providence etc. R. Co. v. Norwich, etc. R. Co.*, 138 Mass. 277; *Wakefield v. Brophy*, 122 N. Y. S. 632.

Laws should be given a reasonable, sensible construction. *Calumet Service Co. v. City of Chilton*, 148 Wis. 334, 135 N. W. 131.

It must be assumed that the legislature did not intend to legislate in vain. *Haas v. Welch*, 207 Wis. 84, 240 N. W. 789.

If it be held that the oil inspectors have the duty to enforce the rules and regulations with respect to gasoline measuring devices and pumps but do not have authority to do so, it would follow that the legislature had legislated in vain in imposing the duty. It is our opinion that the oil inspectors, for the purpose of ascertaining that there is compliance with rules and regulations of the department of agriculture and markets, do have authority to measure devices and pumps used in measuring gasoline.

In answer to your second question, your attention is directed to the provisions of sec. 168.16, Stats., providing in part as follows:

“Every deputy inspector of illuminating oils shall demand and receive from the owner or other person for whom or at whose request he shall examine or test any oil, gasoline, benzine, naphtha or such other like products of petroleum or sample thereof, as provided by law, an inspection fee of four cents for every single cask, barrel, package or sample so inspected. Within fifteen days after the close of each fiscal year the supervisor of inspectors of illuminating oils shall determine what the cost of inspection of illuminating oils, gasolines, benzines, naphtha and other like products of petroleum has been for the preceding fiscal year, and shall divide that cost by the number of barrels, casks, packages and samples inspected. If the cost so calculated is less than four cents per barrel he shall so publicly certify and shall fix the nearest one-half cent above such calculated cost as the fee to be charged for such inspection fees during the then current fiscal year and for thirty days next succeeding. * * * From thirty days after the close of the preceding fiscal year until thirty days after the close of the then current fiscal year the said certified fee shall be the fee which each deputy inspector shall demand and collect in lieu of the legal fee heretofore provided and fixed. * * *.”

Under the above section the supervisor of illuminating oils is authorized to collect, as inspection fees only, the approximate cost of inspection “of illuminating oils, gasolines, benzines, naphtha and other like products of petroleum.” Neither he nor his oil inspectors are authorized under this, or any other section, to collect the cost of inspecting gasoline measuring devices or pumps, or the equipment necessary therefor, from the owners of such devices or pumps, or any other person or persons.

JRW

Corporations — Securities Law — Contract whereby customer furnishes money to securities company for purpose of speculating in stocks and commodities on security and commodity exchanges and whereby company retains forty per cent of net profits for its trading services constitutes sale of securities under sec. 189.02, subsecs. (6) and (7), Stats.

December 30, 1938.

BANKING COMMISSION.

You have inquired whether the solicitation and sale of so-called trading accounts under the following circumstances constitutes sale of securities within the meaning of our securities law.

A Minnesota securities company not licensed in Wisconsin employs an agent, also unlicensed in Wisconsin, to solicit and obtain moneys from Wisconsin citizens to be used by the Minnesota company for trading in stocks or commodities listed on recognized security and commodity exchanges. The company agrees in writing to furnish written statements of net profits or losses every thirty days after deducting forty per cent of any net profits as compensation for its trading service. When and if trading losses impair the account to the extent of forty per cent, the account is to be liquidated and the proceeds remitted to the customer. Upon written notice by the customer or at the election of the company, all or any part of the account is to be liquidated and paid to the customer within thirty days of such written notice. Other provisions are contained in the agreement, but the foregoing constitutes the essential portions as far as the present discussion is concerned.

Sec. 189.02, subsec. (6), Stats., defines "sale" as follows:

"'Sale' or 'sell' includes every disposition, offer, negotiation, agreement, or attempt to dispose of a security or interest in a security for value, and every solicitation of a subscription or order for the purchase of a security and every exchange of a security for property, but shall not include the execution of orders for purchase of securities by a licensed dealer provided such dealer acts as agent of the pur-

chaser, has no direct interest in the sale or distribution of the security ordered, receives no commission, profit or other compensation from any source other than the purchaser, and delivers to the purchaser written confirmation of the order which clearly itemizes his commission, profit or other compensation. Securities given or delivered with or as a bonus on account of any purchase of securities or of any other thing are conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value."

Sec. 189.02 (7) defines "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."

The foregoing statutory definitions are interdependent, and it is apparent that the real question presented is whether the memorandum or agreement furnished the customer constitutes a "security".

In the case of *Klatt v. Columbia Casualty Co.*, 213 Wis. 12, 21, our court said:

"* * * 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. * * *"

A situation parallel to that which exists in the present instance was considered in the case of *Securities & Exchange Commission v. Wickham*, 12 F. Sup. 245, where a contract was issued by the defendant whereby the purchaser put up money with the defendant who used it in speculating pri-

marily in the grain and stock markets and whereby earnings, if any, were to be divided sixty per cent to the purchaser and forty per cent to the defendant with financial losses being sustained by the purchaser. This contract was held to be a "security" within the meaning of the federal statute requiring registration of securities issued in interstate commerce. 15 U. S. C. A. 77a. This statute is very similar to our sec. 189.02 (7) and the court said at pages 248-249:

"* * *. Whether one invests money in the proverbial gold mine where he receives a certificate evidencing his contribution and resulting interest in the profits which are anticipated, or invests in a speculative venture by reason of the claimed skill and experience of a grain and stock market manipulator to make profits, the transactions cannot be rationally distinguished in determining the dealings which Congress intended to regulate in using the term 'investment contract.' Both are investments that the law seeks to supervise and regulate to prevent abuses and afford the investing public some measure of protection. Both entail the issuance of a security. In one the investor expects profits by reason of the gold to be mined; in the other, by reason of the skill and experience of the defendant in the market. In both, the opportunities for fraud are notorious.

"In any event, if resort must be made to any other portion of the act, the phrase 'certificate of interest or participation in any profit-sharing agreement' is amply inclusive to embrace the contract in question. * * *"

It should be noted in connection with the point discussed in the last paragraph quoted above that the Wisconsin statute is practically identical with the wording of the federal statute. Our statute reads "certificates of interest in a profit-sharing agreement". The similarity of language compels the adoption of the same view as that expressed in the *Wickham* case and you are, therefore, advised that the transactions in question constitute sales of securities under the Wisconsin securities law. For a further discussion of what constitutes a "security" under sec. 189.02 (7), see XXVI Op. Atty. Gen. 370 and authorities therein cited.

WHR

Banks and Banking — Plan for sale of aluminum ware whereby customers may buy stamps for ten cents each, which are placed in book and which are redeemable only in goods, wares and merchandise subsequently to be selected and purchased, does not constitute unauthorized banking under sec. 224.02, Stats.

December 30, 1938.

BANKING COMMISSION.

Attention H. F. Ibach, *Commissioner*.

You state that a certain company has developed a plan for the sale of aluminum ware whereby customers may buy stamps for ten cents each at their convenience and place them in a book which is furnished by the store where the stamps were purchased. When the book is filled to the extent necessary to purchase any particular item of aluminum ware the customer may then purchase that item by turning in the book.

You ask whether such a plan would be held to constitute doing a banking business as defined by sec. 224.02 of the statutes.

Sec. 224.02, Stats., provides:

“The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing,
* * *.”

The advertising circular which you enclose was apparently prepared by the company which manufactures the aluminum ware and was sent to a retail store as a guide to the plan and an indication of the terms of the contract under which the aluminum ware is to be sold. In outlining the plan the circular contains these statements:

“Stamps will be accepted at full value on the low price of any * * * utensil.”

"They [stamps] will be accepted at their full cash value on the purchase of any * * * utensil at the amazingly low prices shown."

"Stamps will be redeemed only at the store in which they were purchased."

Nowhere in the advertisement is any mention made of a privilege of redeeming the stamps for cash in lieu of merchandise.

This department had occasion to rule upon a similar question in XXVII Op. Atty. Gen. 556, where the authorities are collected. As is there stated, all of the cases which have been held to be violations of sec. 224.02 have involved a provision which entitled the customer or depositor to a return of all or a part of the deposit. See also XXVI Op. Atty. Gen. 463.

The plan under consideration here contains no such provision; in fact, it clearly states in several places that stamps may be redeemed *upon the purchase of aluminum ware* and such method of redemption appears to be exclusive. There is, therefore, no provision under which one who has purchased stamps could claim the right to a return of all or any part of his money upon surrender of the stamps instead of exchanging them for aluminum ware.

The purpose of sec. 224.02 is obviously to insure the safety of deposits which may be withdrawn in cash. There is no violation of sec. 224.02 when money is deposited with a store for the purpose of enabling the depositor to purchase goods at that store and where the money is actually used for that purpose. *MacLaren v. State*, 141 Wis. 577, 124 N. W. 667 (1910).

You are therefore advised that the plan as outlined by the advertising circular does not constitute a violation of sec. 224.02, Stats., since it does not confer a right upon the purchaser to demand the return of his money instead of redeeming the stamps for aluminum ware.

NSB

Criminal Law — Prisons — Prisoners — Sentences —
Where one A was sentenced to state prison for two years and at time of sentence sentence was suspended and defendant was placed on probation to state board of control, subsequent sentence for violation of parole "for balance of said two year term as provided by law" is construed to mean that two-year sentence starts on date prisoner is received at state prison as provided by sec. 57.03, Stats.

December 30, 1938.

BOARD OF CONTROL.

You have submitted a letter from Mr. John Burke, acting warden of the state prison, together with a copy of a commitment order. It appears that A was in due form of law convicted of the crime of forgery and said court did on the 16th day of August, 1938, pass sentence upon him as follows:

"Upon your plea of guilty it is the sentence of the Court that you * * * be confined in the State Prison at Wau-pun for a period of two years. That such sentence be suspended during your good behavior and you are placed on probation to the State Board of Control of Wisconsin for that period of time.

"That on the 12th day of November, 1938, upon complaint being made to the said Court that said * * * [A] had violated his parole and good behavior, the court order that said suspension of sentence be rescinded and that said * * * [A] be forthwith committed to the State Prison and confined therein for the balance of said two year term as provided by law."

You inquire whether this sentence begins on the 16th day of August, 1938, or on the date he was received at the prison November 12, 1938. You further state that it is necessary that you definitely establish the commencement of the sentence in this case to enable you to compute the discharge date.

"The balance of said two year term as provided by law" is two years from the date that the prisoner was first re-

ceived at the prison, that is, two years from November 12, 1938. See sec. 57.03, Stats., XVIII Op. Atty. Gen. 243; and sec. 359.07, XXVII Op. Atty. Gen. 329.

While the sentence is somewhat peculiarly worded in that it refers to "the balance of said two year term" and continues "as provided by law," there is no purpose to be served by elevating the words "the balance of said two year term" at the expense of the closing part of the sentence "as provided by law." A proper legal sentencing in the case under consideration requires the sentence to commence when the prisoner is received at the state prison. See statutes and opinions of attorney general above referred to. This sentence may be so construed as to make it a legal sentencing in conformity with the statute. As the sentence may be so construed, no purpose can be served by construing it so as to make it an illegal sentencing.

You are advised that the sentence commences to run at the date the prisoner was received at the state prison.

NSB

Prisons — Prison Labor — Trade Regulation — Trusts and Monopolies — Board of control and warden of state prison have power to determine price at which binder twine manufactured in Wisconsin state prison shall be sold and have further right to fix selling price of such twine and to refuse to sell binder twine to dealer who refuses to maintain price set by said board of control and warden.

December 30, 1938.

BOARD OF CONTROL.

In your inquiry of November 22, 1938, you refer to sec. 56.02, subsec. (3), Stats., which reads as follows:

"The price of the binding twine and cordage manufactured in said plant shall be fixed from time to time by the board of control and the warden of the state prison. The

product of said plant shall be sold at such times and places, and in such manner as the said board and warden shall determine to be for the best interests of the state; but citizens of the state shall have the preference in purchasing said products."

You inquire whether the board of control and the warden of the Wisconsin state prison have the right to fix the selling price per pound of twine, and if so fixed, to decline to sell binder twine to a dealer who refuses to maintain the price set by the board of control and the warden. You state that the binder twine manufactured by the Wisconsin state prison is sold only in Wisconsin.

As the binder twine is sold only in Wisconsin, we are not concerned with any possible violation of the Sherman anti-trust act, 26 Stats. 209, 15 U. S. C. A., secs. 1 to 7, 15, or the federal trade commission act, 38 Stats. 719; ch. 311, Comp. Stats., sec. 8836e; 4 Federal Stats. Ann. (2d) 577, as those acts apply only to interstate transactions.

However, with respect to intrastate transactions, our ch. 133 follows very closely and is aimed at the same general objective with respect to intrastate transactions as do the federal acts with respect to interstate transactions.

At the outset it may be stated that it is doubtful that either the federal acts, or the state act, apply to transactions by sovereign states. The acts with respect to your problem are probably material therefore only in arriving at state policy as exemplified by the state act when dealing with analogous problems as applied to private industry and commerce.

As there are no state decisions with respect to the problem presented and as hereinbefore stated the federal acts appear to be aimed at the same general objectives as the state act, it is necessary to examine the federal decisions interpreting the federal acts.

Under the federal acts, it has been held that a trader does not violate the Sherman antitrust act by refusing to sell to others; that he may withhold his goods from those who will not sell them at the prices which he fixes for their resale; but he may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, ex-

press or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade; that where the trader seeks to maintain resale price by system or policy of contracts, combinations, or cooperative efforts, such system or policy violates the antitrust laws. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376; *United States v. Colgate & Co.*, 250 U. S. 300, 63 L. ed. 992, 7 A. L. R. 443, 39 S. Ct. 465; *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208, 65 L. ed. 892, 41 S. Ct. 451; *Federal Trade Comm. v. Beechnut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, 66 L. ed. 307; *Armand Co. v. Federal Trade Comm.* (C. C. A. 1935), 78 Fed. (2d) 707, certiorari denied (1935), 56 S. Ct. 309, 296 U. S. 650, 80 L. ed. 463 and reargument denied, 84 Fed. (2d) 973, certiorari denied (1936), 57 S. Ct. 189, 299 U. S. 597, 81 L. ed. 440, rehearing denied (1937), 57 S. Ct. 234, 299 U. S. 623, 81 L. ed. 459.

Because of the similarity of the federal acts to our own act, the above must be deemed the probable interpretation of our own ch. 133 involving any similar problem as applied to intrastate commerce.

It should be noted here that both sovereigns, through appropriate legislation, are beginning to recognize and have recognized that there are limits to the free flow of competition in the nature of price cutting which are desirable if the various trades and industries are not to become completely demoralized. Witness the various federal instrumentalities, such as the N. R. A. and our own industrial recovery act of 1935, ch. 110, Stats., which by sec. 110.07 specifically exempts any code approved by the governor and any action complying with the provisions thereof from the provisions of the antitrust laws. The federal government, by amendment to the Sherman antitrust act, August 17, 1937, ch. 690, Title VIII, 50 Stat. 693, now specifically provides as follows:

“* * * Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others,

when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, * * *

Sec. 56.02 (3), Stats., specifically gives you the power to sell binder twine "in such manner as the said board and warden shall determine to be for the best interests of the state." Clearly you would be authorized to adopt a policy of refusing to sell to those who will not sell at the prices which you fix for resale, as that would be permissible under ch. 133, even if that act were held applicable to the sovereign. You may possibly go further and maintain the resale prices established by you by express or implied agreements to maintain such prices and other acts condemned under the federal authorities, which acts we believe would also be condemned under our ch. 133 as applied to any intrastate seller other than the sovereign. Such point is not clear or well established and as a matter of policy you may prefer to handle the situation by endeavoring to maintain the resale price by practices recognized as legitimate as applied to others than the sovereign. We believe this to be a matter of policy for your board to determine.

NSB

School Districts — Board of common school district may employ attorney at stipulated fee per month to handle legal work of district other than actions or proceedings.

December 30, 1938.

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

On December 2, 1938,* this office rendered an opinion to you in which it was held that a common school district board may not employ an attorney at a stipulated fee per month to handle actions or proceedings in which the district was not then interested. You now inquire whether a school district board may employ an attorney at a stipulated fee per month to do legal work for a school district which does not involve handling actions or proceedings.

Sec. 40.16, subsec. (1), Stats., provides:

“Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district.”

The “affairs” of a school district have been defined to be: business; something to be transacted; matter; concern. *Montgomery v. Commonwealth*, 91 Pa. 125, 133.

Municipal affairs are the internal business affairs of a municipality. *Fragley v. Phelan*, 126 Cal. 383, 387, 58 Pac. 923.

In the case of *Taylor County v. Standley*, 79 Iowa 666, 670, 44 N. W. 911, it was stated:

“* * * We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, * * *.”

*Page 747 of this volume.

The case of *State ex rel. Stoltenberg v. Brown*, 112 Minn. 370, 128 N. W. 294, involved the legality of the employment of a nurse by the board of education of the city of Minneapolis. The court upheld the legality of such employment in the following language, pp. 371-372:

"The board of education of the city of Minneapolis is a corporation, organized under certain special laws, which it is unnecessary to give in detail here. In the recent case of *Jackson v. Board of Education*, supra, page 167, 127 N. W. 569, we had occasion to consider the organization of that body, and held that in its general purposes and characteristics it did not differ from the other school districts of the state. The purpose of the corporation is to maintain efficient, free, public schools within the city of Minneapolis, and, unless expressly restricted, necessarily possesses the power to employ such persons as are required to accomplish that purpose."

It is our opinion that if the school board of a common school district, in its administration of the affairs of the district, determines that such a course would be for the best interests of the district, it may employ counsel at a stipulated fee per month, rather than for each particular task, to handle the legal work of the district, except the prosecution or defense of legal actions or proceedings. This opinion must not be construed as enlarging the powers of a school district board with respect to employment of counsel to handle actions or proceedings, as given in our opinion of December 2, 1938 for, as stated by the court in *State ex rel. Hawkins F. H. School District v. Nelson*, 212 Wis. 116, 118-119, 259 N. W. 172:

"* * * Suit may be brought by the school district board without authority of the district meeting only in those cases in which the management, control, and conservation of the property and affairs of the district require speedy application for process, the benefit of which might be lost if the board had to wait for specific directions from a school district meeting."

JRW

Education — Social Security Law — Blind — Under sec. 47.08, subsec. (2), par. (a), Stats., person losing his sight while resident of this state need not reside in this state continuously for one year before making application for blind pension.

December 30, 1938.

GEORGE M. KEITH, *Supervisor of Pensions,*
State Pension Department.

From your statement of facts it appears that one A moved from the state of Illinois to Racine county, Wisconsin, on June 21, 1938. On August 1, 1938, A became blind, while living in Racine county. At the time that he became blind, he was a resident of Racine county in the state of Wisconsin and intended to make his home in this state. You inquire whether he must live in the state of Wisconsin continuously for one year before he can make application for a blind pension.

Sec. 47.08, Stats., relates to eligibility for blind pension, and subsec. (2), par. (a), thereof provides, in part, as follows:

“In order for any person to receive such pension he must:

“(a) Have been a resident of this state at the time he lost his sight, or have been a resident of this state for five years or more during the nine years immediately preceding the date of application, and during the last year preceding such application must have resided continuously in this state, * * *.”

A was a resident of the state of Wisconsin at the time that he lost his sight. The answer to your question involves a determination of whether the words “and during the last year preceding such application must have resided continuously in this state” supplement the words “have been a resident of this state at the time he lost his sight”, so that even in those cases where the person was a resident of this state at the time he lost his sight, such person must have resided in this state continuously for one year before being eligible

to receive a pension. The only antecedent which the words "such application" could have is the word "application" found in that part of sec. 47.08 (2) (a) reading as follows:

"* * * have been a resident of this state for five years or more during the nine years immediately preceding the date of application, * * *."

The words "such application" could have no antecedent when read in connection with the words "have been a resident of this state at the time he lost his sight."

It is our conclusion that A, having lost his sight while a resident of Wisconsin, need not reside in this state continuously for one year before making application for a blind pension.

This conclusion is further strengthened by the rule of statutory construction to the effect that qualifying or limiting words or clauses in statutes are to be referred to the next preceding antecedent unless the context or evident meaning of the enactment requires a different construction; and punctuation, or lack of it, cannot be allowed to override this rule. *Jorgenson v. City of Superior*, 111 Wis. 561, 87 N. W. 565.

As the court stated in this case, p. 566:

"* * * There is nothing in the context or in the purpose of this section * * * that requires a violation of the general rule of construction."

JRW

Social Security Law — Old-age Assistance — Rule of state pension board requiring counties to return to prior applicants all life insurance policies transferred, assigned or pledged to county prior to passage of ch. 7, Laws 1937, Special Session, cannot be sustained as within rule-making power of board.

December 30, 1938.

PENSION DEPARTMENT.

In your letter of October 25 you advise that on October 4 the state pension board adopted the following rule relating to the return of life insurance policies:

“Forthwith, after notice of this rule, all insurance policies having a cash or loan value not in excess of \$1000 which have previously been transferred, assigned, or pledged to a county court, county pension department, or manager of county institutions, under section 49.26 of the statutes of 1935, and held by or for said county court, county pension department, or manager of county institutions, shall be returned, released, or re-assigned to the beneficiary or person from whom they were originally transferred, assigned, or pledged.”

On the same date the county pension administrators were advised as to the rule, and further advised as follows:

“The above rule will eliminate any inequality existing between old-age assistance recipients who applied and were granted aid prior to October 19, 1937, the effective date of chapter 7, laws of Special Session of 1937, and those who applied thereafter and were thus exempted by statute from transferring their equity in any policy of insurance whose loan or cash value is not in excess of \$1000.

“Any county to whom such an assignment, transfer, or pledge was made will be expected to return the policy (provided its cash or loan value is less than \$1000) as soon as possible to its original status as far as the beneficiary of such policy is concerned.”

You advise that the state pension department submits that the rule is within the rule-making authority and jurisdiction conferred upon the board and request our opinion thereon.

Sec. 49.26, subsec. (1), Stats. 1937, provided in part as follows:

"If the county judge deems it necessary, he may require as a condition to the grant of a certificate, that all or any part of the property of an applicant for old-age assistance be transferred to the county court, * * *."

Under this law, as above quoted, many county judges in the exercise of the discretion vested in them and as a condition to the granting of old-age assistance, required the recipient of a pension to transfer to the county life insurance policies having a cash or loan value of not in excess of one thousand dollars.

By ch. 7, Laws Special Session 1937, a number of modifications were made with respect to the administration of the old-age pension law and some of the discretionary power theretofore vested in the county administrative officers restricted and restrained with respect to how much property would be required to be turned over to the county by an applicant before the pension would be granted. Thus the system was changed from that of a title interest in real estate by the county under the old law to that of a lien upon real estate for the benefits conferred by the act and sec. 49.26, subsec. (5) of the statutes as amended provides for the county reconveying the real estate previously conveyed and for the county acquiring a lien upon the real estate thus retransferred for any amounts previously paid or which may thereafter be paid.

Sec. 49.26, subsec. (1) of the statutes, as amended, provides in part as follows:

"If the county judge deems it necessary, he may require as a condition to the grant of a certificate that all or any part of the property, except real property situated in the state of Wisconsin and except the property mentioned in subsection (6) of section 272.18 of the statutes, and except cash or loan value not in excess of one thousand dollars in

a policy of insurance, of an applicant for old-age assistance be transferred to the county court, * * *”

Thus, from and after the effective date of ch. 7, Laws Special Session 1937 (October 19, 1937), county judges could no longer require, as a condition for the receipt of the benefits conferred by the act, that the applicant transfer to the county life insurance policies having a cash or loan value of less than one thousand dollars. There is no provision in the amended act (as there is with respect to retransfer of real estate) either requiring or permitting the county judge to retransfer to prior applicants insurance policies having a loan or cash value of not in excess of one thousand dollars and which had previously been transferred to the county as the property of the county.

To the extent that applicants prior to October 19, 1937, were required to assign such life insurance to counties and did so before receiving benefits under the act, applicants that receive benefits under the amended act are not on a parity with prior applicants and it was for the purpose of placing all beneficiaries under both acts upon an equal plane or basis that the state pension department deemed it advisable in the interests of equality to adopt the rule of October-4, 1938.

There is no question in our mind but that the rule is a desirable one and, if we were able to find any legal basis upon which the rule might be sustained, we would have no hesitancy in sustaining it. We are unable, however, to find any legal basis upon which the rule may be sustained. Application of all the rules of statutory construction applicable to the situation lead to the conclusion that such a rule is beyond the jurisdiction of the board.

The board's rule-making powers are defined by sec. 49.50, subsec. (2), Stats., 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 statute as amended requires the retransfer of real estate. As before noted, there is no similar provision with respect to life insurance having a loan or cash value of less than one thousand dollars theretofore transferred to the counties. It is a familiar principle of statutory construction that the expression of one results in the exclusion of others, *expressio unius est exclusio alterius*. Since the legislature has clearly expressed its intention with respect to real estate and has said nothing about personal property, the application of the familiar principle of statutory construction above referred to hardly permits a broadening of legislative intent so as to either require or permit a retransfer of property theretofore acquired and with respect to which the legislature, by failing to legislate, has clearly manifested a legislative intent not to interfere with property rights theretofore vested in the administration of the act prior to amendment.

With respect to real estate the legislature in providing for retransfer substituted a lien method of securing the county for advances in lieu of a title interest under the old law and what was probably the equivalent of an equitable mortgage. If insurance policies within the cash and loan value here under consideration are now returned to the prior applicants, neither the legislature nor the board would be substituting any equivalent security in lieu thereof (as is the case in a retransfer of real estate).

If these insurance policies previously transferred are the property of the county in the exercise of its proprietary capacity, the county would be protected from an invasion of its property right therein the same as a private individual or corporation. McQuillin on Municipal Corporations, 2d ed, sec. 245; Dillon on Municipal Corporations, Vol. 1, page 192; *Milwaukee v. City of Milwaukee*, 12 Wis. 93; *State ex rel. Board of Education of City of Oshkosh v. Haben, Treasurer*, 22 Wis. 660. It is not clear whether the county would hold such policies in its proprietary or governmental capacity, as the line of demarcation between the two is not well defined. An interpretation of the statute that would render it of doubtful constitutionality is to be avoided. *Hariman v. Interstate Commerce Commission*, 211 U. S. 407;

United States v. Del. & Hudson Co., 213 U. S. 366; *United States v. Jim Fuey Moy*, 241 U. S. 394.

Nor can such action be sustained upon the theory that the county judge having a discretion in the first instance may now reexercise that discretion so as to make the original exercise of discretion conform to the now declared public policy under sec. 49.26, subsec. (1), Stats., as amended. The law upon such point seems to be that a quasi-judicial discretion, having been once exercised, may not be reexercised or reviewed by the public official having the original power to exercise the discretion in the absence of a statute specifically conferring such powers. *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 29 S. Ct. 62, 53 L. ed. 168; *Kansas City, M. & O. Ry. Co. v. United States*, 53 Ct. of Claims 258; *Cress v. State ex rel. Flynn*, 198 Ind. 323, 152 N. E. 822; *Cotton v. United States*, 29 Court of Claims 207; *People ex rel. Chase v. Wemple*, 144 N. Y. 478, 39 N. E. 397; *People v. Cantor*, 180 N. Y. S. 153. Furthermore, such discretion, if it rests anywhere, rests with the officer that had the right to exercise it and not with the pension board.

Finally, there is the rule of construction that in the absence of positive indications that the legislature so intended, a statute will not be construed so as to give it retroactive effect. *Filipkowski v. Springfield Fire & Marine Insurance Co.*, 206 Wis. 39, 238 N. W. 828, *Vanderpool v. La Crosse & M. R. Co.*, 44 Wis. 652; *Finney v. Ackerman*, 21 Wis. 268. The foregoing rule of construction is especially applicable here, as in this case such a construction would interfere with existing property rights. *Estate of Pelishek*, 216 Wis. 176, 256 N. W. 700.

If the foregoing is a correct interpretation of the statute, then it must follow that the rule adopted by the board is contrary to the statute. A rule that is contrary to positive law is not within the rule-making power of any administrative board—it is not a mere filling in of detail; it is legislation.

We are unable to conclude that the rule can be sustained as within the rule-making power of the board. If your board feels that the substance of the rule laid down should go into effect, we can suggest to you that this is a matter which the legislature can, if such is the legislative will,

speedily remedy when it meets a few weeks hence. While such legislation may present a constitutional problem, such legislation can be made severable from the rest of the act and the constitutional problem thus squarely presented. Under the present status, the constitutional problem might never be reached because of the rule of statutory interpretation that a construction of a statute is to be avoided which would render the statute of doubtful constitutionality. Under this rule, it is not necessary that a construction in question will clearly make a statute unconstitutional. It is sufficient if the construction renders the act of doubtful constitutionality.

NSB

Counties — Indigent, Insane, etc. — Poor Relief — Taxation — County Tax Rate — Amounts certified by industrial commission to secretary of state under sec. 49.03, subsec. (8a), Stats., to be collected from county, must be included in computing one per centum county tax limitation under sec. 70.62, subsec. (2).

Amounts certified by board of control to secretary of state under sec. 46.10, subsec. (2), Stats., to be collected from county, must be included in computing one per centum county tax limitation under sec. 70.62, subsec. (2).

Taxes for soldiers' relief levied under sec. 45.10, taxes of two mills or less levied for highway purposes under sec. 83.06 and judgments placed upon tax roll under sec. 66.09, Stats., should be excluded in computing one per centum county tax limitation under sec. 70.62, subsec. (2).

December 30, 1938.

VOYTA WRABETZ,

Public Welfare Department.

You inquire whether amounts certified by the industrial commission to the secretary of state, pursuant to sec. 49.03, subsec. (8a) par. (d), and amounts certified by the board of control to the secretary of state, pursuant to sec. 46.10,

subsec. (2), are "county taxes" as that term is used in sec. 70.62, subsec. (2), Stats. That section provides in part:

"The total amount of county taxes assessed, levied, and carried out against the taxable property of any county in any one year shall not exceed in the whole one per centum of the total valuation of said county for the preceding year as fixed by the tax commission; provided that such limitation shall not apply to any taxes levied to pay the principal and interest upon any valid bonds or notes of the county now outstanding or hereafter issued; * * *"

Under sec. 49.03, subsec. (1), Stats., a person who becomes sick while in a town, city or village in which he does not have a legal settlement is entitled to assistance upon making a sworn statement as to his legal settlement. The expense so incurred shall be a charge against the county in which is situated the town, city or village furnishing the assistance. The account for such expense is audited by the county board and paid out of the county treasury, and it may be recovered from the county where such person has his legal settlement" (subsec. (2)). In the event of a dispute between municipalities concerning liability for such expenses, an action to fix liability may be commenced before the industrial commission, which is given jurisdiction and power to hear, try and determine such claims and render decisions thereon between counties (sec. 49.03, subsec. (8a) par. (a)).

A method of appeal is provided for and, under sec. 49.03, subsec. (8a), par. (d),

"* * * When a matter is finally determined by appeal, or if no appeal is taken within the prescribed time, the amount determined to be *owing by a county* * * * shall be certified by the commission to the secretary of state and shall thereafter be collected as are other special state charges against counties * * *. The state treasurer shall remit to the prevailing county * * * such amount * * *"

Under the provisions of section 70.60, Stats., the secretary of state certifies to the county clerk of each county the state tax, if any, and all special charges which he is required by

law to make in any year to any county to be collected with the state tax. He then charges to each county the whole amount of the state tax and charges, and the same are paid into the state treasury as provided by law. Sec. 74.15, Stats., provides that the tax must be paid by the local treasurer to the county treasurer even though it occasions a deficiency in the local taxes and, under sec. 74.26, the county treasurers shall pay to the state treasurer the amount of said taxes charged to their respective counties on or before the second Monday of March in each year.

The amount which the industrial commission certifies to the secretary of state, pursuant to sec. 49.03, subsec. (8a), (d), as being collectible from the county, is a county liability and a county charge or expense. The amount necessary to take care of this liability is collected in the form of a tax assessed against all of the taxable property of the county. The sum so collected is not used for the benefit of the state or of any particular municipality of the county collecting such sum. The state, in collecting this sum, as "other special state charges against counties" are collected, acts merely as a collecting agency.

It is our opinion that as the amount certified by the industrial commission is a liability of the county, the tax which is levied for the purpose of satisfying this liability is a county tax and must be included in computing the one per centum annual tax limitation imposed upon a county under sec. 70.62, subsec. (2).

Under sec. 46.10, subsec. (1), Stats., when a person is committed or admitted to any one of several institutions therein mentioned, the court, judge, magistrate or board before whom the matter is pending, determines the legal settlement of the person being committed or admitted and "the county in which said legal settlement is located shall be chargeable with the support and maintenance in the manner and to the extent provided by law." Sec. 46.10, subsec. (2), provides in part:

"On the first day of July in each year the state board of control shall prepare a statement of the amounts due from the several counties to the state, pursuant to law, for the maintenance, care and treatment of inmates at public charge in state or county * * * institutions. Such

statement shall * * * specify the name of every inmate * * * whose support is partly chargeable to some county, and the name of every inmate in each county institution whose support is wholly chargeable in the first instance to the state and partly chargeable over to some county; and shall further specify, * * * the amount due to the state from such county * * * The president and secretary of the board shall certify said statement, file it with the secretary of state, * * * thereupon the secretary of state shall charge to the several counties the amounts so due, which shall be certified, levied, collected and paid into the state treasury with the state tax as a special charge."

This office has previously ruled and the opinion is now affirmed, that amounts certified by the board of control pursuant to sec. 46.10, subsec. (2), are county taxes within the meaning of sec. 70.62, subsec. (2), and must be considered in computing the one per centum tax limitation. XIX Op. Atty. Gen. 552.

Your request indicates that if the certifications of the industrial commission, made pursuant to sec. 49.03, subsec. (8a), and the certifications of the board of control, made under sec. 46.10, are included in computing the one per centum tax limitation of a county, certain counties will be handicapped and embarrassed in the administration of county affairs due to the fact that the one per centum limitation will prevent them from raising sufficient funds to meet ordinary county expenses. In this connection your attention is directed to the case of *Oconto County v. Townsend*, 210 Wis. 85, 244 N. W. 761, pp. 89-90, in which the court said:

"The one per centum limitation must be held to apply in every instance where the legislature imposes additional burdens calling for additional taxes unless the legislative intent be revealed, either expressly or by implication, that the additional burden is not to be included within the one per centum limitation. It was not the legislative thought, when the one per centum limitation was imposed, that counties would assess up to that limitation. The purpose was to prevent the burden of taxation by the county exceeding the one per centum limitation. As additional burdens were imposed, it might well have been assumed by the legislature that the one per centum limitation afforded ample opportunity for the county to discharge its obligations imposed by the new

legislation, keeping within the one per centum limitation. In case all the burdens imposed upon the county crowded the one per centum limitation, then it became the duty of the county to balance its budget and so arrange its expenditures that the total thereof would not exceed the one per centum limitation. This must be taken as the true purpose of the one per centum limitation, except in those cases where the legislature at the time of imposing new obligations upon the county disclosed an intention that such additional obligations were not to be considered within the one per centum limitation."

In that case it was held that taxes for soldiers' and sailors' relief levied under sec. 45.10, taxes of two mills or less, levied under sec. 83.06, and a judgment placed upon the tax roll for collection, pursuant to sec. 66.09, are not within the one per centum limitation of sec. 70.62, Stats. It is possible that some counties have been erroneously including these amounts when determining the total amount of taxes which they are permitted to assess, levy and carry out against the taxable property of the county.

JRW

Corporations — Finance Companies — Sec. 218.01, Stats., may be amended without two-thirds vote of both houses of legislature.

December 31, 1938.

FRANK H. BIXBY, *Commissioner,*
Banking Commission.

You refer to sec. 218.01, Stats., which relates to the licensing of auto dealers and finance companies, and inquire whether such section is subject to the provisions of art. XI, sec. 4, Wisconsin constitution.

Art. XI, sec. 4, Wisconsin constitution, provides:

“The legislature shall have power to enact a general banking law for the creation of banks, and for the regulation and supervision of the banking business, provided that the vote of two-thirds of all the members elected to each house, to be taken by yeas and nays, be in favor of the passage of such law.”

In XX Op. Atty. Gen. 1127, 1128, it was said:

“* * * The supreme court has construed these provisions in a number of cases. The gist of the decisions is that the constitutional requirement applies to substantive changes in the laws governing the creation of banks and the regulation and supervision of the banking business. General laws applying to banks as well as others which do not materially affect the creation of banks and the regulation and supervision of the banking business do not require a two-thirds vote. *Rock River Bank v. Sherwood*, 10 Wis. 230, 240; *Van Steenwyck v. Sackett*, 17 Wis. 645; *Brower v. Haight*, 18 Wis. 102; *In re Koetting*, 90 Wis. 166; *Northwestern Nat'l. Bank v. Superior*, 103 Wis. 43. * * *”

“But if an enactment materially affects the creation of banks, or the regulation and supervision of the banking business, it is governed by the constitutional requirement that it must be enacted by a two-thirds vote, whether it is general in application or is applicable only to banks. *State ex rel. Reedsburg Bank v. Hastings*, 12 Wis. 47; *Van Steenwyck v. Sackett*, 17 Wis. 645; *Rusk v. Van Norstrand*, 21 Wis. 159; *State ex rel. Bergh v. Sparling*, 129 Wis. 164.”

In XII Op. Atty. Gen. 269, it was held that a law amending a law relating to building and loan associations is not a general banking law and need not be passed in the manner prescribed by sec. 4, art. XI, Wisconsin constitution.

Our court in *MacLaren v. State*, 141 Wis. 577, quoted Morse on Banking (vol. 1, sec. 2, 4th ed.) as follows:

“* * * In order to have a bank ‘it is essential that there should be a place where, as a regular business, the money of others is received on general deposit. * * *”

It was held that a finance company is not engaged in the business of banking. *Eastern Acceptance Corporation v. Godfrey*, 14 N. J. Misc. 187, 183 A. 822.

While sec. 218.01, Stats., applies to banks it does not relate to banks and banking within the meaning prescribed by sec. 4, art. XI, Wisconsin constitution, and it follows that such section may be amended without a two-thirds vote of both houses of the legislature.

WHR

Insurance — Public Officers — City Officials — Words and Phrases — Under sec. 62.09, subsec. (7), par. (d), Stats., city official may sell insurance to city if amount of annual premium does not exceed three hundred dollars.

December 31, 1938.

JACOB FESSLER,
District Attorney,
Sheboygan, Wisconsin.

You inquire whether under sec. 62.09, subsec. (7), par. (d), Stats., a school board officer may validly contract with the city for insurance on city school buildings where the total premiums for the same do not exceed three hundred dollars in any one year. Your question assumes that the school in question is so organized that a school board officer is a city officer and for the purpose of this opinion we shall assume such to be the case.

Sec. 62.09 (7) (d), Stats., provides in part 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. * * * The provisions of this section shall not apply * * * to contract for the sale of printed matter or any other commodity, not exceeding three hundred dollars in any one year.”

One question presented is whether insurance may be classed as a "commodity" within the meaning of the above quoted exception. That word has been rather liberally construed by a number of states, including Wisconsin. In *Beechley v. Mulville*, 102 Ia. 602, 70 N. W. 107, it was held that insurance is a commodity within the purview of a statute prohibiting combinations to fix the price of "commodities". The Massachusetts court has said that the privilege to do business, (*S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, 98 N. E. 1056), the privilege of succession to the property of a deceased person, and the privilege of the owner of the property to dispose of it upon his death are commodities and may be taxed as such under a provision of the Massachusetts constitution which permits an excise tax to be levied upon any "commodities". *Magee v. Treasurer & Receiver General*, 256 Mass. 512, 153 N. E. 1. Our own court has held that telephone service is a "commodity" within the meaning of a statute outlawing combinations or conspiracies to restrain or prevent competition in supply or price of any "commodity". *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38.

On the other hand, there is authority to the effect that insurance is not a "commodity" within the meaning of anti-price-fixing statutes, *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397; *Palatine Ins. Co. v. Griffin*, 202 S. W. (Tex.) 1014.

These cases indicate that there is ample authority for holding that insurance may be classed as a commodity. They also illustrate the rule that words employed by legislators must be construed not as isolated terms but in relation to the statute in which they are used. When so construed a word may properly be given one meaning as used in a particular statute and a more restricted construction in another.

The language of sec. 62.09 (7) (d) indicates that the considerations which prompted the enactment of the prohibition therein contained were, in the opinion of the legislature, not sufficient to warrant the application of that prohibition to transactions which involve the transfer of small sums only from the city treasurer. If the amount of money involved is the basis for the distinction between those sales allowed and

those prohibited there seems to be no reason for not exempting sales of insurance in which the premium paid by the city does not exceed three hundred dollars per year, and since, as indicated by the above cases, the word "commodity" may be very broadly construed it must be held that the exception contained in sec. 62.09, (7) (d), Stats., applies to insurance contracts.

If insurance contracts are included in the exception, the limit of three hundred dollars fixed by the statute applies to the amount of the premium paid by the city and not to the size of the policy. It may be urged that the insurance contract is the "commodity" purchased and hence that the amount of insurance purchased controls rather than the amount of the premium that is paid annually for the insurance. It probably goes without saying that the insurance contract is the commodity dealt with but, even so, considering the nature of the exception and the underlying purpose of the legislature in enacting the exception, it would seem that the annual premium must control rather than the amount of the insurance purchased by such annual premium. The statute was designed to eliminate excessive expenditures by cities on contracts with city officials, not to limit the value of the article or commodity which the city receives. It follows that a city official may sell insurance on city buildings provided the total premiums do not exceed three hundred dollars in any one year.

NSB

Bonds — Public Officers — County Treasurer — County treasurer's responsibility for funds in his possession is in nature of that of insurer and he is liable for all losses even though he has exercised due diligence.

December 31, 1938.

HERBERT F. GUENZL,
District Attorney,
Merrill, Wisconsin.

You state that the office of the county treasurer was robbed and that the county sustained a loss of six hundred seventeen dollars and seventy-two cents thereby.

You inquire whether there is any liability on the part of the treasurer's bonding company under such circumstances.

Since the conditions of the bond are not set forth in your request, it will be assumed for the purposes of this opinion that the bond covers any shortage for which the treasurer is liable.

It appears that the moneys stolen from the treasurer's office were received by him in his official capacity. He must therefore be held strictly accountable, and is liable for any losses even though they occurred without his fault. This rule of law is stated in 22 R. C. L. 468 as follows:

“* * * 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.”

In *Forest County v. Poppy*, 193 Wis. 274, 213 N. W. 696, our court quoted the above statement, p. 277, with approval and added:

“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.”

In accordance with that decision, this department has twice held that a custodian of public funds is in effect an insurer of such funds and will be held liable as such. XXVI Op. Atty. Gen. 227, 329.

It is, therefore, immaterial whether the treasurer in this case used due diligence in safekeeping the funds or not or whether or not he was authorized to keep the receipts in his office safe; in any case, he is liable for the loss and it follows that the surety on his bond is also liable if such bond complies with the statutes.

NSB

Elections — Public Officers — County Judge — Vacancies
— Where county judge dies and appointment is made to fill vacancy, and regular election for same office is to be held following April, appointee serves out unexpired term, there being no special election to fill vacancy in such case.

December 31, 1938.

HON. PHILIP F. LA FOLLETTE,
Governor.

You have requested an opinion on the following question:

“In the case where a vacancy exists in the office of county judge, the regular term of which expires on the first Monday of January, 1940, does the appointee selected to fill the vacancy hold office until the first Monday in January, 1940, or is a special election required to be held for the purpose of selecting a successor for the unexpired portion of the term?”

The answer to your question is controlled by sec. 17.21, subsec. (2) and sec. 8.02, Stats.

Sec. 17.21 (2), relating to filling vacancies in elective offices, reads:

“In the office of county judge * * * by appointment by the governor. Persons so appointed shall hold office until the first Monday of June next succeeding an election held as provided in section 8.02 to fill such vacancy for the residue of the unexpired term. *In case an election cannot be*

held to fill such vacancy, because of the limitations of section 8.02, the appointee shall hold office for the residue of the unexpired term."

Sec. 8.02 reads :

"All regular elections for justice, judge or superintendent shall be held on the first Tuesday of April next prior to the expiration of the term. *Election to fill a vacancy in the office of justice or judge shall not be held at the time of holding the regular election for the same office.* In case of judge, such election shall be held on the first succeeding Tuesday of April, and in case of justice on the first succeeding Tuesday of April when no other justice is elected. In either case, if the vacancy occurs within forty days prior to the first Tuesday of April, the said vacancy shall not be filled until the judicial election of the next years."

In XX Op. Atty. Gen. 106 the identical problem here presented was discussed. It was there held that the person appointed under the circumstances you describe would hold office for the balance of the unexpired term as, the regular election for the particular office being held the first Tuesday of April following, no special election for the purpose of filling the vacancy could be held. While we feel that sec. 8.02, especially the third sentence thereof, is open to a different construction, we believe that the conclusion reached in XX Op. Atty. Gen. 106 is sound. You are therefore advised that the appointee involved in your request is entitled to hold office for the balance of the unexpired term.

WHR

Courts — Guardians and Wards — Indigent, Insane, etc. — Military Service — Veterans' Compensation — After compensation payments are made to veteran or his guardian, compensation estate is administered in accordance with laws of state in which veteran resides. United States Veterans' Administration retains supervisory control over estate to extent only that it can object to use of compensation estate that is improper under laws of veteran's resident state. Allowance from veteran's compensation estate for support of indigent sister is not permissible under sec. 319.26, Stats.

December 31, 1938.

JOHN F. MULLEN, *Director,*
Adjutant General's Office.

You have requested an opinion on the following:

A mentally incompetent world war veteran has accumulated a compensation estate of approximately twenty thousand dollars. In accordance with a 1934 regulation of the United States Veterans' Administration, for their payments of disability compensation to said estate have been discontinued pending such time as the said estate is reduced to five hundred dollars. The incompetent veteran's legal guardian, who was duly appointed by the Waupaca (Wisconsin) county court, petitioned said court for a monthly allowance from this veteran's compensation estate to be paid the veteran's indigent sister. It is assumed that the indigent sister, as next of kin of the incompetent veteran, will inherit a part of the veteran's compensation estate upon his death. The Waupaca county court granted the aforementioned petition. However, the Regional Facility of the Veterans' Administration refuses to permit said allowance, because, it says, compensation and insurance payments to veterans are for the use of the veteran and his "dependents", and that under the federal pension laws the term "dependents" does not include a sister.

In connection with the above you have submitted the following questions:

1. Has the United States Veterans' Administration such an interest in or does it retain such control over this estate that it can properly object to or interfere with the proposed use of the estate?

2. Was the court of appointment acting within its premises in ordering the award from the compensation estate to the indigent sister?

The granting of pensions and compensation allowances are mere gratuities which may be withdrawn at will or upon which congress may impose such limitations as it deems desirable. *Smith v. United States*, (1936) 83 Fed. (2d) 631. The United States Veterans' Administration is given the duty and authority to administer veterans' compensation laws. Thus, any and all questions arising in the course of claims for compensation and the payment thereof are determined by said administration.

However, once the payments have been made, title to the funds and estates arising therefrom vests absolutely in the veteran or his guardian. *Spicer v. Smith*, (1933) 288 U. S. 430, 53 S. Ct. 415, 77 L. ed. 875. The compensation estate is thereafter administered and distributed under and in accordance with the laws of the state in which the beneficiary has his residence. *White v. White*, (1935) 162 So. 368. *In re Guardianship of Gardner*, (1936) 220 Wis. 493, 264 N. W. 643.

The above is so notwithstanding Title 38 U. S. C. A., sec. 450, which provides:

“(2) Whenever it appears that any guardian * * * in the opinion of the Administrator, is not properly executing or has not properly executed the duties of his trust or has collected or paid, or is attempting to collect or pay, * * * allowances that are inequitable * * * the Administrator is * * * empowered * * * to appear in the court which has appointed such fiduciary * * * and make proper presentation of such matters: *Provided*, That the Administrator, in his discretion, may suspend payments to any such guardian * * * who shall neglect or refuse * * * to administer the estate according to law: * * *.”

In *White v. White, supra*, the appellee contended that sec. 450 gave the United States Veterans' Administration supervision and control of the investment of a veteran's funds even after paid to the veteran or his guardian. The court held, however, p. 371;

"* * * The right of the director, 'in his discretion,' to suspend payment to any such guardian * * *, 'does not connote an intent that supervision should be retained after the money comes into the possession of such guardian, * * *'"

"The acts of Congress in respect to trust funds and trust estates, * * * clearly evince the policy that such trust shall be administered and distributed under and in accordance with the laws of the state in which the beneficiary * * * has his residence * * *."

To the same effect is *In re Greiner's Estate*, (1928) 195 Wis. 332, 218 N. W. 437, where it was held that the estate of a deceased veteran must be distributed in accordance with the law of the state in which he resided.

The most that sec. 450 vests in the Administration is a supervisory

"* * * authority over the fiduciary to ascertain whether or not he is proceeding according to law and to take such steps as may be necessary to protect the interests of the ward. No effort is made anywhere in the federal statutes to confer upon the bureau or any officer thereunder judicial power and authority to enforce by its own decree any of its suggestions."

Pedigo v. Pedigo's Committee, (1932) 247 Ky. 403, 57 S. W. (2d) 54.

Thus, in answer to your first question, it is concluded that while the Veterans' Administration may exercise a supervisory control over the use and disposition of veteran's funds already in the hands of his guardian, it has no authority to enforce its decrees in respect thereto in a judicial manner. The Veterans' Administrator's only remedy lies in appearing in the county court, wherein the veteran's guardian was appointed, and objecting to a proposed use of a veteran's compensation estate. *In re Guardianship of MacNair*, (1931) 2 P. (2d) 82.

The provisions in sec. 450, that "the Administrator, in his discretion, may suspend payments to any such guardian * * * who shall neglect or refuse * * * to administer the estate according to law" authorizes the Administrator to suspend payments only when the guardian acts contrary to the laws of the state in which the veteran resides. Here, the veteran resides in Wisconsin, whose laws govern the use and disposition of said compensation estate. The fact that under the federal pension laws a sister is not entitled to any allowances from the estate of a veteran is not material here.

The title of the compensation estate being in the guardian for his ward, the county court acquired exclusive jurisdiction over the compensation estate by the appointment of said guardian. Sec. 253.03, Stats. The county courts are courts of limited jurisdiction and derive their power from the statutes. They can exercise only those powers granted by statute. *Estate of Anson*, (1922) 177 Wis. 441, 188 N. W. 479; *Estate of Kallenbach*, (1924) 184 Wis. 171, 199 N. W. 152. Thus the county court could permit or order the guardian of a ward to use his compensation estate only in a manner authorized by statute.

Sec. 319.26, Stats., provides:

"Every guardian shall manage the estate of his ward frugally and without waste and apply the personal property or the income therefrom or from the real estate, as far as may be necessary for the suitable education, maintenance and support of the ward and of his family, if there be any legally dependent upon him for support, and for the care and protection of his real estate. * * *"

Neither by statute nor at common law are sisters legal dependents. As such, the guardian could not legally apply any of the property or estate of his ward to the support of a sister. Likewise, the county court could not do so, for the county court has no power to create liabilities but can only enforce existing liability, and there is no statutory authorization for an allowance to a sister of a living ward. *Guardianship of Heck*, (1937) 225 Wis. 636, 275 N. W. 520. It is not within the province of the court to deal benevolently

with the veteran's property in passing upon an application for an allowance therefrom. Thus, in answer to your second question we are of the opinion that the county court did not act within its premises in making the award in question.

HHP

Appropriations and Expenditures — Public Officers — County Board — County Board Committees — County Highway Committee — Under sec. 82.05, subsec. (1), Stats., members of county highway committee may be reimbursed for their actual and necessary expense in traveling to and from committee meetings each day.

Unless otherwise provided by specific statute, members of other county board committees shall receive per diem and mileage for each day of official service under sec. 59.06. subsec. (2), Stats.

December 31, 1938.

INGOLF E. RASMUS,

District Attorney,

Chippewa Falls, Wisconsin.

You state that the county highway committee in Chippewa county at times meets and remains in session by adjournments to the following day, thus causing the committee to be in session for several successive days.

You ask: (1) whether members of the highway committee may charge mileage for each day the committee is in session; and (2) whether under a similar set of facts members of other county board committees may charge mileage for each day the committee is in session.

That members of county board committees other than the highway committee are entitled to mileage for each day of committee service was held in XXV Op. Atty. Gen. 86. By

sec. 59.06, subsec. (2), Stats., the compensation of such committee members is fixed at a per diem and mileage and it is provided:

“* * * The number of days for which compensation and mileage may be paid a committee member in any one year, except members of committees appointed to have charge of the erection of any county buildings * * * are limited as follows * * *.”

As indicated in the opinion cited, the language of that section must be construed to mean that such committee members shall be paid a per diem and mileage for each day of official service. However, payments can be made only for miles actually traveled in performance of their duties. While “mileage” has been termed an extra compensation and not a reimbursement for expenses, it is compensation based on miles traveled.

The compensation of highway committee members is provided for not in the general statute cited above but in sec. 82.05 (1), Stats., which reads in part as follows:

“* * * 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, * * *.”

It should be noted at the outset that members may not be paid “mileage” but only actual and necessary expenses. As stated in XVI Op. Atty. Gen. 164 and XXIII Op. Atty. Gen. 317, this means money actually disbursed by such members and is in no sense an extra compensation for the trouble and expense of traveling as a “mileage” allowance appears to be. See XXIV Op. Atty. Gen. 688.

Assuming then that the highway committee members seek to charge only for the actual expense of traveling to and from committee meetings each day, it is the opinion of this department that such charges must be allowed.

Certainly expenses incurred in going to and from committee meetings which members must attend are actual and

necessary expenses incurred in the performance of their duties. If a committee is in session for several consecutive days, the only alternative to traveling back and forth each day is to have the members obtain meals and lodging in the vicinity of the meeting place. This would in most cases mean a much greater expense for the county, since, unlike the per diem of county board members, the per diem paid to highway committee members covers only their time and not their expenses which by the express terms of the statute must be borne by the county. Under such circumstances, the expense of traveling to and from the meetings each day should be held a necessary expense and must be allowed.

NSB



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