OPINIONS
OF THE
ATTORNEY GENERAL
OF THE
STATE OF WISCONSIN

VOL. XXVIII
January 1, 1939, through December 31, 1939

JOHN E. MARTIN
Attorney General

MADISON, WISCONSIN
1939
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 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
January 26, 1939.

TO ALL DISTRICT ATTORNEYS:

Dear Sirs:

As you know, I, like a number of District Attorneys, have just recently assumed office. I have been giving considerable thought to the duties of my office and am most desirous of so organizing my department as to render the maximum of efficient service within a legitimate scope of the duties, powers and functions of this office.

The particular problem with which I am concerned in writing you is that of establishing a workable relationship between this office and the various district attorneys throughout the state in the performance of the duties of this office under sec. 14.53 (3), statutes, which makes it the duty of the attorney general to “Consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office.”

I am concerned with the problem of how this office can best perform this duty in a prompt and efficient manner. With this end in mind, I have examined precedent to determine how my predecessors approached the problem.

It must be conceded that there is an ever present tendency for the attorney general’s office to become just what my predecessors conceived the office should not become. With this thought in mind, I would request that all district attorneys read the opinions in X Op. Atty. Gen., page 1014, and XI Op. Atty. Gen., page 242. In those opinions certain salutary and fundamental principles are expounded in the matter of the relationship of the district attorney to his county board and county officers and to this office. Seven working principles are laid down in X Op. Atty. Gen., pages 1014, 1015, all of which I believe to be fundamental and sound. I particularly want to invite your attention to (6) of that opinion. Many of my predecessors have refused to honor any request from the district attorney unless the request was submitted in accordance with (6) of that opinion.
and unless the request otherwise conformed to the concepts therein set forth. For convenient reference I am attaching so much of the opinion in X Op. Atty. Gen. as is material.

I might add an eighth concept which seems to me fundamental and that is, that attention should be given to whether the matter involved pertains "to the duties of" the office of district attorney. Ordinarily town, city, village and school district matters are not within the scope of any duties of the district attorney, and requests by a district attorney to this office for opinions with respect thereto are obviously beyond the scope of any duties of this office under sec. 14.53 (3), statutes.

Please do not think that I am insinuating that there has been any considerable abuse by district attorneys of the consultation and advisory functions of this office since I have assumed office. Many of you are fully aware of the limitations of this office under sec. 14.53 (3), statutes, and have acted accordingly. In fact, a goodly number of you have made no requests at all for opinions. The point I want to make is that I am new in this office and that many of you are new in yours and that I am desirous of establishing a sound, working relationship with all of you throughout my term of office.

I request that each one of you assist me in the performance of the multitudinous duties of this office. I want each one of you to feel that you have the utmost freedom of consultation with this office and I do not wish this letter to be interpreted in any other manner. I do feel that we ought to establish an understandable, workable relationship at the start and it is for that reason that I am writing this letter. If you will all adhere to the observations herein made, I hope to be able to give you a prompt and efficient service with respect to those matters upon which you desire my consultation and advice.

I wish all of you the utmost success in the duties of your office, whether those duties be new or old to you.

Yours very truly,

JOHN E. MARTIN,
Attorney General.
"October 26, 1921.

"M. J. PAUL,
District Attorney,
Berlin, Wisconsin.

"You have written the attorney general as follows:
"I have been requested to get from you an opinion on what compensation the county clerk of our county is entitled to receive in addition to his salary as fixed by the county board.
"In this connection the following questions have arisen in particular.
"Is the county clerk entitled to pay for his services on the county canvassing board?
"Is the county clerk required to do all the county highway work as one of his duties for his annual salary, or can the county clerk refuse to do this highway work?
"Can the county board after fixing the annual salary of the county clerk later pass a resolution making him a certain allowance for doing the county highway work?
"Who is required to furnish envelopes, postage and blanks for use in the issuing and mailing of hunting and trapping licenses the county, or the county clerk out of his 10% of the fees collected?
"For what can the county clerk sign orders for the payment of money, which has not been directed by the board?"

"Before taking up these questions, I avail myself of this occasion to say:
"(1) That the statutes make the district attorney attorney advisor to the highway commissioner and other county officers (subsec. (8), sec. 59.47; subsec. 7, sec. 1317m-9, Stats.);
"(2) That the attorney general shall 'consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office' (subsec. (8), sec. 14.53), but that it is not his duty and he should not be called upon to fill out or answer legal questionnaires;
"(3) That consultation between lawyers does not consist merely in having one of them quiz the other and thus compel the latter to do all of the legal digging.
"(4) That county officers are entitled to the district at-
IV

torney's advice, but they are not entitled to the attorney general's opinion, and when the district attorney is satisfied in his own mind that he has correctly advised or can correctly advise a county officer upon any official matter submitted, the district attorney should decline to submit that matter to this office and should insist that the county officer content himself with the opinion of his statutory legal advisor or seek advice elsewhere on his own account.

"(5) That it is not fair to the attorney general nor to the district attorney for the latter to be made a mere messenger or interrogator for county officials or others to the attorney general, and that to permit such practice is to cheapen and belittle the high and important office of district attorney and tends to flood this office with questions which should not be submitted, but which it has been felt must be answered as a matter of courtesy, thus taking time which is needed to properly discharge official duties. District attorneys are urged not to relay questions to this office or to permit their office to be used in any such manner that the attorney general and his staff must act as mere law clerks and examiners for everyone.

"(6) That district attorneys before consulting with the attorney general or seeking his advice about any matter should give it study and, if still in doubt, should freely consult with him but let him have the help and benefit of the examination of the law which the district attorney had made.

"(7) That such study will often disclose with certainty the correct solution of the problem and thus obviate the need of submitting the question or will discover a published official opinion by this department upon the precise question in hand. * * *"

Indigent, Insane, etc. — Poor Relief — County cannot charge against town expenses incurred by town officers for relief of transient who has no legal settlement anywhere, as county under sec. 49.04, subsec. (1), Stats., is liable for such relief.

January 10, 1939.

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

In your recent letter you submit the following facts:

"A applied to the town of B for relief in Langlade county and signed an affidavit to the effect that he was a resident of the county of C. The town furnished the relief and charged it to Langlade county and when Langlade county tried to collect from county C the place where the transient claimed to have legal settlement, it developed that he had no settlement at all and had made false statements in the affidavit."

You state that you realize that the man may be punished for the crime, but you are submitting the question whether the county will be the one to suffer on account of this mistake. You state that it is unfair that the county should have to bear the burden for what you deem mistakes on the part of the town whereby the town gives relief to transients
without making thorough investigation before giving the relief, and you inquire whether the county can collect from the town on the theory that the town was negligent in not ascertaining the actual residence of the transient before furnishing him aid. The statute involved is sec. 49.03, subsec. (1) which reads thus:

"When any person not having a legal settlement therein shall be taken sick, lame, or otherwise disabled in any town, city or village, or from any other cause shall be in need of relief as a poor person and shall not have money or property to pay his board, maintenance, attendance and medical aid and shall make a sworn statement as to his legal settlement, the town board, village board or common council shall provide such assistance to such persons as it may deem just and necessary, and if he shall die, it shall give him a decent burial. It shall make such allowance for such board, maintenance, nursing, medical aid and burial expenses as it shall deem just, and order the same to be paid out of the town, city, or village treasury."

Under the facts stated, it appears that the party in question did not have a legal settlement anywhere. It also appears that the town officers did secure from the person in question the affidavit by which he attempted to prove his legal settlement as required by the above sec. 49.03 (1). It might be very difficult to maintain a successful action to recover from the town on the theory that the officers were negligent in not ascertaining the facts when they had the affidavit required by the statute. In this connection it may be well to refer you to sec. 49.04, subsection (1), which provides:

"The county board of each county shall have the care of all poor persons in said county who have no legal settlement in the town, city or village where they may be, except as provided in section 49.03, and shall see that they are properly relieved and taken care of at the expense of the county."

In view of the fact that under the facts presented by you the party in question had no legal settlement and was a transient in the town that gave him the relief, and as the
county in such case is liable for relief, it would be impos-
ible to secure relief by an action against the town or by
charging the amount of the relief against the town, as the
statute makes the county liable for the relief. You are there-
fore advised that the county cannot collect back from the
town money charged against the county for relief given to
transients by the town.

JEM

Corporations — Foreign Corporations — Federal Na-
tional Mortgage Association as instrumentality of federal
government need not comply with sec. 226.02, subsec. (2),
Stats., before purchase of mortgages upon real estate in
Wisconsin.

January 10, 1939.

Fred Zimmerman,
Secretary of State.

This department has been asked to render an opinion as
to whether it is necessary for the Federal National Mort-
gage Association to comply with sec. 226.02, subsec. (2),
Stats., before purchasing mortgages covering real estate in
Wisconsin.

It appears that the sole purpose and function of the asso-
ciation in question is to facilitate the operation of the na-
tional housing act. To that end it was organized pursuant to
Title III of that act by the Reconstruction Finance Corpo-
ration, a federal agency, which holds all the capital stock. As
an association organized under a federal act to further the
aims of that act and owned and controlled by the federal
government through one of its agencies, the Federal Mort-
gage Association must itself be classified as an employee or
agent of that government. As such, it is exempt from any
state legislation which attempts, by taxation or otherwise,
to retard, impede, burden or control it in such a manner as
to impair its efficiency in performing the functions through
which it was designed to serve the government. *Horn Silver Mining Co. v. N. Y.*, 143 U. S. 305; *Pembina Con. Silver Mining Co. v. Penn.*, 125 U. S. 181; *Western Union Tel. Co. v. Mayor of City of New York*, 38 Fed. 552; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9.

Sec. 226.02 sets forth the conditions upon which foreign corporations will be allowed to do business in the state of Wisconsin. In the light of the rule stated above, this department in VII Op. Atty. Gen. 498 held that foreign corporations engaged purely in an enterprise of the federal government cannot be forced to comply with those provisions. That opinion must be followed in this instance.

You are advised that the association need not comply with sec. 226.02 (2) before purchasing real estate mortgages in Wisconsin.

NSB

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**Criminal Law — Taking and Detention of Minors — Kidnaping** — Conviction under sec. 340.55, Stats., is not conviction of "kidnaping" within meaning of sec. 359.07, Stats.

January 11, 1939.

**BOARD OF CONTROL.**

You inquire whether a person convicted under sec. 340.55, Stats., is guilty of the crime of kidnaping within the meaning of sec. 359.07, Stats.

Sec. 359.07 provides for indeterminate sentences in most cases and reads in part as follows:

"The sentence of any convict found guilty of treason, murder in the first degree as defined by law, rape, kidnaping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time, * * * ."

It becomes necessary to determine to what offenses the legislature had reference when it provided for fixed sen-
Opinions of the Attorney General

At common law, the offense of kidnaping consisted of the forcible abduction or stealing away a man, woman or child from his own country and sending him to another. *Furlong v. German-American Press Assoc.*, 189 S. W. 385; *People v. Camp*, 139 N. Y. 87; II Wharton, Criminal Law, (12th ed.), sec. 773; *Smith v. State*, 63 Wis. 453.

The word "kidnaping" has, however, acquired a greatly extended meaning since all the states have enacted kidnaping statutes which, in many instances, include other offenses which were commonly known as independent torts or crimes. It is now generally used to designate violations of those statutes which either specifically define the crime of kidnaping or define offenses similar to kidnaping at common law and are designed to protect those interests invaded by the common law offense. An illustration of this use of the word "kidnaping" appears in the case of *Hackbarth v. State*, 201 Wis. 3, in which the court speaks of "the offense of kidnaping as now defined by sec. 340.54 of the Statutes" (p. 5). Sec. 340.54 does not specifically define "kidnaping" but quite obviously was intended to protect the same interests and take the place of the old common law prohibition. On the other hand, sec. 340.55 is just as clearly a development of the old laws against abduction rather than kidnaping. The statute was designed not to protect the liberty and freedom of the individual but to safeguard the morals of minors and secure the custody of parents and guardians over their children and wards. Whereas the offense of kidnaping is commonly associated with the use of force, fraud, or the excitement of fear, except in the case of young children, the offense defined in sec. 340.55 is complete even though the consent of the victim is freely given and the element of coercion is nonexistent. It is apparent that the offense defined in the section in question cannot be designated as "kidnaping" within the common or technical use of that word.

It will be noted that while both secs. 340.54 and 340.56 are by their titles designated as kidnaping, sec. 340.55 is not. Since sec. 359.07 was enacted after secs. 340.54, 340.55 and 340.56 had been given the titles noted above, it is very probable that the legislature in using the term "kidnaping" in
sec. 359.07 referred to the offenses so designated by the statutes.

You are advised that a conviction under sec. 340.55 is not a conviction of "kidnapping" within the meaning of sec. 359.07.

NSB

Public Officers — County Board Member — Pension Investigator — Under sec. 66.11, subsec. (2), Stats., member of county board is ineligible, during term for which he was elected, to office of additional pension investigator for county, when position was created and appropriation was made therefor during term for which he was elected to county board. Resignation during such period will not make him eligible.

January 11, 1939.

MARTIN GULBRANDSEN,
Ex-district Attorney,
Viroqua, Wisconsin.

Under date of December 29 you submitted the following:

"Upon demand of the state pension department, the county board of Vernon county appropriated revenue to pay the salary of an additional investigator for the pension department, which investigator will be appointed by the pension administrator of this county. The office of pension investigator was created in a prior year, and the appropriation merely covers a sum sufficient to employ an additional investigator. *

In view of these circumstances, you inquire whether a person who was a member of the county board at the time this appropriation was made is eligible to appointment by the pension administrator to the position of investigator under sec. 66.11, subsec. (2), Stats.
Sec. 66.11 (2) provides 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 or council, provided that the governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives."

You will note that this section makes him ineligible not only during the time when he holds the office but during the term for which he is elected. The term continues although he vacates the office by resignation. It appears that the term for which the member was elected has not yet expired. The appropriation was also made by the county board during the term for which the member was elected. Your first question must be answered in the negative.

In view of the above conclusion, it must be apparent that resignation of the board member in question will not make him eligible for the position at any time during the term for which he was elected.

JEM

Courts — Juvenile Courts — Minors — Child Protection — Under ch. 48, Stats., jurisdiction of juvenile courts ceases and therefore county liability ceases when "neglected" or "delinquent" child reaches eighteen years of age and when "dependent" child reaches sixteen years of age except in excepted cases where jurisdiction and therefore county liability either must be or may be extended until child reaches twenty-one years of age.

January 11, 1939.

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

You ask when and at what ages payments by a county should cease or be discontinued for the care of (1) dependent children, (2) neglected children and (3) delinquent
children, who are being maintained under juvenile court orders. You cite sec. 48.01, subsec. (1) pars. (a), (b), (c) and sec. 48.01, subsec. (5), par. (b), Stats. You also cite sec. 351.30, Stats., and state that according to the provisions thereof the obligation of a father for the support of his child ceases when the child arrives at the age of sixteen years and that it seems to you that the same rule should apply in determining the liability of the county.

Sec. 351.30 is a criminal statute which provides a penalty for failure, on the part of a person charged with the duty of supporting a minor child, to meet that duty. We do not consider this section conclusive upon the questions that you have presented. The law may well and does impose a duty to support under many circumstances where criminal liability is not involved. See, for instance, sec. 49.11.

We think that the answer to your questions must be found in the so-called children's code, ch. 48, Stats. Sec. 48.01, subsec. (1), pars. (a) and (c) respectively, define a “neglected child” and a “delinquent child” as children under eighteen years of age, and par. (b) of said subsection defines a “dependent child” as one under sixteen years of age.

Sec. 48.01, subsec. (5), par. (b) provides as follows:

"Whenever the juvenile court shall determine any child to be delinquent, such child shall continue for the purposes of sections 48.01 to 48.28 under the jurisdiction of the court until he becomes twenty-one years of age, unless discharged prior thereto."

Sec. 48.20 in effect provides that the board of control shall admit dependent and neglected children under sixteen years of age (with certain exceptions) and that the board may in its discretion retain control until the child becomes twenty-one years of age.

Sec. 48.15 in substance provides that commitments to any industrial school shall be until the child reaches twenty-one years of age or until paroled.

The statutory scheme seems rather definitely to be that jurisdiction of the court is limited to children under sixteen years of age with respect to “dependent” children and eighteen years of age with respect to “neglected” or “delin-
sequent" children except in the excepted cases above cited where jurisdiction may be retained until the child reaches twenty-one years of age.

You are advised therefore that jurisdiction of the juvenile courts ceases and therefore county liability ceases when a "neglected" or "delinquent" child reaches eighteen years of age and when a "dependent" child reaches sixteen years of age except in the excepted cases where jurisdiction and therefore county liability either must be or may be extended until the child reaches twenty-one years of age.

NSB

Military Service — Peddlers — Under sec. 129.02, Stats., words "recognized by the United States veterans' bureau" modify entire phrase and no other certificate of disability may be substituted in lieu thereof.

January 11, 1939.

TAX COMMISSION.

In your letter of December 9, 1938, you state that application has been made by a United States World War veteran for a special peddler's license to be issued without fee pursuant to sec. 129.02, Stats. You state that the applicant has met all the provisions of the statute except that he has not presented a certificate by the United States veterans' bureau recognizing such disability. In lieu of this he has presented a certificate executed by a surgeon of the Grand Army home for veterans, Wisconsin veterans' home, Waupaca, Wisconsin, which is an accredited state soldiers' home. You state that the license under such practice would be refused, but that the adjutant general of the state of Wisconsin has requested that an official opinion be sought from the attorney general because of the following circumstances contained in an excerpt from a letter directed by him to the officer who issues such license:
"I appreciate that the Wisconsin statutes require proof of a 25% disability recognized by the United States veterans administration. This requirement, however, works a decided hardship upon the applicant in many cases for the reason that many veterans who apply for a free peddler's license have never been physically examined by the United States veterans administration and for the further reason that existing federal laws do not permit of an examination by the United States Veterans administration solely for the purpose of accomplishing a free peddler's license.

"When the Wisconsin law granting a free peddler's license to veterans who had a 25% degree of disability recognized by the Veterans Administration was passed, the federal law provided a non-service connected pension for four degrees of disability—25%, 50%, 75%, and 100%. The present federal law provides non-service connected pension for only permanent and total disability. It is therefore impossible for a veteran to obtain a certificate of 25% disability from the United States Veterans Administration unless he files application for permanent and total disability and justifies such application in the eyes of the United States veterans administration.'"

Sec. 129.02, requiring a license fee and fixing the amount of the license, contains the following exception:

"* * * Except that any ex-soldier of the United States in any war in which the United States was engaged and who has been a bona fide resident of this state for at least five years preceding the application and who has a twenty-five per cent disability or more or has a cardiac disability recognized by the United States veterans' bureau shall upon presenting satisfactory proof of compliance with these conditions to the department be granted a special license without payment of any fee. * * *''

It appears that your department, ever since the law has been enacted, has interpreted the words "recognized by the United States veterans' bureau" as modifying the entire phrase and has administered the law accordingly. We agree with this interpretation of the statute.

While the present wording of the statute may work a hardship due to change in the law of compensation of veterans, that cannot justify this department in substituting some other test in lieu of the legislative test. The foregoing
is especially true in view of the fact that the legislature will be meeting inside of a week and the hardship may easily be corrected by the legislature if some other test is in accord with legislative will.

NSB

January 20, 1939.

J. Henry Bennett,
District Attorney,
Viroqua, Wisconsin.

The Vernon county board of supervisors, at its May, 1938, session, voted to submit to the electors of the county the question whether the county should retain the office of home demonstration agent. At the regular election of November 8, 1938, this question was submitted and the electors voted to discontinue the office.

You inquire whether the decision of the voters is binding upon the board. From the facts you submit, it appears that no attempt was made to follow the procedure outlined in sec. 10.43, Stats., which, by sec. 59.02 is made applicable to counties. Aside from the provisions of sec. 10.43, there is no general authority for direct legislation by the electors of a county. The action of the county board in submitting the question to the voters being unauthorized, it has no legal effect and is purely advisory. The county may either adhere to or disregard the will of the electorate.
As indicated in XX Op. Atty. Gen. 276, it is probably true that the county board may enact an ordinance contingent upon the approval of the voters. However, the resolution adopted by the board at its May session was not so framed, and even if it had been, such an ordinance or resolution would be no more binding upon the board than any ordinary ordinance or resolution since its efficacy would be derived not from the vote of the people but from the will of the board. State ex rel. Atty. Gen. v. O'Neill, 24 Wis. 149.

You are advised that the county board may disregard the result of the referendum if it so chooses.

NSB

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*Prisons — Prisoners — “Good” Time —* Under sec. 53.11, subsec. (3), Stats., consecutive sentences are to be construed as one continuous sentence for purpose of calculation of credit for good behavior, whether imposed at same time or not.

January 20, 1939.

Board of Control.

An opinion has been requested as to the proper interpretation of subsec. (3), sec. 53.11, Stats., which provides:

“Whenever any convict is committed under several convictions with separate sentences they shall be construed as one continuous sentence for the purpose of computing the good time made or forfeited under this section.”

You state that heretofore in instances where consecutive sentences have been imposed at the same time the provisions of this subsection have been applied. However, there have been no instances where it has been applied to the case of a prisoner who, after commitment, was convicted of another offense and sentenced to an additional term to commence at the termination of the one then being served. You
ask whether in cases of the latter type the sentences should be aggregated or treated as one for the purpose of calculation of deduction for good conduct, so that in the years of confinement under the additional sentence such credits would be at the higher graduation.

Sec. 53.11, Stats., has been substantially in its present form for more than forty years. It provides for certain graduated deductions from a term of imprisonment as a reward for good conduct. The credit that may be earned by good conduct in the first year of confinement is one month and it is increased at a graduated rate of one month during each year served until it reaches six months in the sixth year. Thereafter the credit is six months during each year served.

It is said in 21 R. C. L. page 1192:

“Good conduct statutes are framed with the intention of improving prison discipline and have that effect if their enforcement is allowed. The credits are said to be in the nature of a payment or reward by the state to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes or misdemeanors during his imprisonment.”

In the absence of a statute to the contrary, two or more sentences served consecutively, whether they be imposed at the same time or not, cannot be aggregated and treated as one continuous sentence for the calculation of an allowance for good conduct, but are in law and in fact separate and distinct, so that the calculation is made upon each separately and successively. Reinhart v. Vaux et al., (1881) (Com. Pl. Ct.—Pa.) 10 W. N. C. 222.

Without the provisions of subsec. (3) of sec. 53.11, Stats., the good behavior credits of a prisoner confined under one sentence would be calculated differently from those of a prisoner serving the same period as the aggregate of consecutive sentences. It was to take care of this disparity that the provisions of subsec. (3) were undoubtedly enacted.

No reason appears why two prisoners confined for a period of the same duration should be treated differently merely because of a difference in the time of imposition of sentences. As long as the confinement is continuous the re-
sult is the same whether the consecutive sentences were imposed at the same time or at different times. The purposes underlying the granting of good conduct allowances apply equally as well to one as to the other. The general language used in subsec. (3) includes both of such situations. Nothing therein indicates any intention that it shall apply to one or the other only. Certainly, there is nothing that can be pointed to as indicating an intention to deny a prisoner serving consecutive sentences the benefits thereof solely because they were imposed at different times.

Where a statute creating or increasing a penalty is capable of two constructions it should be given that construction which operates in favor of life or liberty. Commonwealth v. Martin, 17 Mass. 359. A statute providing for credits to a prisoner for good behavior which is capable of two constructions should be given that construction which will entitle the prisoner to his discharge at the earliest time. Ex parte Blocker, (1920) 69 Colo. 259, 193 Pac. 546.

It is therefore our opinion that under sec. 53.11, subsec. (3), Stats., consecutive sentences are to be aggregated and construed as one continuous sentence for the purpose of calculating credit for good conduct, whether imposed at the same time or not.

HHP
Bridges and Highways — Counties — County Board Committee — Special committee appointed by county board to work out reapportioning of county trunk system of highways with county committee and commissioner is without power to alter system without approval of state highway commission.

January 20, 1939.

Hugh F. Gwin,
District Attorney,
Neillsville, Wisconsin.

In your communication of January 4 you state that the following is part of a resolution adopted by the Clark county board at the fall session of 1938. It reads as follows:

“We further recommend the reapportioning of our county trunk system based on the state highway and county trunk mileage, and that a committee of five county supervisors be elected by the Clark county board which shall consist of one village, one city, and three township supervisors. This committee to work out this plan with the county highway committee and commissioner.”

You state that some of the members of this committee feel that they have the right, under the resolution, to alter the location of and discontinue some county highways. It is your opinion that this resolution does not give them this power and that such power could not be given by the county board even if the resolution were more specific in its wording. You ask for an opinion.

Conceding that the county board may delegate such power to this committee, the resolution delegating the exercise of such an unusual power should be clear and specific in its language. There is nothing in the resolution in question that would indicate that the county board intended to finally delegate any such power to the committee or that the committee, acting in conjunction with the highway committee and commissioner, were granted any greater power than that of working out a reapportionment proposal for later submission and approval by the county board.
Furthermore, under sec. 83.01, subsec. (6), Stats., the system must be selected in the first instance by the county board and is subject to the approval of the state highway commission. Under the same section, the system cannot be altered or reapportioned without the approval of the state highway commission. Under the circumstances, it must be held that under the resolution the committee has no power to alter the location of or discontinue any of the county trunk highways composing the system. This may not be done without the approval of the state highway commission. NSB

Indigent, Insane, etc. — Poor Relief — Hospitalization — Public Officers — Sheriff is not officer charged with care of poor persons within meaning of sec. 49.08, Stats. Failure to give written notice required by provisions of sec. 49.18, subsec. (2), Stats., defeats hospital’s right to recover from municipality.

January 20, 1939.

HANS HANSON,
Ex-district Attorney,
Black River Falls, Wisconsin.

You direct our attention to sec. 49.18, subsecs. (1) and (2) and sec. 49.08, Stats., and state that the sheriff of your county placed a person who had been injured in an automobile accident in a private hospital, where he remained for one hundred sixty-four days. You also state that the sheriff did not report such fact to the county judge nor did the hospital give a written notice thereof to the town chairman, mayor or chairman of the county board. The hospital has now filed a claim against the county for services rendered to the injured person. You ask whether such claim should be approved and paid.

Sec. 49.08 provides as follows:
"Any officer charged with the care of a poor person whose support may be chargeable in whole or in part to any county or any municipality therein and who shall place such person in any institution shall forthwith report to the county judge of the said county the name and age of said person, the institution in which he is placed, the terms of the contract made for his support or care, and any other information necessary to show the extent of the liability which may thereby rest upon the municipality liable for such support or care; and shall also report to said judge the fact that such person has ceased to be a public charge as soon as he is aware thereof. Each such judge shall keep a record of the information received by him pursuant to the above provisions."

Although there are no cases or previous opinions by this office to guide us in interpreting the above statute, we feel that the language therein used, to wit, "any officer charged with the care of a poor person" is sufficiently clear to enable us to definitely advise that it does not apply to the facts presented by you. Certainly one could not say that a sheriff is an officer charged with the care of poor persons. In fact, the statutes specify what the sheriff’s duties are, and having care, custody or control of poor persons is not included therein.

The above position is further supported by the fact that sec. 49.18 (1) and (2) specifically provides for "Emergency medical relief" as follows:

"(1) Unless the board or council shall have designated some other official therefor, the town chairman, village president, mayor or chairman of the county board, when in his opinion reason therefor exists, shall provide temporary medical relief for a poor person, and liability for expenses so incurred shall be the same as though incurred by the board or council.

"(2) Except in counties having a population of two hundred thousand or more, the town, city, village or county, as the case may be, shall be liable for the hospitalization of a person entitled to relief under this chapter, without previously authorizing the same, when, in the reasonable opinion of a physician called to attend such person, immediate hospitalization is required, for indispensable emergency operation or treatment, and prior authorization for such hospitalization cannot be obtained without delay likely to be
injurious to the patient. There shall be no liability for such
hospitalization beyond what is reasonably required by the
circumstances of the case, and liability shall not attach un-
less, within twenty-four hours after admission of the pa-
tient, a written notice be mailed or delivered to the official
designated in subsection (1), reciting the name and address
of the patient, so far as known, and the nature of the ill-
ness or injury, and the probable duration of hospitalization.
Any municipality giving any such person aid or hospitaliza-
tion as provided in this section, and such person is a legal
resident in some other town, village, city or county, such
municipality may recover from such other municipality as
provided in section 49.03."

This section very clearly provides for emergency medical
treatment if, in the opinion of the doctor, it is necessary, but
it also provides that liability shall not attach therefor un-
less within twenty-four hours after the admission of the pa-
tient a written notice is delivered to or mailed to the munici-
pal officer mentioned in the first subsection thereof. Such a
notice was not given or mailed and therefore the claim
should not be allowed by your county board. Perhaps, con-
sidering the fact that the amount claimed for the services
rendered is apparently very reasonable and that the failure
to give notice is the only thing which defeats recovery, this
is rather a harsh rule, but in view of the definiteness of the
statute, we can arrive at no other conclusion.

AGH
Public Officers — Board of Trustees of County Institutions — Superintendent of County Home — Where county board has not abolished board of trustees of county institutions that board, under secs. 46.18 and 46.19, Stats., has sole authority to appoint superintendent of county workhouse. Appointment of such officer by county board is void.

If appointment to such office is made by board of trustees which involves problem of housing and maintenance, matter of providing same is one which lies wholly within discretion of board of trustees provided such board acts under regulations approved by county board.

January 20, 1939.

Clarence G. Traeger,
District Attorney,
Horicon, Wisconsin.

In your letter of January 6 you state:

“We have a peculiar situation in this county due to the fact that the county board elected a superintendent of the workhouse whose salary is one hundred dollars a year. The election of the superintendent of the workhouse in our county has always been recognized by the trustees of the county institutions as a recommendation by the county board that such party should be named by the trustees of the county institutions as the superintendent of the poor farm and the insane asylum. This year however, the trustees of the county institutions refused to follow the recommendation of the county board and elected another person as the superintendent of the county institutions. The man named to the office of superintendent of the workhouse intends to hold his position and seeks the proper housing and maintenance.”

You request an opinion as to whether or not the county must provide a superintendent of the workhouse with housing and maintenance.

This impasse situation might develop if the county board had power to appoint the superintendent of the workhouse. It seems quite clear that the county board possesses no such power. It seems quite clear from a reading of secs. 46.18, subsec. (1), and 46.19, subsecs. (1) and (2), Stats., that the
power of appointment of such superintendent is lodged with the board of trustees of county institutions. This office ruled in XXI Op. Atty. Gen. 1036 that the county board, acting under authority conferred by sec. 59.08, subsec. (8), could abolish the board of trustees of county institutions and provide for performance of functions of such board by county board members. There is no indication in your submission that the county board has taken any such action.

It does not appear from your submission by what authority the county board purports to have authority to appoint or elect a superintendent of the workhouse and fix his salary therefor. This power is specifically given by the statutes above quoted to the board of trustees of the county institutions. The board of trustees may ignore the appointment and appoint whomsoever they desire to fill such position. Any existing problem may well be eliminated by appointing the superintendent of county institutions to this position. No question of a separate housing and maintenance for this particular official will then be involved.

If, however, an appointment is made that involves such a problem, it is our opinion that the above cited statutory provisions indicate that the entire control of the position of superintendent of the workhouse is vested in the board of trustees of the county institutions. Housing and maintenance are usually provided as a form of compensation incident to a type of position in which constant attendance and supervision are required as a part of the prescribed duties. Since sec. 46.19, subsec. (2) empowers the board of trustees to fix the compensation and also to prescribe the duties of the superintendent of the workhouse, any provision for housing and maintenance can be made only by that body.

There is no statute which requires that a superintendent of a workhouse be provided with housing and maintenance at the expense of a county. The board of trustees, therefore, is not bound to make such a provision.

You are therefore advised that the question of providing housing and maintenance for the superintendent of the workhouse of your county is a matter which lies wholly within the discretion of the board of trustees provided such board acts under regulations approved by the county board. NSB
Public Officers — Assistant Fire Chief — Chief of Village Fire Department — Village Clerk — Village President — Duties of village president and chief of village fire department are incompatible.

Duties of village clerk and assistant fire chief are compatible.

January 20, 1939.

CLARENCE G. TRAEGER,

District Attorney,

Horicon, Wisconsin.

You ask whether the following offices may be held by the same person: (1) village president and chief of the village fire department, (2) village clerk and assistant fire chief.

It has been found impossible to define a rigid test of compatibility which may be applied to any two offices. It may, however, be said that two offices are incompatible when the conflict of interests between them is such as to render it improper from consideration of public policy for one person to retain both. State v. Jones, 130 Wis. 572, 46 C. J. 942; Mechem on Public Officers, sec. 422.

If, as in the case in question, there is no specific statutory provision which prohibits one person from holding both offices, the question can be decided only by a careful analysis of the duties and functions of each office and their relation to each other in the light of the above rule.

You have not informed us under what statutory provision and in what manner the fire department of the village in question has been organized. It would appear, however, that whether the department be organized under ch. 213, Stats., or under ch. 61, relating to villages and their powers, the office of village president and chief of the village fire department involve incompatible duties. This would be clearly true if the fire chief is appointed by the village board or if the board fixes the salary of that officer. In any event, the nature of the duties of the fire chief are such as to involve the hazards of personal injury. If that were to occur, the president of the village, as a member of the village board,
would be involved in the inconsistent duty of passing upon his own claim. Such a possibility has always been held to result in incompatibility of duties.

The foregoing analysis is not true with respect to the office of village clerk and the office or position of assistant fire chief. The village clerk is not a member of the village board, has no vote and his duties under sec. 61.25, Stats., are almost entirely ministerial. The duties of a town clerk received careful analysis by this office in V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605. We recently had occasion to analyze the soundness of those opinions as they appeared to be at variance with the reasoning and analysis in XXII Op. Atty. Gen. 43 (XXVII Op. Atty. Gen. 549). We concluded that the opinions in V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605 were sound in analysis and that the opinion in XXII Op. Atty. Gen. 43 was unsound and that the latter should be overruled. We believe that your second question is ruled by the logic of V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605 and conclude that the duties of village clerk and assistant fire chief are not incompatible.

NSB

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Public Health — County Nurses — Sec. 141.06, Stats., is source of county power to employ county nurses; under said section nurse must be employed by county health committee upon authorization of county board. County board may authorize such employment by committee but cannot itself select and employ.

January 21, 1939.

JOSEPH H. RIEDNER,
District Attorney,
Durand, Wisconsin.

You inquire whether the county board may appoint the county nurses provided for in sec. 141.06, Stats., or whether the power to make such appointments rests exclusively in the county health committee.
Sec. 141.06 provides in part as follows:

"(1) The county health committee shall employ one or more county nurses, when so authorized by the county board and when provision is made by the county board for such nurse or nurses.* * *

"(2) The work of the county nurse shall be directed by a county health committee composed either of the chairman of the county board, the county superintendent of schools, a woman appointed by the county board, the judge of the juvenile court and the deputy state health officer or county physician for that county, or of the deputy health officer and not less than five members of the county board appointed by the chairman thereof."

The language of the above statute seems very clear. There is no reason to believe that the legislature meant that the county board should make the appointment when the statute specifically directs that "the county health committee shall employ one or more nurses." No doubt the legislature had good reason for placing the power of selection in the hands of the committee rather than the board; the work of such nurses is to be directed by the committee and it must be assumed that the legislature felt that it was sound policy to place the responsibility for selecting capable nurses upon those who direct and supervise their activities and presumably have a greater knowledge of county health problems.

Examination of the history of sec. 141.06 reveals that prior to the year 1927 said section provided that "the county board shall employ one or more nurses." By ch. 155, Laws 1927, the statute was changed to read "the county health committee shall employ." The legislature having in its discretion taken the power of appointment from the county board and placed it in the committee, the board is powerless to exercise that function.

It should be noted that county nurses as "public health nurses" are subject to the provisions of sec. 149.09; consequently appointments whether made by the board or by the committee can be made only from a list of candidates certified by the state board of health. See XXIV Op. Atty. Gen. 722.

You are advised that the county health committee only may appoint county nurses and that candidates must first
comply with sec. 149.09 before they are eligible for appointment.
NSB

Public Officers — County Board Chairman — Malfeasance — Bank whose president is also chairman of county board may not lend money to county.

January 26, 1939.

LAMBERT A. HANSEN,
District Attorney,
Sparta, Wisconsin.

You state that the chairman of the Monroe county board of supervisors is also president and a director of the X bank. You also state that the county board has passed a resolution authorizing the county officials to issue notes of the county signed by the county chairman and the clerk as security for a loan of money to the county.

You ask whether the dual position of the bank’s president bars the X bank from loaning money to the county.

Sec. 348.28, Stats., provides in part:

“Any officer * * * of any county * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale or any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same, or in relation to any public service, * * * or in any * * * certificate, account, order, warrant or receipt made by, to or with him in his official capacity or employment, * * * shall be punished by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by fine not exceeding five hundred dollars; * * *. Any contract, to which * * * any county * * * is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the * * county * * * shall incur no liability whatever thereon”
Under the provisions of the above statute, the court has held that a note signed by a town chairman who was also a stockholder of a bank which held the loan and which had as its sole consideration the renewal of a prior loan negotiated by the town treasurer, who was likewise the principal stockholder and managing officer of the bank, is absolutely void. *Town of Swiss v. United States Nat. Bank*, 196 Wis. 171, 218 N. W. 842 (1928). See also, *Arbuthnot v. Kelley*, 165 Wis. 362, 162 N. W. 168 (1917); *Bissell Lumber Co. v. Northwestern C. & S. Co.*, 189 Wis. 343, 207 N. W. 697 (1926); *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 253, 75 N. W. 964 (1898).

In *Noble v. Davison*, 177 Ind. 19, 28, 96 N. E. 325 (1911), the court held:

"Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy,* * * * * * 
"This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, against the public good or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results."

In *Pickett v. School District No. 1, Town of Wiota*, 25 Wis. 551, 556 (1870), the Wisconsin court quoted the following language with approval:

"'All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public—to protect, advance and promote its interests, and not their own. And a greater necessity exists than in private life to remove from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less.'"

In *State v. Bennett*, 213 Wis. 456, 252 N. W. 298 (1934), it was conceded by counsel that a stockholder of a corporation has such an interest in corporate property sold to a municipality as to bring him within sec. 348.28.
In *Edward E. Gillen Co. v. Milwaukee*, 174 Wis. 362, 371-372, 183 N. W. 679 (1921), the court stated:

"There are many decisions holding that contracts are invalid when made by a municipality or a board with a corporation having a stockholder who is also a member of the board or common council. In that case the public officer has a direct proprietary interest in the corporation. But we find very little authority on the exact question here involved, that is, whether contracts with a municipality made between a corporation having a salaried manager or employee who is also an officer of the city or board, are valid. We do not hold that under all circumstances a contract between a municipality and a corporation having an employee who is also a public officer of the municipality would be invalid. The compensation of the employee might be so slight or his employment so transient that there would arise no conflict of interest."

The test laid down in *Gillen v. Milwaukee*, *supra*, indicates that one in the position of president and a director of a bank has such an interest in that institution that any loan by that bank to a public body in which he also holds the highest office would be a violation of public policy.

It is our opinion that a bank whose president is also chairman of the county board may not loan money to the county.

NSB
Indigent, Insane, etc. — Poor Relief — Relief under sec. 49.03, Stats., may be given by town, city or village or directly by county. If proper notice is given, place of legal settlement is liable for such care whether relief is given by municipality or county.

January 26, 1939.

Earl F. Kileen,
District Attorney,
Wautoma, Wisconsin.

You refer to secs. 49.03 and 49.04, Stats., relating to the care of transient paupers. In connection therewith you state:

"Since each statute imposes an imperative duty upon municipalities, one on the county, and one on the towns and villages, it is apparent that they are intended to refer to two classes of paupers, one who has no legal settlement, and the other who has.

"A practice has grown up in one of our neighboring counties, which is operating under the town, city and village system of relief under section 49.03, where the county takes direct charge of the class of paupers who have a legal settlement in some town, city or village in another county, and the claim is not acted upon by the town, city or village where the indigent person is domiciled and receives the relief. Has this county any jurisdiction or authority to pass upon a claim for such relief where it has not first been acted upon by the town, city or village in which the indigent person resides, and can they collect from the county in which the town, city or village is located where the indigent person has a legal settlement?"

In construing secs. 49.03 and 49.04, Stats., relative to the duty of a county to care for transient paupers, this department held in XVIII Op. Atty. Gen. 688 and XXII Op. Atty. Gen. 25 that sec. 49.03 was not the exclusive method of caring for transient paupers but that the county had the power to care directly for all transient relief cases. See also XX Op. Atty. Gen. 1248, XXI Op. Atty. Gen. 517.

A county, therefore, has the power to care directly for transient paupers who might be given aid by a town, city
or village under sec. 49.03, (1), Stats. Liability of the county or municipality of legal settlement for aid granted by some other town, city, village or county, is fixed by sec. 49.03, subsecs. (2) and (4), Stats. Under the terms of this statute the county clerk of the county where the indigent person receives relief serves a notice on the county clerk of the county where such person claims he has a legal settlement. It is the giving of proper notice to the county clerk of the county of legal settlement that creates liability. XI Op. Atty. Gen. 212, XXIII Op. Atty. Gen. 744.

What takes place between the municipality granting relief and the county where the municipality granting relief is located is no concern of the county of legal settlement. That county is concerned only with the question of whether relief was given and proper notice served so that it had an opportunity to deny liability or order the relief recipient to return to the place of legal settlement.

If relief is furnished and proper notice filed on county and municipal clerks of the county of legal settlement, the place of legal settlement is liable for this relief. Whether that relief is given by the municipality where the person needing relief and happens to be located or directly by the county is immaterial.

FAR

Automobiles — Law of Road — Wisconsin Statutes — Sec. 85.01, subsec. (4), par. (dm), Stats., providing for additional registration fee in case of interurban motor buses "as defined in paragraph (a) of subsection (2), of section 194.01", Stats., is still operative even though this latter section has been repealed.

Fred R. Zimmerman,
Secretary of State.

You call our attention to the fact that under sec. 85.01, subsec. (4), par. (d), Stats., passenger-carrying motor
busses are to be registered at a fee equal to three times that specified for motor trucks of the same gross weight. A further fee is provided for in sec. 85.01 (4) (dm) which reads:

“For the registration of such interurban motor bus as defined in paragraph (a) of subsection (2) of section 194.01, the fees required to be paid under paragraphs (c) and (d) of this subsection shall be increased twenty-five per cent.”

However, there is no “paragraph (a) of subsection (2) of section 194.01” in the 1937 statutes. It appears last in the 1925 statutes when it read:

“The term ‘interurban motor bus’ shall mean and include every motor vehicle described in subsection (1) of this section operating between cities and villages which are not contiguous.”

This provision was dropped from the statutes by ch. 395, Laws 1927, when sec. 194.01 and certain other sections following were repealed and re-enacted.

The term “interurban bus” was also defined in the 1935 statutes by section 194.01 (8) which read:

“‘Urban busses’ means busses of a common motor carrier of persons operated exclusively within one incorporated municipality or between contiguous incorporated municipalities; ‘interurban busses’ means all busses not defined as urban busses.”

However, this definition was also dropped out of the statutes when subsec. (8) of sec. 194.01 was repealed by ch. 288, Laws 1937.

In view of these circumstances, we are asked whether there is now any statutory authority for charging the twenty-five per cent additional fee above referred to in the case of interurban busses.

It is our opinion that the repeal of par. (a) subsec. (2), sec. 194.01 is not of controlling significance and that sec. 85.01, subsec. (4), par. (dm) must still be enforced according to the terms thereof the same as if paragraph (a) sub-
sec. (2), sec. 194.01 were still in force and effect. The applicable rule of statutory construction is stated in 59 C. J. 937-938, as follows:

“A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal.”

This rule was laid down in Sika v. Chicago & N. W. R. R. Co., 21 Wis. 870, Wood v. Hustis, 17 Wis. 416 and Milwaukee County v. Milwaukee Western Fuel Co., 204 Wis. 107. The latter case is a tax case involving a similar question and appears to be controlling upon the problem under consideration and in accord with the opinion above expressed.

Indigent, Insane, etc. — Sanity Hearings — Guardian ad Litem — Public Officers — District attorney should not act as guardian ad litem in any hearing or proceeding involving question of insanity, as duty to incompetent may well conflict with duty to county.

January 27, 1939.

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

You ask whether a district attorney who is on a part time basis is eligible to act as guardian ad litem and receive expenses and a fee therefor when such an appearance is made as a practicing attorney and not as a district attorney. You refer specifically to the appointment of a guardian ad litem under the provisions of sec. 51.02, subsec. (6), Stats., regarding hearings to determine sanity.

In counties where the volume of state or county legal work is not sufficient to require an attorney’s entire time
and attention, it may be provided that one holding the office of district attorney may devote a part of his time to private practice. An attorney in that position is nevertheless the district attorney of the county and is bound to observe all of the duties incident to that office. He must take every precaution that his private practice does not interfere with his service as a public officer or invade the province of cases in which the county or state may have an interest.

Sec. 59.47 provides:

"The district attorney shall:

"(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county."

The following is an excerpt from an opinion given by this department regarding the general rules of district attorneys:

"* * * It is the duty of the district attorney to attend to, and represent the state and county in these matters where he is so requested by some officer or official body of the state or county; or if he has notice that such a proceeding is to take place, and he is of the opinion that the interests of the state or county, whether financial or the broader interests of the public welfare, require his attention to the matter, it is his duty to attend thereto, even though there has been no request by state or county officers.

"In accordance with this rule, it is our opinion that it is the duty of the district attorney, upon request of the county court, to appear at hearings for the determination of insanity, sec. 51.02. XXV Op. Atty. Gen. 614. The county is directly interested, since a finding of insanity may result in a financial burden upon the county. Further, it is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court." XXV Op. Atty. Gen. 549, 553.
It seems to us that there is or may be a conflict between the duties imposed by virtue of acting as guardian ad litem for an insane person and those of acting as district attorney for the county in relation to the same incompetent. Such being true, it is our opinion that a district attorney should not act as guardian ad litem in any hearing or proceeding involving a question of insanity.

However, there is no substantial reason why a practicing attorney who is also a part-time district attorney should not be able to act as guardian ad litem and receive expenses and a fee therefor, provided the nature of the particular action or proceeding is such that the county or state could have no possible interest. A part-time district attorney should consent to act as guardian ad litem only after carefully considering every aspect of the particular action and properly concluding that such an appointment could in no way violate his prescribed duties to the public as district attorney.

NSB

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Public Officers — County Board Member — Deputy Sheriff — Under sec. 59.03, subsec. (3), Stats., county board member may not serve as deputy sheriff even though he is willing to serve without pay.

January 27, 1939.

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

In your letter you state:

"Sec. 59.03 (3) of the statutes provides in part as follows: 'No county officer of any county or deputy of any such officer or undersheriff is eligible to the office of supervisor.' A number of the members of the board of supervisors of this county desire to qualify as deputy sheriffs. The sheriff is also anxious that they do so qualify. These men would ex-
pect no compensation of any sort and would under no circumstances bill Rock county for fees, mileage or any other charge. They would in every sense be what is known in common parlance as special deputies. They feel that the language above quoted is intended to apply only to officers either on the pay roll of the county or those who may be filing fee bills to be passed upon by the county board. I am asking that you give us your opinion as to whether or not this language is applicable to so-called special deputies under the circumstances herein described."

It will be noted that sec. 59.03, subsec. (3), Stats., established a legislative incompatibility. No exception is made merely because the deputies or officers are willing to serve without pay. The legislature having established the incompatibility and having made no exceptions thereto, we do not feel that the statute is open to a statutory construction creating exceptions. Furthermore, if there were no legislative establishment of incompatibility, we do not believe that a mere willingness on the part of a county supervisor to serve as a deputy sheriff without pay removes incompatibility. The sheriff is the superior officer. When the supervisor as a member of the county board passes upon claims or matters relating to the sheriff, it seems to us that he is necessarily placed in the position of trying to serve two masters. Such a situation is one of incompatibility regardless of legislative declaration with respect thereto.

NSB
Civil Service — Under ch. 16, Stats., employing officer may at will or pleasure dismiss employee having probationary status.

As a result of peculiar circumstances created by senate resolution No. 6, S., civil service laws will not be evaded if probationary employees resign or are dismissed during such period, their names recertified by bureau of personnel as eligible for new appointment and new appointment is made for new probationary period of six months.

January 27, 1939.

John M. Smith,
State Treasurer.

As a result of senate resolution No. 6, S., you have had transferred to your department a number of employees that had at the time of transfer and still have a probationary status under ch. 16, Stats. These employees were largely, if not wholly, appointed by the tax commission when the duties of the inspection and enforcement bureau were assigned to that commission. As a result of the transfer under the senate resolution above referred to, you have now become the superior appointing officer of these employees and have the correlative right of dismissal and discharge with respect thereto under ch. 16 and the rules and regulations of the bureau of personnel. You feel that the remainder of the probationary period of these employees under sec. 16.22, Stats., is altogether too short a period for you to determine the qualifications and fitness of the employees involved. In endeavoring to work out a satisfactory method of handling the unusual situation that has developed which will do justice to the employee as well as justice to the state service, and particularly your department, you have found it necessary to submit three questions to us as follows:

1. Can an employing officer dismiss at will or pleasure an employee occupying a probationary status?
2. If such probationary employee resigns during the probationary period, may the bureau of personnel recertify such employee to the appointing officer and will an appoint-
ment so made constitute an original appointment so that the appointee will occupy a probationary status for six months following such appointment?

3. Can an appointing officer dismiss an employee occupying a probationary status during the term of such probation and upon such employee’s name being certified, appoint said employee to the same position, and will the employee then occupy a probationary status for six months from the date of the new appointment?

We will take the questions up in their order:

Q: 1. Can an employing officer dismiss at will or pleasure an employee occupying a probationary status?

The governing statute upon this question is sec. 16.22, Stats., which reads as follows:

“All original appointments to the competitive division of the classified service shall be for a probationary period of six months, but dismissal may be made at any time during such period. If during this probationary period the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified, and the director shall be notified in writing, that he will not receive permanent appointment; otherwise his retention in the service shall constitute permanent appointment.”

As the power to be exercised under this statute is a power that pertains to office and not to an individual, it seems quite clear that you are now the appointing officer within the meaning of this statute. State ex rel. Nelson v. Henry, 221 Wis. 127, 134. Sec. 16.24, Stats., provides the procedure for removing “permanent” employees, which removal can be only for “just cause, which shall not be religious or political.” The security of tenure safeguards of the civil service law and the rules and regulations of the bureau established in relation thereto all appear to be with respect to employees occupying a permanent status. We find nothing in any of the statutes or rules indicating that an appointing officer may not dismiss at pleasure or will during the probationary period unless the language, “has not been satisfactory to the appointing officer” as used in sec. 16.22, Stats., above quoted, is sufficient to give the employee occupying a
probationary status a right to position which is something less than "removal for just cause" under sec. 16.24 Stats., and something more than removal at will or pleasure.

With respect to the significance to be attached to the language "has not been satisfactory to the appointing officer" in sec. 16.22, we believe the history of said section most material, if not controlling upon the particular question under consideration. This section was originally enacted by ch. 363, sec. 9, Laws 1905, and read as follows:

"* * * All original appointments to the competitive and non-competitive classes and the labor class of the classified service shall be for a probationary period of one, two or three months in the discretion of the appointing officer, but dismissal for cause may be made during such period. * * *"

You will note that as the section originally read, the probationary period was discretionary within the limits of three months and that a probationary employee could be dismissed only for cause during such period. By ch. 465, Laws 1929, the words "for cause" were dropped out of the section, the words "at any time" added, and a definite probationary period of three months was fixed. And by ch. 424, Laws 1931, the probationary period was again changed to that of six months, so that by 1931 the section assumed the form that it is now in.

The statute as originally enacted in 1905 seems to have provided for two situations, namely: (1) Dismissal for cause during a probationary period, and (2) a means of keeping the appointment from becoming permanent at the end of the probationary period. It would seem that when the legislature of 1929 dropped out the words "for cause" and provided that the employee might be dismissed "at any time during such period" the intent must have been that of giving the appointment officer an absolute discretion with respect to dismissal during the probationary period. We cannot see where any other intent could have been manifested thereby. With the dropping of the words "for cause" from this section the power to dismiss during the probationary period seems to be as broad as the legislature can possibly make it. The language is "but dismissal may be made at
any time during such period." There are no legislative restrictions upon the exercise of the power to dismiss.

It is apparent that the bureau of personnel has interpreted sec. 16.22, Stats., as giving the appointing officer an absolute power of dismissal or a power to dismiss at will during a probationary term. See rule XX, par. 1, which provides in part as follows:

"* * * but they shall not be permitted to earn permanent tenure and they may be discharged at the will of their employing officers in the same manner as probationers in the service."

The interpretation placed upon a statute by an officer or bureau charged with the administration thereof, while not controlling, is entitled to weight upon a question of statutory construction.

The overwhelming weight of analysis seems to be in favor of a construction which gives an appointing officer an absolute discretion with respect to dismissal of an employee during a probationary period.

Combined Q. 2 & 3. If such probationary employee resigns or is dismissed during the probationary period, may the bureau of personnel recertify such employee to the appointing officer and will an appointment so made constitute an original appointment so that the appointee will occupy a probationary status for six months following such appointment?

While the term "resignation" is defined by definition 35, rule I of the bureau as "resignation means the voluntary separation of a permanent employee from the service", that definition seems to be for purposes of determining the right of a resigned employee with respect to subsequent certifications and thus limited to those having a permanent status as distinct from the probationary status. Thus one having permanent status who resigns is entitled to be recertified at the head of the list, whereas one having only a probationary or other status is entitled to certification only upon the basis of original ranking. The definition above quoted does not mean that a probationer cannot exercise the right
to resign during his probationary period. One does not submit to a condition of involuntary servitude even for a limited period merely because he becomes a state probationary employee. We conclude that a probationer may resign during his probationary period.

Recertification for purposes of a new appointment of either a resigned or dismissed probationer is within the discretion and power of the bureau of personnel. See rule XI, par. 2. Dismissal and recertification would not constitute a reemployment but would rather constitute a new employment. There is a distinction between reemployment and reinstatement. Berg v. Seaman, 224 Wis. 263. For the same reason there would appear to be a distinction between reemployment and employment. Reemployment under the rules of the commission is applicable only to persons who have occupied a status of permanent employment. The reemployment list is confined to such persons. See definition 33, rule I of the bureau. As appointment of a probationer after dismissal or after resignation does not constitute reemployment it must constitute a new employment which would start a new probationary period from the date of the appointment unless it can be said that either resignation and new appointment under such circumstances or dismissal and new appointment under such circumstances is contrary to public policy or contrary to the civil service laws, rules and regulations and especially sec. 16.22, Stats.

We find nothing either in the history of sec. 16.22 or in the present wording of said section which, in our opinion, either expressly or impliedly prohibits this procedure. The statute as originally enacted in 1905 did not provide that there should be but one probationary period and no more. It did not provide that there must be dismissal (final) at the expiration of the probationary period or that retention in the service thereafter would constitute a permanent employment. It merely provided that retention in the service after the expiration of the probationary period would constitute permanent appointment if the probationer at the expiration thereof was not advised that his appointment would not become absolute. The section read:
If at the close of this probationary term the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified in writing that he will not receive absolute appointment; otherwise his retention in the service shall be equivalent to his final and absolute appointment.

The same observations may be made with respect to the wording of the statute today. Thus, a probationer who has been notified within the probationary period that he will not receive permanent appointment at the expiration thereof will have no status as an employee unless appointed anew at the expiration thereof, as the original appointment is for a definite term and in the absence of a new appointment the employment ceases at the expiration of that definite term. But there is nothing in the language of the statute which prohibits a new probationary appointment at the expiration of a probationary term if the employee has been properly notified within the term that the appointment will not become absolute or permanent and there is nothing which prohibits a new appointment within what would otherwise be the probationary term if the employee either resigns or is dismissed with the original probationary term.

We do not mean to insinuate that an appointing officer may arbitrarily or in bad faith serve notice upon a probationer that his appointment will not become permanent and thus by a series of six months' appointments keep an employee from ever attaining a permanent status.

"The primary purpose of civil service laws is to improve the efficiency of the public service. Provisions regulating the discharge of employees are enacted to prevent the disturbance of that service, not to benefit individuals who happen to be in service, except as it may give them the assurance of a recognition of faithful and capable conduct with a tenure more secure than existed under the system in vogue before civil service was so generally adopted." State ex rel. Esser v. McBride, 215 Wis. 574, 578.

Perhaps it may be said that improvement of public service is primary and that security of tenure is incidental. When it comes to a question of statutory construction, if there were any clash between the two, security of tenure would undoubtedly yield to that of improvement of service.
While motive and bad faith are immaterial when it comes to a question of discharge for cause, if cause exists, *State ex rel. Nelson v. Henry*, 221 Wis. 127, many of the acts of a public officer are subject to the scrutiny of the test of good or bad faith and arbitrary as distinguished from reasonable action.

It is our view of the matter that in view of the peculiar circumstances of this case, neither resignation of the employee followed by a new probationary appointment nor dismissal followed by a probationary appointment would constitute bad faith or arbitrary or unreasonable action. It is perfectly conceivable that the good of the service demands such action. The only remaining question can be whether the statute prohibits such action. For reasons hereinbefore stated we do not believe that the statute prohibits such action when such action is taken in good faith and not for the purpose of evading the civil service laws and rules and regulations of the bureau.

We may add that we have not been able to find where our supreme court has passed upon any of the questions which you have submitted to us. We have endeavored to find cases from other jurisdictions involving statutes sufficiently similar to our own to be helpful upon the questions submitted. We have been unable to find any cases which we deemed very persuasive. Our opinion must necessarily be based upon analysis of our own particular statutes by application of what seem to be essentially sound concepts in the field of the administration of civil service laws.

NSB
Criminal Law — Commutation of Sentence — Prisons — Prisoners — Commutation of sentence of one A is construed to mean that two sentences run concurrently after second sentence was imposed.

January 30, 1939.

Board of Control.

You have submitted a communication from the acting warden of the Wisconsin state prison concerning the sentence of one A who was sentenced to the reformatory at Green Bay, Wisconsin, on May 10, 1933, from the circuit court of Jefferson county to serve five to seven years for burglary in the night time. He was received at the prison May 10, 1933.

On December 10, 1936, he was convicted of accessory before the fact in commission of felony in the municipal court for Brown county and sentenced to the Wisconsin state prison for one to ten years, such sentence to run consecutively with the sentence imposed by the circuit court of Jefferson county on May 10, 1933. On November 15, 1938, Governor La Follette granted A commutation of sentence in the following language:

"I, Philip F. La Follette, as governor of the state of Wisconsin, do by these presents commute the sentence of the said A which was imposed upon him by the municipal court of Brown county to run concurrently with the sentence imposed upon him by the circuit court of Jefferson county; and at the expiration of the said commuted sentence, the warden of the Wisconsin state prison is hereby commanded to discharge the said A from imprisonment and to make due return of this warrant, together with his doings thereon as provided by law."

The acting warden states in his letter that under the commutation of the governor the two sentences are to run concurrently instead of consecutively, making the maximum time to be served ten years and, allowing good time, he should have six years and three months to serve in all. The warden also says that A maintains that the sentence should be considered as beginning on May 10, 1933, the date he was
received at the reformatory, while the warden believes his time should be figured from December 10, 1936, the date of the second conviction.

A commutation is to be construed as a whole to carry out the intention of the officer granting it and technical words or terms are not necessary to constitute a commutation of sentence. In Williams v. Brents, 171 Ark. 367, 284 S. W. 56 at 58, the court stated:

"* * * If commutation of sentence means to change from a higher to a lower or less severe punishment, the instrument in question should be construed as a whole, and that meaning given to it which it was intended by the Governor to have."

The language employed by the governor indicates clearly that the commutation was to apply to the sentence imposed upon A by the municipal court of Brown county on December 10, 1936. His action in this regard can have no application to the sentence which A was serving at the time the second sentence was imposed.

In the case of In re Hall, 34 Neb. 206, 209, 51 N. W. 750, the court held:

"* * * The commutation of a sentence * * * is not in the nature of a conditional pardon, but the substitution of one sentence for another, and for the purpose of its execution will be treated precisely as if the substituted sentence had been imposed by the court in the first instance, provided, of course, it is within the jurisdiction of the court; * * *"

See also State ex rel. Murphy v. Wolfer, 127 Minn. 102, 148 N. W. 896, L. R. A. 1915B 95; Ex parte Warren, 39 Okla. Cr. Rep. 348, 265 P. 656; People v. Larkman, 244 N. Y. S. 431 at 434, 137 Misc. 466.

A commutation therefore does not nullify the sentence as originally imposed by a court. Its effect is merely to substitute a less severe punishment in place of that originally imposed, leaving the first sentence in force in all other respects.

Sec. 359.07, Stats., provides in part:
All sentences shall commence at twelve o’clock noon, on the day of such sentence, but any time which may elapse after such sentence, while such convict is confined in the county jail or is at large on bail or while his case is pending in the supreme court upon writ of error or otherwise, shall not be computed as any part of the term of such sentence; * * *.

When A was sentenced on December 10, 1936, in the municipal court of Brown county, that court had discretionary power to pronounce sentence to run either consecutively or concurrently with the sentence under which A was then confined in the state reformatory. To that extent the future time at which the sentence should begin was a matter to be determined by the court. However, the sentence could not begin to run earlier than noon of December 10, 1936, the day upon which it was imposed. Sec. 359.07, Stats., fixes that date as the base time from which the term may begin.

In XIV Op. Atty. Gen. 371 this department ruled that a sentence which was imposed to begin on a date prior to that upon which it was pronounced was erroneous since it did not conform to the provisions of sec. 359.07, Stats.

The commutation states that the two sentences which were imposed upon A for separate offenses should run “concurrently.” That term has been defined as follows:

“The fact that the sentences run concurrently merely means that the convict is given the privilege of serving each day a portion of each sentence, * * *.” Nishimoto v. Nagle, 44 Fed. (2d) 304, 305 (C. C. A. Cal).

In XIX Op. Atty. Gen. 18 it was ruled that there is no legal objection to sentences in the state reformatory and the state prison running concurrently.

For many years the form of a commutation of sentence by the governor contained fixed language, namely, that the commuted sentence was “to date from the day of the original sentence.” This was a part of the usual form until a change was made for reasons which have no bearing upon the problem under consideration. See XX Op. Atty. Gen. 54 and 806.

In the opinion of this department, the governor intended to commute A’s second sentence only to the extent of order-
ing that it begin to run on December 10, 1936, the date upon which it was imposed, and that thereafter it runs concurrently with the term which A is now serving in the state reformatory.

This conclusion is further fortified by and consistent with the recommendation of the state pardon board to the governor in re commutation of this sentence. The following is an excerpt from the recommendation of the state pardon board to the governor in connection with the commutation of A's sentence. B and C were accomplices with A in the plan to escape.

"B was sentenced on May 11, 1936 to a term of one to ten years to run concurrently with the sentence he is now serving: C, on Feb. 2, 1937, was sentenced to one to two years to run concurrently with the sentence now serving and we, therefore, recommend that the sentence of the applicant, A, be commuted to a sentence of from one to ten years, to run concurrently with the sentence he is now serving, in order to equalize the sentences of the accomplices." (Letters inserted by us.)

NSB

Public Officers — Manager of Municipal Water Department — Municipal Utility Commission — Opinion in XII Op. Atty. Gen. 606, that member of municipal utility commission under sec. 66.06, subsec. (10), Stats., is not entitled to compensation, is adhered to.

Member of such commission may not hold position of manager of utility and receive compensation therefor.

January 30, 1939.

CALMER BROWY, Director,

Public Service Commission.

You have inquired whether there have been any judicial decisions or change in the statutes since our opinion in XII Op. Atty. Gen. 606, which would require a different
opinion upon the same question at this time. It was there held that members of a municipal water and light utility commission may not receive salaries for services rendered in that capacity. We find no changes in the statutes or subsequent judicial decisions requiring a different opinion at this time.

You also inquire whether a member of a municipal water and utility commission may (1) be given the position of supervising manager and receive compensation as such although the utility still retains its general manager and continues his compensation as such, or (2) temporarily perform the duties of the general manager and receive compensation for such services during a temporary incapacity of the general manager and a suspension of the latter's compensation.

Sec. 66.06, subsec. (10), par. (a), Stats., provides:

"In cities owning a public utility, the council shall and in towns and villages owning a public utility the board may provide for a nonpartisan management thereof, and create for each or all such utilities, a board of three or five or seven commissioners, to take entire charge and management of such utility, to appoint a manager and to fix his compensation, and to supervise the operation of the utility under the general control and supervision of the board or council."

Subsecs. (c) and (d), sec. 66.06 (10), Stats., *inter alia*, give the commission the authority and power to make rules for its own proceedings and for the government of the department, to "employ and fix the compensation of such subordinates as may be necessary," and to audit departmental expenditures.

It is the well settled rule of the common law that a person cannot, at one and the same time, rightfully hold two offices which are incompatible. *Lilly v. Jones*, (1930) 158 Md. 260, 148 A. 434, *State v. Jones*, (1907) 130 Wis. 572, 110 N. W. 431. 22 R. C. L. 412. There is no clear and comprehensive rule as to what constitutes incompatibility of offices, but

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other
in some of its important and principal duties, or is subject
to supervision by the other, * * *. Under this principle two offices are incompatible where the incumbent of one
has the power to remove the incumbent of the other
* * * and it also exists where the incumbent of one office
has the power of appointment as to the other office.
This rule has applied to prevent a board from appointing
one of their own members to an office which is subordinate
to such board. * * *” 22 R. C. L. 414; XVII Op. Atty.
Gen. 498.

In Gaw v. Ashley, (1907) 195 Mass. 173, 80 N. E. 790, it
was held that where an ordinance provided that a quarantine physician should hold office during the pleasure of the
board of health and that his charges to the sick should be
only such as the board should approve, the board could not
lawfully elect one of its own members to this office.

Under the test of incompatibility that all officers who
have the appointing power are disqualified for appointment
to the office to which they may appoint, the answer to both
parts of your question is in the negative. The power of
appointment of a manager of the utility and the employees
thereof lies with the commission. The commission cannot
appoint one of its members to a position filled by its own
appointment.

In addition a person cannot hold two positions in public
employment if his interest in one office is in conflict with his
position in the other. XXIII Op. Atty. Gen. 605; 46 C. J.
942. The commission is empowered to fix the salaries of its
subordinates, including the manager. If a member of the
commission which appoints a manager and fixes his compen-
sation could hold such position, he would in effect be ap-
pointing himself and fixing his own compensation. Further,
a member of the commission also manager of the utility
would in effect be auditing his own departmental expendi-
tures and making his own rules for the government of the
department. The aforementioned is contrary not only to the
spirit of the law but to the letter as well.

It is therefore our opinion that a member of a municipal
utility commission created pursuant to sec. 66.06 (10)
Stats., may not be employed as manager of the utility, in
either a permanent or a temporary capacity. It is immate-
rial whether or not the utility suspends the compensation of the manager who is thereby being assisted or displaced.

HHP

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Elections — Public Officers — Municipal Judge — Wisconsin Statutes — Special Acts — Sec. 17.21, subsec. (2), Stats., controls election of judges of courts created by special act of legislature which have jurisdiction throughout county.

Sec. 371.10, Stats., is not general statutory rule of construction but is limited to construing revised statutes in which it is found.

January 30, 1939.

M. J. McDonald,
District Attorney,
Balsam Lake, Wisconsin.

You state that a judge of the municipal court in Polk county was recently appointed and cite portions of the statutes and special acts of the legislature as follows:

Sec. 17.21:

"Vacancies in elective county offices shall be filled in the manner and for terms as follows:

(1) *

(2) In the office of county judge, or judge of a municipal, superior, district, civil or other special court created under the general law or by special act and with jurisdiction throughout the county, 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:

"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 occur within forty days prior to the first Tuesday of April, the said vacancy shall not be filled until the judicial election of the next year."

Sec. 371.10:

"None of the general provisions of these revised statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular counties, towns, cities or villages or the officers or offices thereof unless such special acts are enumerated in the acts hereby repealed."

Ch. 69, sec. 2, Laws 1891:

"* * * and in case of vacancy occurring in the office of municipal judge, the vacancy shall be filled by appointment by the governor, and the person so appointed to fill such vacancy shall continue in office for the residue of the term for which his predecessor was elected or appointed."

You ask whether, in view of the provisions of sec. 371.10 the provisions of sec. 17.21 (2) or the provisions of ch. 69, Laws 1891, will control the time of holding the next election of a judge for said court.

Sec. 371.10 serves but one purpose in the statutes. It repels the presumption that statutes contained in the general revision statutes of 1898, such as sec. 4987, were intended to repeal special acts relating to particular counties, towns, cities and villages and the officers thereof, unless the acts containing such provisions are expressly repealed by sec. 4987. See revisor's note, Wisconsin Annotations 1930, sec. 371.10.

The history and purpose of a similar statute (subsec. (3), sec. 370.02) was considered at some length by the attorney general and the conclusion reached was that it was intended to apply only to the provisions of the revision bill which be-
came the statutes of 1898. X Op. Atty. Gen. 889. It is our opinion that the discussion, reasoning and conclusion reached in said opinion will also apply to the provisions of sec. 371.10. Sec. 17.21 (2) first came into existence by virtue of ch. 362, Laws 1919, or since 1898. Therefore it is our opinion that the provisions of sec. 371.10 should not be considered in answering your question.

Apparently the above answers the question which you had in mind as the provisions of sec. 17.21 (2) specifically provide that it applies to courts created by special act with jurisdiction throughout the county and also provides that a judge of a court who has been appointed to fill a vacancy shall hold office only until the first Monday of June next succeeding an election held as provided in sec. 8.02 to fill such vacancy for the residue of the unexpired term. Therefore you are advised that it will be necessary that an election be held in your county to elect a judge of the municipal court for said county at the coming spring election.

AGH

Insurance — Mortgages, Deeds, etc. — While domestic insurance company may invest its surplus funds in real estate mortgages under secs. 201.25 and 219.01, Stats., it may not use its surplus funds as capital for conducting what is essentially real estate mortgage brokerage business.

January 30, 1939.

H. J. Mortensen,
Department of Insurance.

You have inquired whether a mutual insurance company which writes fire insurance on the property of retail lumber dealers may invest its surplus funds in federal housing administration insured mortgages under the following circumstances:
This company has established a mortgage loan department which is to operate in conjunction with retail lumber dealers in making the real estate mortgage loans to be insured by the federal housing administration. The insurance company, after placing such mortgages, proposes to sell them, using the proceeds to make mortgage loans of a like character. Thus, to some extent at least, the insurance company will be engaged in the mortgage brokerage business. Under the federal housing administration regulation the company, as mortgagee, is permitted to charge an initial service charge of not exceeding two and one-half per cent of the face amount of the mortgage. On refinancing, this charge is one per cent of the face amount of the mortgage. The company will have two alternatives with respect to the sale of notes and mortgages. It will either sell the notes and mortgages without servicing after the sale, or it will service the note and mortgage after the sale, in which case it will retain for its services a commission equal to three-fourths of one per cent of the annual interest charged, such servicing to involve the collection of payments made on a monthly basis.

The mortgages will be placed exclusively upon real estate being improved in part at least with lumber and other materials sold by lumber dealers who are members of the insurance company in question, and the buildings upon the mortgaged premises will be insured in this insurance company. The company has a surplus of some two hundred seventy-five thousand, and it is proposed to make and sell mortgage loans amounting to several million dollars a year.

It is contended on behalf of the insurance company that this program will increase its insurance business and that the new construction thus encouraged will be advantageous to the individual policy holders who are retail lumber dealers.

Under sec. 201.25, subsec. (1), par. (c), Stats., domestic insurance companies are authorized to invest their assets in real estate mortgages upon improved real estate with certain limitations as to the size of the loan when compared to the value of the property. These limitations are modified in the case of federal housing administration insured mortgages by the operation of sec. 219.01, Stats., which, among
other things, permits insurance companies to make loans in the case of obligations which the federal housing administration insures or makes commitments to insure.

We take it that no question is raised as to the authority of the insurance company to make such loans in the usual course of business in investing its surplus funds. It also follows that a wide latitude of discretion is vested in the insurance company when it comes to the reselling of such securities where surplus funds are needed to pay losses or where, in the opinion of the company, it becomes advisable as a matter of good business judgment to dispose of particular securities and reinvest the funds in other securities.

However, a somewhat different problem presents itself where the surplus funds are used primarily as capital for a mortgage brokerage business, even though such business may incidentally or directly promote the insurance company's business.

We understand that the express powers of this company include the writing of insurance upon property of its members who must be engaged in the retail lumber business and be members of some recognized retail lumbermen's association. Other than the foregoing, there are no express powers granted by the articles of organization.

A corporation has the implied power to do whatever may be necessary to execute its express powers and to accomplish its purpose for which it is formed. 7 R. C. L. 528, 6 Fletcher Corporations (Perm. ed.) 194.

Such incidental powers, however, can never avail to enlarge the express powers and thereby warrant the corporation to devote its efforts and its capital to propositions other than those which its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate objectives. Fifth Avenue Coach Co. v. New York, 58 Misc. 401, 417, 111 N. Y. S. 759, 769 (aff. 126 App. Div. 657, 194 N. Y. 19, 221 U. S. 467.)

The purpose of such powers is to further the authorized purposes, not to authorize others. In other words, to put the proposition in rather plain and homely language, the exercise of a corporation's implied or incidental powers must not reach the point where "the tail begins to wag the dog".
By way of illustration, it would appear that the servicing of a note and mortgage for a commission of three-fourths of one per cent of the annual interest charged, after the mortgage has been sold by the insurance company, in no way directly promotes the purpose for which the company is expressly organized. The only justification for the making of the loan in the first instance was because it constituted a proper investment of surplus funds. After the mortgage has been sold and the proceeds reinvested, no surplus funds are any longer involved in the transaction. We are not impressed by the argument that construction loans will stimulate the sale of lumber by individual policyholders, since the policyholders are merely selling lumber to themselves, the insurance business of the company being restricted to lumber dealers. Even were this situation otherwise, the promotion of the individual business of its policyholders is no primary concern of an insurance company. Neither does the mere fact that more fire insurance will be written because of such construction loans justify a collateral line of business enterprise by the fire insurance company. We do not mean to say that it is improper for the insurance company to insist upon writing the insurance in the case of property upon which the company is making a loan of its surplus funds in the ordinary course of investing such funds. But it is quite a different thing to say that the company may go into the mortgage brokerage business as a means of acquiring the insurance on the property involved. In the course of time it might well be questioned whether such a company is an insurance company or a mortgage brokerage company.

It may be rather difficult to apply the legal principles hereinbefore discussed to specific situations because of the undoubted power of an insurance company to invest its surplus funds in real estate mortgages and to convert the same into cash when needed or to reinvest the same in other mortgages or securities when good business judgment so dictates, but if, in the course of your supervision of an insurance company, it should definitely appear from all of the
evidence that the company is using its surplus merely as capital in the mortgage brokerage business rather than for ordinary investment purposes of such funds, it would seem that such practice is *ultra vires*.

WHR
Criminal Law — Gambling — Lotteries — “Bank Night”, as operated, allowing persons who have not purchased admission tickets to join in plan, is not in violation of sec. 348.01, Stats.

February 2, 1939.

WILLIAM H. ROGERS,
District Attorney,
Jefferson, Wisconsin.

You inquire whether there is any disposition on the part of this office to overrule the opinion of XXVII Op. Atty. Gen. 190, holding “bank night” to be a lottery in violation of sec. 348.01, Stats.

The question submitted by the former district attorney of Jefferson county was:

“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.”

The opinion referred to states that our criminal statutes do not define a lottery and that the supreme court has not passed upon the question of whether transactions of the type under consideration are a lottery. Thus, resort must
be had to general legal definitions. It is there pointed out that it is well accepted that, before a particular plan can be classified as a lottery, it must contain some exaction of a consideration from the participants. The conclusion that sufficient consideration exists in plans of the type under scrutiny is then arrived at by a strict analysis of the factual situation and the use of fine legal distinctions in the application of general principles of law. Lawyers trained in the use of legal logic are not in complete accord as to the result reached. In fact, the decision of such courts as have passed upon the subject are in conflict. I refer you here to paragraph seven (7) of the previous opinion. It must be recognized that whether in plans of this type there exists sufficient consideration to make them lotteries is subject to difference of opinion. Being debatable, then whatever conclusion is reached is not free from all reasonable doubt.

This is not to say that the former opinion is not correct as a pure legal proposition; neither is it to say that we hold with it; but in its application a practical problem arises. To obtain convictions and prosecutions predicated upon the proposition that such a scheme is a lottery, it is necessary to convince a jury beyond all reasonable doubt that such activity is a lottery in fact. To date, although there have been numerous prosecutions founded upon that proposition, in every instance there has been an acquittal.

In none of the trials thereon has it been denied that the accused actually operated under a plan of the type under consideration. The controversy was solely upon the question of whether the acts done constituted a lottery. Accordingly, the jury must have acquitted in each instance not because of any failure to establish the factual activity, but because it decided that the activity itself did not constitute a lottery. There being no question but that in each instance a prize was given and that it was awarded as a result of chance, the acquittal must have been founded upon the decision by the jury that the existence of a consideration had not been established beyond all reasonable doubt.

In view of this experience, it would seem that before there can be hope of successful prosecution upon the theory that promotional plans of this type constitute lotteries in violation of our criminal statutes, the matter should be presented
to the legislature for definite action. Thereby any doubt as to whether they are such would be dispelled.

It is, therefore, the opinion of this office that whether or not "bank night" constitutes a lottery as set forth by sec. 348.01, Stats., is a question where reasonable minds might well differ and is therefore doubtful; being a criminal statute, all reasonable doubt, as you know, must be overcome in order to sustain a conviction. Under these conditions, we are forced to hold that "bank night" is not a lottery under sec. 348.01 as the section now stands.

JEMartin

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Elections — Nominations — Public Officers — County Judge — Sec. 5.26, subsec. (4), Stats., is applicable to office of county judge. Circulation of nomination papers at large throughout county is in compliance with said section.

February 4, 1939.

E. E. Hohman,

District Attorney,

Wausau, Wisconsin.

A judicial election for the office of county judge in and for Marathon county will be held this coming April. You request an opinion as to whether nominations for the office of county judge may be made by the circulation of nomination papers in Marathon county pursuant to the provisions of sec. 5.26, Stats. Subsec. (1) of sec. 5.26, Stats., reads as follows:

"Independent or nonpartisan nominations may be made for any office to be voted for at any general, judicial, or special election."

The statute then provides that such nominations shall be made by nomination papers bearing the signatures of a cer-
tain proportion of the electorate. Subsec. (4), sec. 5.26, Stats., provides in part:

"* * * For judicial candidates in districts comprised of one county or more, except as herein provided, such nomination papers shall be signed by at least two per centum and not more than four per centum of such electors. * * *"

It is quite evident that the above quoted portion of the statute applies to candidates for the office of county judge. Such candidates are certainly "candidates in districts comprised of one county", thus bringing them directly within the scope of the statute. The word "districts" is there used in a general sense synonymous with "territory" or "area". Obviously it can not be construed to refer to special subdivisions of the state called "districts" since there are no subdivisions so named which elect judicial officers. See X Op. Atty. Gen. 198.

You are advised that candidates for the office of county judge may be nominated by the circulation of nomination papers pursuant to sec. 5.26 throughout the county at large in which they seek office and further that the portion of sec. 5.26 (4) above set forth applies to candidates for the office of county judge.

NSB
Public Officers — County Board — Malfeasance — Dentist who is member of county board may not perform services for indigent, services of whom are approved in advance of performance by pension department and bill for services of whom is ultimately paid out of children's aid fund, which is in part created by appropriations by county board.

February 6, 1939.

Richard G. Harvey, Jr.,
District Attorney,
Racine, Wisconsin.

You state that, under your local practice, when an indigent who comes within the jurisdiction of the pension department requires dental service, he secures an order from the pension department directing any dentist chosen by the indigent to make an examination and an estimate of the cost of whatever work is necessary. The dentist chosen by the indigent informs the pension department of the estimated cost of the required work and, after obtaining approval for the same, completes the work and submits a bill to the pension department. The bill is then paid out of the dependent children's aid fund.

You ask whether a member of the county board who is a dentist may render service to such indigents and receive compensation therefor totaling more than one hundred dollars per year without falling within the provisions of sec. 348.28.

Sec. 348.28, Stats., provides in part:

"Any officer * * * of any county * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner * * * in any contract, proposal or bid in relation to the same * * * made by, to or with him in his official capacity or employment, or in any public or official service, * * * shall be punished by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by fine not exceeding five hundred dollars; but the provisions of this section shall not apply to contract for the sale of printed matter or any other commodity, not exceeding
one hundred dollars in any one year except as to second, third, and fourth class cities, * * * * the amount shall be three hundred dollars, * * * * Any contract, to which the state or any county, * * * * is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the * * * county * * * * shall incur no liability whatever thereon."

You will notice that the limit now allowed in Racine, as a city of the second class, is three hundred dollars and not one hundred dollars as you state in your letter. The amendment was made by ch. 270, Laws 1937.

Sec. 20.18, Stats., makes various provisions for appropriations from the general fund of the state for charitable aids. Subsec. (1) reads:

"Annually, beginning July 1, 1937, five hundred ninety-five thousand dollars for state aid for dependent children and in addition thereto all moneys received from the federal government for this purpose, to be expended according to the provisions of sections 48.33 and 48.331 of the statutes."

Sec. 48.33, Stats., provides for aid to dependent children or, under certain conditions, to those persons having their care and custody. Subsec. (9) of that section provides:

"The county board of each county shall annually appropriate a sum of money sufficient to carry out the provisions of this section. Upon the orders of the judge of the court having jurisdiction, the county treasurer shall pay out the amounts ordered to be paid as aid, under the provisions of this section."

The dependent children's aid fund, therefore, is made up of appropriations by the federal government, the state, and the particular county where that fund is dispersed. The county board, in allocating funds for the various county projects, must appropriate a sufficient amount of money to carry out the provisions of sec. 48.33.

In XXIV Op. Atty. Gen. 422 it was stated that a governmental officer is considered to have a "pecuniary interest" in a contract with the governmental unit of which he is an
officer when he sells either commodities or services directly to that governmental unit.

In Henry v. Dolen, 186 Wis. 622, 203 N. W. 369, it was held that a county board officer cannot have a pecuniary interest in a contract for personal services with a county because of the provisions of sec. 348.28.

In XXIV Op. Atty. Gen. 260 this department ruled that when a store in which a county board member has an interest sells more than one hundred dollars worth of relief supplies to a county in one year the county board member is guilty of violation of sec. 348.28.

In XXIV Op. Atty. Gen. 312 at 314-315 the tests to be applied to similar transactions are set forth as follows:

"Referring now to sec. 348.28, Stats., we must apply the following tests to the transaction: First, was the seller of the supplies an officer, agent or clerk of the municipal corporation? Second, did the officer, agent or clerk have a pecuniary interest in the contract, either directly or indirectly? Third, was the officer, agent or clerk acting in an official capacity in passing upon the contract at any time?"

"The third question is probably the most important of the three and may be determined in different ways. One method of determining this point would be to ascertain whether the officer, clerk or agent is under some legal obligation to inspect the goods delivered, or to approve the services rendered or to pay the bill for the services or goods or to approve the purchase price and order warrants to be drawn therefor. In other words, the question is whether the officer, clerk or agent at any time places himself or is placed in such a position that he will be pecuniarily interested in receiving benefits under the contract and will at the same time be duty bond to guard the interest of the municipality against imperfect goods or exorbitant prices, the object of the statute being to prevent a person from using his official position to in any way enhance his private pecuniary interest, and it might perhaps be said to be a criminal and civil amplification of the common law rule of agency, which prohibits an agent from serving two masters with opposing interests in the same transaction."

The county board member in the situation which you describe cannot meet the third test as outlined above since, in his private capacity as a dentist, he would have a contract
claim to be paid out of a fund which he was instrumental in providing as an official of the county.

We are not unmindful of the holding in State v. Bennett, 213 Wis. 456, to the effect that sec. 348.28, Stats., is not violated unless the contract is "made by, to or with him [the official] in his official capacity or employment, or in any public or official service." In the Bennett case the official involved did not occupy a legislative position nor was his position such that he acted in a supervisory capacity, such as a member of the county board necessarily does with respect to the pension department. For these reasons we believe the services in question to be within the condemnation of the statute within the rule of the Bennett case.

You are therefore advised that a member of the county board of Racine county may not receive compensation from the dependent children's aid fund for dental services to indigents in excess of three hundred dollars in any one year.

NSB

Public Health — Embalmers — By operation of sec. 156.095, subsec. (5), Stats., apprentice registered in embalming prior to effective date of ch. 141, Laws 1937, is entitled to all rights and privileges appertaining to such registration as governed by 1933 statutes, including right to be examined as applicant for funeral director's license, but such registration terminates on January 1, 1940.

February 14, 1939.

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

You have inquired whether a person registered as an embalmer's apprentice under the law as it existed in 1933 must serve the registered apprenticeship prescribed by the 1937 statutes, in order to be eligible at the present time for examination as a funeral director, and, secondly, whether an
applicant who had written an examination for a funeral director's license under the provisions of the 1933 statutes and failed, is eligible to write the examination a second time without serving the apprenticeship required under the 1937 statutes.

Ch. 302, Laws 1933, provided for the licensing of funeral directors and emblamers. Prior to 1933, it was not necessary for funeral directors to secure licenses. By ch. 302, Laws 1933 (sec. 156.04), persons who were actively engaged in the business of undertaking six months prior to the effective date of the act were entitled to secure licenses on application. Also, all licensed embalmers who had a fixed place of business were entitled to licenses as funeral directors if they applied therefor in the year 1933. All other persons wishing to be funeral directors were required to take examinations.

The requirements for taking such examinations were greatly increased by ch. 141, Laws 1937, so as to require, among other things, at least two years' practical experience in the business of funeral directing by serving the apprenticeship prescribed in sec. 156.095.

Subsec. (5), sec. 156.095, Stats., provides:

"Apprentice registrations that were filed prior to the effective date of this section shall be governed by the laws in effect under the statutes of 1933, but such registrations shall terminate on January 1, 1940."

There were no "apprentice registrations" in the case of prospective funeral directors prior to the passage of ch. 141, Laws 1937, and it therefore becomes necessary to determine whether an apprentice registration in embalming may be regarded as falling within the classification of "apprentice registrations" as used in sec. 156.095 (5) when applied to an applicant for a funeral director's license.

The terminology employed in the act is confusing to the point of suggesting legislative clarification.

Sec. 156.01 (6), defines an apprentice as follows:

"An 'apprentice' is a person engaged in the practice of funeral directing or embalming or both under the instruction and personal supervision of a licensed embalmer or licensed funeral director."
Again, in sec. 156.095 (1), the apprenticeships required for funeral directing or embalming are run together, as follows:

"The term of a registered apprentice for funeral director or embalmer shall be recognized only when given full time employment in a fixed place or establishment, under the personal supervision of a licensed embalmer or licensed funeral director."

Thus there is no clear-cut distinction between an apprenticeship in embalming and an apprenticeship in funeral directing. Certainly prior to 1937 an apprenticeship in embalming was regarded as sufficient for both embalming and funeral directing, and we are unable to say that they are now so separately classified that one may not be included within the other. Specifically, it would appear that, while an apprenticeship in funeral directing does not qualify the apprentice for an embalmer's license, it may well be that an embalmer's apprenticeship is sufficient for the purpose of funeral directing.

In State ex rel. Kempinger v. Whyte, 177 Wis. 541, a statute requiring an undertaker to have an embalmer's license was held invalid. It is apparent, of course, that one need not be skilled in the technique of embalming in order to take charge of and manage a funeral. It would seem, however, that one who had qualified as an embalmer would have most, if not all of the essential training required of a funeral director. For instance, sec. 156.04 (4), relating to the examination of applicants for funeral directors' licenses, includes the subjects of "funeral directing, sanitation, public health and business ethics." Sec. 156.05 (4), relating to the examination of applicants for embalmers' licenses, includes the subjects of "anatomy, bacteriology, autopsy, chemistry, practical embalming, sanitation, public health and business ethics."

Thus, prospective embalmers are examined in three of the four subjects covered in funeral directors' examinations, plus numerous other and more technical subjects.

Furthermore, sec. 156.05 (2), relating to embalmers' licenses, includes a provision concerning approved embalming schools which give "a course of thorough instruction on
the subjects of anatomy, bacteriology, autopsy, chemistry, practical embalming, funeral directing and public health". Hence a graduate of an approved embalming school would not only be examined in three of the four subjects included in a funeral directors' examination, but he would also have training in the fourth subject.

Also, there is no direct provision in the law for the registration of a funeral director's apprentice under a funeral director. The only provision for registration of an apprentice with the state board of health under ch. 156, is that contained in sec. 156.10, which reads in part as follows:

"Before beginning an apprenticeship under the instruction and supervision of a licensed embalmer, the person desiring to become an apprentice must register with the board. * * *"

We are not here called upon to determine whether a funeral director's apprentice may serve his apprenticeship solely with a funeral director who is not an embalmer, but we merely cite the above statute as showing the emphasis that is placed upon apprenticeship in embalming, or, at least, under an embalmer, in contrast to the apparent lack of a legislative intent to set up a separate and distinct apprenticeship in funeral directing wholly unrelated to embalming.

In view of the foregoing, you are advised that registered apprentices who were qualified to write the examination for funeral directors' licenses under the 1933 law are entitled, by the operation of sec. 156.095 (5), to have their registrations considered under the 1933 law, but that such privilege will terminate on January 1, 1940.

This conclusion makes it unnecessary to consider your second question at length, as we understand that the individual who wrote the examination prior to the enactment of the 1937 law falls within the category discussed in answering your first question. If he is entitled under sec. 156.095 (5) to have his qualifications judged under the 1933 law, it is immaterial that he once wrote the examination and failed. He is in exactly the same position as if he had not written the examination at all, and, in the absence of statutory pro-
visions requiring an opposite conclusion, he is not to be penalized for having failed on his previous attempt to pass the examination. It must again be remembered, however, that the effect of his apprentice registration under the prior law, will terminate January 1, 1940.

WHR

Marriage — Divorce — Minors — Legal Settlement —
Minor girl takes and follows legal settlement of her husband, sec. 49.02, subsec. (1), Stats., and retains that settlement during year immediately following granting of absolute divorce from bonds of matrimony.

February 14, 1939.

LLOYD C. ELLINGSON,
District Attorney,
Menomonie, Wisconsin.

You ask if a minor girl has a legal settlement in the city of M—— in view of the following facts:

"A minor girl living with her mother in the city of M—— married a minor boy living with his mother in the town of M——. The two minors have been married for three months, during which time they lived in the town of M——. An absolute divorce from the bonds of matrimony was obtained at the end of the three months and the minor girl moved back to live with her mother in the city of M——."

It is assumed that the parents of these two minors have legal settlements in the city and town of M—— respectively. Sec. 49.02, subsecs. (1) and (2), Stats., provides:

"(1) A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the
marriage; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall receive it in the place where his wife shall have her settlement."

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

Under subsec. (2), the husband, being a minor, follows and takes the legal settlement of his mother in the town of M—— if he has no father or his father has no legal settlement in this state. XXII Op. Atty. Gen. 225. XXIII 113, 755. XXIV 583. XXV 430. Town of Grand Chute v. Milwaukee County, 282 N. W. 127, 128.

The minor girl took his settlement after her marriage, since a wife always follows and takes the legal settlement of her husband if he has one in this state. 49.02 (1), Stats. XVI Op. Atty. Gen. 732. XVII 298, XXIII 113.

Thus, at the time of the divorce, the girl in question had a legal settlement in the town of M——.

Since it is not stated just when this divorce was secured and how long the parties have been divorced, it is impossible to definitely determine just where this girl's legal settlement is at the present time. However, for purposes of this discussion we assume that less than a year has elapsed since the divorce has been granted. It will, therefore, be necessary to determine just what her status is during the year immediately after an absolute divorce from the bonds of matrimony.

Sec. 247.37, Stats., provides that a judgment from the bonds of matrimony shall not affect the status of the parties until the expiration of one year from the date of granting such judgment except that the parties shall be prohibited from cohabiting together and appeal may be taken during that period. When first considering this statute as amended, by ch. 239, Laws 1911, our court said in Rogers v. Hollister, 156 Wis. 517, at page 523:

"The history of legislation on the subject and the statute as left by ch. 239, Laws of 1911 (sec. 2374, Stats.), would
seem to indicate that it was the intention of the legislature that the entry of judgment should dissolve the marriage contract, subject to the conditions prescribed by the statute, but this we do not decide."

On this same point, Judge Marshall in his concurring opinion stated at page 527:

"* * * in my judgment, upon the entry of a divorce judgment, as in this case, the parties cease to be man and wife; their former status is not affected, for the time being, as to marriageability; but otherwise their condition is entirely changed. Cohabitation between them during the period of waiting would be adultery and marriage of either person to a third person would be bigamy."

From this it would seem that the parties cease to be man and wife immediately after a judgment has been granted. However, this case has in effect been overruled or distinguished in later decisions of the court. For example, in *Hiller v. Johnson*, 162 Wis. 19, it was held that a wife could not testify against her husband during the period of one year after the divorce was granted, since during that time they were still husband and wife within the meaning of the statutes. The court said at pages 23-24:

"It appears that a couple of weeks before the trial a divorce was granted by a court of this state between plaintiff and his wife. The defendants called her to testify to the circumstances of plaintiff's returning to Kenosha, his home, upon the day of the accident. Plaintiff objected on the ground that the witness was still his wife and therefore incompetent to testify for or against him. The objection was sustained because under sec. 2374, Stats. 1913, in force at the time the decree was entered, the decree of divorce did not, for one year following its entry, affect the status of the parties. The ruling was correct. Sec. 2374 provides: 'When a judgment of divorce from the bonds of matrimony is granted in this state by a court, such judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of an appeal to review the same, until the expiration of one year from the date of the entry of such judgment,' and it is made the duty of the court to so inform the parties appearing in court. Mrs. Hiller at the time of the trial for all purposes of giving testimony was still the wife of the plaintiff notwithstanding the decree of
divorce had been entered a few weeks previously. Cases de-
cided under former statutes where the judgment became ab-
solute from the date of its entry can have no bearing upon
the question here presented. Nor does the fact that this
court in Rogers v. Hollister, 156 Wis. 517, 146 N. W. 488,
held that the word 'husband' as used in a will did not mean
a husband from whom the testatrix had been divorced un-
der this statute within a year, militate against the conclu-
sion here reached. In that case the court sought to reach the
meaning given the word in a will where the testatrix made
a bequest to him if he was her husband at the time of her
decese. The question there was not to ascertain the techni-
cal legal meaning of the word, but the meaning in which the
testatrix used it."

Again in White v. White, 167 Wis. 615, the court had oc-
casion to construe sec. 247.37 (then sec. 2374, Stats. 1915).
The court held that the parties were still man and wife dur-
ing the year following the granting of an absolute divorce
and based its decision on Hiller v. Johnson, 162 Wis. 19.

It can, therefore, be said at the present time that divorced
persons are still considered to be man and wife during the
year immediately following the granting of an absolute di-
vote from the bonds of matrimony. Applying this princi-
ple to the facts submitted, the girl involved is still the wife
of this minor boy and consequently follows and has a legal
settlement in the town of M———, rather than the city of
M———.

It does not seem necessary to determine what her status
would be at the expiration of this year. However, in refer-
ence to this point, we refer you to an opinion in VII Op.
Atty. Gen. 302, at page 304, where this department held that
a minor who is an apprentice takes the legal settlement of
her parents if the parents have a legal settlement in the
state immediately upon the termination of the period of her
apprenticeship. In the case of minors, we are dealing en-
tirely with derivative settlements. Such being true, after
the expiration of one year, there would appear to be no good
reason why the wife would not take the settlement of her
parents or why the opinion in VII Op. Atty. Gen. 302 would
not be applicable.
FAR
February 14, 1939.

GEORGE P. HAMBRECHT, State Director,
Vocational and Adult Education.

You state that A was engaged under contract as a teacher in a vocational school for a period of six years from 1930 to 1936. Subsequently A was married.

On March 30, 1936, the local vocational board took the following action:

"It was moved and seconded that the rule of this vocational board respecting the employment of married women teachers be as follows: Namely, that no married women teachers be offered contracts for next year, but may be employed month by month at less than full time upon recommendation of the director. Carried."

Pursuant to this action, A taught for nine-tenths of the full time without a contract during the school year for 1937-38 and received therefor only nine-tenths of the full time salary.

You state further that A was unable to teach when school opened in September, 1938, due to maternity. At that time no formal leave of absence was granted to A and no understanding, either verbal or written, was reached in regard to her reemployment for the year 1939-40. It appears therefore that A has not taught under contract since June of 1937 and that she has not served as a teacher in any capacity since June of 1938.

You ask the following questions:

(1) Can her nine-tenths time be considered as part time?

(2) Can Teacher A demand a return to her former position?

The teacher tenure law was enacted by ch. 374, Laws 1937, and took effect on August 1, 1937 as sec. 39.40 of the statutes. That section provides in part:
"(1) The term 'teacher' as used in this section shall mean and include any person who holds a teacher's certificate and whose legal employment requires such certificate and who is employed: * * *; (c) by any county superintendent as a supervising teacher under section 39.14; provided, however, with respect to employees of * * * local boards of vocational and adult education included in this section, the term 'teacher' shall mean and include only full-time employees who meet, respectively, at least the minimum requirement prescribed, respectively, by the * * * state board of vocational and adult education.

"(2) All employment of teachers as defined in subsection (1) of this section shall be on probation, and after continuous and successful probation for five years in the same school system or school, either before or after the taking effect of this section, such employment shall be permanent during efficiency and good behavior and until discharge for cause. A teacher who has acquired permanent employment by reason of five or more years of continuous service as herein provided, 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.

"(3) No teacher who has become permanently employed, as herein provided, shall be refused employment, dismissed, removed, or discharged, except for cause, upon written charges preferred by the managing body or other proper officer of the school system or school in which such teacher is employed. * * *"

In view of the specific language used by the legislature in regard to employees of boards of vocational and adult education, it is apparent that only full-time employees of such boards can claim under the teacher tenure law. Any teaching employment requiring less than full time in this type of school will not satisfy the requirements of sec. 39.40. A's teaching for only nine-tenths of the 1937-38 term must therefore be considered as part time employment.

In XXVI Op. Atty. Gen. 404, the following statement was made in regard to the act creating teacher tenure:

"The effective date of the act clearly implies a legislative intent to give local school boards a free hand respecting
tenure up to August 1, 1937, and any school board was at liberty on July 12 to discharge any teacher, subject, of course, to outstanding valid contracts" (p. 405).

While it is true that A was not discharged, the nature of her employment was so changed prior to August 1, 1937, that she was at that time ineligible for tenure. In a recent decision the Wisconsin court held that a teacher failed to establish tenure since he was not within the provisions of the act on the date when it became effective. *State ex rel. Peters v. Sleeman*, 229 Wis. 252, 282 N. W. 19.

In order for the retroactive provisions of sec. 39.40 to take effect in this instance, it is necessary that the teacher complete a probationary period of "continuous" full-time teaching for five years prior to August 1, 1937. We are of the opinion, therefore, that the action of the local vocational board in placing Teacher A on part time before August 1, 1937, effectively barred her from claiming under the teacher tenure law at the present time.

You are therefore advised that the local board of vocational and adult education is not bound by sec. 39.40 to return A to her former position as a teacher.

NSB

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*Courts — Justice of the Peace — Prisons — Prison Labor — Sec. 56.08, Stats., is applicable to justice court. Unless justice provides otherwise, said section operates as commitment to hard labor as matter of course.*

February 14, 1939.

*William Leitsch,*

*District Attorney,*

*Portage, Wisconsin.*

You ask whether a justice of the peace, in pronouncing sentence, can require that the sentence, or part of it, be served at hard labor as provided by sec. 56.08, Stats.
Sec. 56.08, subsecs. (1) and (2), Stats., provides in part:

“(1) In any county having no workhouse any person, and in all other counties any female person, convicted of any offense and sentenced to imprisonment in the county jail shall be committed to hard labor; provided, that the court may order the imprisonment, or a part thereof, to be in actual and ordinary confinement, unless the jail to which the commitment is made shall have been declared inadequate or unfit by the state board of control pursuant to section 46.17. Every such prisoner, for such period of time as he may have been sentenced to hard labor, shall be required to do and perform any suitable labor provided for by the sheriff anywhere within said county; * * *

“(2) At the time such sentence is imposed or at any time before its termination, the court sentencing such person may, upon consideration of his health and training, ability to perform labor of various kinds, and the ability of the sheriff to find and furnish various kinds of employment, direct the kind of labor at which such person shall be employed, and the nature of the care and treatment he shall receive during such sentence.”

It is apparent that the effect of the above provisions is to commit to hard labor any person convicted of any offense and sentenced to a county jail. It was so ruled in XXIV Op. Atty. Gen. 380.

Ch. 360 of the statutes relates to proceedings in criminal cases in justice courts. Sec. 360.01, subsec. (5), Stats., provides that justices of the peace shall have power and jurisdiction throughout their respective counties:

“To hold a court, subject to the provisions hereinafter contained, to hear, try and determine all charges for offenses arising within their respective counties the punishment whereof does not exceed six months’ imprisonment in the county jail or a fine of one hundred dollars, or both such fine and imprisonment, except as otherwise provided.”

Sec. 360.21, Stats., provides:

“Whenever the accused shall be tried under the preceding provisions of this chapter and found guilty, either by the court or by the jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall ren-
der judgment thereon and inflict such punishment, either by fine or imprisonment, or both, as the nature of the case may require; but such punishment shall in no case exceed the limit fixed by law for the offense charged.”

Since it is within the jurisdiction of a justice of the peace to impose a sentence to be served in the county jail, it is obvious that such a court has the power to order that such sentence, or a part of it, shall be served at hard labor. Indeed the provisions of sec. 56.08, subsec. (5), make commitment to hard labor mandatory unless the court, in its discretion, orders otherwise.

Hence, a prisoner in a county jail may be hired out by a sheriff even without an order to that effect issued by the justice of the peace who imposed the sentence. XI Op. Atty. Gen. 47; XXII 668. See also XII Op. Atty. Gen. 308 and XV 286.

You are therefore advised that unless a justice of the peace provides otherwise in sentencing a convicted person to a county jail, such sentence operates as a commitment to hard labor as a matter of course under sec. 56.08, Stats.
Taxation — Tax Sales — Where county sells land to which it has tax deed for less than total of outstanding tax certificates, all of which are owned by county, under sec. 75.36, Stats., purchase price should be allocated to tax certificates upon ratio which purchase price bears to total amount of outstanding tax certificates and these amounts so allocated will belong to county or city, depending upon status of county levy for the particular year. If county has collected its entire levy for particular year amount allocated belongs to town, city or village and vice versa.

Where there are outstanding certificates subsequent to certificate upon which tax deed is issued owned other than by county, proceeds should be first allocated to payment of such certificates in full and balance then prorated to other years upon ratio that such balance bears to total of outstanding taxes for such years.

February 14, 1939.

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

In your letter you advise as follows:

"Some time ago Langlade county took a tax deed on the tax certificate for the year 1931 on certain lots located in the city of Antigo. Subsequently, the county sold this property for the sum of $6,500.00. At the time of this sale, tax sale certificates for the years 1928, 1939, and 1932 to 1938, both inclusive, were outstanding. The certificates, including the one on which the tax deed was taken, together with interest to the date when the county sold the property, exceeded the sale price by several thousands of dollars, in fact the face of the certificates without interest amounted to about $3,000 more than the sale price.

"The city of Antigo had excess delinquent rolls for the years 1932 to 1938, both inclusive. The county has collected its full share of the 1932-1933 and 1934 rolls. Thus collections now being made on those three rolls are being turned over by the county treasurer to the city of Antigo. The county has not as yet collected its share of the rolls for the years 1935 to 1937, both inclusive."
You inquire:

"How should the $6,500.00 be applied in this instance? Should it be applied pro rata to the certificates including the one on which the deed is based with interest figured to the date the land was sold, or should the purchase price be applied in some other manner, possibly to the certificates with interest in order of their age? If applied in the latter manner, what is to be done with the certificates on which there is nothing to apply?"

You do not state whether the county owns all outstanding tax certificates, and we shall accordingly analyze the situation, first, upon the assumption that the county owns all outstanding tax certificates, and second, we will consider modifications of the rule established where there are outstanding certificates owned by some one other than the county.

Prior to the passage of ch. 405, Laws 1929 (now amended sec. 75.36, Stats.) there would have been no problem, as under the holding of the court in Spooner v. Washburn County, 124 Wis. 24, 36, 102 N. W. 325, the county, immediately upon taking the tax deed, would be accountable to the city for the full amount of the outstanding certificates to the same extent as if the certificates had been fully redeemed.

But by ch. 405, Laws 1929, sec. 75.36, Stats., was amended so that it now reads as follows:

"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, witnessed, sealed and acknowledged and 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; but no such deed shall be issued until the county board shall, by resolution, order the same. The county taking such deed shall not be required to pay any delinquent or outstanding taxes on such land, the redemption value of any outstanding tax certificates, or interest or charges until the land is sold by the county, or in the case of lands registered as forest crop lands, until the forest crop is taken off. If the sum realized on such sale or from the severance of such forest crop is insufficient to pay all of the said taxes, delinquent taxes,
certificates, or interest or charges, the amount realized shall be applied thereto and there shall be no further liability upon the county for the same."

You will note the italicized portion of the statute and that no legislative method of apportionment is provided. Under the circumstances, some equitable method of apportionment has to be devised and this appears to be especially true in view of the holding of the court in Town of Bell v. Bayfield, Co., 206 Wis. 297, to the effect that a county is not entitled to credit, upon the claim of a town for delinquent taxes collected by the county treasurer during a given period, for uncollected taxes returned by the town in the delinquent list of a subsequent period. While the court refers to periods rather than years, the logic of the case would seem to be equally applicable to years. Such being true, it would seem to be improper for the county to apply the proceeds of sale to the taxes owing it for the years 1935 to 1937, inclusive, before charging itself with any amount to which it is accountable to the city.

The municipal accounting division of the tax commission has worked out what appears to be a most equitable method of apportionment and accounting. The method used is that of apportioning the entire purchase price to the various years for which the taxes are delinquent upon the ratio that the purchase price bears to the entire amount of delinquent taxes. When that fraction of apportionment is arrived at you will then be able to tell the amount which should be applied to each particular year for which the taxes are delinquent. Then, under the circumstances of any given case, the entire amount allocated for that particular year becomes either taxes belonging to the town, city or village or taxes belonging to the county, depending upon whether the county has satisfied the county tax for the particular year. If the county taxes for a particular year have been satisfied and paid in full the entire amount allocated for that particular year is accounted for as taxes collected which are payable to the town, city or village. The opposite is equally true where the county in a particular year has not yet collected the full county levy for that particular year. Thus the amount allocated for that particular year is accounted for as taxes to
which the county is entitled up to the point where the county levy for that particular year has been paid in full. The following example will illustrate:

Assume that the county takes a tax deed in 1938 upon property with respect to which there are a total of outstanding delinquent taxes for the years 1934, 1935, 1936 and 1937 of $500.00, and sells the property the same year for $300.00. The ratio of sale price to delinquent taxes is that of 3/5th or 60%. Assume that the delinquent taxes for each year are as listed in the first two columns of the following schedule; the sale price would then be apportioned on the basis of 60% of the tax owing for each year as per the last column:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount of delinquent tax certificates</th>
<th>Sale price apportioned to each year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1934</td>
<td>$ 50.00</td>
<td>$ 30.00</td>
</tr>
<tr>
<td>1935</td>
<td>100.00</td>
<td>60.00</td>
</tr>
<tr>
<td>1936</td>
<td>150.00</td>
<td>90.00</td>
</tr>
<tr>
<td>1937</td>
<td>200.00</td>
<td>120.00</td>
</tr>
<tr>
<td></td>
<td>$500.00</td>
<td>$300.00</td>
</tr>
</tbody>
</table>

Assuming that the county levy for the years 1934 and 1935 has been fully collected and that for the years 1936 and 1937 there are county taxes yet uncollected in excess of the sum of $150.00 and $200.00, respectively. Under such circumstances the $30.00 and $60.00 for the years 1934 and 1935, respectively, would belong to the town, city or village and the $90.00 and $120.00 for the years 1936 and 1937 would belong respectively to the county.

No reason is perceived why the delinquent taxes represented by the tax certificate with respect to which deed is issued should be treated differently than any other year. The entire foregoing method of apportionment and accounting is consistent with the legislative scheme of tax collection in this state. The towns, cities and villages collect and retain taxes upon the basis of entire town, city and village levy while the tax roll is in the hands of the treasurer for collection and without regard to property source from which the taxes come. The same applies to county collections when the delinquent tax roll has been returned to the county. No rea-
son is perceived why the same principles should not be applied when accounting for the proceeds of sale of tax deed lands.

The foregoing method of allocation and accounting is confined to those situations where the county is the owner of all outstanding tax certificates issued subsequently to the certificate with respect to which the county acquired title by tax deed and is predicated upon the proposition that the certificates so held and all subsequent delinquent taxes are merged in the county’s title. In re Dancy Drainage Dist., 199 Wis. 85, 89 et seq., Spooner v. Washburn County, 124 Wis. 24. It may be urged that, since the rule of these cases is somewhat grounded upon the proposition that the tax deed constitutes payment which necessitated an immediate accounting by the county upon the basis of such payment, and that since that rule has now been changed by sec. 75.36, Stats. (Town of Bell v. Bayfield County, 206 Wis. 297), the reason for the prior ruling no longer exists and that the taking of the tax deed does not constitute payment and does not result in a merger of the tax liens in the county’s title. Whatever the merit to the argument that the taking of a tax deed no longer constitutes payment, we do not think there is anything in sec. 75.36, Stats., that necessitates holding that the tax liens are no longer merged with the title. It seems to us that sec. 75.36, Stats., as amended, does not change the logic of the court in In re Dancy Drainage Dist., 199 Wis. 85, 91, where the court discusses the status of the 1927 delinquent taxes with respect to which there were no tax certificates. If the 1927 taxes in that case merged with the title, the delinquent tax certificates held by the county and all delinquent taxes, whether or not tax certificates have issued, are equally merged with the title under sec. 75.36, Stats., as amended, and whether or not the taking of the tax deed since the amendment of said section operates as payment, that is, whatever the effect of sec. 75.36, as amended, with respect to the concept of payment, it does not seem that that section has any effect upon the concept of merger.

But so far as we can find, it has never been held that the taking of a tax deed operates as a merger where the tax certificate is held and owned by some one other than the
county. Ever since the holding in Spooner v. Washburn County, supra, it has been deemed that the county, by virtue of its tax deed, acquired a fee simple title, free from the lien of all general taxes, and that a like title was conveyed to a purchaser from the county. Purchasers from the county are still undoubtedly under the belief that they acquire such a title. In so far as possible, counties should so allocate the purchase price of tax deed lands as to effect such a result when there are outstanding tax certificates owned by some one other than the county. Tax certificates issued prior to the one with respect to which the county acquired the tax deed title need give us no concern as they are obviously cut off by the county’s tax deed. Doolittle v. J. L. Gates Land Co., 131 Wis. 24; Patterson v. Cappon, 129 Wis. 439; Sayles v. Davis, 22 Wis. 225; Jarvis v. Peck et al., 19 Wis. 74. But the foregoing is not true with respect to certificates issued subsequent to that by virtue of which the county acquired tax deed and which are outstanding and owned by some one other than the county. As to such delinquent taxes and certificates, the proceeds of the sale should be first allocated to payment in full of such certificates or taxes. The county will thus first charge itself with payment of the taxes for the years represented by such certificates, and if such charge results in an excess of charges over credits for the particular year or years, such amounts, to the extent of the excess for each year, will be money owing to the town, city or village. The balance of the proceeds of sale will then be prorated upon the ratio that such balance bears to the total of outstanding delinquent taxes which, of course, will exclude those taxes paid by the first apportionment. The fore part of this opinion will then govern the accounting from such point on.

NSB
Corporations — Securities Law — Trade Regulation — Partnership — Under sec. 123.06, subsec. (1), Stats., every partner is agent of partnership for purposes of its business and partner in securities firm licensed to sell securities comes within definition of agent provided by sec. 189.02, subsec. (1), so as to require agent's license if he is engaged in sale of securities on behalf of partnership.

February 14, 1939.

PUBLIC SERVICE COMMISSION.
Attention G. M. Buenzli, Acting Director,
Securities Division.

You have inquired whether individual members of a partnership which is licensed as a dealer in securities under ch. 189, Stats., are required to have agents' licenses, where they are engaged in the sale of securities on behalf of the partnership.

For purposes of the securities law, and so far as may be material here, an agent is defined by sec. 189.02, subsec. (1), Stats., as follows:

"'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 (2), provides, in part:

"'Dealer' includes every person and company, not an agent, who in this state, for compensation, sells or accepts orders for purchase of any security * * * ."

Under the uniform partnership act a partnership is defined in sec. 123.03, subsec. (1), as follows:

"A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Under sec. 123.06 (1), every partner is an agent of the partnership for the purposes of its business.

Our problem, therefore, is to analyze and apply the foregoing definitions, while keeping in mind the fact that the
entire purpose of the securities law is to protect the investors of this state and to restrain the flotation and sale of improvident securities, a purpose which makes it apparent that the law should receive liberal construction so as to carry out the manifest legislative intent. *Klatt v. Columbia Casualty Co.*, 213 Wis. 12, 21.

Since, under the uniform partnership act every partner is an agent of the partnership for the purposes of its business, the question is already answered by statute, unless there is something in the securities law definition of "agent" which would preclude the application of the agency principle stated in the uniform partnership act.

In our opinion, sec. 189.02 (1), defining the term "agent" as used in the securities law, in no way limits the application of sec. 123.06 (1) or 123.03 (1), mentioned above. Taking the statutory definition of "agent", in sec. 189.02 (1), step by step, we find that it contains three elements: First, an agent must be a natural person; second, he must receive compensation; third, he must represent or act for another with authority in the sale of securities.

Obviously, the individual partner in question is a natural person, so that the first element in the definition presents no difficulty; neither is it debatable that he receives compensation. The statute does not restrict the form of the compensation. The fact that it is received in the form of profits is immaterial. The word "compensation" when given its common and approved meaning, as is ordinarily required in the construction of statutes by sec. 370.01 (1), has a very broad application. It has been defined as "That which constitutes, or is regarded as, an equivalent or recompense." Webster's New International Dictionary. Also as "payment; amends; especially, an equivalent in value or the like." Funk & Wagnalls New Standard Dictionary of the English Language. According to the latter dictionary, the word "profits" is defined, among other things, as "comprehending the acquisition of anything valuable * * *; advantage of any kind; benefit; return." Thus there is no conflict between the word "compensation" as used in sec. 189.02 (1), and "profit" as used in sec. 123.03 (1).

A somewhat more difficult task arises with respect to the third element in the definition of "agent" as used in sec.
189.02 (1). Is a member of a partnership representing or acting for "another" when he sells securities as an agent for the partnership?

"A partnership is not ordinarily regarded as strictly a legal entity distinct from the individuals composing it, and having an independent existence; nor as a person, either natural or artificial; nor as a being or legal being." 47 C. J. 747.

The foregoing statement is subject to considerable qualification, and there are many exceptions, as will be noted upon reading further in the text above quoted. However, in Wisconsin, it has been held in accordance with the above rule that a partnership has no entity distinct and apart from the persons who compose it. Village of Westby v. Beckedal, 172 Wis. 114.

Nevertheless, this does not necessarily mean that a member of a partnership acting on its behalf is not representing or acting for "another." If the partnership is not a legal entity, certainly the other partners are separate beings whom the partner in question is representing or acting for, at least, in part. He is representing not only himself but the other members of the partnership as well. Thus it seems clear that another partner is "another" within the meaning of sec. 189.02 (1) and, consequently, all three elements of the definition are satisfied so as to constitute an individual partner of a firm an "agent" under the securities law.

This conclusion is further fortified by the manifest purpose of the law which has already been stated. Surely the public is entitled to the same degree of protection in the case of an agent for a partnership as it is in the case of an agent for a corporation. The one can do quite as much harm in the flotation and sale of improvident securities as the other, and if the plain wording of the statute requires no difference in the treatment of the one as compared to the other, no distinction should be supplied by intendment.

WHR
Constitutional Law — Public Officers — Seal — Neither constitution nor statutes expressly or impliedly prohibit miniature of state's seal from being used as ring emblem to be furnished children at state school for blind at time of graduation.

February 14, 1939.

Fred R. Zimmerman,
Secretary of State.

You ask whether a miniature of the Wisconsin seal may be used as a ring emblem to be given to graduates of the Wisconsin school for the blind.

Neither the Wisconsin constitution nor the statutes place any express limitation upon the use of the seal either by officials or private individuals.

Art. XIII, sec. 4 of the constitution provides that the legislature shall adopt a seal for the state of Wisconsin, which shall be used to authenticate all the official acts of the governor. Sec. 14.26, Stats., sets forth the design thereof and also provides for a "lesser" seal to be used by the secretary of state.

The declarations in both the constitution and the statutes concerning the purposes for which such seals shall be used must be held to impliedly prohibit the indiscriminate use of such seals or insignia identical thereto in such a manner as to defeat their value as a means of authentification of official acts. Thus, the use of the seal of the state of Wisconsin by a private corporation as a corporate seal or trade-mark would not and should not be permitted. Clearly any use of such seal for the purpose of confusing or deceiving the public is unlawful.

However, it must be recognized that the Wisconsin seal has been and is frequently used for decorative and other harmless purposes. In the absence of any express prohibition in the constitution or statutes, it is the opinion of this department that such uses may be permitted. The use of such insigne by a state institution in the manner indicated in your request does not seem to be prohibited by either express or implied limitations contained in the constitution or statutes.

NSB
Automobiles — Law of Road — Truck trailer not registered in this state during preceding licensing year is vehicle “not previously registered in this state” within meaning of sec. 85.01, subsec. (4), par. (h), Stats., and when license is applied for in January is eligible for registration upon payment of part year fee as provided in said section.

February 14, 1939.

Fred R. Zimmermann,
Secretary of State.

In your letter you advise:

B has a two-wheel truck trailer with a gross weight of 16,000 to 18,000 pounds, which he had licensed with the secretary of state from July 1, 1936 to June 30, 1937. Said trailer was not operated after June 30, 1937, and on January 1, 1939, B applied for license.

You inquire:

“Must B pay the full year fee, or shall the fee be computed on the basis of one-twelfth of the yearly registration fee, multiplied by the number of months of the year which have not fully expired on the date of application?”

The licensing year for truck trailers is from June 30 to June 30. Sec. 85.01, subsec. (5), Stats.

Section 85.01 (4) (h) provides in part 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 herewith, 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 nonregistered vehicle which has not been used in the current license year (as shown by the affidavit of the owner) shall
be transferred, the registration fee to be paid by the trans-
feree shall be computed in the same manner as provided
above for new vehicles. * * * ."

The question must be answered by reference to what is
meant by "for new vehicles and vehicles not previously reg-
istered in this state * * * ." "Not previously regis-
tered" must be read in reference to the first sentence of the
subsection which is in reference to "registered in the state
in the previous year * * * ." Had the legislature in-
tended that any vehicle registered at any time in this state
is thereafter ineligible for registration upon a part fee
basis, it would have been a simple matter for the legislature
to so provide. But by the first sentence of the subsection the
plain legislative intent seems to be to limit full year regis-
tration fees to that of vehicles which were "registered in the
state in the previous year." When the first sentence of this
subsection is read in connection with the second sentence, it
seems apparent that the words "not previously registered in
this state" in the second sentence must mean not previously
registered in this state the preceding year. This seems to
be the only construction which harmonizes with the legisla-
tive intent as expressed in the two sentences.

As the particular truck trailer in question was not regis-
tered in this state during the preceding licensing year, you
are advised that it is eligible for license upon a part year
basis.

We are aware that in XXV Op. Atty. Gen. 131, we ruled
that a "nonregistered vehicle" as applied to a transferred
vehicle meant not registered in the current licensing year.
That construction was necessary if the exception in the first
sentence of sec. 85.01 (4) (h) was to be given any meaning.
The construction herein adopted is arrived at likewise by
giving meaning to the language of the first sentence of said
section.

NSB
Constitutional Law — Painters' License — Criminal Law — Reported Question — Public Officers — District Attorney — It is duty of district attorney to enforce criminal statute even though he believes such statute to be unconstitutional. However, he is under no duty to refrain from submitting constitutional question to court and may properly recommend in case of conviction that constitutional question be certified to supreme court, under sec. 358.08, Stats.

February 15, 1939.

J. Henry Bennett,
District Attorney,
Viroqua, Wisconsin.

You state that you have been requested to prosecute an elderly man who has been doing odd painting jobs for thirty or forty years, because he has no license under sec. 101.40 of the statutes. This request comes from two painting inspectors employed by the industrial commission under sec. 101.40, subsec. (13), to enforce the painters’ license law.

It is your opinion that this law is an unconstitutional exercise of the police power, in that it restricts the right to engage in a common business occupation that does not involve the public health, safety or morals, and you inquire whether it is the duty of the district attorney to prosecute, where it is his opinion that the statute in question is unconstitutional.

It is apparent from your request that you have given the constitutional question very careful thought and study. It is seldom that we are favored with such excellent research, and we feel sure that this office could render much more effective service if district attorneys generally would follow your example.

Strange as it may seem, it does not appear that our office has been asked for an opinion on this question, nor do we find that the problem has ever reached our supreme court or the appellate courts of other jurisdictions.

However, the underlying principles involved are not difficult to apply.
The final responsibility of passing upon the unconstitutionality of the statute, rests with the courts. As is said in 11 Am. Jur. 713:

"* * * It has been thoroughly stated that the right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution. The oath of office 'to obey the Constitution,' means to obey the Constitution, not as the officer decides, but as judicially determined, for since every law found on the statute books is presumptively constitutional until declared otherwise by the court, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement."

We also call attention to the language of the court in the case of Preveslin v. Derby & A. Developing Co., 112 Conn. 129, 151 Atl. 518, 70 A. L. R. 1426, 1433, where it was said:

"The rule of law promulgated in State v. Carroll, 38 Conn. 449, 472, 9 Am. Rep. 409, is still the law of this state and of this land. 'Every law of the legislature,' we assert, 'however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge.'"

So far as we are able to find, no liability for damages is incurred by a district attorney in prosecuting under a statute, which, on appeal, is determined to be unconstitutional. The district attorney is a quasi-judicial officer. State v. Peterson, 195 Wis. 351, 218 N. W. 367; Synder's Case, 301 Pa. 276, 152 Atl. 33, 76 A. L. R. 666. In the official exercise of such quasi-judicial powers the district attorney enjoys immunity from civil liability even where there is error of judgment. Price v. Cook, 120 Okla. 105, 250 Pac. 519. See

In the absence of personal liability on the part of the district attorney for enforcing an invalid statute, we see no reason why he should refuse to enforce a law simply because he has weighed it at the bar of his own private judgment and found it wanting in one or more constitutional aspects. Otherwise, more or less chaos would result in the enforcement of our laws, depending upon the respective constitutional views entertained by the seventy-one district attorneys of the state.

You also suggest in your letter that a local jury would promptly find the individual in question not guilty. We do not consider this factor to be controlling. A district attorney is not excused from enforcing a law because local sentiment largely predominates in favor of the nonenforcement of the law that has been violated. *In re Voss*, 11 N. D. 540, 90 N. W. 15.

However, we do not mean to imply that it is your duty to see a man punished for violation of an invalid statute while keeping secret from the court the fact that the statute is probably unconstitutional. It is as much the duty of a district attorney to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged. *State v. Osborne*, 54 Ore. 289, 103 Pac. 62, 20 Ann. Cas. 627. It has been held that since the oath of office of the prosecuting attorney requires him to support the state constitution, if a legislative act violates that constitution, he is under no duty to refrain from challenging it and submitting to the court the question of its validity. *People v. Fullenwider*, 329 Ill. 65, 160 N. E. 175.

A prosecuting attorney represents the public, and, as a quasi-judicial officer, he is charged with assisting the courts in the administration of justice. He is not to be judged by the number of cases in which he secures convictions, but rather the real question is whether justice has prevailed. He is not a baseball player who is to be evaluated according to his batting average for the season. The courts are quick to appreciate and commend the prosecutor who sees that no innocent man suffers, as well as that no guilty man escapes.
You need not hesitate to call to the attention of the court any factors which will tend to safeguard any fundamental rights of the accused, even though a conviction might be more readily assured by remaining silent. By way of illustration, we call your attention to the language of our supreme court in the case of In re Ernst, 179 Wis. 646, 648, where it was said:

"* * * and we cannot refrain from commending especially the representative of the state in such co-operation and in assuming an attitude of fairness in his search for the truth, which had for its object and purpose the granting of certain fundamental rights to the plaintiff in error. Such a conception of the duties of the highest law officer of the state in a criminal case is in accordance with the modern and approved standard laid down by the decisions and the authorities."

We also wish to point out that a convenient way of raising a constitutional question in a criminal case is afforded by sec. 358.08, Stats., which reads:

"If upon the trial of any person who shall be convicted in said circuit court any question of law shall arise which, in the opinion of the judge, shall be so important or so doubtful as to require the decision of the supreme court he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising therein, and thereupon all proceedings in that court shall be stayed."

It would seem that the question of the validity of the painters' license law, sec. 101.40, Stats., is of sufficient importance to justify the use of sec. 358.08, although, of course, the procedure there provided is discretionary with the circuit judge. You may perhaps feel that it is unfair to place upon the individual accused the burden of carrying his case to the supreme court, but in the very nature of things, it is incumbent upon those affected by an allegedly invalid law to assume the responsibility of challenging the law they violate.

In view of the conclusion here reached, it becomes unnecessary for us to render you an opinion upon the constitution-
ality of sec. 101.40, as requested, and, indeed, it might prove embarrassing for us to do so, since we may be faced with the duty of assisting you in the supreme court in the event our suggested use of sec. 358.08, Stats., is followed.

WHR

Public Health — Pharmacy — Aspirin — Compounds bearing names similar to aspirin and containing similar ingredients may be sold only under sec. 151.04, subsec. (2), Stats.

February 15, 1939.

BOARD OF PHARMACY.
Attention Sylvester H. Dretzka, Secretary.

We are asked whether the sale of compounds bearing a name similar to aspirin by others than registered pharmacists is contrary to law.

Some of these aspirin compounds which are being sold by other than registered pharmacists are "asperline" which, like aspirin, contains acetyl-salicylic acid, and it also contains a very small quantity of phenacetin; another is known as "asper-mint" which contains acetyl-salicylic acid, phenacetin, caffeine and mint. These compounds, being similar in name to aspirin, are often confused with aspirin, and purchased as aspirin. Also the directions for use indicate that they are intended for about the same ailments as are mentioned in the directions for using aspirin.

Sec. 151.04, subsec. (2), Stats., provides, with certain exceptions not material here, that no person shall retail, compound or dispense drugs, medicines or poisons, unless he is a registered pharmacist.

Sec. 151.04 (3), exempts from the operation of sec. 151.04 (2), the sale of proprietary medicines in sealed packages, labeled to comply with the federal pure food and drug law, with directions for using, and the name and location of the manufacturer.
In the case of *State v Zotalis*, 172 Minn. 132, 214 N. W. 766, it was held that aspirin was not a proprietary medicine, and the subject was also given thorough consideration by the attorney general of this state in XVI Op. Atty. Gen. 140 and 318, wherein it was definitely ruled that aspirin can be sold only as a drug. See, however, XVII Op. Atty. Gen. 497, to the effect that these former opinions would not apply if aspirin were a proprietary medicine.

If aspirin is not a proprietary medicine, and may not be sold as such, it would seem that aspirin compounds sold under similar names and for the same or similar purposes, may not be sold except as drugs. Otherwise, the purpose of the pharmacy law would be nullified by subterfuge. The purpose of such laws is well explained in the following language from *State v. F. W. Woolworth Co.*, 184 Minn. 51, 237 N. W. 817, 819:

"* * * But the examination of the quality of medicines sold is not the sole purpose of having a pharmacist in charge. Many poisonous drugs and medicines may be sold in original packages. The pharmacist knows what drugs are poisonous. He is required to keep a record of sales of numerous poisonous preparations. If attentive to his duties, he will in some degree guard against mistakes and misuse. He must in the first instance determine whether an article called for is a poison requiring registry of the sale. He should know whether an article sold is a standard preparation made according to the United States Pharmacopoeia formula, or an adulterated and harmful preparation."

In speaking of aspirin, this department in XVI Op. Atty. Gen. 318-319, said:

"* * * Medical books say it acts upon the vital organs and if too much is taken it may be dangerous or even fatal to the person and the amount that can safely be used or taken in any case depends upon the condition of the person and the strength of the medicine. As stated in that opinion [XVI Op. Atty. Gen. 140], the patent having expired, it can be manufactured or compounded by any one, so it might be made and sold of varying strength and if permitted to be sold at grocery stores, confectionery stores or other like places, the purchasing public would not be likely to regard it as a drug but rather something to be eaten like groceries
or candies or confectioneries or left about the house so that children might use it. Our thought was that the legislature intended by the provisions of our statutes to make it a drug which could only be sold as such at a drug store and by persons accustomed to selling drugs."

It would seem that like reasoning should apply to aspirin compounds, since the law looks to the substance rather than form, and is not to be defeated by mere gloss of words.

You are therefore advised that aspirin compounds may be sold only in accordance with sec. 151.04 (2), Stats.

WHR

Military Service — Veterans' Compensation — Under sec. 618, Title 38 USCA, proceeds of veterans' adjusted compensation certificate, while in form of money, are exempt from all judicial process aimed at subjecting said proceeds to claims of creditors and court can neither order guardian to cash certificate before maturity and apply proceeds in satisfaction of creditor's claim nor subject proceeds to payment of such claim after maturity of certificate.

February 15, 1939.

Elmer E. Hohman,
District Attorney,
Wausau, Wisconsin.

You request an opinion on the following set of facts:
A mentally incompetent veteran was committed to the state hospital at Winnebago. During his confinement, and because of it, the United States government reduced his veteran's compensation payments from thirty dollars to six dollars per month, apparently upon the assumption that his hospitalization was to be without charge to the veteran. After his release from the hospital the state board of control filed a bill against his guardianship estate, which bill the court ordered paid. Since the cash assets in the estate
are insufficient to pay the claim, the order provides that the
guardian shall cash the veteran's adjusted compensation
certificate and apply the proceeds toward payment of the
bill.

You ask:
(1) Whether the court can compel the guardian to cash
the certificate for such purpose;
(2) Whether the court can order the guardian to so ap-
ply the proceeds of the certificate if the guardian cashes it
in order to support the veteran, and,
(3) Whether upon the maturity of the certificate in 1945
the proceeds can be seized to comply with the court's order.

You have not quoted any provisions in the adjusted com-
penion certificate (if there are any) which are material
in a determination of the problems presented, nor have you
cited us to any federal statutes or decisions or decisions
from this state or elsewhere that have created confusion
upon the subject. The field for our research is therefore re-
stricted to the entire field of the subject matter of the ques-
tions submitted.

The claim itself is seemingly valid; the fact that the
United States government reduced the veteran's compensa-
tion in the mistaken belief that his hospitalization was free
is immaterial. It does not appear that the board of control
or the hospital authorities made any representations to that
effect nor that it is the duty of the board to present its bills
or claims monthly. However, the fact that the claim is valid
does not mean that the county court can order the veteran's
guardian to apply the compensation certificate thereto.

It is well settled that pensions and allowances of this na-
ture are in the eyes of the law free gifts from the govern-
ment. They may be awarded to such individuals, to be as-
certained in such way and granted upon such terms and con-
ditions as congress may prescribe. Smith v. United States,
83 Fed. (2d) 631; Corkum v. Clark (Mass.), 161 N. E. 912.
There can be no doubt that congress may declare such al-
lowances exempt from the claims of creditors in order to
secure to the veteran alone the benefit thereof. Mahar v.
McIntyre, 16 Fed. Supp. 961; Derzis v. Vafes, 227 Ala. 471,
150 So. 461. In the case of adjusted compensation certifi-
cates congress has done so. Sec. 618 of Title 38 USCA provides:

"No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate shall be subject to attachment, levy, or seizure under any legal or equitable process, or to national or State taxation, and no deductions on account of any indebtedness of the veteran to the United States shall be made from the adjusted service credit or from any amounts due under this chapter."

This exemption is certainly just as effective when the certificate is in the hands of the guardian as when the veteran himself controls it.

In the face of the federal statute exempting such certificates, can the county court order such certificate cashed and the proceeds used to pay the claims of a creditor? Sec. 618, supra, declares that no certificate "shall be subject to attachment, levy, or seizure under any legal or equitable process." In Mahar v. McIntyre, supra, it was held that those words must be liberally construed in favor of the veteran to include a court order issued in a supplementary proceeding demanding that the veteran apply the proceeds of his adjusted compensation certificate upon his judgment debt. The court declared such order ineffective, saying, p. 963:

"* * * Manifestly, the words 'attachment, levy or seizure' appearing in three foregoing sections are not to be construed so narrowly as to embrace only process in the hands of an officer for service. * * *"

In De Baum v. Hulett Undertaking Co., 169 Miss. 488, 494, 153 So. 513, the court construed the same words as follows:

"* * * 'Any legal or equitable process' should be given a broad construction. The language 'attachment, levy, or seizure' is not confined to the mere process of a court in the hands of an officer or decree of a court of law or equity subjecting the adjusted certificate, or the proceeds of a loan thereon, to the payment of the debts of the veteran."

To hold valid and effective an order such as the one in question is to permit the court administering the guardian-
ship estate to wholly deprive the veteran of the benefits of the exemption clause, and to permit creditors to seize the adjusted compensation in contravention of the statute. It is our opinion that the court cannot compel the guardian to cash the certificates to pay claims against the veteran's estate.

A number of recent decisions have announced that the proceeds of such adjusted certificates are likewise exempt from creditors' claims as long as such proceeds retain the qualify or identity of money. In Mahar v. McIntyre, supra, the court reached this conclusion by a construction of sec. 618, Title 38 USCA. Two later decisions to the same effect were based on sec. 454a, Title 38 USCA, which expressly exempts all benefits paid to veterans from creditors' claims either before or after receipt by the beneficiary. In re Houchins, 17 Fed. Supp. 556; Culp v. Webster, 70 Pac. (2d) 273. These cases indicate the answers to your second and third questions. The proceeds of the certificates being exempt from creditors' claims, it follows that the county court can not order them applied to the payment of the claim in question, either at the maturity of the certificate or prior thereto, if the guardian cashes it for the veteran's benefit.

The conclusions herein reached appear to be consistent with the holdings of our court in Folschow v. Werner, 51 Wis. 85; Estate of Bollow, 223 Wis. 262.

NSB
Courts — Public Officers — Clerk of Circuit Court — County Board — District Attorney — Civil suit against clerk of circuit court for damages arising out of alleged failure to perform duties of office by not cashing or having certified insurance company’s check deposited with him as supersedeas bond, as result of which judgment creditor was unable to realize upon judgment because of failure of insurance company, held:

(1) That it is not duty of district attorney to defend action;
(2) That county board may not authorize retention of counsel to be paid at county expense;
(3) That county is under no duty to reimburse clerk for expense of defending action but may do so under sec. 331.35, Stats., if clerk prevails and then petitions for reimbursement or under other circumstances specified where clerk does not prevail but is not at fault.

February 15, 1939.

George A. Richards,
District Attorney,
Rhinelander, Wisconsin.

You state that an action has been commenced against the clerk of the circuit court of Oneida county, charging him with unlawfully, negligently, and carelessly failing to perform the duties of his office by not cashing or having certified an insurance company’s check deposited with him as a supersedeas bond, as a result of which the judgment creditor was unable to realize on the judgment, due to failure of the insurance company. You also state that this action has been brought against him as an individual and that if he is found liable the judgment will be enforced against his personal bond.

You ask (1) whether it is your duty as district attorney to defend the clerk in this action and (2) if not, whether the county board can authorize employment of special counsel in his behalf. Your questions will be considered seriatim.

Sec. 59.47 prescribes the duties of a district attorney. That section provides in part:
"The district attorney shall:

"(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.

** * * *

"(3) Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers; * * *"

Although the provisions of subsec. (1) are very general as to the types of proceedings and the courts in which a district attorney must appear, it is evident that such duties are specifically limited to proceedings in which the state or county is interested or a party. This construction is in accord with an early ruling of this department in Op. Atty. Gen. for 1906, 659, that it was the duty of the district attorney to institute proceedings and act as attorney for the county sheriff where a town treasurer failed to file bonds and refused to deliver the tax roll to the sheriff, since the county is interested in the collection of taxes. And in Op. Atty. Gen. for 1912, 412, it was held to be the district attorney's duty to defend a state game warden in a replevin action for the recovery of hides, the title to such hides being in the state. See also I Op. Atty. Gen. 447.

The duty imposed by subsec. (3) of sec. 59.47, Stats., relative to advising county officers as to their official duties cannot reasonably be extended to include undertaking the defense of those officers in any action brought against them in connection with the discharge of their duties.

In XXI Op. Atty. Gen. 430 this department rendered an opinion to the effect that it is not the duty of a district attorney to defend a police officer in a civil action brought against him for false arrest and malicious prosecution. And in XXIII Op. Atty. Gen. 56 it was ruled that it is not the duty of a district attorney to defend a sheriff in a civil action brought against him for damages on account of the shooting of a person engaged in picketing. See also XIV Op. Atty. Gen. 602. In these situations the actions were brought
as a result of an act committed by a county officer in his official capacity. It is apparent, however, that the state or county had no interest in the outcome of those actions since it is now settled law in Wisconsin that the state or a municipality, while acting in a governmental function, is not liable for the negligence of its agents, officers, or servants. Crowley v. Clark Co., 219 Wis. 76, 261 N. W. 221, Apfelbacher v. State, 160 Wis. 656, 152 N. W. 144; XXV Op. Atty. Gen. 439.

Since neither the state nor the county is the judgment creditor in the situation which you describe and since any judgment which may be rendered against the clerk of the circuit court cannot affect the state or county, it is evident that the state or county has no possible interest in the outcome of the action. We are therefore of the opinion that it is not your duty as district attorney to defend the clerk of the circuit court in this action.

(2) You ask whether the county board can authorize the employment of special counsel in his behalf. In connection with this question you refer us to secs. 59.44 and 331.35 of the statutes.

We are of the opinion that sec. 59.44, Stats., has no application to your problem and that the provisions of sec. 331.35 alone must govern. Sec. 331.35, Stats., provides in part:

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

This department has ruled in XVI Op. Atty. Gen. 343 that under this section a county is not made liable for expenses of an officer incurred in an action brought against him, but that the county may pay such expenses if, in the discretion of the county board, it decides to do so. See also XXIII Op. Atty. Gen. 63 and 547; XVI Op. Atty. Gen. 593; XXVI Op. Atty. Gen. 243.

In view of the construction placed on sec. 331.35 it would not seem to be within the province of the county board to authorize special counsel to defend the clerk of the circuit court at this time. In your letter you state that the action in question "is still pending and remains undisposed of." The statute authorizes a county board to exercise its discretion as to the payment of such expenses only after the officer has been subjected to personal liability or after the action has been discontinued or dismissed or determined in favor of the officer. The county board would therefore be unwarranted at this time in authorizing special counsel to defend the clerk of the circuit court or in appropriating money for the payment of such an expense. This is especially true in this situation since the county has no interest in the action.

You are therefore advised that the clerk of the circuit court should employ private counsel and, if the disposition of the action falls within the terms of sec. 331.35, that he should then petition the county board for allowance of his expenses in connection therewith.

NSB
Bonds — Fidelity Bonds — Employees' Bonds — Criminal Law — Embezzlement — Where employee embezzles funds of his employer during term of one surety bond and later replaces same by further misappropriations during term of subsequent bond, liability for loss rests on sureties on bond during term of which first misappropriation occurred.

February 24, 1939.

Banking Department.

You have presented the following problem for our consideration. Upon recent examination of a state bank, certain shortages of the assistant cashier in the amount of $3,289.25 were found to have occurred prior to April 1, 1937. During that time the bank was secured by a bond written by the A Company. Subsequently to April 1, 1937, $1,678.64 was embezzled by the same officer to replace his previous defalcations, during which latter period the B Company carried the bond. The question has arisen as to the respective liabilities of the two surety companies, arising out of the two defalcations.

While we cannot give a conclusive answer without reference to the bonds, since liability arising thereunder is dependent upon the terms of the written instrument, we can set out certain principles of law which are applicable.

Upon the question of liability under fidelity bonds such as those here involved, the following rule of law has been generally applied:

"In the liability of sureties on bonds of defaulting public officials it is quite generally recognized that the defaults of a prior term are not chargeable against the sureties on an official bond for a subsequent term." Royal Indemnity Co. v. American Vitrified Products Co., (1927) 117 Ohio St. 278, 281, 158 N. E. 827, 828, 62 A. L. R. 407, 409.

Such liability bonds usually cover losses arising during the period specifically set forth in the bond. In an early Wisconsin case dealing with the question of liability under an official bond, one Otis, a county treasurer, embezzled money during his first term but at the end of that term re-
ported more than he actually had in his hands, so that such shortages were not discovered until the end of his second term. In discussing the question of liability with respect to the bond which covered only the second term the court said:

"For any moneys paid Otis prior to the execution of this bond, and in his hands at the commencement of the second term, the sureties therein became answerable to the county. But if he had already appropriated to his own use any of those moneys, he had been guilty of a breach of duty; it was a past delinquency or default, for which they never became responsible. How does the fact that Otis was his own successor change the principle of law, or enlarge the liability of the sureties on the second bond? * * * It was only for defaults which might accrue during the second term that they became responsible." Vivian v. Otis, (1869) 24 Wis. 518, 520.

See also Stuck v. Dutton, (1928) 4 W. W. Harr. (Del.) 144, 144 A. 191.

Thus, in the absence of any provision in the bond to the effect that it covers only losses discovered within twelve months of the expiration of the bond, the A company would be liable for the full amount of the defalcation which occurred during the period covered by the bond. City Bank of Portage v. Bankers' Limited Mutual Casualty Co., (1931) 206 Wis. 1, 288 N. W. 819.

The liability of the B Company for any defalcation made subsequently to April 1, 1937, would depend upon the nature of the defalcation and the use to which the money was put. The facts you present indicate that the full $1,678.64 was used to replace the prior shortages. If the full amount embezzled subsequently to April 1, 1937, was used to replace the prior shortages then the B Company would incur no liability on the theory that no loss occurred as a result of this latter defalcation. The alleged embezzlement during the second period was nothing more than a bookkeeping entry which transferred funds from one account to another. Such an act may constitute a breach of duty but would not result in any pecuniary loss to the bank for which the B Company would become liable. In the case of Royal Indemnity Co., supra, the court there held under similar facts, the action
being brought on a fidelity bond covering one Cook, a cashier of a manufacturing concern, p. 410:

"* * * the Royal Indemnity Company would not be liable for any act of Cook which was done before the bond was executed, because the bond contains nothing which is retroactive in character, but is rather prospective; that the missappropriation of funds after the date of the bond, with which to pay his prior shortages, did not constitute a new pecuniary loss to the products company under the terms of the Royal Indemnity Company bond, for the reason that the products company had already sustained a pecuniary loss * * *. The actual loss suffered by the products company after the effective date of the indemnity bond was the additional amount that Cook misappropriated not used to pay prior defalcations, * * *.


The B Company here is in substantially the same situation in relation to the A Company that the Royal Indemnity Company bears to the former sureties in the above case. Since the Royal Indemnity case is in accord with the majority rule we are of the opinion that it should be followed here.

It is therefore our opinion that the A Company must sustain the full loss of $3,289.25 incurred prior to April 1, 1937, and that the B Company incurred no liability by reason of the defalcations occurring subsequent thereto, unless there are special provisions to the contrary in the bonds in question.

HHP
Education — Student Safety Patrols — Public Officers — Liability of School Boards, Principals, Superintendents, Teachers, Members of Patrols, etc. — Negligence — School boards have power to authorize student safety patrols when such patrols are kept within proper confines and exercise no municipal police functions.

If injury were to occur to pupil while crossing as result of negligence on part of patrol, liability may be analyzed as follows:

1. School district — none;
2. School board — none;
3. Individual members of school board — none;
4. Principal, superintendent and teachers — liable for actionable negligence in administration of system;
5. Patrol leader or members of patrol — liable for actionable negligence;
6. Parents of negligent patrol member or members — none.

February 24, 1939.

Honorable John Callahan, State Superintendent,
Department of Public Instruction.

With reference to student safety patrols organized in the schools in which upper grade or high school boys serve at street crossings to stop school children from crossing when there are cars approaching and to signal them to go across when they think it safe, such patrols being stationed at crossings at or near the schoolhouse, and being organized for the purpose of cutting down or eliminating accidents while the children are going to and returning from school, and where the pupil traffic at those corners or crossings is concentrated during those periods when pupils are going to and from school, you have submitted a number of questions, as follows:

1. If an accident were to happen to a pupil while crossing as a result of negligence on the part of the patrol, would there be any liability upon:

   (1) the school district;
   (2) the school board;
(3) the individual members of the school board;
(4) the principal or superintendent of schools;
(5) a teacher or teachers charged with responsibility for
organizing the patrols;
(6) the patrol leader or other members of the patrol;
(7) the parents of the negligent patrol member or
members.

These are rather robust questions and we may state at the
outset that we have been unable to find any cases upon the
subject of student patrols, whether they are a legitimate
school activity and thus within the scope of the educational
process or who may or may not be made to respond in dam-
ages if injury occurs as a result of the school's embarking
upon a program of safety patrols. Our conclusion will,
therefore, have to be arrived at by application of legal prin-
ciples or concepts to the particular questions submitted.

You do not state in detail the organization or function of
these student safety patrols. It may be safely stated that
school districts and school boards have no municipal police
powers; that the patrols cannot be organized so as to take
over any such functions; that they may not be organized to
direct traffic or to make arrests or to perform any of the
numerous functions that properly belong to the police power
of the town, city, or village in which the district is located.
As school districts possess no such municipal police func-
tions, we shall not attempt to determine liability should the
school district or the administrative authority of the school
endeavor to organize such a patrol, ostensibly clothed with
municipal police functions.

The formation of student safety patrols has received much
stimulus in recent years as a result of the promotion of such
patrols by the American Automobile Association (AAA).
The standard rules for the operation of such school safety
patrols of the AAA should be studied by any school intend-
ing to embark upon this program.

"Function" is therein defined as follows:

"1. Function. The function of the school safety patrol is
to instruct, direct and control the members of the student
body in crossing the streets at or near schools. Patrots
should not be charged with the responsibility of directing vehicular traffic, nor be allowed to do so, other than signaling to a motorist who approaches the crossing after the student pedestrians have left the curb.

"Note: Patrols need not and should not, therefore, be recognized by city ordinance. They must not be termed 'police' nor organized as such. When a patrol member raises his hand to warn a motorist approaching a group of children who are crossing the street, he is not directing or controlling the motorist but merely calling his attention to his obligation under the law to respect the rights and safety of pedestrians at crosswalks.

"An important function of school safety patrols is to instruct the school children in safe practices in their use of the streets at all times and places."

The position and procedure under such function is defined as follows:

"The patrol member should stand on the curb, not in the street, and hold back the children until he sees a lull in traffic. When this occurs, he motions for the children to cross the street in a group. He still keeps his position on the curb, except that if his view of traffic is obstructed by parked cars or otherwise, he may step into the street a sufficient distance to obtain a clear view, but not more than three paces; after the children have crossed, he returns to his station on the curb.

"School authorities should arrange for proper parking of cars near schools so that only in exceptional cases will the patrol member need to walk three paces into the street.

"Where the street is wide or the traffic heavy, there should be two patrol boys at the crossing. One operates as described in the preceding paragraph, on the side from which the children are coming. The other operates similarly on the opposite curb giving attention to possible traffic approaching on that side and assisting the group of children to reach that curb in safety.

"Where there are no adequate lulls in vehicular traffic occurring at reasonably frequent intervals and of sufficient duration to allow pupils to cross the street or highway safely, the traffic problem is not a patrol responsibility but should be handled by the municipality."

These rules are the result of experience and if the schools may embark upon such a program at all, confine the function of the patrol within proper bounds. The program has
been watched in some three thousand communities throughout the United States, and we are advised by the local AAA officer that, so far as is known, not a single accident has occurred throughout the more than eight year period that AAA has been watching the system; and the pamphlet further advises that in one community the system has been in successful operation for a period of over twenty years.

Your immediate questions are submitted as a result of the state highway commission getting behind the student patrol movement and urging the various schools to adopt the student safety patrol system.

We shall first examine the question as to whether the organization by school boards is within the authority of the school board if such patrols are kept within the bounds of the AAA system.

It is our opinion that school boards possess such authority. There are numerous decisions holding that school authorities may to some extent control the conduct of students after hours. In State ex rel. Dresser v. Dist. Board, 135 Wis. 619, our court upheld the right of school authorities to punish students for misconduct taking place outside of school; the court said, p. 627:

"* * * There is abundant authority, however, that the school board or the teacher may make rules to govern the conduct of the pupils after school hours and punish a violation thereof by suspension from attendance upon school. * * *"

See also State ex rel. Bowe v. Board of Education, 63 Wis. 234. In Jones v. Cody, 132 Mich. 13, 16, it was held that the school board could enforce a rule that children must go directly home at the close of school. The supreme court of Kentucky, in a case involving a similar question, quoted with approval from Mechem on Public Officers, sec. 730, as follows:

"There is no question that the power of school authorities over pupils is not confined to school room or grounds, but to extend to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to
or from school, or after he has returned home.’” Gott v. Berea College, 156 Ky. 376, 380.

It cannot be doubted that school boards and teachers may make rules regulating the conduct of pupils in the schoolroom and on the grounds and while going to and from school if the regulation has any reasonable relation to the conduct and orderly functioning of the school. The physical well-being and safety of the pupils is certainly a matter of legitimate concern to school authorities and is of just as much importance as the morals of such pupils and the maintenance of discipline. In Burdick v. Babcock, supra, it was held that a rule forbidding students to participate in certain dangerous or fatiguing sports after school hours could be enforced by school authorities.

Furthermore, it is our opinion that the organization of such safety patrols is well within the scope of education and the educational process. There is no question but that the staggering annual human toll of death or injury caused by automobile accidents is one of the major national problems. There is probably no better place to attack this problem than in the schools. Safety lectures probably do not make the same impression upon an adult mind that they make upon an immature mind in its formulative stages, and for the same reason that visual seeing and experience is often more effective and readily comprehensible than lectures or studies, the patrol system offers opportunity for impressive instruction considerably in excess of anything that might be offered in the classroom. If some progress can be made with respect to the national safety program by training of the immature mind in the school and by practical demonstration of the need for safety and care, who can legitimately argue that such training is not legitimately within the scope of the educational process? But, unless and until the legislature makes such training a compulsory part of the curriculum, it would seem desirable to confine these patrols to that of voluntary patrols and to procure the parent's consent to having the child serve as a patrol member.
Having determined that the formation of student patrols within proper confines is within the power of the school board, we now proceed to answer your questions seriatim:

If an accident were to happen as a result of negligence on the part of the patrol, would there be any liability upon:

(1) **The school district**

In order for the school district or anyone else to be liable, liability must be predicated upon negligence, which is the proximate cause of the injury. But the school district carrying on a governmental function cannot be made to respond in damages for the negligence and acts of its servants, agents or employees. *Apfelbacher v. State*, 160 Wis. 566; *Juvl v. School Dist. of City of Manitowoc*, 168 Wis. 111; *Srnke v. Joint Dist. No. 3*, 174 Wis. 38; *Sullivan v. School Dist.*, 179 Wis. 502; 56 C. J. 531. As we have determined that the formation of student safety patrols, within proper confines, is a legitimate exercise of school board power, under the rule of the above cases, it must follow that a school district could not be made to respond in damages. The foregoing would probably be true even though the formation of such patrols were not within the powers of the school board, as under the rule of the cases cited, the district as such cannot be made to respond in damages when its servants or agents act in excess of authority.

(2) **The school board**

This question is not essentially different from question (1). To hold the board liable as such would be the equivalent of holding the district liable, since the board has only district funds at its disposal with which to meet liabilities imposed. This question must be answered the same as question (1). There would be no liability.

(3) **The individual members of the board**

Individual members of a board can be made to respond in damages only where they have been guilty of such misconduct in the discharge of their duties as would render them liable as individuals. *Morrison v. Fisher*, 160 Wis. 621. As we have determined that the board has authority to authorize such patrols, and if the board does authorize such patrols
and keep them within proper confines, there would seem
to be no possible basis for holding that the individual board
members have been negligent in the discharge of their du-
ties. Negligence cannot be predicated upon an act within
the scope of authority of a board member.

The only possible basis for holding a board member indi-
vidually liable must be that of a rule or determination to
the effect that the board has no authority to establish such
patrols and that when the individual board member author-
izes such a patrol, in excess of authority, he, as a reasonably
prudent man, should have anticipated that injury to another
might occur as a result of placing the safety of smaller stu-
dents in the hands of older but nevertheless immature chil-
dren. Such argument seems to be wholly without merit in
the face of the experience of the AAA and those schools
throughout the country that have adopted the system. If
the argument is sound, then a number of national leaders
must be charged with less foresight than that much-abused
mythical legal personality—the average reasonably prudent
man. We quote from the flyleaf of the AAA Standard Rules:

"They safeguard classmates so the waste in human life
may be reduced. They protect the future of millions of our
boys and girls by helping to develop a safety consciousness
which will serve through life and which will reflect itself in
their driving habits and practices.

"I am most grateful for the fine example set for uni-
versal care and vigilance.

"Theirs is a work of inestimable value to every com-

unity in which it is carried out.'

—Franklin D. Roosevelt."

"I am intensely interested in this school patrol
movement. I have observed these youngsters at their posts
of duty and believe that they are not only doing a fine thing
from the standpoint of national safety, but are receiving
splendid training.'

—John J. Pershing."

"Aside from the value of the patrols in saving
lives and preventing injuries to their schoolmates, the train-
ing offered creates a new sense of responsibility among
members. I have often observed the friendly relationship
existing between patrol members and police officers and per-
sonally believe that it is conducive to better citizenship.'

—George F. Zook,
Former United States
Commissioner of Education."
We think that the argument is without merit and are of the opinion that the individual members of the board could not be made to respond in damages.

(4) and (5) The principal or superintendent of schools and a teacher or teachers charged with responsibility for organizing the patrols

These two questions will be discussed together as liability of either the principal, superintendent, or teacher, or all of them to respond in damages must be based upon some act of negligence on the part of the individual in administering the patrol system. If students are not properly instructed, if a careless, haphazard, or negligent system is installed, if reckless, devil-may-care students are put in charge of patrols, etc., it may well be argued that any or all of the foregoing constitute negligence which would be the proximate cause of injury sustained and as a result thereof. As we have pointed out in a recent opinion to you, actionable negligence is ordinarily a jury question, and it is only in those cases where the court can say, as a matter of law, that certain acts are or are not negligence which proximately caused injury, that a court will interfere or upset a jury finding with respect thereto. It is our opinion that a jury would be justified in finding actionable negligence in any of the situations outlined above or any other situations where it can reasonably be said that the superintendent, principal, or teacher, in the administration of the system, has failed to exercise that degree of care which the great majority of mankind exercise under like or similar circumstances, and under such circumstances that he, as a reasonably prudent man, should have foreseen that injury to another might occur. The following authorities sustain this view, although they do not involve student patrols: Drum v. Miller, 135 N. C. 204; Morris v. Union High School Dist., 160 Wash. 121, 294 Pac. 998; Williams v. Eady, 10 T. L. R. 41 (C. A.); Shepherd v. Essex County Council, 29 T. L. R. 303 (K. B.); Chilvers v. London County Council, 32 T. L. R. 363 (K. B.).

There is no reason why superintendents, principals and teachers cannot be made to respond in damages for their own acts of actionable negligence as well as anyone else.
XXVII Op. Atty. Gen. 395. It will be noted that it is our view that superintendents, principals and teachers can be made to respond in damages, not by virtue of establishing student patrols within proper confines and with proper rules, but only in the negligent administration of such a system if a proper system has been installed.

A superintendent cannot be held for negligent administration by a teacher placed in charge and with respect to which he owes no duty. Each can be made to respond in damages only where they have been negligent in the performance of their duty under the system put in operation.

(6) **The patrol leader or other members of the patrol**

Children are liable for their torts, including negligence. *Wisconsin Loan & Finance Corp. v. Goodnough*, 201 Wis. 101; *Paradies v. Woodard*, 156 Wis. 243; *Briese v. Maechtle*, 146 Wis. 89. The patrol system being voluntary, it would seem that the members of the patrol do assume a duty under the rules and regulations of the patrol system to those whom the patrol undertakes to guide safely across the streets. This does not mean that the patrol members can be held liable as insurers or that they insure a safe crossing. It simply means that they can be held liable if they are negligent in the performance of their duty where injury follows as the proximate result of such negligence. It must also be remembered that in determining whether a child is guilty of actionable negligence, the standard of care applicable is that which is ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience, under the same or similar circumstances. *Osborne v. Montgomery*, 203 Wis. 223. Again, it must be remembered that whether a child is negligent and such negligence is the proximate cause of an injury is likewise, ordinarily, a question for a jury to determine under all facts and circumstances of a particular case.

(7) **The parents of the negligent patrol member or members**

Parents are not responsible for the torts of their children unless the relation of master and servant or principal and agent exists. *Schaefer v. Osterbrink*, 67 Wis. 495; *Hopkins*
v. Droppers, 184 Wis. 400. Since such a relationship obviously does not exist in respect to the child's activities as a patrol member, there can be no liability established against the parent.

The conclusions herein reached with respect to questions (1), (2) and (3) are in accord with a number of opinions that have been submitted to us, as follows: opinion of Charles C. Collins, Counsel, American Automobile Association, Washington, D. C., dated January 18, 1936; opinion of James C. Tormey, Corporation Counsel, dated December 27, 1935, addressed to Mr. William E. Rapp, Commissioner of Public Safety, Syracuse, New York; opinion of Melvin T. Bender, General Counsel for the New York State Automobile Association, dated January 20, 1936; opinion of S. M. R. O'Hara, Deputy Attorney General, State of Pennsylvania, dated January 9, 1929, addressed to Hon. John A. H. Keith, Superintendent of Public Instruction, and opinion of Owen J. Roberts, of the law firm of Roberts & Montgomery, Philadelphia (now Justice Roberts of the supreme court of the United States) dated May 24, 1929, addressed to the Citizens' Safety Committee of the Philadelphia Chamber of Commerce. All of the opinions agree that school boards have authority to establish such student safety patrols but within such proper confines that the school is not assuming to take over any of the municipal police functions.

We have endeavored to render a fairly exhaustive opinion upon this subject and upon the questions submitted.
Taxation — Tax Sales — County has no power under present statutes to waive all interest and penalties on delinquent taxes prior to 1937 levy. Under sec. 75.015, Stats., county may waive only interest and penalties on taxes of 1937 levy and subsequent year which accrue after two years' delinquency.

February 24, 1939.

THOMAS W. FOLEY,
District Attorney,
Superior, Wisconsin.

You have requested an interpretation of sec. 75.015, Stats., asking what effect, if any, this section has on the power of a county to waive interest and penalties on taxes for the years prior to 1937. You further ask what effect sec. 74.205, Stats., has on this question and the purpose of its enactment.

Sec. 75.015 provides:

"Beginning with the 1937 levy, no county shall waive interest and penalties on delinquent taxes which have accrued during the two-year period following delinquency but may waive interest and penalties on delinquent taxes accruing after such two-year period."

It is our opinion that by the provisions of this section the interest and penalties accruing during the two years following the date of delinquency of taxes of the levies of 1937 and subsequent years, may not be waived by the county, but that it may waive such interest and penalties as accrue after said two-year period has elapsed. This section by its very terms has no application to any taxes imposed prior to the 1937 levy and applies only to taxes of the levy of 1937 and those levied in subsequent years. It therefore grants no power to counties to waive interest and penalties on taxes of the years prior to the 1937 levy and has no effect thereon.

At the present time there is no statute which grants to a county the power now to waive all interest and penalties on delinquent taxes of levies prior to that of 1937. While sec. 74.205, Stats., provides:
"The governing body of any county, or city of the first class may, but is not required to, waive the payment of all or any part of the interest, penalty, publication, redemption or other fees upon the original amount of real estate taxes, other than special assessments, for the years 1931, 1932, 1933, 1934 and 1935, for which such county or city holds tax certificates not pledged as security, provided the full amount of such original tax thereon is paid on or before October 1, 1937”,

this was special legislation which was operative only between the date of its enactment on April 21, 1937, and October 1, 1937. Obviously, it could apply only to taxes mentioned therein which were paid prior to October 1, 1937, and so is not now operative as a grant of power that may be at present exercised. By its express provisions it could have no application to taxes paid after October 1, 1937, regardless of the year in which they were levied. Presumably this section of the statutes was enacted to facilitate the collection of outstanding tax certificates held by a county or city of the first class by granting to such county or city the special power to waive all penalties and interest between the date of enactment and October 1, 1937, as an inducement to payment during that period.

While there is no statute now authorizing the waiving of all penalty and interest, it was held in XXIII Op. Atty. Gen. 529, that a county board under sec. 75.01, subsec. (1m), Stats., may waive most of the redemption interest on tax 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.

It is therefore our opinion that under the present statutes a county has no power to waive all interest and penalties on delinquent taxes levied prior to the 1937 levy and that as to taxes of the 1937 levy and subsequent years the county may waive only the penalties and interest which accrue after two years’ delinquency.

HHP
Education — Vocational Education — Tuition — Vocational school student who became twenty-one years of age on June 15, 1937, who, prior to entering said school in 1935, had been living with her parents, who has been entirely self-supporting while attending school, who voted in general election in 1938 in city where vocational school is located, who has not even returned to her parents' home for visit within past year and who claims present intention of making city in which school is located her permanent residence and is now looking for permanent work in such city, is resident student for tuition purposes.

February 24, 1939.

GEORGE P. HAMBRECHT,
Director of Vocational and Adult Education.

You state that X, who had been living with her parents in Y, Wisconsin, came to Z in 1935 to attend the Z school of vocational and adult education. Since that time she has continued to live in Z, where she has worked for her room and board and has been entirely self-supporting. X became twenty-one years of age on June 15, 1937. She now claims to be an adult resident of the city of Z, and as such she voted in this city at the general election held in 1938. Prior to last summer she visited her parents in Y. Last year she stayed in Z during the entire year.

You state further that X has informed you that for some time past she has intended and now intends to make Z her permanent residence. She is now seeking employment here in connection with her school training.

Until this time X has been classed as a nonresident student and a nonresident tuition fee has been imposed accordingly. You ask whether X can now be considered as a nonresident student for purposes of requiring the payment of nonresident tuition fees.

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.

* * *"
In discussing the residence status of a student while attending college, the Illinois court stated:

"* * * In Cooley's Constitutional Limitations (7th ed. p. 904,) the rule is laid down that a student in an institution of learning, as a resident there for the purpose of instruction, may have a residence at such place, provided he is emancipated from his father's family and for the time being has no home elsewhere. The Supreme Court of Indiana in Pedigo v. Grimes, supra [113 Ind. 148], held that a student who goes to a college town with the intention of remaining there simply as a student and does not change his intention does not acquire a residence, but where the intention is formed at any time to make a town his domicile in good faith, to the exclusion of all other places, he becomes a citizen and entitled to vote, if otherwise qualified, even though he intends to remain only a limited period. In Hall v. Schoenecke 128 Mo. 661, it is stated that there is no doubt that a student might become a resident of the college town after he went there to attend school. Whether he has done so depends on the facts and circumstances. The fact that he is supported by his parents will be a strong, but not a conclusive, circumstance to prove that he has not changed his residence. The question is largely one of intention, although as to this the testimony of the student himself is not conclusive.

"* * * The residence in such college town must be an actual, bona fide one, with no intention of returning to the parental home upon completion of the studies. The controlling inquiry in deciding the residence of students, as with all others, is where does the party actually make his home and claim for the time to exercise the rights of property or of citizenship incident to or resulting from permanent residence? Kreitz v. Behrensmeyer, 125 Ill. 141." Welsh v. Shumway 232 Ill. 54, 87-89, 83 N. E. 549.

In Seibold v. Wahl, 164 Wis. 82, 159 N. W. 546, the Wisconsin court considered the residence status of a student for purposes of voting. It was there held p. 86:

"Much weight is to be laid upon the fact as to whether or not such student is what is commonly called 'emancipated' from his family so far as looking to them for a home or a place to which to return or for means of support."

And in a concurring opinion of that decision it was stated, p. 88:
“On this subject two general propositions may be laid down, viz.: If the student has a family of his own and removes the same to the college town and supports them there, or if, being separated from his father’s family and earning his own way wholly or substantially, he removes to the college town, these are persuasive circumstances more or less conclusive tending to show an acquirement of a voting residence there. If, on the other hand, he have a father or mother living, who maintains a family residence in another town, to which residence the student returns in vacation time, and if such parent supports the student wholly or substantially, these are quite persuasive circumstances tending to show that there has been no change of voting residence, especially if the student registers or describes himself as of such family residence.

“Other circumstances, such as the age of the student, the fact, if it is a fact, that he has already been out in the world earning his own living, or that he has already had a voting residence at some place other than the parental home, will be entitled to weight in determining the question. No rule can be laid down which will at once determine every case. Each case must depend upon its own facts.”

See also Asbahr v. Wahl, 164 Wis. 89, 159 N. W. 549; Gross v. Wahl, 164 Wis. 91, 159 N. W. 549; Wadsworth v. Wahl, 164 Wis. 93, 159 N. W. 550. Annotation in 37 A. L. R. 138.

In Kellogg v. City of Oshkosh, 14 Wis. 623 at 628, the court held:

“* * * The act of voting was the highest evidence that he had changed his domicil, and made Oshkosh his home in intent as well as in fact. In some cases it is regarded as conclusive on the subject.”

As the foregoing decisions indicate, the determination of status as to residence depends upon a number of facts and circumstances, none of which is controlling. See In re Burke, 229 Wis. 545, 282 N. W. 598. The nature of the question is such that the particular elements of fact in each case must be combined and considered as a whole.

After a consideration of your statement of the facts in this situation, this department is of the opinion that in view of the authorities cited, X has established legal residence in the city of Z. Consequently the Z school of vocational and adult
education cannot properly require that X pay any further nonresident tuition fee.

NSB

Loans from Trust Funds — Where lands located in municipality which obtained state trust fund loan and levied irrepealable tax to pay same subsequently are acquired by county through tax deed, sec. 25.05, subsec. (5a), Stats., has no application when county sells such lands to United States.

February 25, 1939.

T. H. Bakken, Chief Clerk,
Commissioners of the Public Lands.

Pursuant to the provisions of ch. 25 of the statutes your department has made loans from the state trust funds to various municipalities of this state. The loans were made after receipt from each municipality of an application for a loan. Prior to the time the loan was obtained the municipality applying for the loan passed a resolution in accordance with the provisions of sec. 25.05, subsec. (5), Wis. Stats., levying upon the taxable property of the municipality an irrepealable tax sufficient in amount to pay, and for the purpose of paying, the principal and interest on the proposed loan as such principal and interest would become due. Many loans were originally made for a period of fifteen to twenty years. Subsequently to the granting of the loan, certain lands within the debtor municipality became tax delinquent and such lands were ultimately acquired by the county through the taking of tax deeds. The federal government now contemplates purchasing from the county over ten thousand acres of such county owned lands located in municipalities which, prior to the time such lands became delinquent, had obtained loans from the state trust funds, and which loans are not yet fully repaid. You inquire whether sec. 25.05, subsec. (5a), Stats., would apply to the proposed sale of these county owned lands to the United States.
The following statutes are deemed to be pertinent:
Sec. 25.05, subsec. (5):

"Such application shall be accompanied also by a certified copy under the hand of the proper clerk of a recorded resolution adopted by the municipality applying for or approving the loan, levying upon all the taxable property of the municipality a direct annual tax for the purpose of paying and sufficient to pay the interest on such proposed loan as it falls due, and also to pay and discharge the principal thereof within twenty years from the making of such loan.
* * *

Sec. 25.07:

"All the taxable property in any municipality which has obtained or shall obtain any loan from the state or from any of its trust funds shall stand charged for the payment of the principal and interest thereof. * * *"

Sec. 25.05 (5a):

"Any owner of lands situated within such district who intends to convey such lands to the United States government or to other tax exempt body, may apply to the tax commission to have the amount of such loan which is a lien on his property on account of such irrepealable tax levy, ascertained by finding the proportion which the assessed valuation of his property according to last assessment bears to the assessed valuation of the whole property of the district, and upon payment of such sum so ascertained to the commissioners of public lands such commissioners shall issue to such owner a certificate showing that such lands so conveyed are free and clear of any lien on account of such tax levy, and upon receipt of such payment the amount thereof shall be credited as a partial repayment of such loan. Such application to the tax commission shall be accomplished by a copy of the contract to convey such lands to such tax exempt body, and after the filing of such application and proof of recording of a deed of conveyance of such lands to such tax exempt body such lands shall not be subject to any tax."

Sec. 70.11:

"The property in this section described is exempt from taxation, to wit:
** * * *"
"(2) Lands owned * * * exclusively by any county, * * *"

In XVII Op. Atty. Gen. 615 it was held that forest crop lands within the provisions of ch. 77 of the statutes which became and remained such prior to the first Monday in August of any year are not taxable for that year under an irrepealable tax levy made by a school district or other municipality at the time of obtaining a loan from the state trust funds under ch. 25, or incurring of indebtedness under ch. 67, and are also exempt from other general taxes. That opinion referred to art. XI, sec. 3 of the Wisconsin constitution, sec. 25.05 (5) and section 25.07, and then stated, pp. 616-617:

"While the levy of taxes sufficient to pay the principal and interest becoming due from year to year is, under the constitutional and statutory provisions above quoted and referred to, a present, irrepealable levy on all the taxable property in the school district or other municipality, such taxes in any year can be assessed and extended only against the taxable property—that is, the property not exempt from the general taxation provisions of ch. 70, Stats.—existing in a municipality on the first Monday of August, when the tax roll is delivered to the clerk; there is no lien for taxes on any property in any given year until that date. Petition of Wausau Investment Co., 163 Wis. 283, 289-290. The taxable property in any municipality varies from year to year—some previously taxable has become exempt by law, some has been destroyed by fire or other cause, some has been removed out of the taxing district, other property has been created or developed or has been brought into the taxing district, property formerly exempt has become taxable, etc., etc. Obviously, the annual tax collected in any given year is levied by the irrepealable tax levy made at the time of obtaining the loan only upon and must be borne entirely by the taxable property existing in the municipality in the assessment year whether such property is greater or less than that which was taxable in the prior year or years. Borner v. Prescott, 150 Wis. 197, 202-203."

In XX Op. Atty. Gen. 214, without making any reference to the opinion in XVII Op. Atty. Gen. 615, it was held that a tax which was levied to pay the principal and interest on a loan from state trust funds to a school district constitutes a
lien upon each parcel of taxable property within such district, and that such property remains liable for such tax regardless of its detachment from the district and regardless of its purchase by the state or federal government. The opinion was grounded largely upon the case of State ex rel. Owen v. Rogers, 166 Wis. 628, 166 N. W. 19, which case was not mentioned in the opinion in XVII Op. Atty. Gen. 615.

In the Owen case, supra, a free high school district had obtained a loan from the state trust funds and had levied an irrepealable tax to guarantee the repayment of the loan. Ch. 370, Laws 1915, had detached a town from the free high school district and had provided that the town "should be liable for its just share of all liabilities, likewise credited with its just share of all assets of said district". The only question before the court was whether ch. 370, Laws 1915, released the town from its direct obligation to the state for its share of the loan made to the district of which it formerly was a part. The court discussed what are now secs. 25.05 and 25.07 and then said:

"In view of these specific statutory provisions requiring the levy of a tax upon the property of a district sufficient to pay the loan with interest before it is made, and the declaration that the property of the district shall stand charged for the payment thereof, there is no force in an argument based upon implications from other language or upon a construction that would nullify the plainly expressed intentions of the legislature. The provision in the act of detachment that the territory set off should be liable for its share of the indebtedness and credited with its share of the assets of the district is in no wise inconsistent with the town's direct liability to the state for its share of the loan. The status of this loan was fixed when made. All the property of the district stood charged with its payment—the town of Kimball with its proportionate share. Such being the express mandate of the written law, the provision of the later act cannot be construed to discharge the detached portion from the direct liability created when the loan was made." (Pages 630-631.)

The opinion in XX Op. Atty. Gen. 214 was based upon the foregoing language, and particularly the second from the
last sentence and the third from the last sentence of the foregoing quotation.

In the Owen case, supra, the question was not before the court as to whether taxable property located in a municipality at the time of the levying of an irrepealable tax under the provisions of sec. 25.05 (5) could, while the irrepealable tax levy was still effective, become exempt from the provisions of such irrepealable tax levy by passing into the hands of a body whose property was ordinarily tax exempt. It is our opinion that the court did not attempt to pass upon this question but that the Owen case can be cited only for the proposition that land in a school district or other municipality which has obtained a loan from the state trust funds cannot detach itself from such school district or other municipality and so relieve itself from the provisions of the irrepealable tax levy or from a direct obligation to the state for the repayment of its proportionate share of such loan. The reasoning in the opinion in XVII Op. Atty. Gen. 615 appeals to us as being sound and is affirmed; the opinion in XX Op. Atty. Gen. 214 is overruled in so far as it holds that an irrepealable tax levied to pay principal and interest on a loan from state trust funds is, until the loan is repaid, a continuing lien upon property which was in the borrowing municipality at the time of the loan but which has since passed into the hands of a tax exempt body.

As a result of the opinion in XX Op. Atty. Gen. 214, which was requested by the assembly, the legislature enacted sec. 25.05, subsec. (5a), Stats., to provide a method whereby the lien which under that opinion was said to exist might be released from property which had passed, or was passing, into the hands of a county, the United States, or other tax exempt body.

Under sec. 70.11 (2) the property of a county is exempt from taxation. If the provisions of sec. 25.05 (5a) were applied to a sale of county lands to the United States, there would be deducted from the proceeds of the sale and paid to the commissioners of the public lands such sum of money as presumably would have been assessed against the lands under the irrepealable tax levy. This, in effect, would be making the county lands taxable contrary to the provisions of sec. 70.11 (2), Stats. It is our opinion that the irrepealable
tax levied pursuant to sec. 25.05 must be assessed in any year only against the property not exempt from taxation for that year and that sec. 25.07 was not intended to require that property otherwise exempt from taxation must be assessed its proportionate share of such irrepealable tax each year until the trust fund loan is repaid. Hence, sec. 25.05 (5a), Stats., does not apply to the sale about which you inquire.

JRW

Municipal Corporations — Beer Licenses — Issuance of second license under sec. 66.05, subsec. (10), Stats., for same premises during same license year is within power of proper licensing authorities.

February 28, 1939.

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

You state that a license was issued to A to sell liquor on certain premises from July 1, 1938, to June 30, 1939, and that while such license was in effect the premises were sold and a new license for the same period was issued to the new operator, B, for the same premises without a revocation or surrender of the license to A. You ask whether the licensing body had power to issue the second license to B.

You do not state the type of license involved. However, reference is made to sec. 66.05, subsec. (9), Stats., which deals with nonintoxicating liquor licenses and to sec. 176.05, Stats., which deals with intoxicating liquors. It is assumed that the license you have in mind is of the kind referred to in sec. 66.05 (10) and your request is answered accordingly.

Although nowhere in the statute is there any express reference to the issuance of a second license for the same premises during the same year, we find nothing in the statutes prohibiting the same. Rather, a carrying out of the con-
cepts expressed by the statutes would seem to contemplate the issuance of more than one license for the same premises during the same year.

Sec. 66.05, subsec. (10), subd. (d), par. 2, provides:

"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. *

Sec. 66.05 (10) (d) 4 provides as follows:

"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; * * * A separate license shall be required for each place of business. Said licenses shall particularly describe the premises for which issued, shall not be transferable, and shall be subject to revocation for violation of any of the terms or provisions thereof or any of the provisions of this subsection. *

The provision making said licenses nontransferable was construed in XXII Op. Atty. Gen. 937 to apply to transfers from place to place as well as from person to person. Subsequently, there was enacted the provision of sec. 176.05, subsec. (14), Stats., which now expressly provides that licenses issued pursuant to sec. 66.05, subsec. (10) may be transferred by the proper issuing authority from one premises to another within the same city, town or village, but that no licensee shall be entitled to more than one transfer in any one license year. Even though the statute now provides for the transfer of licenses from one place of business to another they are not transferable from one person to another and thus such licenses are still personal to the licensee. As was said in XXIV Op. Atty. Gen. 138, 139:

"Both licenses to sell fermented malt beverages and licenses to sell intoxicating liquors are issued to particular persons to run particular places."

Since such licenses are not transferable from person to person it would always be necessary for a new operator who,
during the license year, takes over a premises licensed to another to obtain a separate license for himself covering the period of time from then until the thirtieth of June next following. The issuance of a license by the authorities is no guarantee that the holder thereof will be able to use the privileges thereby granted for the full period of the license. Such licenses merely give permission to the person named therein to carry on the particular activity at the designated premises for the period specified, without which he would be prohibited from so doing.

Whether or not a licensee avails himself of the privilege granted is purely a matter of his own concern. The obtaining or retention of rights of possession of the premises during the license year, so as to be able to enjoy the privileges granted by the license, is a matter solely within the control of the licensee and which he must arrange. If he exercises the privileges of the license for a time and thereafter ceases or is unable to do so, the latter is something of his own making. Upon a sale or discontinuance of business at the designated premises all that remains is the possibility of obtaining a transfer to other premises pursuant to the statute. While it may be that he could surrender his license, there is nothing in the statute providing for revocation because of removal from the premises, discontinuance of business or sale thereof.

If, upon discontinuance of business at a particular location by a licensee either by removal or abandonment of business, a new license could not be issued for the same premises, the effect of the license would be that of a monopoly and would make the same something relating to the property rather than to the person. Such effect would mean that licenses for less than a year could be issued only when new businesses were started up in premises which had not previously been occupied during the license year by persons holding licenses. There is nothing in the statutes which will support such a conclusion. In fact the provision for permitting transfer from one location to another but not from person to person clearly indicates that the license is something that relates to the person rather than to the property.

We are therefore of the opinion that the licensing authorities acted within the scope of their power in issuing a
second license on the premises in question under the circumstances stated.

HHP

Bridges and Highways — Electric Lines on Highways —
Under sec. 86.16, subsec. (1), Stats., permit from town board is condition precedent to issuance of construction of transmission line orders by highway commission, and such town board permit and approval by highway commission are required as to all classes of highways.

February 28, 1939.

THOMAS J. PATTISON, Secretary,
Highway Commission.

You have raised several questions in connection with the issuance of so-called transmission line orders to individuals, firms, and corporations. You state that these orders extend permission to erect and operate telephone and electric transmission lines along or within the limits of town roads, county trunk highways and state trunk highways. You further state that before issuing such permits or transmission line orders, the highway commission at present is requiring the applicant to furnish a copy of the town board permit as evidence of the town's approval and that this policy has led to many protests by applicants for mere extension of existing lines because it results, the applicants contend, in unnecessary trouble and delay.

You have requested our opinion of the intent of secs. 84.08 and 86.16, Stats. as relating to the following questions:

"1. As a precedent to the issuance of a construction or transmission line order by the state highway commission, instructing the applicant on the location of poles, height of wires, and other construction details governing the transmission line's occupation of the highway, is it necessary for the applicant to secure a town permit from the town board?"
"2. Are town board permits required for the construction or extension of transmission lines within or along all classes of public highways, that is, town roads, county trunk highways, and state trunk highways, and, further, is highway commission approval of such town board permits required on all classes of highways?

"3. Is the commission correct in requiring that applications for new construction or extension of existing facilities be accompanied by a copy of the town board permit to such applicant?"

Sec. 86.16, subsec. (1), Stats., provides:

"Any person, firm or corporation may, with the written consent of the town board, but subject to the approval of the state highway commission, construct and operate telegraph, telephone or electric lines for the purpose of transmitting messages, light or power along or within the limits of any highway."

Although municipal authorities cannot exclude telephone and telegraph companies from operating within their limits, they have the right to make and enforce such reasonable police regulations as are in the interest of the municipality and its inhabitants. Wisconsin Tel. Co. v. City of Milwaukee, (1936) 223 Wis. 251, 270 N. W. 336. Sec. 86.16 (1), in requiring the applicant to obtain a town permit as a precedent to the construction of transmission lines along the streets or highways of the town, is a recognition by the legislature that the municipality, as well as the state, has an interest in the condition of streets and roads by reason of its police power. Kenosha v. Kenosha Home Telephone Co., (1912) 149 Wis. 338, 135 N. W. 848; XX Op. Atty. Gen. 1068. Sec. 180.17 (1) contains a similar legislative recognition, for while the right of the applicant to construct and maintain such lines is recognized, the municipality is given authority to make reasonable regulations with respect to the same. In sec. 196.58 there is found the same recognition of local authorities' control over the extension of the existing facilities.

The right acquired by the public in land dedicated or taken for a highway or street is merely an easement or right of use for highway purposes, the abutting landowner retaining title to the center of the highway or street adja-
cent to his property, subject only to a public easement. Hegar v. Chi. & N. W. Ry. Co., (1870) 26 Wis. 624, Spence v. Frantz, (1928) 195 Wis. 69, 217 N. W. 700. The permit required of the town board under sec. 86.16, subsec. (1), necessarily acknowledges that the town enjoys an easement in respect to lands used for highway purposes which the utility companies seek to make available to themselves for their transmission lines. The right to construct transmission lines is thus not only subject to a reasonable exercise of the town's police power but can extend only to lands used as highways and over which the town enjoys an easement. The statutes make no distinction between the construction of new lines and a construction of extension of existing lines.

It is therefore concluded that the commission has been acting in the only manner authorized by the statute in requiring the applicants to first obtain a permit from the town board.

While sec. 84.08, Stats., by its express language, is applicable only to trunk highways in the town, sec. 86.16, subsec. (1), uses the words "any highway" which have been construed in such cases to pertain to all the highways, streets, and roads within the municipality. State ex rel. Wis. Tel. Co. v. City of Sheboygan, (1901) 111 Wis. 23, 86 N. W. 657. The provisions of sec. 84.08 are not intended to be all inclusive and therefore, in view of the general scope of sec. 86.16, subsec. (1), Stats., it is our opinion, in answer to your second question, that the provisions of sec. 86.16 (1) are controlling and require the obtaining of a permit from the town for all classes of highways within the town and that the approval thereof by the highway commission is required as to all classes of highways.

As to your third question, the statute makes it quite clear that the commission is left no choice in the matter but must insist upon some instrument showing the written consent of the town board. The written consent called for in sec. 86.16 (1) must be construed to mean consent granted in the recognized manner by the town board after due deliberation. It must be the official consent. Since the applicant must obtain express authority from the town board in the first in-
stance, no hardship is worked upon it by requiring it to present the permit as evidence of such authority. This is a reasonable rule in view of the fact that the permit is issued as soon as the board passes on the proposed plan.

HHP
Public Health — Dentistry — Under sec. 152.07, subsec. (4), Stats., dentist may not employ more than one dental hygienist, but this does not prohibit employment of additional employee holding dental hygienist’s license where such employment is for purely general office or other work and provided that such additional employee performs no services in capacity of dental hygienist.

March 2, 1939.

BOARD OF DENTAL EXAMINERS
Attention Dr. S. F. Donovan, Secretary.

You have inquired whether a dentist may employ more than one dental hygienist in his office, provided that only one hygienist does dental hygiene work.

The number of dental hygienists who may be employed in any dentist’s office is regulated by sec. 152.07, subsec. (4), Stats., the material part of which reads:

“Certified dental hygienists * * * may be employed in any dental office, not exceeding in number the licensed dentists operating therein and subject to regulations of the board of examiners in enforcing this section * * *”

The purpose of the foregoing restriction is apparently to protect the public by insuring close supervision of the work of dental hygienists, because such work borders so closely upon the practice of dentistry. Such must necessarily be its purpose, or otherwise the statute would be open to condemnation as an invalid exercise of the police power, since things that do not offend against public morals, health, safety, or welfare cannot be prohibited. State v. Withrow, (1938) 228 Wis. 404, 280 N. W. 364. We are thus constrained to assign a purpose to the statute which will render it valid, because if a law is open to various constructions that construction which will save it from condemnation will be adopted in preference to one which renders it unconstitutional. Petition of Breidenbach, 214 Wis. 54.

Consequently we must proceed with the interpretation of this statute, having in mind the obvious legislative intent as stated above.
In what way is the public health, safety, morals or welfare affected by having a dentist employ as a secretary, typist, or even as a scrubwoman, a girl who incidentally happens to hold a dental hygienist's license, so long as all of the dental hygiene work is performed by another licensed dental hygienist? To state the question is to demonstrate the answer.

The only possible objection to such a situation is that there might be a temptation to occasionally use both employees as dental hygienists at the same time. This, of course, would be in direct violation of the statute. But does that mean that because the legislature has directly prohibited the employment of two dental hygienists as hygienists, it has also by implication prohibited the employment in another capacity of an additional employee holding a hygienist's license on the theory that the act prohibited includes situations which might lead by temptation to direct violations?

We do not believe that the statute is open to such construction.

In the first place, to prohibit a girl from exercising in a dental office an ordinary lawful occupation, such as stenography, or the like, because she happens to hold a dental hygienist's license, strikes us as being neither an appropriate nor reasonable means of enforcing an otherwise legitimate statute. As was said in *State v. Donald*, 160 Wis. 21, 151 N. W. 831, 371:

"It must be understood that, whether a particular subject concerns the public welfare is not the sole test of whether it is a proper one to be dealt with under the police power. That question being answered favorably to the exercise, then the inquiry is presented, Do the interests of the public generally or reasonably call for the interference? That being also answered favorably and the field of legitimacy of purpose will have been passed and that of appropriateness and reasonableness of means will have been reached. The legislature furnishes such means. What is appropriate and what is not, what is unduly oppressive and what is not, is within its discretion to determine within a wide range; but the means must be reasonably adapted to the particular end and must not be so burdensome as regards private rights as to outweigh any reasonably probable benefit from the interference. * * *"
To prevent a person from exercising a lawful occupation merely on the grounds that it affords temptation to violate the law, seems unduly oppressive and we are reluctant to convict the legislature of having adopted an unreasonable and burdensome means of attaining the end sought, in the absence of language so clear and convincing as to compel that construction. This is in line with the rule of construction that statutes in derogation of common law or common right are to be strictly construed and must be so clearly expressed as to leave no doubt as to the legislative intent. Orton v. Noonan, 29 Wis. 541; Koepp v. National Enameling and Stamping Co., 151 Wis. 302.

Lastly, the statute is highly penal in its nature, and under subsec. (5), sec. 152.07, both the license of the hygienist and the licenses of the dentist may be revoked for violating the statute. The right to practice a profession such as dentistry is a very valuable one. It is not to be lost by application of a statutory construction which is at best doubtful or strained. You are therefore advised that a dentist may employ more than one dental hygienist, provided that only one hygienist performs dental hygiene work.

WHR

Criminal Law — Gambling — Lotteries — Bank Night Insurance — So-called bank night insurance held to be lottery.

March 2, 1939.

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

In your letters of recent date you enclose a coupon which is used in connection with so-called bank night insurance. The coupon reads as follows:
THE ANTIGO NOVELTY CO.  
836 Fifth Ave., Antigo, Wis.  
OFFERS THIS WEEK FIVE HUNDRED DOLLARS ($500)  
To person whose name and address is entered on attached  
stub if his or her name is called at Home or Palace Theatres  
on night of Feb. 16, 1939.  
Claim Expires One Week From Date.  
Only One Ticket Eligible to Each Registrant—Duplicates  
Void.  
Void unless name and ad-  
dress are entered plainly on  
stub of corresponding  
number.  
First name called for great-  
est amount eligible only.  
Good only for date  
specified.  
B No. 1296"

You inquire whether the so-called bank night insurance  
constitutes a lottery.  
We can see no justification for calling this bank night in-  
surance. The offer appears to be absolute upon its face.  
Anyone owning the coupon whose name is called would ap-  
ppear to be entitled to the five hundred dollars, regardless of  
whether such holder is eligible for the bank night prize un-  
der the rules and regulations of the Home or Palace Thea-  
ters. There appears to be no reason why the holder of this  
coupon cannot collect from both the theater and the issuer  
of the coupon, the Antigo Novelty Co., if his name is called  
and he becomes eligible for and is entitled to the prize  
awarded in the theater under the rules and regulations of  
the theater. So far as appears upon the face of the coupon,  
a holder circumstanced as above would be entitled to collect  
both at the theater and from the Novelty Company under  
the terms of the company’s coupon offer.  
If the foregoing is true, this offer is in no sense insur-  
ance. It is operated in conjunction with bank night at the  
local theaters. Fifteen cents is paid for the coupon and the  
holder becomes entitled to five hundred dollars if his name is  
drawn, regardless of whether the holder is entitled to the  
prize at the theater under the rules and regulations of the  
theater. If entitled to the prize under the rules and regula-  
tions of the theater, it seems obvious that the holder would
be entitled to the prize at the theater and to collect five hundred dollars from the Novelty Company.

It appears to be quite immaterial whether bank night is conducted in such manner as to constitute a lottery. This so-called insurance clearly is a lottery. There are but three elements necessary to constitute a lottery, namely, (1) consideration, (2) a prize, and (3) the element of chance. All three elements are present in connection with this scheme. The purchaser pays consideration — the purchase price of the coupon; the five hundred dollar offer is the prize, and it is certainly obtained by the element of chance, namely, a drawing.

Incidentally, we would like to know what possible argument can be made contra to the above. In some schemes of bank night, where those on the outside of the theater who have not purchased any ticket have a chance equal with those who have purchased a ticket, it can be argued that those who purchase tickets pay no consideration for the chance at the prize, as they have no greater chance than those who pay nothing. Courts that have held bank night so conducted not to be a lottery follow such line of reasoning. But there is no possibility of following such line of reasoning in connection with the so-called bank night insurance. So-called bank night insurance is a plain lottery, built upon bank night and regardless of whether bank night is or is not conducted in such manner as to constitute a lottery.

NSB
Opinions of the Attorney General 135

Mothers' Pensions — Social Security Law — County pension agency may not require as condition precedent to granting of aid to dependent children under sec. 48.88, Stats., that applicant contract to reimburse county or convey or pledge present or future property for such reimbursement. This does not preclude placing of funds in escrow or joint account to be used for future needs of beneficiary where county pension agency is otherwise free to deny aid until such funds are exhausted.

March 2, 1939.

Pension Department.
Attention George M. Keith, Supervisor of Pensions.

You have inquired whether a county pension agency may require an applicant for aid to dependent children under sec. 48.33, Stats., to contract to reimburse the county or convey or pledge present or future property, excepting homesteads, as a condition precedent to the granting of such aid.

The conditions upon which aid for dependent children may be granted are phrased in rather broad terms in various portions of sec. 48.33.

Subsec. (1) thereof provides:

"If any person shall have knowledge that any dependent child as defined in this section is dependent upon the public for proper support or that the interest of the public requires that such child be granted aid, such person may bring any such fact to the notice of a judge of a juvenile court or of a county court of the county in which such child has a legal settlement."

Subsec. (5) prescribes certain conditions as to the persons with whom such dependent children must be living, age, legal settlement, aid to the mother or stepmother, and the like. Par. (f), subsec. (5), provides:
“The ownership by a person having the care and custody of any dependent child of a homestead shall not prevent the granting of aid under the provisions of this section if the total cost of maintenance of said homestead does not exceed the rental which the family would be obliged to pay for living quarters.”

Subsec. (6) prescribes limits in the form of family budgets within which the aid may be granted.

Subsec. (7) provides for aid to certain women relatives caring for dependent children, and subsec. (12) defines a dependent child as follows:

“A ‘dependent child’ as this term is used in this section is a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in place of residence maintained by one or more such relatives as his or their own home.”

Thus it will be observed that the statutes do not attempt to lay down any definite yardstick as to property or absence of property conditioning the granting or denying of aid, with the exception of the homestead provision in sec. 48.33 (5) (f), above quoted.

In XXI Op. Atty. Gen. 596, this department ruled that a county may not require a needy person as a condition of relief, to contract to reimburse the county and to convey present or future property as security therefor. It was there pointed out that the duty to relieve and support indigent persons was statutory, and it was said at p. 597:

“A person is within this requirement when he has not the means or credit presently available with which to secure all of the necessities of life, and the ownership of property upon which funds cannot be presently raised does not bar the right to relief, but goes only to the question of reimbursement of the municipality. Elkey v. Seymour, 169 Wis. 223.”

It was also said in that opinion that the amendment of sec. 49.01, by ch. 187, Laws 1931, so as to provide that the
ownership of a home should not bar the granting of relief, in the discretion of the authorities administering relief to any person who by reason of unemployment or sickness stood in need of relief, operated to broaden the statute so that one need not mortgage his home to secure relief if he was unemployed or sick.

The foregoing opinion was followed in XXII Op. Atty. Gen. 277, and it might be added at this point that there is a much stronger reason for the rule laid down in these opinions as applied to aid to dependent children than there is in relief cases, because sec. 49.10 provides for the recovery of relief with certain exceptions, whereas the statutes make no provision for recovery of aid to dependent children. In XXI Op. Atty. Gen. 791, and XXVII Op. Atty. Gen. 141, it was pointed out that the county cannot recover from the estate of a recipient of blind relief. This reasoning was based upon the common law rule that in the absence of contract or some express statutory provision, neither the recipient of statutory relief nor his estate after death is under any obligation to make reimbursement. 48 C. J. 519-520.

Since there is no statutory provision for recovery of aid to dependent children such as sec. 49.10 provides in relief cases, it would seem clear that the county pension agency may not require an applicant for such aid to contract or pledge present or future property as a condition precedent to obtaining aid. This does not mean, however, that there is any absence of discretionary power to determine the fact of whether or not, by reason of the ownership of property, the applicant is or is not in need of aid. That is, the need of assistance is a question of fact to be decided in the light of all the attending circumstances in each particular case.

You have inquired further whether the answering of your first question as it is answered here would prohibit the placing of funds in escrow or joint account to be used for the future needs of the beneficiary, but not for recovery of any aid furnished by the granting agency. By way of illustration you mention the case of a widow who is left with a small amount of insurance money which is in danger of being dissipated if not protected, and ask whether the grant-
ing agency could require that such funds be sequestered for the purpose of protecting the future interests of the beneficiary.

We see no objection to this procedure, and, on the contrary, believe that it constitutes a wise administrative practice. The possession of the funds in the first instance goes to the question of need, and since aid might be denied in the discretion of the administrative agency until the available funds were first exhausted, there is no good reason why the grant should not be made contingent upon placing the funds in escrow or in joint account to be used for the future needs of the beneficiary. This is entirely different from a contract to convey property for purposes of reimbursing the county pension agency for aid granted. It is merely one way of applying the applicant's own property to his own needs, which, of course, he may be required to do as a condition precedent to the granting of aid in any case, subject only to the homestead exemption provided by sec. 48.33 (5) (f), Stats.

WHR


March 2, 1939.

Rudolph P. Regez,
District Attorney,
Monroe, Wisconsin.

You inquire whether the offices of mayor of a city and supervisor are compatible. You cite us to sec. 59.03, subsec. (3), Stats., and IX Op. Atty. Gen. 230, the opinion being to the effect that the two offices are compatible.
On the basis of this opinion we held also in XV Op. Atty. Gen. 172 that the offices of mayor and chairman of the county board are compatible.

We do not see how any other conclusion can be reached, when sec. 59.03 (3) makes the offices of member of the common council and county supervisor compatible. We know of no duties of the offices of mayor that would make his office incompatible and the office of alderman or member of the common council compatible. There would appear to be no basis for changing the prior rulings of this office upon the subject.

NSB

Counts — Courts — County Judge — Wisconsin Statutes — Ch. 468, Laws 1935 (sec. 253.15, subsec. (4), Stats.), repealed sec. 59.15, subsec. (1), in so far as latter section applies to salary of county judge. Under sec. 253.15 (4) county judge is entitled to fees, per diem or compensation provided by general or special statutes and county boards may not legislate with respect thereto except as to fees, per diem or compensation payable from or referable to county treasury, and as to such latter county board may by affirmative action legislate with respect thereto, whether same arise from general or special acts.

Fee, per diem or compensation is referable to or payable from county treasury if county treasury may ultimately or in some event be liable therefor.

March 2, 1939.

D. E. SCHNABEL,
District Attorney,
Merrill, Wisconsin.

In your letter you advise that prior to January 1, 1938, the salary of the county judge, which also included his work as judge of juvenile court, was two thousand dollars a year
and all fees. These fees included the amounts paid for certified copies, commitments to the insane asylums, and any other fees which might come into his hands, except those which the statute expressly provided should be turned over to the county. There was no difficulty in this respect.

By ch. 249, Laws 1895, and as amended by ch. 55, Laws 1909, and ch. 192 Laws 1915, the county judge was given the powers of a justice of the peace, except that his jurisdiction in civil actions was up to five hundred dollars; in addition to that he was given certain jurisdiction in trials of misdemeanors and examinations in criminal actions, and the act expressly provided that he had jurisdiction in the trials of offenses against the ordinances of the city of Merrill.

As to fees payable in exercise of the justice of the peace jurisdiction conferred upon the county court ch. 55, Laws 1909, provides as follows:

“In all actions, examinations or proceedings in the county court, under this act, the county judge shall have and receive the same fees as are now allowed by law to justices of the peace for like services, and the sum of one dollar in addition thereto for every criminal action, examination or proceedings in the county court.”

You state that up to January 1, 1938, all court costs paid in trials of misdemeanors in criminal actions were retained by the county judge, and in those cases where the costs were not paid by the defendant, an annual bill was presented to the county board covering the above items and the bill was paid out of the county treasury.

With regard to the trials in civil actions, no charge was ever made against the county for the court fees in such actions, and with regard to trials of offenses against the ordinances of the city of Merrill, no charge was ever made against Lincoln county, but when the fees were paid, the court costs were retained by the county judge, and if the defendant did not pay the costs, they were charged to and paid by the city of Merrill. So in both civil actions and offenses against the ordinances, the county never became obligated to pay any fees. You state that in civil actions the court costs were charged to and paid by the attorneys bringing
the actions. The city of Merrill furnishes its own blank forms and its own docket and any other documents necessary for the enforcement of its ordinances.

At the regular meeting of the county board in 1936, a resolution was adopted by the board fixing the salary of the county judge at three thousand six hundred a year, and providing that all fees were to be paid into the county treasury.

You state that in view of sec. 62.24 (statute with reference to police justices in cities) and the special acts of the legislature conferring increased jurisdiction upon your county court and fixing the fees that the judge shall "have and receive", you have some doubt as to just what fees the county judge is entitled to receive in view of the 1936 resolution of the county board increasing the salary from two thousand dollars a year to that of three thousand six hundred dollars a year and providing that all fees are to be paid into the county treasury.

We assume that there is no problem involved of increasing the fees of the judge while in office and we are not concerned with prior operations in years gone by. We are concerned only with present and prospective operations under the existing statute and the 1936 resolution of the county board.

Sec. 59.15, subsec. (1), Stats., provides as follows:

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

In VIII Op. Atty. Gen. 720 we held that the above section, so worded, put a stop to the hybrid fee and salary method of compensation of county judges and that under said section a county judge was entitled only to his salary in lieu of all fees. That opinion has been consistently followed by this office in a long line of opinions throughout the subsequent years.
By ch. 468, Laws 1935, sec. 253.15, Stats., was amended and a new subsec. (4) was added, providing 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."

It will be seen that there is an obvious inconsistency and conflict between sec. 59.15, (1) and sec. 253.15, (4), Stats.

The specific statute controls the general. State ex rel. de Forest v. Hobe, 124 Wis. 8. Sec. 59.15 (1) is general, and sec. 253.15, subsec. (4), is specific. Furthermore, ch. 468, Laws 1935, is later in point of time than sec. 59.15 (1), and in so far as the two sections are in conflict, sec. 253.15 (4) must prevail.

In an effort to reconcile these two sections of the statutes, in XXVII Op. Atty. Gen. 582, 584-585, we ruled as follows:

"Since sec. 253.15 (4), Stats. provides that 'the county board may by resolution provide that the salaries 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."
Your submission, involving as it does, special statutes and fees fixed thereby has necessitated our reexamining the entire matter, and upon reexamination we are convinced that secs. 59.15 (1) and 253.15 (4), Stats., are in hopeless conflict and that the former must be deemed repealed in so far as it has any application to county judges. We are aware that repeals by implication are not favored and that in the ordinary case that construction will be adopted which does not necessitate an implied repeal. Pabst Corp. v. City of Milwaukee, 190 Wis. 349, 208 N. W. 493.

In XXVII Op. Atty. Gen. 582 we failed to give sufficient significance to the language in sec. 253.15 (4) “out of the county treasury.” If we try to read the two statutes together and reconcile them, it seems to us that we reach a result which is the opposite from what appears to be the legislative intent in enacting sec. 253.15 (4). Thus, under sec. 59.15 (1), the county board has no jurisdiction at all with respect to fees. Its jurisdiction is limited to that of fixing a salary and the salary is in lieu of all fees. If the county board now has any jurisdiction with respect to fees, it must be by virtue of sec. 253.15 (4), Stats., and the only jurisdiction that the county board has with respect to fees by that section is limited to “fees, per diem, or other compensation out of the county treasury.” Thus, by said section the county board may legislate with respect to such fees, per diem and compensation but has no authority to legislate with respect to any others. The county board may permit retention of fees, per diem or other compensation “out of the county treasury” but may not legislate with respect to “fees, per diem and compensation” that has no relation to the county treasury. With respect to this latter class of fees, per diem etc., sec. 59.15 (1) would operate so that such money would be payable to the county treasury.

We do not think that such was ever the legislative intent in enacting sec. 253.15 (4). The legislative thought behind sec. 253.15 (4) would seem to be that the statutes provide certain fees for county judges and that these fees are of no concern to the county, except such fees or compensation as may be referable to or payable from the county treasury, and that as to such fees or compensation, the county should
have a discretion as to whether the salary will be in lieu of such fees. We cannot believe that the legislature intended that the county treasury should receive all fees or compensation of the judge which is not referable to or payable from the county treasury, but that the judge, at the option of the county, might retain or receive fees and compensation that is referable to or payable from the county treasury. That would not seem to make sense, as it would in substance benefit the county treasury with respect to fees with which the treasury is in no wise concerned.

If we are correct in our interpretation of the legislative thought and intent in the enactment of sec. 253.15 (4), then it must follow that sec. 59.15 (1), Stats., was repealed by the enactment of sec. 253.15 (4), Stats., in so far as the former section applies to salary and compensation of county judges.

We interpret sec. 253.15 (4) to mean that the county board is without jurisdiction to legislate with respect to fees, per diem and compensation of a county judge unless such fees, per diem, or compensation is referable to or payable from the county treasury; that the emoluments of the office belong to the county judge, except in so far as the county board may legislate otherwise; that the county board may legislate otherwise only with respect to fees, per diem and compensation which is referable to or payable from the county treasury; and that unless the county board takes affirmative action providing that the salary shall be in lieu of such fees, per diem or other compensation, the county judge is entitled to such fees, per diem or compensation in addition to salary.

Your county board has taken affirmative action. That affirmative action is necessarily limited to the fees which are referable to or payable from the county treasury. The resolution is ineffective as to fees, per diem or compensation which cannot be so classified.

The only remaining question in relation to your particular problem must be that of whether the resolution can be effective as to fees, per diem or compensation which are referable to or payable from the county treasury but which arise out of the special acts of the legislature conferring increased jurisdiction upon the county court. You will note that sec.
253.15 (4) is with reference to "are authorized under the provisions of subsection (3) of this section or of any other statute." We think that the term "statute" is broad enough to comprehend special acts of the legislature. We do not find where our general statutes or the supreme court has given any particular meaning to the term. The ordinary meaning of the term is that of "the written will of the legislature rendered authentic by certain prescribed forms and solemnities, prescribing rules of action or civil conduct with respect to persons, things, or both; * * *." 59 C. J. 521.

A statute or law may be general or it may be private, local or special—but it is none the less a statute. This concept is consistent with our whole scheme of statutory construction. Private, local or special laws must be construed and they are construed by application of rules of statutory construction. This concept is consistent with sec. 35.18, Stats., making it the duty of the revisor of statutes to prepare the volume designated "'Wisconsin Statutes,' which shall contain all the general statutes in force." The language of sec. 253.15 (4) is not with reference to "these statutes" (general statutes), but is with reference to "any other statute."

We conclude that your county board has power to fix the salary of your county judge and to make that salary in lieu of fees which are referable to the special acts conferring increased jurisdiction upon the county court in so far as those fees, per diem or compensation are referable to or payable from the county treasury.

A fee, per diem or other compensation is referable to or payable from the county treasury, as that term is used in this opinion, if the county treasury may ultimately or in some event be liable therefor as well as in a sense of primary and only liability.

NSB
Automobiles — Law of Road — Wisconsin Statutes — Sec. 85.08, subsec. (11), par. (a), and 85.135, Stats., are in pari materia and under said sections driver’s license and certificate are suspended (1) until such time as judgment for damages has been paid and (2) even though judgment is paid within three year period after entry, suspension is not lifted during such three year period until defendant has furnished proof of ability to respond in damages.

March 2, 1939.

Fred R. Zimmerman,
Secretary of State.

You state that it has been the policy of your department upon receipt of a transcript of judgment resulting from the negligent operation of a motor vehicle, to suspend the driving privileges and registration certificate or certificates held by the person against whom such judgment was rendered, under both secs. 85.08, subsec. (11), par. (a) and 85.135, Stats. The driving privileges of such person have been so suspended and have not been reinstated until he has been able to furnish a satisfaction of judgment, a court order permitting instalment payments on the judgment, or a certified copy of a notice of appeal and a court order staying execution during the appeal period as provided in sec. 85.135, and he has also been required to furnish proof of financial responsibility under sec. 85.08 (11) (a) in order to regain his driving privileges in full.

You state further that it has been contended that when a judgment has been satisfied in compliance with sec. 85.135, the requirements of sec. 85.08, subsec. (11) (a) cannot be properly enforced. You request the opinion of this department as to the correct procedure.

Sec. 85.08, Stats., relates to automobile drivers’ licenses. Subsec. (11), par. (a), of that section provides in part:

“Damage judgment suspends driver’s license and auto registration; relief therefrom. (a) The driver’s license and all of the registration certificates of any person who shall have been found negligent in respect to his operation of a motor vehicle in any civil action for damages and
against whom a judgment shall have been rendered on account thereof, shall be forthwith suspended by the secretary of state upon receiving a certified copy or transcript of such judgment from the court in which the same was rendered showing such judgment or judgments to have been entered, and same shall remain so suspended and shall not be renewed, nor shall any motor vehicle be thereafter registered in his name for a period of three years after the entry of said judgment unless said person gives proof of his ability to respond in damages as required in subsection (10) of this section, for future accidents. No such judgment shall be stayed insofar as it operates to cause a suspension of license or registration certificates unless proof of ability to respond in damages for any future accidents is made as provided in subsection (10) of this section. * * * If after such proof has been given, any other such judgment shall be recovered against such person for an accident occurring before such proof was given but after this section shall take effect, such license or licenses and certificate or certificates shall again be and remain suspended."

Sec. 85.135, subsec. (1), Stats., provides:

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

Since each of the above sections prescribes the legal consequences of the filing of a judgment for damages resulting from the negligent operation of an automobile, they are in pari materia for purposes of construction.

In State ex rel. Plowman v. Lear, 176 Wis. 406, at 409, 186 N. W. 1014, the court held:

"* * * But statutes in pari materia must be construed together, and recourse must also be had to the object of the legislature and the rights obviously sought to be safeguarded."

Sec. 85.135 is the more recent of the two statutes, having been enacted by ch. 489, Laws 1935. Prior to that time the
extent of denial of driving privileges incident to the filing of a damage judgment for negligent operation of an automobile was prescribed solely by sec. 85.08 (11) (a). By the terms of the latter section, the duration of the suspension of driving privileges is limited to three years. That section effectively prohibits such a person from driving during that time unless proof is furnished of ability to respond in damages as to future accidents within the period of suspension, since it requires the suspension of the driver's license. Upon the expiration of the three year period, however, the driver's license, certificate of registration, and full driving privileges would be restored even though there had been no proof of financial responsibility and even though the initial judgment had not been satisfied.

It appears, therefore, that the object of the legislature in enacting the provisions of sec. 85.135 was to impose a further restriction upon a person who has been found negligent in the operation of an automobile by prohibiting such person from driving at any time until the initial judgment is satisfied under the terms of that section. Under this interpretation there can be no conflict between sec. 85.08, (11) (a) and sec. 85.135 (1), the purpose of the latter section being to supplement the earlier statute by barring such a person from driving after the expiration of the period of suspension prescribed by sec. 85.08 (11) (a) if the initial judgment then remains unsatisfied.

Such a construction is in accord with the rule laid down by the Wisconsin court in the Lear case (supra), in regard to statutory provisions of this nature since each section is given its intended effect and the two are construed together.

You are therefore advised that the policy which has been followed by your department is correct under the provisions of these two statutes, and that the satisfaction of a judgment under sec. 85.135 does not bar the enforcement of sec. 85.08 (11) (a), which requires proof of financial responsibility as a condition precedent to the renewal of a driver's license and registration certificates within three years from the date of entry thereof.

NSB
Agriculture — Marketing — Peddlers — Fact that person has license to peddle under ch. 129, Stats., does not authorize him to become milk dealer in regulated milk market without obtaining license under sec. 100.03, Stats.

March 3, 1939.

DONALD E. SCHNABEL,
District Attorney,
Merrill, Wisconsin.

You state that a World War veteran who has a veterans' peddlers' license under secs. 129.01 to 129.07, Wisconsin statutes, wishes to start a milk route in the city of Merrill and inquires as to whether or not another license is necessary and whether or not the code now in existence would have to be adhered to in regard to prices.

The license issued under secs. 129.01 to 129.07 gives to the veteran the right to engage in the business of a trucker, hawker, or peddler. In the case of DeWitt v. State, 155 Wis. 249, 251, 144 N. W. 253, the court defined peddling as follows:

"* * * The essential thing is 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. While doing that he is a peddler though he may, at the same time, have a business domicile to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler."

In the case of National Baking Co. v. Zabel, 227 Wis. 93, 97, the court, in referring to the DeWitt case, said:

"* * * The definition there suggested contemplates one engaged in the business of peddling which must include, in the absence of more specific legislative delimitation, one who speculates on the possibility of acquiring customers by thus going from house to house. As already intimated, the usual and ordinary acceptance of the term 'business of peddling' carries the idea of one relying on present solicitation of chance patrons for purchases of uncertain quantities and making concurring deliveries, as distinguished from one
dealing with regular customers whose regular purchases are so nearly fixed as to be comparatively certain."

In view of the above there is a question whether a man who delivers milk to regular customers, whose purchases are so nearly fixed as to be comparatively certain, would come under the provisions of secs. 129.01 to 129.07, Wisconsin statutes. It is my opinion that he would not.

I am informed that the city of Merrill and a certain area adjacent thereto is a "regulated milk market" as defined in par. (c), subsec. (3), sec. 100.03, Wisconsin Stats. Par. (f) of that same subsection defines a dealer:

"'Dealer' means any person buying for resale or receiving, handling or selling, either personally or through an agent or as agent of another, either at wholesale or retail, regulated milk in a regulated milk market."

Subsec. (4), par (a), sec. 100.03 provides:

"No person shall engage in business as a dealer without a license therefor under this section, except a producer distributing milk only and not to exceed ten quarts daily, and except that a dealer not bottling milk or cream in any fluid form shall not be required to be licensed for the operation of a grocery or delicatessen store, meat market, bakery, confectionery store or restaurant."

Subsec. (5), par. (a), sec. 100.03 authorizes the department of agriculture and markets to prescribe such terms and conditions for the purchasing, receiving, handling or selling of regulated milk in any such market as it shall find necessary to eliminate unfair methods of competition or unfair trade practices, which terms and conditions may include schedules of prices for producers, dealers and consumers, or either. The license required by sec. 100.03 (4) (a) is a license to be a milk dealer in a regulated milk market. The object of this license is to give the state control over those who engage in the business of a milk dealer in a regulated market. The license required by sections 129.01 to 129.07 has no such limitation and the person who secures a peddlers' license under secs. 129.01 to 129.07 can peddle any-
where in the state. It is my opinion that a peddlers' license under ch. 129 will not authorize the holder thereof to operate as a milk dealer in a regulated milk market without securing the license required by subsection (4), par. (a), sec. 100.03.

If the party in question wishes to sell milk in the city of Merrill, he will be subject to the milk control law, sec. 100.03, Wisconsin Stats. If he fails to comply with the code or regulations prescribed by the department of agriculture and markets for the Merrill regulated milk market he will be subject to the penalties prescribed by sec. 100.26 (4), Wisconsin Stats.

RMO

Automobiles — Taxation — Motor Vehicle Fuel Tax — Refunds — Words and Phrases — Sworn statement for tax refund under sec. 78.14, subsec. (2), Stats., deposited in post office on ninetieth day and received by state treasurer following day is not "filed" with state treasurer within ninety-day period and is therefore not in compliance with statute.

March 4, 1939.

John M. Smith,

State Treasurer.

You state that it appears from an invoice that X purchased a quantity of gasoline on June 28, 1938, upon which he paid a motor fuel tax as required by sec. 78.02, Stats. You state also that a claim for a tax refund upon this purchase was received in your department on September 27, 1938.

Your question is:

"If proof is made that this claim, in a securely sealed envelope with postage prepaid, addressed to the state treasurer, was deposited in the United States post office on September 26, does it come within the ninety days provided by the statute?"
Sec. 78.14, subsec. (2), Stats., provides in part:

"Any person who uses motor fuel, upon which has been paid the tax required to be paid under this chapter, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes, or who shall purchase or use any motor fuel for cleaning or dyeing or for any commercial use or purpose other than operating a motor vehicle upon the public highways of this state, shall be reimbursed and repaid the amount of the tax so paid upon filing a sworn claim with the state treasurer upon forms prescribed and furnished by him, provided, however, that such claim be filed within ninety days after the purchase of the motor fuel, or the claim will not be allowed. * * *"

A general rule as to the computation of time was followed in Brown v. Oneida Knitting Mills, 226 Wis. 662 at 666, 277 N. W. 653, where the court quoted from Siebert v. Dudenhoefer, 178 Wis. 191, 194:

"The rule is well established on an issue of limitation where the time is to be computed from a certain date, that in the computation the day of the date is to be excluded, and where the computation is from a certain event the date of that event must be included."

However, sec. 370.01, subsec. (24), provides:

"Time, How Computed. The time within which an act is to be done as provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Sunday or a legal holiday the act may be done on the next secular day; * * *"

It has been held that this section evidently creates an exception to the general rule in cases where the time limited is expressed in days. Siebert v. Jacob Dudenhoefer Co., 178 Wis. 191 at 195, 188 N. W. 610.

The application of this statutory rule to your situation results in excluding June 28, the day of the purchase, and including September 26, that being the ninetieth day thereafter. Since September 26, 1938 fell on a Monday and since
that day was not a holiday, the exception clause of sec. 370.01, subsec. (24) has no application. Hence the ninety-day period prescribed by sec. 78.14, subsec. (2), expired at midnight of September 26, 1938.

In order to receive a tax refund under the provisions of sec. 78.14, subsec. (2), it is necessary that a proper claim therefor be "filed within ninety days after the purchase of the motor fuel."

In discussing the meaning of the word "filed" the Wisconsin court said in Bergeron v. Hobbs, 96 Wis. 641 at 643, 71 N. W. 1056:

"* * * A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file."

It has also been held that under a statute providing for an affidavit regarding candidacy for office at a primary election, and requiring it to be "filed" at least forty days before the date of the election, an affidavit which was mailed on the last day for filing, but which did not reach the state auditor's office until the next day, was not "filed" within the required forty days and hence was ineffective. State v. Erickson, 152 Minn. 349, 188 N. W. 736. See also Pendrey v. Brennan, 31 Idaho 54, 169 Pac. 174; In re State ex rel. Attorney General, 185 Ala. 347, 64 So. 310.

Under the generally accepted meaning of the term "filed", sec. 78.14, subsec. (2), must be construed as requiring that a claim for refund be actually received and held for record in the office of the treasury department within the ninety-day period.

In order for X to become entitled to a tax refund under sec. 78.14, subsec. (2), therefore, it was necessary that his claim reach the office of the state treasurer on or before September 26, 1938. Depositing the claim in a United States post office on that date was not the equivalent of actual receipt by the state treasurer since, in this instance, the post office department was the agent of X. See In re State ex rel. Attorney General, supra. Hence the filing requirement of sec. 78.14, subsec. (2), was not satisfied within the prescribed period.
You are advised, therefore, that in the situation which you describe X is not entitled to a tax refund under the provisions of sec. 78.14, subsec. (2), even though he prove the facts which you enumerate.

NSB

Taxation — Exemption — Sec. 70.11, subsec. (15), Stats., is applicable to Minnesota church organization or corporation owning orphanage property in Wisconsin and conducting orphanage institution upon said property. XX Op. Atty. Gen. 685 adhered to.

March 7, 1939.

James H. Larson,
District Attorney,
Shawano, Wisconsin.

You call our attention to an opinion of this department reported in XX Op. Atty. Gen. 685, the first part of which is to the effect that all real and personal property of an orphanage such as the Homme Orphan Home in Wittenberg, Wisconsin, is exempt from taxation under the provisions of sec. 70.11, subsec. (15), Stats.

You state that the Homme Orphan Home, which is owned by the United Norwegian Lutheran Church of America, a Minnesota corporation, has subsequently purchased additional property. Since questions have again arisen in regard to the tax exemption of an orphanage which is so owned, you ask for a reconsideration of the problem by this department.

We have reexamined the opinion in question and the problem presented. The statute is not free from ambiguity. We appreciate that it may be urged that the statute is applicable only to property owned by a Wisconsin orphanage corporation or association; that when the property is owned by a nonresident church corporation, rather than by the orphanage as such, section 70.11 (4) governs rather than sec-
tion 70.11 (15). See People v. St. Mary's Roman Catholic Hospital of Centralia, 306 Ill. 174, 137 N. E. 865. The foregoing is a significant argument when it is considered that taxation exemption statutes must be strictly, rather than liberally, construed.

We think there is no doubt but that the analysis of the phrase "not exceeding one lot" in sec. 70.11 (15) in XX Op. Atty. Gen. 685 is sound and that that phrase or limitation is applicable only to the preceding antecedent, namely, "the real estate of the Home of the Friendless in the City of Milwaukee." The only remaining question can be whether sec. 70.11 (15) or sec. 70.11 (4) governs. Valid arguments can be made upon both sides of this proposition. Under the circumstances, we feel that we must adhere to the prior ruling of this office. The language of the court in Union F. H. S. Dist. v. Union F. H. S. Dist., 216 Wis. 102, 106, 256 N. W. 788 (1934), cited with approval in In re Kootz' Will, decided June 21, 1938, 228 Wis. 306, 280 N. W. 672, is peculiarly applicable and must govern our ruling at the present time.

"* * * 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 than as expressed in the attorney general's opinion.

The legislature is in session and if the prior opinion is not in accord with legislative will or intent, the legislature may very easily put the matter at rest by legislation with respect thereto.

NSB
Legislature — University — Requirement in subsec. (2), sec. 36.16, Stats., that recommendations for remission of nonresident tuition be submitted not later than August 1 preceding beginning of school year and not later than December 1 for nonresidents entering university at beginning of second semester is mandatory. Newly elected legislator can make no valid appointment under provisions of subsec. (2), sec. 36.16, Stats., for any semester prior to next ensuing fall semester.

M. E. McCaffrey, Secretary,

Regents of the University of Wisconsin.

You invite attention to subsec. (2), sec. 36.16, Stats., and ask the following questions: (1) Are the dates August 1 and December 1 mandatory or directory? (2) Can an appointment by a newly elected legislator made after January 1 be recognized as valid whether or not an appointment has been made by nomination from that district?

The requirement in subsec. (2) of sec. 36.16, Stats., that recommendations for the remission of nonresident tuition be submitted not later than August 1 preceding the beginning of the school year and not later than December 1 for nonresidents entering the university at the beginning of the second semester, is mandatory.

A newly elected legislator can make no valid appointment under the provisions of subsec. (2) of sec. 36.16, Stats., for any semester prior to the next ensuing fall semester.

Subsec. (2), sec. 36.16, Stats., provides:

"In addition to the number of remissions of nonresident tuition authorized under subsection (1), each state senator and each assemblyman may recommend for attendance at the university a nonresident whose scholastic qualifications entitle him to attend the university and whose nonresident tuition for the school year for which recommended shall be remitted by the regents. Not more than one such remission shall be made for any one school year pursuant to the recommendation of any one member and each nonresident whose tuition shall have been remitted under the provisions of this subsection shall be entitled to continue in attendance
at the university for the period for which recommended if such nonresident continues to meet the university's general standards for continuance therein as a student. Such recommendations shall be submitted annually to the regents not later than August first preceding the beginning of the school year in such manner as the regents may designate, except that for nonresidents entering the university at the beginning of the second semester, such recommendations shall be submitted not later than December first preceding the beginning of such second semester."

Prior to the amendment by ch. 383, Laws 1937, this subsection read as follows:

"The maximum number of remissions of nonresident tuition under subsection (1) shall include those for which recommendations may be made under this subsection. Each state senator and each assemblyman may recommend for attendance at the university a nonresident whose scholastic qualifications entitle him to attend the university and whose nonresident tuition for the school year for which recommended shall be remitted by the regents; but not more than one such remission shall be made for any one school year pursuant to the recommendation of any one member. Such recommendations shall be submitted annually to the regents in such manner and at such time as the regents may designate."

Ch. 383, Laws 1937, granted to the legislators the privilege of recommending nonresident students for remission of nonresident tuition without regard to the limitation contained in subsec. (1), of sec. 36.16, which authorized the remission of nonresident fees to not more than eight per cent of the number of nonresident students registered in the preceding year. While under subsec. (2) of sec. 36.16, Stats. 1935, the regents had authority to determine the time when such designation should be made, ch. 383, Laws 1937, expressly required that the submissions should be made not later than August 1 preceding the beginning of the school year and not later than December 1, preceding the beginning of the second semester where a nonresident enters the university at that time. The legislature took the power of determining the time of the recommendations from the regents and definitely fixed that time by law.
Two cardinal rules governing the construction of statutes are: "* * * Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction. Gilbert v. Dutruit, 91 Wis. 661, 65 N. W. 511" (Julius v. Druckrey, 214 Wis. 643, 649), and "* * * The dominant rule in the construction of statutes is to discover and give effect to the legislative purpose. State ex rel. Wis. Allied Truck Owners' Assn. v. Public Service Comm. 207 Wis. 664, 242 N. W. 668" (McCarthy v. Steinkellner, 228 Wis. 605, 615). It is difficult to imagine how the legislature could have expressed itself more definitely than it did regarding the time of submission of recommendation. When the legislature said that the recommendations "shall be submitted * * * not later than" August 1 and December 1, it meant precisely what it said, and there can be no justification for thwarting the legislative intent by a strained construction or misinterpretation.

It is true that statutes are sometimes construed as directory rather than mandatory, but in In re Incorporation of Village of Twin Lakes, 226 Wis. 505, 512, the court said:

"* * * Every statute fixing a time at which an act shall be done cannot be held directory merely because it may be thought by the court that the act might just as well be done later."

The conditions under which statutes may be held directory are set forth in Appleton v. Outagamie County, 197 Wis. 4, 9-10:

"* * * 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."
When the legislature gave to the legislators a privilege and provided that the privilege must be exercised not later than a specified date, it seems obvious that it intended that if the privilege was not exercised by the specified time, it should not be exercised at all. The rule governing the situation is set forth in Schaut v. Joint School District, 191 Wis. 104, 107-108, where the court said:

"* * * It is a fundamental rule that where statutes confer a new right, privilege, or immunity and prescribe a mode for its acquisition, preservation, enforcement, or enjoyment, such statutes are mandatory and must be strictly complied with, and where the statute provides the manner and form in which the right to be enjoyed may be acquired, such provisions are likewise mandatory, and if not complied with no right exists. 2 Lewis' Sutherland, Stat. Constr. (2d ed.) sec. 632 and cases cited; Wilcox v. Porth, 154 Wis. 422, 143 N. W. 165."

Since the dates of August 1 and December 1 are mandatory, obviously no appointment can be made after those dates by either the former legislator or the newly elected legislator.

ML
Appropriations and Expenditures — Bridges and Highways — Street Improvements — Term “improvement” as used in sec. 20.49, subsec. (8), Stats., relating to allotment of gas tax, motor vehicle registration fees and operators’ license fees, includes grading, surfacing and straightening of curves on highways which are open and used for travel, but does not include purchase of right of way or any construction work on highways which have not been opened and used for travel.

March 9, 1939.

EARL F. KILEEN,

District Attorney,

Wautoma, Wisconsin.

You have inquired whether the word “improvement” as used in sec. 20.49, subsec. (8), Stats., includes the following:

1. Surfacing highways with gravel or clay.
2. Surfacing highways with concrete.
3. Surfacing highways with oil.
4. Surfacing highways with black top (asphalt).
5. Buying right of way for the purpose of laying out highways.
6. Removing trees and blowing stumps on right of way purchased for highway purposes.
7. Constructing a portion of a highway for the purpose of lengthening curves.
8. Grading highways.
9. Constructing newly laid out highways.”

Sec. 20.49 (8), relating to allotments of motor vehicle registration fees, operators’ license fees and motor vehicle fuel taxes, reads in part, as follows:

“On March 1, 1934, and annually thereafter, to the towns, villages and cities of the state, for the improvement of and removal of snow on public roads and streets within their respective limits which are open and used for travel, and which are not portions of the state or county trunk highway systems, and which are not direct connections through cities between state trunk highways, the following sums:

* * * *.”
In XXII Op. Atty. Gen. 538, 539, in construing the word "improvement" as used in sec. 20.49 (8), this office said:

"In 41 C. J. 262 it is stated that the word 'improvement' is a relative term, and its meaning must be ascertained from the context and the subject matter of the instrument in which it is used. The word is defined in Webster's New International Dictionary as, 'A valuable addition, or betterment,' and in Funk & Wagnalls New Standard Dictionary as, 'A valuable or useful addition to or modification of something.' It has been held that the word 'local improvement' includes street sprinkling. Roswell v. Bateman, (N. M.) 146 Pac. 950, 954. On the other hand it has been held that the word 'local improvement' does not include street sprinkling. Owensboro v. Sweeney, (Ky.) 111 S. W. 364, 366-367. It has been held that authority to 'improve' existing streets means to better the same and does not include such improvements as are necessary merely to keep the streets in condition for travel. Birmingham v. Starr, (Ala.) 20 So. 424, 427; that 'improvement' of an existing boulevard means bettering it as grading, curbing, macadamizing, etc. Wolff Chemical Co. v. Philadelphia, (Pa.) 66 Atl. 344, 347; that 'improving' a highway has reference to bettering the same State v. Babcock, (Minn.) 242 N. W. 474, 476. The general tenor of the decisions is that 'improvement' means a betterment amounting to an addition to the street or highway."

Under the above authorities and on principle there would appear to be no great difficulty in determining that the surfacing of highways, regardless of the materials employed, would fall within the classification of "improvement" as the term is commonly used and understood. This takes care of the first four situations raised in your inquiry, subject only to the limitation hereafter discussed, that such surfacing must be confined to highways which are open and used for travel.

On the other hand this department ruled in XXI Op. Atty. Gen. 801, that town boards have no authority to use funds derived under sec. 20.49 (8) to build new roads, since the statute limits the use of the appropriation to the improvement of roads that "are open and used for travel." This covers the 5th, 6th and 9th situations referred to in your request, since none of these operations pertains to roads that "are open and used for travel", but, on the contrary, contemplate new construction.
The 7th situation perhaps presents the closest question. However, if the work consists merely of lengthening or straightening out the curves in an existing highway open and used for travel, it should satisfy the requirements of the statute, since relocations of that character are not considered to constitute the laying out of new highways, and are governed by entirely different statutory procedure than that which applies to opening new roads.

This leaves for consideration the 8th situation, consisting of highway grading. Grading on highways open and used for travel appears to fall clearly within the term "improvement", as used in sec. 20.49 (8). Note, Wolff Chemical Co. v. Philadelphia, supra. Another case to the same effect is State ex rel. City of Breckenridge v. Thompson, 322 Mo. 323, 15 S. W. (2) 346, 347.

WHR

Appropriations and Expenditures — Public Officers — District Attorney — Neither sec. 59.47, subsec. (3), Stats., nor other general or special statutes relating to duties of district attorney make it his duty to obtain options, examine titles, draft contracts and conveyances nor prepare bond issues and perform other like services for building committee of county board in connection with construction of new county buildings. Private counsel may be employed by county for such purpose.

March 23, 1939.

FULTON H. LEBERMAN,
District Attorney,
Sheboygan, Wisconsin.

You have inquired whether the building committee of the county board may engage and pay an attorney for the legal work necessary in the performance of the committee's duties in connection with the erection of a new county hospital for
the insane. The legal work consists of obtaining options on necessary real estate, examination of titles, preparation of contracts, conveyances, and a bond issue, negotiating for a government grant, and the like.

We assume from the correspondence submitted to us that there is no disagreement between the building committee and the county board on the question, as the committee has been given very broad powers by the board in making any contracts necessary to the discharge of its functions in constructing the building, and you have rendered an opinion to the effect that the county board represented by the building committee acted within its rights in retaining an attorney for the legal work incident to the construction of the building. Hence, for purposes of clarification, it may be better to consider your question from the standpoint of the powers of the county board rather than on the basis of the powers of the building committee of the board.

In the view which you have taken on the matter, the board or committee has the right to engage an attorney, unless it is the duty of the district attorney to render such service. This is undoubtedly the correct approach to the question as was recognized in XXVII Op. Atty. Gen. 162, to which you have referred us. In that opinion we ruled that it was within the power of the county to employ an attorney to resist the application of a railroad before the interstate commerce commission for permission to abandon a branch line running through the county. This opinion was based in part, at least, upon the fact that there is no statutory duty on the part of the district attorney to appear for the county in such a proceeding. Frederick v. Douglas County, 96 Wis. 411, and The Town of Eagle River v. Oneida County, 86 Wis. 266, were mentioned in the above opinion as laying down the rule that the right of the county to employ special counsel in particular types of litigation or proceedings concerning the county depended upon whether or not the district attorney has the statutory duty to represent the county in such matters.

In XXV Op. Atty. Gen. 549-573, this office rendered an exhaustive opinion as to the duties of the district attorney, under both general and special statutes. At page 559, in discussing sec. 59.47, subsec. (3), Stats., which among other
things provides that the district attorney shall give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested, or relating to the discharge of the official duties of such board or officers, we quoted from III Op. Atty. Gen. 684, 685, to the effect that it is the duty of the district attorney "to attend upon the county board or any committee thereof when requested to do so and advise them or render any other professional service required by them concerning any matter within the scope of their official duties."

However, an examination of the opinion quoted from will disclose that it does not cover facts similar to those involved in your question. It related to a situation where the district attorney had rendered professional services to a committee of the county board, and it was ruled that he was not entitled to compensation therefor in addition to his regular salary. In the instant case, the services are by a former district attorney. He performed some services for the committee while he was still district attorney, and as to such services he has neither asked for nor expects compensation in addition to his salary. The situation as to such past services is fully covered by the following language from III Op. Atty. Gen. 684, 685:

"Even though it were not a part of the official duties of the district attorney to render such services, it has been said, both in the opinions of this department and by the supreme court, that, while the county board could not require the district attorney to render such services, if he does render them, the county board can not allow him compensation therefor."

Our inquiry here is directed rather to services performed as a private attorney after his term as district attorney had expired. The duty of the district attorney to "give advice" imposed by sec. 59.47 (3), means just that. The common and approved usage of the words quoted can hardly be said to include the preparation and drafting of options, contracts, conveyances, bond issues and the like. Also a careful examination of the various other general and special statutes relating to the duties of the district attorney and discussed in XXV Op. Atty. Gen. 549, discloses no duty on the
part of the district attorney to render the services about which you inquire. Under familiar rules of statutory construction the expression of certain duties to be performed by the district attorney results by implication in the exclusion of others, *expressio unius est exclusio alterius*. This general principle has often been enunciated by our supreme court. See *State ex rel. Owen v. Reisen*, 164 Wis. 123, and other cases cited in Callaghan's Wisconsin Digest under "statutes" sec. 111.

We therefore follow the reasoning contained in XXVII Op. Atty. Gen. 162, and the cases therein cited to the effect that the county board, through its appropriate committee, may employ counsel in such legal matters of the county as are not delegated to the district attorney by statute.

WHR

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*Fish and Game — Trade Regulation — Monopolies —* Conservation commission has no authority to enter into agreement with fishermen of any county whereby said fishermen will be permitted to fish for carp during closed season if they enter into agreement to hold all carp for given price and to refrain from selling except at such price or higher. Such agreement violates ch. 133, Stats.

March 28, 1939.

C. G. Chadek,

*District Attorney,*

Green Bay, Wisconsin.

You state that a representative of the Wisconsin conservation commission offered Brown county fishermen the following proposition, that if such fishermen entered into an agreement to hold all carp caught for a certain price, the commission would permit Brown county fishermen to fish for carp during the closed season. You ask whether such an agreement would violate sec. 133.01, Wisconsin statutes.

Sec. 133.01 provides in part:
"* * * Every * * * agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, * * * or which * * * agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, * * * or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade, * * *.”

There can be no doubt that the above statute prohibits agreements of the kind suggested by the commission. The only question is whether the conservation commission is given specific authority (in the nature of an exception to ch. 133, Stats.) to fix the price at which commercial fishermen may dispose of their catch or to authorize agreements between the fishermen themselves fixing such prices.

Examination of the statutes fails to reveal any provision which may be construed to give the commission that power.

Subsec. (2), sec. 29.174, Stats., reads as follows:

“It shall be the duty of the conservation commission and it shall have power and authority to establish open and close seasons, bag limits, 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 for any lake or stream or part thereof.”

By sec. 29.085, Stats., the commission is authorized to

“regulate hunting and fishing on and in all interstate boundary waters, and outlying waters specified in subsection (4) of section 29.01. Any act of the conservation commission in so regulating the hunting and fishing on and in such interstate boundary waters and outlying waters shall be valid, all other provisions of the statute notwithstanding, provided such powers shall be exercised pursuant to and in accordance with section 29.174 and subsection (7) of section 23.09.”

The above statutes, while delegating to the commission very broad powers in respect to the regulation of hunting and fishing, do not authorize the commission to indulge in
price fixing. The legislative conception of the scope of the powers involved in the regulation of hunting and fishing is illustrated in subsec. (2), sec. 29.174, which delegates authority "to establish open and close seasons, bag limits * * * rest days and other conditions governing the taking of fish or game". The purpose and policy of the legislature in enacting ch. 29 is specifically declared to be to "conserve the fish and game supply and insure to the citizens of this state continued opportunities for good fishing, hunting and trapping". Subsec. (1), sec. 29.174. The authority delegated in subsec. (2) of sec. 29.174 shall by its terms be exercised "in accordance with the public policy declared in subsection (1)", and sec. 29.085 provides that the powers therein set forth shall be exercised in accordance with sec. 29.174. While fixing the price of fish to rehabilitate the commercial fishing industry may be a measure of some merit, it is not designed to further the policy declared in sec. 29.174.

The merits of price fixing by the government is a highly controversial issue and price fixing in general is condemned by sec. 133.01, Stats. Unless, therefore, the intent of the legislature to authorize the commission to establish minimum prices in the fishing industry is clearly indicated, it must be held that the agreement in question would be invalid.

You are advised that the commission has no authority either to require Brown county fishermen to enter into such an agreement or to authorize them to do so.

NSB
Courts — Clerk of Circuit Court — Taxation — Income Taxes — Wisconsin Statutes — Clerk of court paid salary must collect fees for filing delinquent income tax warrant from taxpayer at time such warrant is satisfied or released.

Sec. 71.36, subsec. (7), Stats., created by ch. 1, Laws Special Session 1937, applies only where clerk is not paid on salary basis.

In so far as secs. 59.43 and 71.36 (2) conflict, latter controls.

March 28, 1939.

Connor Hansen,
District Attorney,
Eau Claire, Wisconsin.

You state:

"The local assessor of incomes claims that subsequent legislation gives him the authority to pay filing fees on delinquent income tax warrants only to clerks who are on a fee basis and that in those instances where the clerk is paid by salary, he is to collect his fee from the judgment debtor.

"Inasmuch as our clerk of circuit court is on a salary basis, the assessor of incomes claims that the clerk is to collect fees for the county from the judgment debtor. It appears that only a small percentage of the warrants on record are satisfied on the record and therefore the clerk is responsible to the county for the fees involved, which in the course of two years, will be appreciable."

You then ask if the clerk of court for your county may require the assessor of incomes to pay filing fees on delinquent income tax warrants at the time they are filed, or whether he may be made responsible for such fees.

Sec. 59.43, as far as material here, provides:

"* * * every such clerk may require his fees to be paid in advance for any services except such as are to be performed in the progress of a trial in court."
Delinquent income tax warrants are filed pursuant to sec. 71.36, Stats. Subsec. (2) thereof, as amended by ch. 1, Laws Special Session 1937, effective October 7, 1937, provides:

"The sheriff shall within five days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, unless the taxpayer shall make satisfactory arrangements for the payment thereof with the tax commission, in which case, the sheriff shall, at the direction of the commission, return such warrant to it. The clerk shall docket the warrant as required by section 270.745, and thereupon the amount of such warrant, together with interest as provided by paragraph (f) of subsection (3) of section 71.10, shall become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The clerk of circuit court shall accept, file and docket such warrant without prepayment of any fee, but the fees provided by subsection (42) of section 59.42 shall be added to the amount of such warrant and collected from the taxpayer when satisfaction or release is presented for entry; provided, that in counties wherein the clerk is compensated otherwise than by salary such fees may be paid by the state in the manner provided by subsection (7) of section 71.36 and added to the amount of the warrant and collected as herein provided. The sheriff shall be entitled to the same fees for executing upon said warrant as upon an execution against property issued out of a court of record, to be collected in the same manner. Upon the sale of any real estate the sheriff shall execute a deed of the same, and the taxpayer shall have the right to redeem the said real estate as from a sale under an execution against property upon a judgment of a court of record."

It will be noted that sec. 59.43, Stats., provides that fees are to be paid in advance for all services, performed by a clerk of court, whereas sec. 71.36 (2), referring specifically to delinquent income tax warrants, provides that all fees allowed for filing such warrants are to be collected from the taxpayer if the clerk is paid on a salary basis. It is only when he is paid on a fee basis that sec. 71.36 (7) is applicable.

It seems clear that the legislature by the amendment to sec. 71.36 (2), Stats., intended to require clerks of courts paid on a salary basis to file delinquent income tax war-
rant without cost to the state, and that all fees due the clerk for filing such warrants are to be collected from the taxpayer when a particular warrant is released or satisfied. In case of a conflict between this section and sec. 59.43, the former must control, since it is well settled that where two statutes conflict, the later supersedes the earlier in so far as full effect cannot be given to both. *State ex rel. M. A. Hanna Dock Corp. v. Willcuts*, 143 Wis. 449, 453, *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 29, *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 601.

Furthermore, the special provisions of a statute dealing with a particular subject prevails over general provisions in the same or other statute relating to the same subject, in case there is a conflict. *Kollock v. Dodge*, 105 Wis. 187, 195; *Wisconsin Gas & Elec. Co. v. Ft. Atkinson*, 193 Wis. 232, 241; *Fox v. Milwaukee Mechanics' Ins. Co.*, 210 Wis. 213, 216.

Applying the above rules of statutory construction to secs. 59.43 and 71.36 (2), as amended, the latter controls in so far as there is a conflict.

You are therefore advised that the clerk of court of your county, being paid on a salary basis, must collect all fees allowed him by sec. 59.42 (42), Stats., created by ch. 1, Laws Special Session 1937, from the taxpayer at the time a delinquent income tax warrant is satisfied or released.

The statute provides how fees for filing delinquent income tax warrants are collected. This method of collection is exclusive under the familiar rule of *expressio unius est exclusio alterius*. Under the present statute the assessor of incomes may not be required to be responsible for the fees collected pursuant to sec. 71.36 (2), Stats. That may be done only by proper legislative action.

If your clerk is not paid on a salary basis, then sec. 71.36 (7), Stats., created by ch. 1, Laws Special Session 1937, is applicable.

FAR
Courts — Costs and Fees — Words and Phrases — Folio

— Punctuation marks, such as commas, colons, semicolons and periods, are not counted as words or figures under sec. 271.17, Stats.

Each digit of figure is counted as separate word.

THOMAS E. McDOUGAL,

District Attorney,

Antigo, Wisconsin.

You refer to sec. 271.17 (1), Stats., and in connection therewith, say:

"I would like to know if a comma, colon, semicolon, and period could be charged as a figure; whether or not compound words could be segregated and each part of same charged as a separate word. For instance, in writing the year '1938' should that be considered five or six words?"

Sec. 272.17, subsec. (1), Stats., provides:

"The term 'folio', when used as a measure for computing fees for compensation, shall be construed to mean one hundred words, counting every figure necessarily used as a word; and any portion of a folio, when in the whole draft or paper there shall not be a complete folio and when there shall be any excess over the last folio, shall be computed as a folio."

You first wish to know whether a comma, colon, semicolon or period may be considered a figure or word when computing a folio under the above quoted section.

In the construction of statutes all words and phrases shall be construed and understood according to the common and approved usage of the language. Sec. 370.01 (1), Stats. Wadhams Oil Co. v. State, 210 Wis. 448. This rule would apply here since there is nothing in sec. 271.17 (1), Stats., indicating that the terms used therein shall be given a technical or restricted use.

Since your question refers specifically to commas, colons, semicolons and periods, it will be necessary to consider a
definition of these terms. A comma is defined as a point used to indicate the smallest interruption in continuity of thought, the making of which contributes to clearness. The semicolon makes such division a little more pronounced. 11 C. J. 1236-1237. A period is defined as a point that marks the end of a complete sentence or of an abbreviated word. Webster's International Dictionary. See 48 C. J. 812. A colon is a character used to separate two parts of a sentence complete in themselves and is ordinarily used after an introductory word to show anticipation, such as "Dear Sir:"
Webster's International Dictionary.

From the foregoing it is clear that the characters referred to in your letter are used only for purposes of punctuation. It is generally stated that all marks of punctuation are used to more clearly point out the divisions in sentences or parts of sentences used in a particular writing. 51 C. J. 91. In speaking of punctuation marks the federal court of appeals said in Holmes v. Phenix Insurance Co., 98 Fed. 240, 241-242, that punctuation is no part of the English language but is only an arbitrary method of separating or pointing off sentences or parts of sentences.

Since punctuation marks are not ordinarily considered a part of the English language such as Arabic numerals or words, it can hardly be said that the legislature intended that punctuation marks such as commas, colons, semicolons and periods should be counted as either words or figures under sec. 271.17 (1), Stats. Had the legislature intended to include punctuation marks when computing a folio, it could have used the words "every figure or character necessarily used as a word".

A similar conclusion was reached by the New York supreme court in the case of In Re Murtaugh, (1911) 128 N. Y. Supp. 850, 71 Misc. Rep. 513. In that case an application had been made to the New York supreme court for the approval and allowance of a stenographer's bill for taking testimony in an insanity hearing. The court refused to count punctuation marks as figures or words and, in doing so, said at pp. 851-852:

"(1) Section 21 of the general construction law provides that 'a folio is 100 words, counting as a word each figure
necessarily used.' The word 'figure' does not include punctuation marks, and is not so intended in this section. If that had been the intention of the Legislature, it would have used the words 'each figure and character.' Bouvier's Law Dictionary defines the word 'figures' as 'numerals,' and numerals are letters or characters representing number. In 'Words and Phrases,' the title 'Figures' contains no reference to punctuation marks, which are treated under another title. Punctuation, in writing and printing, is a pointing off or separation of one part from another by arbitrary marks; a division of a composition into sentences. So says the Century Dictionary. When a stenographer is taking testimony, he does not make a note of punctuation marks, for the reason that the speaker utters no sound to indicate one. He does of figures, and there is the reason of the statutory discrimination. In transcribing his notes, the stenographer may arbitrarily point off as many commas as he pleases; but that is not transcribing testimony. This state has been liberal to stenographers in permitting them to count each figure as a word. * * * In view of the liberality of this state, as well as of the intention of the Legislature, punctuation marks should not be included."

The reasoning of this case appears to be applicable to sec. 271.17, Stats., since the language used in that statute is almost identical to that construed by the New York supreme court.

We therefore hold that punctuation marks such as commas, colons, semicolons and periods shall not be counted as words or figures as those terms are used in sec. 271.17, Stats.

You ask also whether each digit of a figure, e. g., 1938, would be considered one unit or a number of separate figures.

This department has held that each digit of a figure must be regarded as a single word. VI Op. Atty. Gen. 423. For example, five digits would be counted as five separate words. Since the year "1938" is composed of four digits, it would be counted as four words, rather than one. FAR
Corporations — Securities Law — Sale of certificates evidencing interest in income or investment "plan" whereby investor makes monthly payments to issuing company, which company retains part of such payments and uses balance to buy stock of savings and loan or building and loan associations for investor and to pay premiums on life insurance policy issued to investor to assure completion of "plan" to maturity, company retaining possession of loan association stock and insurance policy and handling disbursement of funds resulting therefrom and certificate specifying definite amount due at maturity payable in one sum or as annuity at option of investor, constitutes sale of security as defined in sec. 189.02, subsec. (7), Stats., so that firms selling certificates are "dealers" within sec. 189.02 (2), salesmen are "agents" within sec. 189.02 (1) and require license as such under secs. 189.12 and 189.13 and certificates require registration prior to such sale.

March 28, 1939.

PUBLIC SERVICE COMMISSION.

You have requested an opinion as to whether certain firms and persons engaged in the practices outlined in your letter are "dealers" or "agents" as defined in section 189.02, Stats., so that such firms or persons would be required to obtain licenses under the provisions of secs. 189.12 and 189.13, Stats. From your letter and from files submitted in connection therewith we understand the facts surrounding the activities of these firms and persons to be as follows:

Certain private organizations in corporate form or otherwise are offering within the state of Wisconsin certain investment or income "plans". These organizations, which will be designated herein as the "selling agents", are engaged through salesmen in soliciting the public on behalf of certain corporations designated as "service companies", to purchase the said investment or income "plans". The mode of operation of each of the various "selling agents" and conjunctural "service companies" involved is substantially alike. In the sale of a "plan" to an investor by one of the "selling agents" on behalf of the particular "service com-
pany" whose plan the "selling agent" is selling, provision is made for the payment of specified monthly payments by the investor to the "service company", which company issues to the investor a certificate evidencing participation and interest in the "plan". The "plan" contemplates the investment of a part of the monthly payments made to the "service companies" in stock or "savings share accounts" or savings and loan associations or building and loan associations organized under federal or state law. The investment in the said loan associations is made in the name of the investor, the "service company" making the required payments thereon. The "plan" further provides for the issuance of a life insurance policy on the life of the investor, which policy is issued in such form and in such amount as to presumably assure the completion of the "plan" to maturity in the event of the prior death of the investor. Payment of premiums on the insurance policy is also made by the "service company". The salesmen of the "selling agents", which salesmen are licensed insurance agents, receive a commission from the life insurance company issuing the policy and also receive an additional commission for selling the "plan". The additional commission is paid by the "service company". The "service company" retains as a "service charge" a certain specified number of the first monthly payments (the first seven, eight or ten such payments, as the case may be, in the various companies) less insurance premiums paid during this period. After the payments thus retained have been paid to the "service company" by the investor, the "service company" puts the "plan" into full operation by commencing payments to the particular loan association designated and continuing payment of premiums on the life insurance policy.

In order to determine whether the "selling agents" selling these "plans" are "dealers" and whether the salesmen of the "selling agent" are "agents" as defined in 189.02 (1) and (2), Stats., it is necessary to determine whether they are engaged in the sale of securities as defined in 189.02, subsec. (7), Stats., which reads:

" '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."

An examination of the documents which comprise the contract between the investor and the "service company" reveals the following facts.

Upon the sale of a "plan" to an investor by the "selling agent" the investor signs an application. The application forms used in connection with the operation of each of the particular "service companies" to which you have directed attention are in substantially similar form. The application is addressed to the "service company" and states that the applicant is desirous of participating in the particular "plan" and agrees to make payment monthly of specified amounts to the "service company" as his "special agent". Applicant appoints the "service company" his "special agent" and authorizes and instructs the "service company" to pay for his account and on his behalf the premiums due on the insurance policy and the amounts due for the loan association shares. The "service company" is to hold the life insurance policy and the loan association certificates for safekeeping or in escrow. Mention is made of the fact that the first seven (or more as the case may be) monthly payments are to be retained by the "service company". It is also repeatedly stated that the "service company" is acting only as the "special agent" of the applicant and it is provided that the "service company" holds no title to the insurance policy or the loan association share accounts. The "service company" is to hold the life insurance policy and the loan association shares for safekeeping or in escrow. Mention is made of the fact that the first seven (or more as the case may be) monthly payments are to be retained by the "service company". It is also repeatedly stated that the "service company" is acting only as the "special agent" of the applicant and it is provided that the "service company" holds no title to the insurance policy or the loan association share accounts. The "service company" agrees to receive payments from the applicant, to give notice when such payments are due, to retain custody of the life insurance policy and the loan association certificates and to see to the payment of the amounts due on these items. Upon the application being signed and the insurance company issuing or agreeing to issue the insurance policy, the "service company" issues to the investor a certificate
evidencing the investor's interest in the particular "plan". The certificates issued by the various "service companies" whose certificates were embraced in your inquiry are substantially alike in form and tenor. On the face of each certificate is stated the number of months which are to run until maturity of the "plan" and the amount which the holder will be entitled to receive at maturity either by way of lump sum settlement or optional annuity payments. On the inner portion of the certificate is printed its detailed terms and conditions and the various modes of settlement which the holder may choose are outlined. It is stated that the issuing company is acting only as agent of the holder and the payments which the holder is to receive are limited to the amount of loan or other value on the loan association shares at any given time or the cash surrender value of the life insurance policy. The certificate contains many other provisions not necessary to be set out here. In addition to the application and certificate other forms are provided whereby the investor applies for shares in the particular loan association designated and for his life insurance policy. Documents are attached to the certificate signed by the issuing "service company" certifying that values will be provided from the specified loan association and certifying to the issuance of the life insurance policy.

From the foregoing facts as well as from a detailed examination of the particular certificates and other documents involved in the sale of these "plans" we are of the opinion that the sale of these "plans", in the instances with which your letter is concerned, constitutes the sale of securities as defined in 189.02 (7), Stats. Included in the definition of the term "security" in said subsection are "investment contracts". The certificates here in question are, on their face, investment contracts. Although a close examination of the certificates would indicate that the purchaser thereof is in many respects in the same position as though he had himself opened an account for the purchase of stock of a federal savings and loan association or other loan association and had himself taken out a life insurance policy in the required amount (in which event the "service company" would not receive the first seven, eight or ten monthly payments), yet it is clear that upon the issuance of the certificate by the
“service company” he has, in addition, something else. The certificate recites on its face the amount which the purchaser will receive at maturity. The amount of the monthly payments which the purchaser is to make, varying with the age of the purchaser, are calculated for him and constitute an obligation to the “service company” as long as the contract is in existence. Although some months must elapse before the “service company” commences to invest the investor’s funds in the loan association, yet during all of this time a contract is in force between the investor and the “service company” according to the tenor of the certificate. The insurance policy and loan association shares are not delivered to the investor but are held in escrow or in safekeeping by the “service company”. The investor makes the specified monthly payments to the “service company” and looks to the “service company” to disburse to him the funds due upon maturity of the contract.

In State v. Gopher Tire and Rubber Co., (1920) 146 Minn. 52, 177 N. W. 937, the court said, p. 938:

“* * * To lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without a license would be to aid the unscrupulous in circumventing the law. It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the scope of the statute.

“No case has been called to our attention defining the term ‘investment contract’. The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an ‘investment’ as that word is commonly used and understood. If defendant issued and sold its certificates to purchasers who paid their money justly expecting to receive an income or profit from the investment, it would seem that the statute should apply. * * *.”

This general language, illustrating as it does the necessity of determining in each instance whether an instrument is within the definition, can be applied in the present case.

The sale of these “plans” therefore constituting the sale of “securities”, the “selling agents” must be held to be “dealers” within the meaning of sec. 189.02 (2), Stats., and the salesmen thereof must be held to be “agents” within
the meaning of sec. 189.02 (1), so that such "dealers" and "agents" would be required to obtain licenses under the provisions of secs. 189.12 and 189.13. It would also appear that the certificates in question should be registered under the provisions of ch. 189, Stats., prior to their sale by the "dealers" and "agents".

RHL

Contracts — Trade Regulation — Monopolies — Contract between manufacturer and his jobber whereby jobber agrees that manufacturer's products will not be sold below certain specified maximum discounts are countenanced, authorized and encouraged by sec. 138.25, Stats., and said section creates no exception in favor of state when purchasing from said jobber.

Administrative office of state cannot, therefore, insist upon jobber giving greater maximum discount to state than is provided for in said contract when state contemplates purchasing from said jobber.

March 28, 1939.

F. X. Ritger,

Director of Purchases.

You state that a certain manufacturing company has entered into a maximum discount agreement with jobbers handling its products and that the discounts fixed in such contract are not as large as those the state has received in the past. The contract excepts from its terms sales made to the United States government. You ask whether the state may demand similar exemption. It is assumed that your inquiry is directed only to the question whether the state can, through its administrative agencies, demand such an exemption under the present law, and not whether the legislature can change the law to require manufacturers to exempt the state from the provisions of such a contract. So restricted,
your question may be restated as follows: Is such a contract valid in so far as it purports to include sales of said manufacturer's products to the state of Wisconsin?

Prior to the enactment of sec. 133.25, Wisconsin statutes, contracts fixing minimum resale prices were unlawful under the provisions of sec. 133.01, prohibiting contracts in restraint of trade and, if they affected interstate transactions, under sec. 5 of the Sherman anti-trust act. By sec. 133.25, Wis. Stats., and the Miller-Tydings amendment to the Sherman act, sec. 1, title 15 USCA, such contracts were expressly sanctioned in so far as antimonopoly laws are concerned. While the Wisconsin statute provides that every contract of such a nature shall include certain exceptions which are set forth, it does not require that sales made to the state shall be excepted. No objection can therefore be raised to the validity of the contract on the ground that it is in restraint of trade. However, if it be found that a contract fixing the price at which a jobber may sell a certain product to the state is objectionable for any other reason sec. 133.25 will not protect it, since that section merely declares that such a contract shall not be deemed in restraint of trade. The only ground upon which it might be held void is that it constitutes an attempt to stifle competition for a public contract under the rule of those cases denouncing contracts tending to restrict bidding for public contracts. See 13 C. J. 436. Analysis of the agreement in question, however, reveals that its purpose and effect is not to destroy competition between producer of like commodities, but to eliminate unwholesome and economically unsound price cutting upon a single product produced by the same manufacturer. The contract is therefore restricted to a very narrow field and the state still receives the benefit of unlimited competition between the producers of similar commodities. Furthermore, should the price fixed by the contract prove to be unreasonably high, subsec. (7), sec. 133.25 provides that the contract may be set aside. The interests of the state are consequently amply protected and in view of the legislative declaration of a policy in favor of the elimination of unreasonable price cutting, the agreement can hardly be said to be contrary to public policy even though it fails to exempt sales to the state of Wisconsin. If, then, the agreement is
valid, it follows that a manufacturer may freely enter into such a contract and the state certainly has no power to prevent him from doing so or to force him to make any exceptions therein other than those provided in sec. 133.25 Stats.

If selling below the price agreed upon is an unfair trade practice, as applied to Farmer Jones or Merchant Smith, it is difficult to see why it is not equally an unfair trade practice as applied to the state. Presumably, the state has as much purchasing power as Farmer Jones or Merchant Smith. The state is simply getting a taste of its own medicine and declared public policy of encouraging price fixing between manufacturer or producer and his jobber. If such is a sound public policy, the state cannot complain when the policy is put into effect against the state, at least until the legislature creates exceptions in favor of the state. The legislature thus far has created no exceptions in favor of the state. It must follow, therefore, that administrative officers may not create such an exception; that administrative officers may not insist upon the jobber breaching his contract with the manufacturer when dealing with the state.

NSB

Public Printing — Newspapers — Two year provision of sec. 331.20, Stats., is not applicable to other requirements set forth therein nor does fact that newspaper skipped issue within two year period, that had otherwise been continuously published for two years or more, prevent paper from being one that has been "regularly and continuously published" within meaning of statutes.

March 28, 1939.

LEE C. YOUNGMAN,
District Attorney,
Barron, Wisconsin.

You inquire whether the Rice Lake Bulletin is eligible to publish legal notices under section 331.20, Stats., under the following facts and circumstances:
The Rice Lake Bulletin is published at Rice Lake. It secured second class mailing privileges under the federal postal laws on July 12, 1937, and prior to that time had been a "free circulation sheet". This paper has been regularly and continuously published at least since July of 1937 with the exception of one week, approximately June 2d or 3d of 1937. At that time the Rice Lake Chronotype carried the following article:

"Les and Vern Lindvig, who published the Rice Lake Bulletin the past year or more, informed us that they had accepted positions with a newspaper circulation firm at Des Moines, Iowa, and were leaving for there today. The boys said for the time being Walter Erickson would be in charge of the shop.

"Lindvig Bros. stated no issue of the Bulletin would be gotten out this week, but there would be next week after the list in the subscription campaign ending last Saturday had been tabulated. A St. Paul firm that owns the machinery here is advertising for a buyer."

Despite this article, a printer in the employ of the Rice Lake Bulletin made an affidavit that an issue was printed although no copy was retained for the paper's files. This paper has recently changed ownership. In view of the foregoing, it is asked whether this paper is eligible to publish legal notices under sec. 331.20, Stats. That section reads in part:

"No publisher of any newspaper in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, advertisement, or report of any kind or description required to be published by or in pursuance to any law or by order of any court unless such newspaper has all the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges and has a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, and one thousand copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously published in such city and county for at least two years immediately before the date of such notice, advertisement, or report, * * * *"
No information was given as to the circulation of this paper or how long it has been published. For purposes of this opinion it will be assumed that this paper has been published the required length of time and has the required circulation.

Under sec. 331.20, Stats., a newspaper may receive compensation for publishing legal notices if it complies with the following requirements:

(1) Has second class mailing privileges under the postal laws.

(2) Has a bona fide paid circulation of not less than 300 subscribers for each issue.

(3) Has been published regularly and continuously for two years immediately before a legal notice is published.

(4) Appears at regular intervals of at least once a week, contains reports of happenings of recent occurrences, and is designed for the interest of the general reader.

From the facts submitted and what has been said heretofore, it appears that requirements (1), (2) and (4) have been met. In connection with requirement (1) it was suggested that the paper must have had second class mailing privileges at least two years before a legal notice was accepted for publication. Upon this point, this department said in an unpublished opinion to the district attorney of Rusk county, dated August 21, 1937:

"1. It must meet the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges.

"This requirement, according to your letter, has been met.

"2. It must have a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, and one thousand copies in cities of the first and second class.

"We understand that this requirement likewise has been met.

"3. It must have been regularly and continuously published for at least two years immediately before publishing a legal notice.

"This requirement also has been met according to your letter.

"Thus all of the statutory requirements appear to have been met, and we do not believe that the first and second
requirements above mentioned, are to be considered as a part of the third requirement. They are separate and distinct requirements, and if the legislature had intended that the second class mailing privileges and the paid circulation requirements must have been met for two years, it could have said so, and its failure to do so as to the first and second requirements, while including this time element in the third requirement, seems to conclusively show a definite legislative intent not to include the time element in the first two requirements, under the familiar doctrine of *expressio unius est exclusive alterius*, that is, the expression of the one results in the exclusion of the other. See cases cited in Callaghan’s Wisconsin Digest under ‘Statutes’, sec. 111.”

Since the two year publication requirement cannot be read with the second class mailing privilege requirement, it is our conclusion that the fact that such privilege was secured on July 12, 1937, is immaterial.

Requirement (3) provides that a newspaper, in order to be eligible to publish legal notices, must "*have been regularly and continuously* published in such city and county for at least two years immediately before the date of such notice, advertisement, or report. * * *.”

A strict interpretation of this section would seem to require publication for two years of a newspaper at least once a week without interruption for any reason. It is quite possible that newspapers, especially in smaller communities, might miss an issue due to a breakdown in the press, death of the publisher, change of ownership, etc. When speaking of the two year publication requirement, this department said in VIII Op. Atty. Gen. 869, 870:

"Undoubtedly the object of requiring the regular publication of the newspaper for a period of two years before the date of the tax sale notice is to prevent the establishment of papers for the mere purpose of obtaining the public printing, and to insure the advertisement in a paper that has a *bona fide* established circulation."

From the facts submitted, it is clear that the Rice Lake Bulletin was not established for the mere purpose of obtaining public printing and does have a *bona fide* established circulation in the community. Since a statute must be given
a reasonable interpretation in order to carry out the intent of the legislature, a newspaper should not be disqualified if otherwise eligible under sec. 331.20 merely because it missed one issue due to a change in ownership or for any other legitimate reason. Thus the fact that this newspaper failed to publish the week of June 3d, 1937, would not disqualify it.

The fact that there was a change in ownership is not material. For example, this department has held that the change of name or location in the county of an eligible newspaper would not make such newspaper ineligible under the statutes. XXV Op. Atty. Gen. 544. Again in VIII Op. Atty. Gen. 869, it was held that a change in language of a newspaper would not disqualify it. In the opinion this department said, p. 870:

"The Antigo Herold has at all times been a newspaper published at Antigo. The change in the language used has not made it a different newspaper. It enjoys the same rights and privileges as second class matter under the federal statute. (Sec. 6668 Barnes' Federal Code, 1919, 20 Stats. at Large 359.) It continues to be published weekly, is published for the same purpose as before, and enjoys substantially the same circulation and goes to the same subscribers."

The same reasoning would apply to the Rice Lake Bulletin since apparently it has at all times been a newspaper published at Rice Lake and the change in ownership has not made it a different newspaper. It still enjoys the same rights and privileges as second class matter under the federal statutes and continues to be published weekly for the same purpose as before and enjoys substantially the same circulation and goes to the same subscribers as formerly.

In view of the foregoing, it is clear that this paper is eligible to publish notices under 331.20, Stats.

NSB
Counties — County Board — Courts — County board has power to permit use of court room for non-governmental functions provided such use is in interest of public welfare and does not interfere with use of court room by judiciary. Circuit court or judge has inherent power to protect itself against any action of county board or its committee that would unreasonably curtail its power or materially impair its efficiency.

Circuit judge or court has no power to prohibit use of court room at all times for all purposes other than court use and county board use unless facts are such that such order does have reasonable relation to exercise of judicial function. Under ordinary circumstances such order appears to have no reasonable relation to judicial function.

March 31, 1989.

Earl F. Kileen,
District Attorney,
Wautoma, Wisconsin.

In your letter you state that you have been requested to obtain an opinion from this office upon the following statement of facts:

"For a long period of time the building committee of the county board has been asked for, and has given, permission for various groups of law-abiding citizens to hold their meetings in the county court room. During the month of March of this year it was the hope of the five posts of the American Legion in Waushara county to hold their twentieth birthday anniversary, accompanied by an appropriate program, in the circuit court room. With the consent of the building committee, notices were sent to the citizenry of Waushara county that such program was to be held at the court house on March 16th, 1989 at 8 o'clock P. M. A news story to that effect was run in the local Wautoma paper and individual notices were sent to all members of the Legion residing in Waushara county. It must be remembered that at this time the circuit court of Waushara county was not in session and would not convene until the first Monday of April, 1939. It must be likewise remembered that it has never been the desire of these groups to use the circuit judge's chambers or the library that is connected with the
circuit court. After the mailing of the above described notices and the news item above referred to, the clerk of the circuit court received an order from the circuit judge prohibiting such use, a copy of such order being attached hereto.”

The order that you refer to is as follows:

"Mr. R. L. Booth,
Clerk of Court,
Wautoma, Wis.
Dear Mr. Booth:

My attention has been called to the fact that in your county there are several requests for the use of the circuit court room for other than court purposes. I am going to adhere to the rule and order that has been in effect for several years that the circuit court room, including the library and judge's chambers, shall not be used for any other purpose except the holding of court, and the meetings of the county board.

Unless you have a written order or statement from me to the contrary you will bear this in mind and please enforce this rule.

Very truly yours,
[Name of circuit judge]."

You inquire:

"When the circuit court is not in session, who has the control of the circuit court room and the balance of the courthouse, other than the judge's chambers and the library; the building committee of the county board, on authority from the county board, or the circuit judge?"

Strictly speaking, the circuit court is in session at all times. Sessions run from one term to another. We presume that what you mean is that the jury cases are over for the present term and that the next jury term does not commence until the first Monday of April — that in the interim the court room is in use by the circuit court only upon such occasions as the court has need for same in disposition of court business, that is, intermittent and occasional use.

In XXII Op. Atty. Gen. 404, we held that the county board has control over the courthouse and courthouse grounds by virtue of 59.07, subsecs. (1), (2), (4) and (6); that the county board has the right to permit the use of the court-
house for non-governmental functions, provided such use is in the interest of the public welfare and does not interfere with the use of the court rooms by the judiciary.

We have been unable to find any statute conferring powers either upon the circuit court or the judge thereof with respect to exclusive control of the use of the court room. It would seem to follow that the circuit court or the judge's control of such room must be grounded upon the inherent powers possessed by courts and judges to protect the judicial branch of the government against any action that would unreasonably curtail the powers of the court or materially impair its efficiency. Inherent powers are grounded upon the principle of *ex necessitate rei*. It would seem that the court possesses inherent power to control the use of the court room within the limitations of the following principle:

"* * * The authorities, in so far as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would *unreasonably curtail* its powers or *materially impair* its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it. Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, and to that end may, in appropriate cases, make *ex parte* orders without formally instituting an action to secure the desired relief. * * *" *In re Court Room*, 148 Wis. 109, 121.

For further cases upon discussion of inherent powers of the court, see *In re Janitor of Supreme Court*, 35 Wis. 410, and *Rubin v. State*, 194 Wis. 207.

There remains to be considered whether a circuit court or judge acting within the scope of his inherent powers as expounded in the quotation from *In re Court Room*, *supra*, has power to make an order that the circuit court room, including the library and judge's chambers shall not be used for any other purpose except the holding of court and the meetings of the county board. It is difficult for us to see where such an order can be said to be reasonably necessary for the court to protect itself against unreasonable curtailment of its powers or actions which materially impair its functions. The particular meeting in question is to be held
at 8:00 o'clock, p. m., and at a time when the circuit court has only intermittent use or need for the court room even during court hours. It is difficult to see where the meeting in question can in any way "unreasonably curtail" the court in the exercise of its functions or "materially impair" the efficiency of the court.

Any such question naturally involves facts as well as law. It is conceivable that a factual presentation might be made whereby such an order could be said to be within the scope of the inherent power of the court in protecting itself against unreasonable curtailment or acts that materially affect its efficiency. All that we can do is state that under ordinary circumstances and in the absence of an unusual factual situation, it would appear that an order of the court that purports to go as far as this order appears to be considerably beyond the scope of the inherent power of the court in relation to its court functions.

There is an inconsistency between your statement of facts and the judge's letter to the clerk of court. You state that for a long period of time the county board has been asked for and has given permission to various groups to hold meetings in the court rooms. The judge's letter states:

"* * * I am going to adhere to the rule and order that has been in effect for several years * * * ."

You do not refer us to any such rule or order. The letter of the judge to the clerk obviously is not an order and can have no force as such. If there is any such rule or order at present in existence to which we have not been referred, it would seem that the proper procedure would be to petition the court for vacation or modification of such rule or order. Testimony may then be taken bearing upon the reasonableness or unreasonableness of the rule and the necessity or nonnecessity for such rule in the exercise of the judicial functions. Upon such testimony the court will then enter an order. If the order as entered appears to conflict with the principle of the inherent powers of the court within the language of the quotation from In re Court Room, supra, such order may be appealed from and the question finally determined.

NSB
Public Officers — Board of Control — Superintendent of Workshop for Blind — Trade Regulation — Negotiable Instruments — Checks — Board of control may authorize use of check writer by superintendent of workshop for blind in drawing checks for institutional bills of less than seventy-five dollars but board is without power to waive any claim that state may have against bank which honors check so signed without authority.

April 4, 1939.

H. B. Evans, Chief Accountant,
Board of Control.

You state that in accordance with the provisions of sec. 20.17 subsec. (19), Stats., a contingent fund has been allotted to the Wisconsin workshop for the blind in order to cover the payment of institutional bills of less than seventy-five dollars. A bank account has been taken out in the name of that institution with the X Bank, which has been designated as the depository. Mr. E. F. Costigan, the supervisor of the workshop, has been authorized to draw checks on this account. The bank has also been authorized to accept the signature of Mrs. Hedwig Robinson in the absence of Mr. Costigan.

You state further that the workshop for the blind is desirous of using a checkwriter which would print the signature of Mr. Costigan on checks. The X Bank has requested the board of control to adopt a resolution authorizing it to accept checks with this imprint as well as to "waive any claim which it may hereafter have against said bank on account of its paying and charging to the account of said Wisconsin workshop for the blind, any check when such impression was placed thereon by some person without authority or unlawfully using the mechanism for the Wisconsin workshop for the blind to print or stamp such impression."

You ask whether the board of control is within its rights in approving this resolution and delegating to Mr. Costigan the right to use this mechanism in drawing checks against this account for sums of less than seventy-five dollars.
It has been held that where a bank accepted a check bearing a depositor's signature which was unlawfully affixed by means of a stamp the bank could not charge the amount of the check against the depositor's account, provided the depositor was not negligent in respect to his custody of the stamp. *Kepitigalla Rubber Estates v. National Bank of India*, (1909) 2 K. B. 1010; *Robb v. Pennsylvania Co.*, 3 Pa. Super. Ct. 254, affirmed in 186 Pa. 456, 40 Atl. 969, 41 Atl. 49, 41 L. R. A. 695, 65 Am. St. Rep. 868. See comment in 37 Am. L. Reg. (N. S.) 745. Although the question has not been decided in Wisconsin, it is probable that, in view of these authorities, any loss resulting from the acceptance of such a check would be held to fall upon the bank. The requested waiver in this instance, if valid, would effectively bar the assertion of a claim against the bank and, consequently, the state appropriation would suffer the loss.

The powers of a purely statutory tribunal must be found within the four corners of the statute creating it. *City of Milwaukee v. Railroad Commission*, 206 Wis. 339 at 352, 240 N. W. 165. The board of control exists by virtue of ch. 46 of the statutes. That chapter contains no provision which either directly or by implication confers a power upon that body to waive a present or possible future claim for the recovery of money appropriated to its use by the state.

Sec. 20.17, subsec. (19), provides in part:

"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, except as herein otherwise provided, without the necessity of being first submitted to the state board of control and to the secretary of state for approval and audit. * * *"
The authority granted by this section regarding the designation of a public depository cannot reasonably be construed to include the power to waive a right to a claim which might arise in connection with such a deposit, since such a waiver is not a usual incident to the designation of a depository. This department is of the opinion, therefore, that under the present statutory provisions, the board of control has no authority to waive any right to assert a claim which might arise in the future relative to a fund allotted to it by the state.

Since the superintendent of each institution under the jurisdiction of the board of control is specifically authorized to draw checks for institutional bills of less than seventy-five dollars, there is no substantial reason for prohibiting his use of a checkwriter to reduce the labor of personally signing numerous checks. See Robb case, supra. You are therefore advised that the board of control may authorize the use of a checkwriter by the superintendent of the Wisconsin workshop for the blind in drawing checks for institutional bills of less than seventy-five dollars but that you have no right to waive any claim that you may have against a bank for honoring a check so signed without authority.

NSB

NH
Indigent, Insane, etc.—Custody and supervision by state department of mental hygiene would not be lost if department, acting under authority of sec. 51.12, subsec. (3), Stats., transfers to county asylum for chronic insane person sentenced to life imprisonment who was subsequently transferred to Winnebago state hospital by board of control acting as commission in lunacy. Sec. 51.13 (2) would not apply and county institution would receive patient subject to provisions of sec. 51.23 (3) and sec. 51.22, Stats. No contract with county institution whereby custody and control of state is retained and whereby institution agrees never to release or parole patient under any circumstances appears to be necessary although it might be prudent to have such understanding or agreement with institution.

April 4, 1939.

GRANT C. HAAS, Director,
Board of Mental Hygiene.

You state that on May 1, 1919 one A was sentenced to life imprisonment in the Wisconsin state prison for first degree murder. In 1923 she was transferred to the Winnebago state hospital after having been pronounced insane by the board of control acting as a commission in lunacy. Her present condition makes it advisable to transfer her from the Winnebago state hospital to an asylum for the chronic insane. You ask whether the department of mental hygiene may enter into a contract with some county asylum binding the superintendent of such asylum never to release or parole said patient.

Subsec. (2), sec. 51.13, Stats., expressly authorizes the superintendent of any county asylum upon recommendation of the visiting physician to grant leaves of absence to patients in his institution. It is extremely doubtful whether the superintendent could contract never to exercise the power conferred upon him by that statute in those instances where the statute is applicable.

It is the opinion of this department that under the facts you present, subsec. (2), sec. 51.13 does not apply and that
the superintendent would have no power to release or grant a leave of absence to this particular patient. Consequently, there is no absolute necessity for a contract of the kind you suggest.

Sec. 51.22 authorizes the board of control to transfer insane prisoners from the state prison to the central state hospital and subsec. (3), sec. 51.23 declares:

"All persons required by law to be committed or transferred to the central state hospital for the insane, but remaining or confined in any other state hospital because sufficient provision has not been made for their care and treatment at said central state hospital, shall be subject to the statutes governing inmates of the said central state hospital."

By virtue of the above statute A is subject to the statutes governing inmates of the central state hospital. Subsec. (1), sec. 51.23 provides:

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

The excepted provisions are those relating to transfer and parole. It will be noted then that the only provisions for the transfer of persons committed or transferred to the central state hospital are those contained in sec. 51.12 (3) and sec. 51.23 (2). Since you apparently do not contemplate removing A to Milwaukee county hospital pursuant to sec. 51.23 (2), the only statute under which the proposed transfer can be made is sec. 51.12 (3). The power there given the board of control is conditioned upon a finding that the patient is incurably insane and that he is retained to the exclusion of more hopeful cases. Assuming that such a finding has been or will be made, the question is whether such transfer will give to the county superintendent the same authority to release or parole A that he exercises over regular patients by virtue of sec. 51.13 (3).

The theory that insane criminals may be released from custody at the will of the superintendent of the institution
in which they are confined is hostile to the intent and purpose of the legislature as revealed throughout the statutes. Sec. 51.23 (1) expressly excepts from the statutes made applicable to inmates of the central state hospital those provisions dealing with release of the insane from state institutions; sec. 51.23 (2) provides that if any patients are transferred to the Milwaukee county hospital they shall be subject to the statutes governing inmates of the central state hospital; by sec. 51.23 (3) all persons required by law to be committed to the central state hospital but confined in other state hospitals shall be subject to the statutes governing inmates of the central state hospital; sec. 357.13, which provides for the commitment to state hospitals of persons insane at the time of conviction for crime, expressly prohibits the release of such persons except upon the order of the court having jurisdiction over their trial. There is clearly no reason why persons insane at the time of their conviction should be more closely or carefully confined than those who became insane after conviction and commitment to the state prison. In the light of the overwhelming evidence that the legislature intended that insane criminals should not be released from custody under the rules governing the release of the ordinary insane and feeble-minded, it would be highly unreasonable to hold that the legislature, by permitting transfer of the criminally insane to county asylums under subsec. (3), sec. 51.12, intended that the superintendent of the county asylum should have authority to release them.

Turning again to sec. 51.22, which authorizes the transfer of insane persons from the state prison, we find that the last sentence thereof provides:

"When a prisoner thus removed recovers his reason before the expiration of his sentence, he shall, by order of the board, be returned to the prison from whence he was taken."

Any transfers made under that section are subject to the above limitation, namely that the prisoner must be returned to the state prison when he recovers his reason. Clearly that limitation impliedly prohibits any release of such prisoner prior to his recovery. Wherever A may be transferred after
the initial transfer from the state prison, the provisions of
the statute pursuant to which she was removed will control.
Consequently, the county superintendent must keep A con-
fined until her recovery and upon her recovery, if it should
ever occur, by the direct mandate of the statute under which
she was removed from the state prison, he is required to re-
turn her to said prison.

You are therefore advised that, if the proposed transfer
is made, the superintendent of the county asylum will be
bound by the law never to release or parole A and that,
while a contract to that effect may be prudent, it does not
appear to be necessary.

NSB
RK

Education — Vocational Education — State board of vo-
cational and adult education in computing amounts actually
expended for salaries for instruction and supervision upon
which to compute federal and state aids under sec. 41.21,
subsec. (1), par. (b), Stats., is not authorized to deduct
tuition received by local school.

April 4, 1939.

GEORGE P. HAMBRECHT,
Board of Vocational and Adult Education.

You inquire whether the state aid to vocational and adult
education shall be calculated on the basis of the gross an-
nual salaries paid for instruction and supervision or
whether the amount of nonresident tuition shall first be
deducted.

Sec. 41.21, subsec. (1), Stats., provides:

“(b) If it appears from such report that such school or
schools have been maintained pursuant to law, in a manner
suitable to the state board of vocational and adult education,
the said board shall certify to the secretary of state, in favor of the several local boards of vocational and adult education, amounts equal to one-half the amount actually expended for salaries for instruction and supervision; * * *.

The above statute refers to the "amount actually expended for salaries". The word "expend", according to Webster's Dictionary, means to pay out or disburse money; apparently it has no reference to "net cost". The addition of the word "actually", in our opinion, simply emphasizes the fact that the amounts in question must in fact have been paid and that the salaries must in fact be for instruction and supervision.

According to the plain and ordinary meaning of the language used by the legislature the amount of state aid is to be based on expenditures of the local board for a particular item, namely, salaries for instruction and supervision. The fact that the board has another and independent source of income which may be applied to payment of salaries does not alter the fact that it actually expended a certain amount of its fund for salaries. Had the legislature intended that the amount of state aid should be based on the net cost of furnishing instructors and supervisors it undoubtedly would have used language to that effect. Since we find no clear indication of a legislative intent to the contrary, the natural and ordinary meaning of the language used must prevail. You are therefore advised that no deduction may be made of tuition received prior to estimating the amount of state aid.

NSB
RK
Fish and Game — Game warden does not have right, without search warrant, to enter those portions of refrigerated locker plant subject to sole control of manager of plant unless he has reason to believe wild animals, taken or held in violation of provisions of ch. 29, Stats., are to be found therein.

Game warden does not have right, without search warrant, to open or require to be opened any individual refrigerated locker rented to customer unless he has reason to believe wild animals, taken or held in violation of provisions of ch. 29, Stats., are to be found therein.

Manager of refrigerated locker plant is not responsible for seeing that game belonging to customer is removed from customer's locker at expiration of time when such game may lawfully be kept in such locker.

Warrant authorizing search of refrigerated locker plant describing same as one "occupied by A," who is owner and manager of said plant, does not authorize officer executing such warrant to search lockers therein which have been rented to individual customers. Before individual lockers may be searched they must be definitely described in warrant.

April 4, 1939.

CONNOR HANSEN,
District Attorney,
Eau Claire, Wisconsin.

In Eau Claire county there are several refrigerated storage plants which contain separate lockers which are rented to patrons of the plant. In these plants animals are slaughtered and the meat is hung up in a separate drip room. The meat is then sold to patrons of the plant and is wrapped, stamped with the locker number of the patron, frozen in the quick freezing room for twenty-four hours and then placed in the locker rented by the customer. Each locker has two keys—one kept by the manager of the plant, and the other by the customer who rents the locker. The customer has access to his own locker at all times and may take meat out
of it at any time without the knowledge of the manager of the plant or anyone else. The manager likewise has access to the locker, but ordinarily opens the locker only for the purpose of putting meat in it as directed by the customer. The manager of the plant does not know how long meat stays in the locker unless he makes a special examination of the locker. With these facts in mind, you inquire:

"1. Has a game warden any right, without a search warrant, to enter a refrigerated locker plant and inspect meat which is being hung up in the plant, meat which is in the quick freeze room or meat which is in any locker not rented but under the sole control of the manager of the plant?"

"2. Has a game warden any right, without a search warrant, to open or require to be opened, any locker rented by a customer?"

"3. Is the manager of the plant in any wise responsible for seeing that any game belonging to a customer is removed from the customer's locker at the expiration of the time when such game may lawfully be kept in such locker?"

"4. If a search warrant is procured against the corporation or individual owner of the plant, may an officer open customers' lockers under such search warrant, or must the complaint be made against the individual customer renting such locker?"

Art. I, sec. 11, Wisconsin Const., provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Sec. 29.05, subsecs. (5) and (6), Wis. Stats., relating to police powers of the state conservation commission and its deputies, provide as follows:

"(5) They shall be permitted by the owner or occupant of any cold storage warehouse or building used for the storage or retention of wild animals, or carcasses or parts thereof, to enter and examine said premises; and the said owner or occupant, or his agent, servant, or employe, shall deliver to any such officer any wild animal, or carcass or
part thereof, in his possession during the close season therefor, whether taken within or without the state.

“(6) They shall seize and confiscate in the name of the state any wild animal, or carcass or part thereof, caught, killed, taken, had in possession or under control, sold or transported in violation of this chapter; and any such officer may, with or without warrant, open, enter and examine all buildings, camps, vessels or boats in inland or outlying waters, wagons, automobiles or other vehicles, cars, stages, tents, suit cases, valises, packages, and other receptacles and places where he has reason to believe that wild animals, taken or held in violation of this chapter, are to be found; but no dwelling house or sealed railroad cars shall be searched for the above purposes without a warrant.”

Sec. 29.05, subsec. (6), has been upheld as authorizing a conservation warden to search an automobile without a warrant where the warden had reasonable or probable cause to believe that it contained contraband. State v. Leadbetter, 210 Wis. 327, 246 N. W. 443, See also Wilder v. Miller, 190 Wis. 136, 208 N. W. 865; and Carroll v. United States, 267 U. S. 132.

The probable cause referred to in sec. 29.05 (6) "is the existence of such facts and circumstances as would excite an honest belief in a reasonable mind, acting on all the facts and circumstances" Glodowski v. State, 196 Wis. 265, 269, quoting from State v. Baltes, 183 Wis. 545, 549.

Sec. 29.05, subsec. (6), however, would authorize a search of a building, including a refrigerated locker plant, only if the probable cause referred to therein existed.

Sec. 29.05, subsec. (5), at first glance, might be construed as an attempt by the legislature to authorize the deputies of the state conservation commission to search "any cold storage warehouse or building used for the storage or retention of wild animals, or carcasses or parts thereof" without a search warrant and without the existence of the probable cause required under sec. 29.05, (6). In our opinion, however, such a construction would be erroneous. This statute merely constitutes a direction to "the owner or occupant of" the warehouse or buildings referred to therein, to permit such warehouse or buildings to be entered and examined. If the owner or occupant of the warehouse or buildings referred to in that subsection refuses to allow the conserva-
tion warden to enter and examine the premises when such warden either has a search warrant or, not having one, has reason to believe that wild animals, taken or held in violation of the provisions of chapter 29, are to be found therein, such owner or occupant would violate a provision of chapter 29 of the statutes and would be subject to the penalty provision found in sec. 29.63, subsec. (1) par. (d), or 29.64, Stats. Sec. 29.05, subsec. (5), is only another police power regulation to which the owners or occupants of cold storage warehouses and buildings used for the storage and retention of wild animals are subject. Thus, it is our opinion that a game warden does not have a right, without a search warrant, to enter a refrigerated locker plant and inspect that portion of the premises subject to the sole control of the manager of the plant, unless the warden has reason to believe that wild animals taken or held in violation of the provisions of chapter 29 are to be found therein.

Upon the basis of the reasoning given in the answer to question one, it is our opinion that a game warden does not have a right, without a search warrant, to open or require to be opened any locker rented by a customer, unless the warden has reason to believe that wild animals taken or held in violation of the provisions of chapter 29 are to be found therein.

The department of agriculture and markets advises that refrigerated locker plants are not subject to, or licensed under, the provisions of the uniform cold storage act found in chapter 99 of the statutes. The relationship which exists between the owner of a refrigerated plant and the customer who rents a locker therein is akin to the relationship which exists between a bank and a customer who rents a safety deposit box therein. Subject to very limited authority given to the manager of the plant, largely as his agent, the customer who rents the locker has sole control thereof.

The jurisdiction of the customer over the individual locker may be, in law, as complete as his jurisdiction would be had he rented similar space wholly separated from the rest of the refrigerated plant.

Secs. 29.39 and 29.395 provide:
"No person shall have in his possession or under his control, or have in storage or retention or as common carrier for any one person, any game, game fish, or other wild animal or carcass or part thereof, during the close season therefor, or in excess of the bag limit for one day or below the minimum size thereof at any one time during the open season, whether lawfully or unlawfully taken within or without the state."

"It shall be unlawful to have in possession or under control during the open season the carcass or part of the carcass or skin of any protected wild animal showing that the same has been taken during the close season for such animal."

As the locker is subject to the control of the customer, so are the contents thereof. When the meat is purchased from the owner of the plant, frozen and deposited in the locker of the customer, the meat is in the possession and under the control of the customer rather than the owner or manager of the plant, and was placed, and is kept, in storage by the customer rather than by the owner or manager of the plant, although such owner or manager may have acted as the agent of the customer in performing the physical task of placing the meat in the locker. In answer to your third question, it is our opinion that the manager of the plant is not responsible for seeing that any game belonging to a customer is removed from the customer's locker at the expiration of the time when such game lawfully may be kept in such locker.

A search warrant must contain a description of the premises to be searched, so specific and accurate as to avoid any unreasonable or unauthorized invasion of the right of security; it must identify the premises to be searched in such manner as to leave the officer in no doubt and to leave him no discretion as to the premises to be searched. People v. Martens, (Ill.) 170 N. E. 275; State ex rel. King v. District Court, (Mont.) 224 Pac. 862; State v. Nejin, 140 La. 793, 74 So. 108.

The purpose in specifying a definite description is to avoid the issuance of general or traveling warrants which purported to authorize searches in a great many places without specifying them. United States v. Snyder, 278 Fed. 650. From the fact that the description must be definite, it does
not follow that the description must be a legal one or that it must be technical. *Chruscicki v. Hinrichs, et al.*, 197 Wis. 78, 221 N. W. 394.

In that case it was held that a search warrant describing the rural property to be searched as "The premises occupied by V. C." was valid where the designation of the premises by the owner's name enabled the officers to make the search, though in the legal description contained in the warrant the wrong section and range were given.

It would appear that the locker of an individual customer would be considered in the nature of premises occupied by him, rather than premises occupied by the owner or manager of the refrigerated plant as a whole. A warrant authorizing search of a refrigerated plant "occupied by A" when A was the owner and manager of the refrigerated plant as a whole, would not sufficiently describe the lockers rented to B, C and D to authorize search of said lockers. Before such individual lockers may be searched, they must be definitely described in a warrant.

JRW
Counties — Public Officers — County Judge — Salary paid county judge by virtue of special act of legislature conferring upon county court certain circuit court and justice of peace jurisdiction and providing that judge, in exercise of such jurisdiction, shall receive salary of twelve hundred dollars per annum until said salary is changed by county board, is not affected by sec. 253.15, subsec. (4), Stats., nor is judge entitled to fees collected by virtue of said section in administration of jurisdiction conferred by special act.

Sec. 253.15 (4) does not convert salary method of compensation into fee method of compensation where neither special act nor resolutions of county board authorize fee method of compensation.

April 4, 1939.

JAMES H. LARSON,
District Attorney,
Shawano, Wisconsin.

In your letter you enclosed a letter from the county judge of Shawano county addressed to you and which you have referred to us for an opinion with respect thereto. The letter states:

“At the November 1930 session of the Shawano county board of supervisors the following resolution was adopted:

Resolution No. 20

‘Resolved by the county board of supervisors of Shawano county that the salary of the county judge of Shawano for the ensuing term, shall be and is hereby fixed at the sum of $3,500.00 per year for said term, in twelve equal monthly installments.

‘That the said salary is to cover the compensation for services rendered as county judge, as judge of the juvenile branch of said court and as compensation for services rendered as Judge of the justice court branch of the county court and the circuit court branch of the county court as provided by chapter 145 of the law of 1925.

‘Dated this 20th day of November, 1930.

Adopted November 21, 1930
Approved December 1, 1930
T. A. Loken, Chairman
O. O. Wiegand, Clerk.

B. H. PRAHL
CHAS. ELSHOLTZ
ALBERT HAUFÉ
"The Shawano county board of supervisors at its meetings in 1936 and 1937 failed to fix the salary of the county judge for the ensuing term which commenced on January 3, 1938, but provided in its budget under the heading 'Expenses for operation and maintenance' the following:

<table>
<thead>
<tr>
<th>Account Name</th>
<th>1935</th>
<th>1936</th>
<th>1937</th>
</tr>
</thead>
<tbody>
<tr>
<td>County Court</td>
<td>6,815.57</td>
<td>7,000.00</td>
<td>7,000.00</td>
</tr>
</tbody>
</table>

"I respectfully refer you to the opinion of the attorney general dated March 2, 1939 to D. E. Schnabel, district attorney, Lincoln county, Merrill, Wisconsin, and the opinion of the attorney general given under March 1, 1932 to James P. Cullen, district attorney, Prairie du Chien, Wisconsin, found in Vol. XXI, Op. Atty. Gen. 245. I would like to get your official opinion as to what is the salary of the county judge for the current term, and as to whether or not the salary is in lieu of fees, and if so, what fees."

The opinion to District Attorney Cullen, XXI Op. Atty. Gen. 245, is obviously inapplicable as the budget referred to does not even purport to fix the salary of the county judge, as did the budget referred to in the opinion to District Attorney Cullen. This particular budget apparently not only includes the salary of the county judge, but the salary of the register in probate, and other operation and maintenance items. Under the circumstances, nothing much with respect to fixing of salary can be gleaned from the particular budgets referred to.

In the opinion to D. E. Schnabel, district attorney of Lincoln county, dated March 2, 1939,* we held:

"** * * * it must follow that sec. 59.15 (1), Stats., was repealed by the enactment of sec. 253.15 (4), Stats., in so far as the former section applies to salary and compensation of county judges.

"We interpret sec. 253.15 (4) to mean that the county board is without jurisdiction to legislate with respect to fees, per diem and compensation of a county judge unless such fees, per diem, or compensation is referable to or payable from the county treasury; that the emoluments of the office belong to the county judge, except in so far as the county board may legislate otherwise; that the county board may legislate otherwise only with respect to fees, per diem and compensation which is referable to or payable from the

*Page 139 of this volume at 144.
county treasury; and that unless the county board takes af-
firmative action providing that the salary shall be in lieu of
such fees, per diem or other compensation, the county judge
is entitled to such fees, per diem or compensation, in addi-
tion to salary."

In said opinion we further held, p. 145:

"A fee, per diem or other compensation is referable to or
payable from the county treasury, as that term is used in
this opinion, if the county treasury may ultimately or in
some event be liable therefor as well as in a sense of pri-
mary and only liability."

There remains only the application of the foregoing to
the facts submitted. No resolution fixing the salary other
than the 1930 resolution has been submitted. In the ab-
sence of a more recent resolution, that resolution controls.
See sec. 59.15, (4), Stats., which reads as follows:

"Salaries of officers or persons included within the provi-
sions of subsections (1), (2) and (3) fixed by or pursuant
to law shall be and remain the salaries of such officers and
persons until changed by the county board pursuant to this
section."

Section 21, ch. 145, Laws 1925, which gave your county
court circuit court and justice court jurisdiction, provides
as follows:

"The county judge of said Shawano county, Wisconsin,
shall receive an annual salary of twelve hundred dollars, for
performing the duties required by this act, to be paid out of
the county treasury in equal monthly installments at the
end of each month, until the county board of Shawano
county shall by resolution fix a different salary."

Section 31 of said chapter further provides:

"All fines and all costs and fees collected by the clerk in
every civil and criminal action or proceeding under the gen-
eral statutes of this state tried or determined by the county
court, which if tried or determined by the circuit court or
circuit judge would be paid over to the county treasurer,
shall be accounted for and paid over quarterly by the clerk
of said county court into the county treasurer of said
Shawano county. All fees collected in any action or proceeding in the justice court branch of the court shall be paid over to the county."

It appears, therefore, that the county judge, in the exercise of the circuit and justice court jurisdiction, conferred by ch. 145, Laws 1925, has never been upon a fee basis and said chapter gave him no right to fees collected. There is no language in sec. 253.15, (4), Stats., which would convert the salary provided for in ch. 145, Laws 1925, into a fee method of compensating the judge for services performed in the exercise of circuit court and justice court jurisdiction conferred by the act. There appears to be no resolution of the county board that would work any such conversion from a salary to a fee method of compensation. The judge, therefore, in the exercise of circuit and justice court jurisdiction conferred by ch. 145, Laws 1925, is compensated by salary and by salary alone.

The resolution of 1930 fixing the salary of the judge clearly contemplates that the $3,500.00 per year shall be in lieu of all fees and other per diems. It is effective for that purpose in so far as any fees, per diem, or other compensation provided for in the revised statutes are referable to or payable from the county treasury. Since the enactment of ch. 468, Laws 1935 (sec. 253.15 (4), Stats.), the resolution would not be effective as to any fees, per diem, or other compensation provided for by the general or revised statutes and which is in no sense referable to or payable from the county treasury. In this connection it must be remembered that fees, per diem, or other compensation is referable to or payable from the county treasury if the county treasury may ultimately or in some event be liable therefor as well as when the county treasury is the only source of payment or when the county treasury is primarily liable for the payment.

Under ch. 145, Laws 1925, and the 1930 resolution of the county board, it is our opinion that your county judge is entitled to only such fees, per diem, or other compensation as is provided for in the general or revised statutes and with respect to which the county treasury would in no event be
liable to him for payment of same, and that he is entitled to no fees in the exercise of circuit court and justice court jurisdiction conferred by ch. 145, Laws 1925.

NSB

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*Elections — Citizenship* — Child born at Washington, D. C., to federal employee who was resident of this state and who has throughout intervening years maintained his residence in this state, takes domicile and residence of said parent, and said child, although still living in Washington, D. C., with said parent, upon whom she is dependent, upon reaching her majority and until she intentionally acquires residence elsewhere, is resident of this state for voting purposes.

April 4, 1939.

Fred R. Zimmerman,

*Secretary of State.*

You state that X was born and raised in Washington, D. C., where her father, who formerly lived in Wisconsin, is employed by the federal government in the department of agriculture. X’s father has voted by mail in Wisconsin during the entire period of his employment in Washington, D. C.

X, who is now twenty-two years of age, is living with her father, upon whom she is wholly dependent. She has never voted or claimed legal residence anywhere.

You ask whether X has the right to vote by mail in Wisconsin.

Sec. 6.01, subsec. (1), Stats., provides:

“Every citizen of the United States of the age of twenty-one years or upwards, who shall have resided in the state one year next preceding any election, and in the election district, or precinct where he offers to vote, ten days, shall be deemed an eligible elector.”
In construing a residence requirement in a statute relating to voting, it has been held:

"It is true, of course, that a person may have two or more residences, as distinguished from a domicile * * *; but the word 'residence' or 'resident,' when used in the Constitution, or in statutes relating to the subject of voting * * * is in nearly every case synonymous with 'domicile.'" In re Rooney, 159 N. Y. S. 132 at 135, 172 App. Div. 274.

See also Kempster v. Milwaukee, 97 Wis. 343; Op. Atty. Gen. for 1902, 78.

It is now settled that the domicile of every person, at birth, is the domicile of the person on whom he is legally dependent, whether it is at the place of birth or elsewhere. Glos v. Sankey, 148 Ill. 536, 36 N. E. 628 at 633. And it is equally well recognized that a domicile, once established, will continue until a domicile elsewhere has been established. Seibold v. Wahl, 164 Wis. 82, 85, 159 N. W. 546; Kempster v. Milwaukee, supra.

From your statement of facts it appears that X's father, although living in Washington, D. C., has successfully retained his domicile and residence and voting privileges in Wisconsin. Hence, in view of the above authorities, it is apparent that X, during infancy, was domiciled in and a resident of Wisconsin by virtue of her parentage. Since she has taken no steps to change that domicile or residence upon becoming of age, her status in this regard remains the same.

This conclusion is in accord with a decision based upon facts similar to those under consideration. The Missouri court has stated:

"Carlos B. Tomlin voted for contestant, and the vote was counted by the court. The father of the voter received employment as clerk in the general land office at Washington, D. C., in which he is still engaged. The son, when 16 years of age, removed with his father to Washington, where he continued to live. When he voted [in Missouri] he was 22 years of age. The residence of the father was not changed by reason of living in Washington City while engaged in the civil service of the United States. The residence of the son continued the same as that of the father during the minority of the former, and until he acquired one of his
own. He testified that he had never intended to change his residence, though he continued to live in Washington after he had attained his majority. The question was one of intention and the finding of the court will not be disturbed.” 

See also *Dennis v. State*, 17 Fla. 389.

You are therefore advised that X is now a resident of Wisconsin for purposes of voting and that, if she procures her registration in the manner prescribed by sec. 6.17, subsec. (5), she may then vote in Wisconsin by mail as provided by secs. 11.54 to 11.68, inclusive of the statutes.

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**Appropriations and Expenditures — Publicity — Public Officers** — Conservation commission has power under sec. 23.09, subsec. (7), par. (1), Stats., to join with private groups or associations in carrying on out-of-state advertising projects and pay part of costs thereof.

April 6, 1939.

**HONORABLE JULIUS P. HEIL,**

**Governor.**

Certain out-of-state advertising and promotional activities, such as all-year advertising displays and exhibits at outdoor shows and similar expositions, have been carried on by private groups or recreational associations for the purpose of publicizing the recreational facilities and attractions of the state. It is now proposed that the conservation commission defray a part of the future costs of carrying on these publicity projects and make payment thereof out of the so-called “recreational advertising fund” appropriated by sec. 20.205, subsec. (3), Stats. The moneys would not be turned over to the private organizations to spend, but the
conservation commission would join with them in conducting and carrying on such projects and itself pay part of the expense thereof. You direct our attention to the opinion in XXVI Op. Atty. Gen. 452 and ask whether the conservation commission has the authority to so expend such appropriation.

The so-called "recreational advertising fund" is appropriated by sec. 20.205 (3), Stats., to the conservation commission to be used by it in the execution and carrying out of the functions set out in sec. 23.09 (7) (1), Stats. As stated in the opinion in XXVI Op. Atty. Gen. 452, the conservation commission is given broad powers by sec. 23.09 (7) (1) to determine how such fund shall be spent in order to effect the purposes for which it is appropriated.

In XXV Op. Atty. Gen. 123 we held that the commission had the power and authority under sec. 23.09 (7) (1) to expend such "fund" in putting on exhibits to advertise the recreational advantages of Wisconsin at outdoor shows and similar expositions held outside the state and for the expenses of its employees in connection therewith.

However, in the opinion in XXVI Op. Atty. Gen. 452, we pointed out that such statute does not give the commission the power to allot any part of such "fund" to private organizations to be used by them in carrying on their own activities of publicizing the recreational advantages of Wisconsin. The objection thereto is that without legislative sanction public funds would be expended by private persons or organizations. Nothing in the statute grants the commission the power or authority to turn the moneys of said fund over to private persons to expend. What the statute does is give to the commission the power and authority to itself expend the funds for the purpose of publicizing the recreational advantages of the state. Thus, while it is left to the judgment of the commission to determine the desirable and feasible ways of spending such funds in furtherance of the desired result, the expenditures must be made by the commission itself.

We find nothing, however, in the statute that would prohibit the conservation commission from sponsoring and carrying on out-of-state advertising projects in conjunction with private groups or organizations and paying a portion
of the costs thereof. If the commission determines that is an advisable way of effectively carrying out the objective of publicizing the recreational facilities and advantages of the state, it would have the authority to participate therein and to directly pay its proper part of the expenses thereof which it incurred and agreed to pay. Any such expenditures by the commission would be subject, however, to the general restrictions which govern expenditures by state departments.

HHP

Automobiles — Corporations — Motor Transportation — WPA truck rental contracts and actual practices thereunder examined to determine whether such trucks are operated by United States within language of exemption, sec. 194.05, subsec. (1), Stats. Ruling in XXV Op. Atty. Gen. 197 adhered to.

April 6, 1939.

LAWRENCE R. LARSON, Chief Clerk,

Senate.

Senate Resolution No. 12, S., in substance invites our attention to XXV Op. Atty. Gen. 197, in which it was held that the operation of a motor vehicle on a WPA project is not within the purview of chapter 194, Stats.; invites our attention to "changed conditions" (presumed to mean changed methods of operation by WPA) and requests that we review the opinion referred to in the letter in the light of such changed methods of operation and that we advise whether the opinion referred to controls with respect to present methods of operation.

At the time the opinion was rendered, WPA methods of operation were stated in the opinion to be as follows:
“(1) The rental of a truck by the hour with gas, oil, maintenance, etc., furnished by the owner, but without the furnishing of a driver.

“(2) The rental of a truck by the hour with gas, oil, maintenance, etc., furnished by the owner, and with driver also furnished.

“(3) The rental of a truck from one who is called a ‘relief owner operator,’ that is to say, the owner operates the truck himself and he is a person who is included on the relief rolls. The rental of the truck and the compensation paid to the relief operator is computed in separate items so that a part of the compensation is paid as wages and a part as truck rental.”

No question can be raised as to the soundness of that opinion as applied to methods of operation (1) and (3) above referred to. Under method (1), WPA furnished its own employee, relief or otherwise, to operate or manage the truck and under method (3), the owner operator was a relief owner operator in the employ of WPA.

The exemption section, 194.05 (1), provides as follows:

“Neither this chapter nor section 76.54 shall apply to motor vehicle or vehicles owned or operated by the United States, any state or any political subdivision thereof.”

The operators under both method (1) and method (3), being employees of the government, their operation must be the government’s operation and such trucks clearly were “operated by the United States” within the meaning of the exemption.

The opinion made no attempt to distinguish method (2) from methods (1) and (3). However, there can be no doubt but that the opinion is much more questionable with respect to method (2) than with respect to the other two methods of operation. Under method (2), the driver, furnished by the owner, was at least ostensibly an employee of the owner. Under method (2), at the time of rendition of the opinion as well as under present methods of operation, the truck with driver was rented by the government from the owner at a certain specified rental per hour. The owner in turn had to pay the driver wages at the prevailing wage rate for the type of service in question. The driver thus furnished was not pay rolled by the government.
If the opinion referred to was sound as applied to method of operation No. (2) referred to in that opinion, then it is sound as applied to present methods of operation as there is no essential difference between the two. At the time of rendering the opinion, WPA's practice with respect to method (2) was that of contracting for rental of the truck plus driver to be furnished by the owner upon what was called "fixed or schedule rate" basis. As a result of a recent ruling of the comptroller general (the supreme court for most federal agencies), WPA is no longer permitted to contract for rental of trucks upon a "fixed or schedule rate" basis but must contract upon a competitive bid basis of rental in compliance with sec. 3709, revised statutes (USCA, Title 41, sec. 5).

The fact that rental contracts must in the future be let upon a competitive bid basis rather than as heretofore in no wise changes the essential nature of the problem involved in determining whether these trucks are within the language of the exemption. The essential problem is one of determining the relationship between the driver and the government to the end that it may be determined whether it can be said that these trucks are "operated by the United States" within the meaning of the exemption.

The determination of the relationship between the driver of one of these rented trucks and the government presents a most difficult problem of analysis. The WPA set-up as applied to any of the recognized legal relations,—master and servant, employer and employee, principal and agent, etc.,—is such a part-man part-beast hybrid sort of thing as to literally defy any conclusive analysis. The government has exhibited a very human tendency of wanting to "have its cake and eat it". The government apparently wants and asserts all of the attributes of an employer but goes to great length to establish that it is not the employer,—at least on paper. We proceed to attempt to analyze the relationship that exists.

Present methods of operation permit the rental of trucks with or without operator. In practice, some eighty per cent of the trucks actually rented are with operator. Where the rental is without operator WPA furnishes the operator, the operator is an employee of the government; such relation-
ship is recognized by all concerned and there is no difficulty in reaching the conclusion that trucks rented upon such basis are "operated by the United States" within the language of the exemption.

When trucks are rented with operator, the operator may be either the owner or a driver furnished by the owner. The rental contract is entered into through the procurement division of the United States treasury department. The procurement division advertises for bids for rental of a truck with driver. The government endeavors to specify how many hours or designate by some other unit, such as days or weeks, the extent of the rental period and the nature of the work. The owner usually bids or offers to rent his truck with driver at so much per hour rental. The owner is obliged to carry workmen's compensation insurance with respect to the driver furnished. He is obliged to specify that he is the owner of the truck, the license number and license rating, and the rental contract is with respect to a specific truck with driver. The contract further provides that "trucks having the same license rating but with different license numbers may be substituted for listed trucks only after approval of such substitution has been given by the state procurement officer * * *." The rental contracts are subject to further restrictions as follows:


"The following provisions of the Federal Eight-Hour Law shall be made part of this contract:

"No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any sub-contractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the Act of June 19, 1912 (37 Stats. 187) relating to hours of labor".
“5. Minimum Wages

“Contractors who employ drivers or teamsters in the performance of this contract hereby agree to pay such drivers or teamsters not less than the prevailing wage rate per hour shown on page 1, and agree to submit, when requested, evidence that such wages have been paid.”

The contracts are skilfully drawn to make it appear that the driver furnished is the employee of the truck owner and that there is no employer-employee relationship between the government and the driver furnished by the owner. They are skilfully drawn to make it appear that the government is merely contracting for the rental of equipment and is not hiring men or hiring services. The federal employment compensation bureau does not recognize that there is any employer-employee relationship between the driver of the trucks furnished by the owner and the government.

It seems to be apparent that if the owner-driven rented truck or truck rented with driver furnished by owner comes within the language of the exemption law “or operated by the United States” some relationship between the government and the driver such as master and servant, employer and employee, or principal and agent is necessary. The government cannot be the operator if the truck is actually being operated by some one bearing no legal relationship to the government which would make the government the operator of the truck.

If the matter were to be decided upon the basis of the request for bids, submission of bids, and the terms and conditions of the contract ultimately entered into, it would be most difficult to conclude that the driver of these trucks is anything other than the employee of the truck owner. The problem presented would probably be ruled by Packard v. Industrial Commission, 213 Wis. 1, and the line of cases therein cited to the effect that:

“The reason is that the hiring is not of the team distinct from the driver or of the driver distinct from the team, but is the hiring of the entity composed of the two. While the hirer acquires dominion or authority over the entity to designate the work that shall be done and direct the manner of doing it, he acquires no authority to direct how the team shall be driven, managed, or cared for, nor can he divide the
entity by separating the driver from the team. He may dis-
 pense with the services of the entity—the driver and the 
team—but he cannot discharge the driver and substitute
 another. The safety and well-being of the team is a matter
 of concern to the owner. It may be greatly damaged from
 the standpoint of health and soundness, as well as disposi-
tion and habits, by unskilful management and inconsiderate
 and cruel treatment. Hence the owner says, in effect: "I
 will not hire my team to be driven by a stranger, but I will
 hire my team with a driver of my own choosing, one in
 whom I repose trust and confidence. You shall not discharge
 him and substitute another. That is a right I reserve." '
(P. 5, quoting from Wagner v. Larsen, 174 Wis. 26, 30-31.)

However, when the actual practice is examined with re-
spect to degree of control which WPA, through its project
foreman or manager, exercises over the drivers of these
trucks, it is difficult to see wherein the government is not
actually the employer—if not a general employer, at least a
special employer to the extent that it can be said that the
driver is an employee of the government at least for some
purposes. In actual practice, we have not been able to find
where WPA exercises any more supervision and control
over its own employee operated truck than it does over the
rented truck which is either owner-operated or driver-fur-
nished by owner. Every attribute which an employer or-
ordinarily exercises with respect to his employee is exercised
by WPA over the drivers of these rented trucks.

Within the rule of Packard v. Industrial Commission,
supra, and the cases therein cited, (see especially Wagner v.
Larsen, 174 Wis. 26), there is room for two employers. It
may be quite possible that the truck owner is the employer
within the meaning of these cases with respect to actual
management of the truck while in use. On the other hand,
it is quite conceivable that the government is the employer
with respect to every other conceivable operation of the
truck. Such would appear to be the case in actual practice.

The problem would be ruled by C. R. Meyer & Son Co. v.
Grady, 194 Wis. 615, which would make the driver the em-
ployee of the government were it not for the fact that the
government has gone to such great lengths to make it ap-
pear otherwise and to contract against any such relation-
ship. But the relationship cannot be determined solely with
regard to the contract. Actual practice and actual operations must be considered as well as the language of the contract. The mere calling of a rose a violet does not make it any the less a rose. The same is true with respect to a question of employer-employee relationship.

As at present advised, it is our opinion that the government's degree of control asserted and exercised over the driver of the rented truck, whether that driver be the owner or a driver furnished by the owner, is such that it can be reasonably concluded that there is an employer-employee relationship. It seems unnecessary to determine the exact extent of this relationship,—it is sufficient to conclude that the relationship exists. We do not think that the government must be the sole or only employer in order for it to come within the language of the exemption "operated by the United States". If actual operations under the rental contracts are such and the degree of the government control over the driver is such that it can be determined that the truck actually is "operated by the United States", that seems all that is necessary to determine the question.

The question is by no means free from doubt. The question was actually passed upon though probably not given sufficient consideration when ruling with respect to method of operation (2) as set forth in the prior opinion. Since that time the legislature has had an opportunity to clarify the matter if not satisfied with the conclusion reached in the prior opinion as applied to WPA operations. Even though we might not agree with the opinion as applied to method (2) as an original proposition, we would hesitate to overrule the opinion at the present time unless we can say that the opinion is clearly wrong. We have concluded that as applied to actual operations, the opinion is probably sound. Under such circumstances, the language of the court in Union F. H. S. Dist. v. Union F. H. S. Dist., 216 Wis. 102, 256 N. W. 788 (1934), cited with approval In re Kootz' Will, decided June 21, 1938, 228 Wis. 306, 280 N. W. 672, is peculiarly applicable and must govern our ruling at the present time.

"* * * 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 at-
Attorney general unsound, and if it had been the legislative intention "* * *"—otherwise than as expressed in the attorney general's opinion. (P. 106.)

WPA relief quotas have been established upon the basis of the prior opinion. The drivers of these trucks are not pay rolled and are not counted in relief quotas. A ruling contrary to the prior opinion will obviously affect relief quotas and will affect WPA methods of operation. In rural areas, it is doubtful that WPA could secure the required number of trucks to carry on their relief projects if the owner of the rented trucks were obliged to comply with the provisions of chapter 194, Stats. We would be reluctant to place any construction on the law that would interfere with the free functioning of WPA in carrying on its employment program as a supplement to industrial and other employment—especially after three years of acquiescence in the conclusion reached in the prior opinion by all concerned, including the legislature. If the law as heretofore construed by this department is not sound public policy and not consonant with legislative intent, it would seem that it is for the legislature to make the change rather than this office.

This opinion must not be construed as giving carte blanche authority to owners of trucks to operate them without complying with ch. 194, Stats., just so long as there is some sort of relationship by contract or otherwise with the federal government, the state, or a municipality thereof. The opinion is confined to the WPA method of rental operation and the actual practices that exist thereunder.

NSB
Taxation — Income Taxes — Moneys owing firemen's pensioner under sec. 62.13, Stats., are not exempt under provisions of 62.13 (9) (d) from state's claim for income taxes owing by pensioner. Express provisions of sec. 74.11 (3) (c) and (4) and sec. 74.30 prevail over sec. 62.13 (9) (d), Stats. State proceeding under sec. 71.36 cannot reach pension by order of court in supplementary proceedings but can reach pension only by proceeding under quasi-garnishment statutes—sec. 304.21, Stats.

April 6, 1939.

JOHN A. THIEL, Director,
Tax Commission.

You advise that a delinquent income tax warrant has been filed against an individual in the city of Green Bay who has no income or property other than a fireman's pension amounting to $85.00 per month. In the course of supplementary proceedings based upon such warrant, one of the pension checks was ordered paid to the Wisconsin tax commission to be applied upon the delinquent tax. The city clerk has refused to comply with this order. You request an opinion as to whether money due a pensioner under the firemen's pension law may be so appropriated to satisfaction of delinquent income taxes assessed against said individual.

Subsec. (9), par. (d), sec. 62.13, Stats., which by subsection (10) (e) of section 62.13 is made applicable to firemen's pensions, provides as follows:

"Money due or to become due to any pensioner or beneficiary from the pension fund shall be exempt from any process, or order of any court of this state, upon account of any claim or demand against any such pensioner or beneficiary."

Does the foregoing provision prevent the said pension from being subjected to the state's claim for delinquent income taxes? For reasons hereinafter stated, it is our opinion that it does not. Sec. 71.18 (3), Stats., provides as follows:
"All laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, the correction of errors in assessment and tax rolls, and for the collection of delinquent personal property taxes except the provisions for the compromise or cancellation of illegal taxes and the refund of moneys paid thereon, shall be applicable to the income tax herein provided."

Sec. 74.11 of the statutes provides for an action to collect taxes on personal property and provides for the entering of judgment at the end of the somewhat summary procedure provided for by said section. The said sec. 74.11 (3) (c) then provides:

"* * * No stay of execution shall be allowed on any such judgment except in case of appeal; and no property of such defendant shall be exempt from levy and sale upon execution issued thereon. * * *"

Sec. 74.11 (4) provides for filing of transcript of the judgment in the office of the clerk of the circuit court of any county and further provides as follows:

"* * * The clerk of any circuit court in which any such transcript is filed and docketed may issue execution thereon; and no real or personal estate of the defendant shall be exempt from seizure and sale upon such execution. * * *"

Sec. 74.29 provides for collection of delinquent personal property tax by tax warrant attached to schedules of delinquent personal property taxes. Sec. 74.30 provides as follows:

74.30 (1) provides:

"The sheriff to whom any such warrant shall be delivered shall proceed in the same manner and with the same power to collect the unpaid taxes specified in the schedule or warrant as he would upon execution issued out of a court of record. And the county treasurer or any person in his behalf who is interested in the collection of said tax may make the necessary affidavit for garnishee proceedings or attachment, and thereupon any competent court shall have jurisdiction of the same. Such affidavit need not state that such indebt-
edness or property is not exempt by law from sale on execution, but shall state that the indebtedness is for a delinquent personal property tax instead of stating that it is on contract or judgment. Such affidavit may be amended as in other cases."

74.30 (2) provides:

"In case any of such taxes shall be returned unpaid in whole or in part the said treasurer may, at any time within six years thereafter, bring an action or actions in the name of his county to recover such unpaid taxes and the costs and charges thereon against the persons or corporations charged therewith in any court of competent jurisdiction; and no law exempting any goods and chattels, lands and tenements from forced sale under execution shall apply to a levy and sale under any of said warrants or upon any execution issued upon any judgment rendered in any such action; and upon the return of such general warrant the county treasurer is also authorized to institute against any person charged with any personal tax which remains uncollected supplementary proceedings for the collection thereof; and all laws applicable to such supplementary proceedings upon judgments are made applicable to the proceedings hereby authorized, except that if such delinquent is a resident of this state such proceedings shall be instituted before some proper officer of the county in which the person proceeded against resides, otherwise in any county in the state."

It seems clear from a reading of secs. 74.11 (3) (c), 74.11 (4) and 74.30 (1) and (2) that personal property taxes are collectible out of any property owned by the debtor and that the general exemption statutes have no application. The foregoing being true with respect to personal property taxes, it is likewise true with respect to income taxes by the express language of section 71.18 (3), Stats., above quoted.

The procedure followed by the commission in this case was that authorized by sec. 71.36, Stats., which procedure in its essentials does not differ from that of sections 74.29 and 74.30, Stats. Furthermore, sec. 71.36 (4) provides as follows:

"If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes, penalties, interest and costs as upon a judgment against the taxpayer for the amount of same."
So that by the express language of said subsection all of the remedies provided in 74.30 and 74.11 (3) (c) and (4) are available to the commission when proceeding under sec. 71.36, Stats.

It is our opinion that the specific provisions of secs. 74.11 (3) (c) and (4) and sec. 74.30 control over the more general provisions of sec. 62.13 (9) (d), Stats. This construction is fortified by analysis of sovereign prerogatives and rights as they existed at common law. It is by no means certain that this pension fund would be exempt from satisfaction of a tax judgment or claim in favor of the sovereign even though there were no such specific provisions barring exemptions in relation thereto. The general rule is stated in 61 C. J. 1041 as follows:

"* * * Except as specifically provided for by statute, as a general rule there is no exemption of any class or kind of personalty from distress or seizure for taxes; and it is immaterial that the property in question may be by law exempt from levy and sale on ordinary executions, or even that it was exempted by statute from taxation, or otherwise was not subject to taxation at the time of the assessment, although the contrary has been held. * * *"

Claims for taxes are not barred by sec. 313.08, Stats., by failure to file against an estate within the time allowed by law for filing other claims. Estate of Adams, 224 Wis. 237.

Sec. 313.16 prior to 1935 gave the state no preference or priority by express language with respect to claims filed against an estate. This section was amended by ch. 336 of the laws of 1935 so that there was added to sec. 313.16 (1) (c) the following language "or the laws of the state of Wisconsin". Thus, prior to 1935 there was no statute expressly giving the state priority unless it could be said that the state obtained priority by virtue of section 313.16 (c), which at that time read as follows: "debts having a preference under the laws of the United States". It could be urged that such language by reference to the bankruptcy laws gave the state priority. The supreme court in the recent case of In re Will of Koehring, Deceased (decided March 7, 1939, 284 N. W. 523, 230 Wis. 533), held that it was unnecessary to
determine whether said subsection gave the state a priority prior to the 1935 amendment. The court said, p. 524:

"However, it is not necessary to pass upon the foregoing contentions because, in the absence of any statute to the contrary, there is applicable to the state's claim for the tax, the rule that 'at common law the crown, by prerogative right and independently of any statute, was entitled to priority of payment over general creditors for all debts, taxes and other demands against the estates of insolvent debtors.' Woodyard v. Sayre, et al., 90 W. Va. 295, 110 S. E. 689, 24 A. L. R. 1497. That rule, as is also stated in that case, 'seems to have been recognized and followed in this country by a long line of decisions, state and federal, with but one or two exceptions, since the government of the United States was established; * * *.' In Re Assignment of Milwaukee S. & W. Co., 186 Wis. 320, 323, et seq., 202 N. W. 693, this court said:

"'Section 1700 Statutes, [relating to the payment of claims in voluntary assignment proceedings] in referring to the priority of claims for taxes and other preferred claims, is largely declaratory of the common law. * * *"

"'The proceeds derived from taxes are an essential to the maintenance of the government, and this consideration lies at the basis of the government's priority. Such priority was inherent in the common law of England before we became independent. As is said in Central Trust Co. v. New York C. & N. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260: "There is great force in the claim that 'the state has succeeded to all the prerogatives of the British Crown so far as they are essential to the efficient exercise of powers inherent in the nature of civil government, and that there is the same priority of right here, in respect to the payment of taxes, which existed at common law in favor of the public treasury.'"

"'34 Cyc. 346 states the rule as to receivers as follows: "Generally, taxes constitute a claim upon the assets in the hands of a receiver superior to every other claim except costs." See, also, [1] Clark, Receivers, sec. 827, p. 909.'


The court in said case concludes as follows, pp. 524-525:
"* * * in the absence of a clear and unambiguous statute specifically denying the state's right of priority, its right thereto exists as to all taxes by virtue of the common law. * * *"

The question herein presented is not essentially different than the question presented in the Koehring case. Common law sovereign prerogatives prevail "in the absence of a clear unambiguous statute specifically denying the state's right of priority,"—in this case the state's right to collect against any property which has not been specifically exempted by clear and express language from seizure in satisfaction of the sovereign's claim.

In Dennis v. Maynard, 15 Ill. 477, 481, the court holds a similar question similar to the sovereign prerogative right of priority. The court says:

"All the principles applicable to the prerogative priority of the crown in this respect equally apply to the public dues for taxes."

By application of the doctrine of sovereign prerogatives as they existed at common law to the problem herein involved, it seems quite probable that a fireman's pension could be subjected to the sovereign's claim for income taxes even though there were no express provisions in the statutes specifically barring all exemptions in relation thereto. Having such point in mind, it is not difficult to conclude that sec. 74.11 (3) (c) and (4) and sec. 74.30 prevail over the provisions of section 62.13 (9) (d), Stats.

There remains to be considered, however, the question of whether the tax payer's pension can be reached by court order in supplementary proceedings. We are of the opinion that it cannot be reached by such an order.

Prior to the enactment of the quasi-garnishment statute, the rule had been firmly established in Wisconsin as well as in the great majority of the states that funds in the hands of a municipality could not be reached by garnishment or proceedings supplementary to execution. This rule has been applied to wages, salaries, fees and benefit payments. See Merrell v. Campbell, 49 Wis. 535; Burnham v. City of Fond du Lac, 15 Wis. 193; 23 C. J. 835. While the quasi-garnishment act has remedied the situation, it is obvious that the
benefits of that act can be realized only by proceeding under its provisions. In this regard, the state would seem to have no more right to reach the fund by order in supplementary proceedings than would any private suitor.

You are therefore advised that the taxpayer’s pension may be reached only by proceeding pursuant to the terms of the quasi-garnishment statute, to wit, sec. 304.21, Stats.

Sec. 71.36, subsec. (4), Stats., expressly provides:

“If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes, penalties, interest, and costs as upon a judgment against the taxpayer for the amount of same.”

In XXV Op. Atty. Gen. 526, this department held that the filing of a transcript of the warrant with the proper official operates as quasi-garnishment of wages of a public official. There can be no doubt that the remedy of quasi-garnishment is available to the tax commission on a delinquent income tax warrant. There is some authority to the effect that pensions cannot be seized in garnishment proceedings. 28 C. J. 187; Manchester v. Burns, 45 N. H. 482; Seventy-First Street & Broadway Corp. v. Thorne, 157 Atl. 851 (N. J.). The arguments which form the basis for that view are in the main as follows:

1. That pensions are by statute exempt from seizure for debts.

2. That it is contrary to public policy to permit creditors to seize the funds designed to save the beneficiary from destitution and thus prevent him from becoming a ward of the government or to induce an individual to enter some form of government service.

3. That the obligation on the part of the payor or obligor is not absolute—that it is not a debt due the pensioner.

The first of these arguments, while valid, is not applicable in this case since the statutory exemption is not effective against tax claims or against the sovereign. The second would seem to be without merit in any case for, if the public policy involved does not warrant protection of such pension by a general exemption provision, there can be no greater reason for holding that such policy prohibits garnishment. Garnishment, like simple execution, is a means
of subjecting a debtor's property to the claims of judgment creditors. The fact that his property happens to be in the hands of a third party should not of itself give it greater security.

As regards the third argument, it must be admitted that the essential concept of garnishment proceedings is that the debtor has an interest or claim upon the property to be seized, which claim he could enforce. Taylor v. Donahoe, 125 Wis. 513; Lehmann v. Farwell, 95 Wis. 185; 28 C. J. 15. The question is whether the claim of the debtor against the garnishee is such that the debtor can demand payment thereof and can enforce payment in case of refusal. The pensioner's right to receive payment becomes fixed and absolute upon the happening of one of the events stated in the law. It may perhaps be true that until the occurrence of one of those contingencies, the government has absolute control over the funds and may dispose of them as it sees fit without impairing any property rights of the beneficiary. The case of State ex rel. Risch v. Trustees, 121 Wis. 44, so holds. However, the court in its opinion indicated that upon the occurrence of such event the sum promised would become vested in the officer or his representative. Thereupon, the beneficiary acquires a property interest and his right to the payments would be absolute. Certainly if payments are wrongfully refused, the pensioner can maintain an action to compel the proper official to turn over the amount to which he is entitled. Examination of the cases relating to the firemen's pension law reveals a number of instances in which such action has been brought.

It is considered that the obligation owing to a pensioner under sec. 62.13 (9) (d) is sufficiently fixed and absolute to support quasi-garnishment proceedings. The quasi-garnishment statute itself refers simply to "money due, or to become due". The word "due" is defined as meaning "what may be demanded." Bouvier's Law Dictionary. There seems to be little doubt that pension payments are "due" within that definition when the event occurs upon which they become payable. It follows that the funds in question may be seized pursuant to sec. 304.21, the quasi-garnishment statute.

NSB
Intoxicating Liquors — Public Officers — Town Board —
Licensed tavern operator is not ineligible to serve on town
board nor is town board member ineligible to be licensed.
Town board member so circumstanced may pass upon
neither his own application for license nor any other appli-

April 8, 1939.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

In your wire you refer us to XXIV Op. Atty. Gen. 292 and inquire:

"Can town board member owning and operating a tavern
serve on town board when town board is licensing board and
part of duties as licensing board are the granting of a
license A to himself B to other persons applying can he act
on town board for any other purpose must he relinquish
either tavern license or membership on town board."

Under the old licensing laws, we ruled in a number of
opinions that a town board member or member of the city
council might be licensed but that he could not pass upon his
461, and XXIII Op. Atty. Gen. 191, 197. It was never held
that a member of the town board could not be licensed or
that if licensed he could not be a member of the town board.

In XXIV Op. Atty. Gen. 292, we extended the logic of the
prior opinions under the new licensing law and held that a
member of the city council who was a licensed pharmacist
should not serve upon the licensing committee. The same
public policy that requires the conclusion that the member
of the board is disqualified from passing upon his own ap-
plication would seem to require that he is likewise disquali-
ified if he were to attempt to pass upon his competitor's or
proposed competitor's application.

It must be noted that the question that you submit does
not deal with a question of incompatibility of offices. There
is but one office involved. The question is whether a tavern keeper is eligible for town office or whether a town officer is eligible to become a tavern keeper. The legislature has created no disqualification. The attorney general’s opinions above cited indicate the extent to which public policy in the absence of legislation dictates disqualification. The opinion in XXIV Op. Atty. Gen. 292 appears to be sound in analysis. If the disqualification is to be further extended, it is for the legislature to extend rather than for us.

The opinion in XXIV Op. Atty. Gen. 292 is adhered to and is neither restricted, extended nor modified.

NSB
Courts — Judgment — Social Security Law — Old-age Assistance — Judgment rendered and docketed in court of record in county in which real property of A is located prior to filing of old-age pension certificate has priority over old-age pension lien as to all property of A except homestead.

As to homestead, old-age pension lien by virtue of certificate filed prior to improvements made and with respect to which mechanic's lien is subsequently filed, old-age pension lien has priority.

While old-age pension lien may not be at present enforceable it nevertheless exists as lien, and foreclosure of mechanic's lien must be subject to old-age pension lien.

Under sec. 289.12, Stats., only interest of owner at time of commencement of work which forms basis of mechanic's lien can be sold. Foreclosure judgment should be for sale of owner's equity as it existed at time of commencement of rendering of services,—sale of equity rather than sale of property.

April 10, 1939.

Richard G. Harvey, Jr.,
District Attorney,
Racine, Wisconsin.

You ask the opinion of this department as to the order of priority of the various liens under the following set of facts.

A judgment was docketed in a court of record in Racine county against one A. Subsequently A inherited a piece of real estate situated in said county. After A had thus acquired the property, the Racine county pension department filed a certificate of lien with the register of deeds of that county in accordance with sec. 49.26, subsec. (4), Stats., as amended by ch. 7, Laws Special Session 1937. Thereafter certain improvements were made upon the premises by D, who properly filed and perfected a mechanic's lien therefor.

As indicated in the opinion which you have attached to your request, the order of priority in the situation outlined above is as follows: first, the judgment lien; second, the old-age assistance lien, and third the mechanic's lien.
If the premises in question constitute the homestead of A, then the lien of the judgment does not attach according to the provisions of secs. 270.79 and 272.20, Stats. In that event the old-age assistance lien ranks first and the mechanic's lien second. The fact that the premises constitute the homestead of A does not necessarily make the old-age assistance lien unenforceable. Sec. 49.26, subsec. (4), as amended by ch. 7, Laws Special Session 1937, provides:

"* * * Provided, however, that no such lien and no claim under section 49.25 shall be enforced against the homestead of the beneficiary while it is occupied by a surviving spouse or by any surviving minor children of the beneficiary; * * *.""

The question is, then, not whether the property is A's homestead, but rather whether it was the homestead of the beneficiary and whether A is a surviving spouse or minor child. Assuming those questions are answered affirmatively, the old-age assistance lien is unenforceable as long as A occupies the premises. The lien, however, is still in existence and enjoys priority over all liens subsequently acquired or recorded, except tax liens. Sec. 49.26, subsec. (4). Consequently the old-age assistance lien would be prior in rank to the mechanic's lien although the latter could be enforced according to sec. 272.20, subsec. (1), Stats., while the former could not.

If, under those circumstances, action were brought to foreclose the mechanic's lien, the premises would be sold subject to the old-age assistance lien. Sec. 289.12, Stats., provides in part:

"The judgment shall adjudge the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the commencement of the work or furnishing the materials for which liens are given and which he has since acquired, or so much thereof as may be necessary, be sold to satisfy the judgment, and that the proceeds be brought into court with the report of sale to abide the order of the court. * * *.""

At the time the work was commenced, A's interest in the land was subject to the old-age assistance lien and a sale
pursuant to an action to enforce a mechanic's lien will, by virtue of the above statute, leave the prior lien unaffected. To the effect that efforts to enforce a mechanic's lien must be strictly confined to the actual interest held by the party who authorizes the improvements at the time the improvements were commenced, see Milwaukee Loan and Finance Co. v. Grundt, 207 Wis. 506; Delap v. Parcell, 283 N. W. 305. See also A. Lentz Co. v. Dougherty, 218 Wis. 493, in which our court held that foreclosure of a mechanic's lien would be granted subject, however, to the rights of a prior mortgagee who had been made a party to the action.

NSB
RK

Words and Phrases — Income — Term "income from any source" as used in sec. 45.07, subsec. (2), par. (g), Stats., is used in broad sense as meaning "means of support derived from any source" as applied to any individual in question, but income of wife is not income of husband and vice versa.

April 10, 1939.

COL. WM. A. HOLDEN, Commandant,
The Grand Army Home for Veterans,
Waupaca County, Wisconsin.

You request the opinion of this department as to the meaning of the word "income" as it appears in sec. 45.07, subsec. (2), par. (g), Stats. You ask whether that term includes:

(1) Proceeds from life insurance policies;
(2) Annuities from life insurance or other savings corporations;
(3) Payments to a widow or a mother under war risk insurance contracts held by husbands or sons;
(4) Pension or annuities from municipal police department;
(5) Pension or annuities from municipal fire department;
(6) Pension as retired postal employee.

Sec. 45.07, subsec. (2), pars. (a) to (f), sets out various classes of individuals who may, as members of the home, receive the benefit of state appropriations provided by sec. 20.08, subsec. (7). Sec. 45.07 (2) (g) provides in part:

"No person of any of the classes specified in paragraphs (a) to (f) shall be admitted to the Grand Army Home for Veterans * * * unless he shall pay twenty per cent of his income from any source or at the option of the commandant all of his income in excess of four hundred dollars into the general fund for the maintenance and operation of the home; provided, that a wife of a veteran may, in addition, retain for personal use, annually, one hundred dollars independent income; provided further, that the advisory board may in its discretion remit such sums as they deem necessary for the care of the minor dependents of a member. * * *"

A consideration of the provisions of this section in view of the purpose and function of a home for veterans reveals no reason for restricting the meaning of the word "income" to the technical connotation which it bears when employed in statutes relating to more specialized fields. Had the legislature intended to use the term in its narrow sense, it could easily have done so.

This department has ruled that monthly payments of an insurance company on a disability policy constitute "income" as that word is used in sec. 47.08, Stats., which provides for pensions to the blind. XXII Op. Atty. Gen. 316. And in interpreting the provisions of sec. 49.21, Stats., relative to old-age pensions, we have ruled that the meaning of the word "income" as used in that section is "means of support". XXV Op. Atty. Gen. 250; XXIV Op. Atty. Gen. 461. In the latter opinion it was stated that the word "income" is a "broad, comprehensive, flexible and inclusive term" and hence should be construed and understood according to common and approved usage of the language under sec. 370.01, subsec. (1) Stats.
We are of the opinion that the word "income" in sec. 45.07 (2) (g) should be interpreted in its broad sense as meaning "means of support derived from any source." You are therefore advised that money derived from all of the various sources which you enumerate constitutes income for purposes of ascertaining the amount required to be paid by sec. 45.07 (2) (g) in order to secure admission to the Grand Army Home for Veterans.

We reach this conclusion the more readily in that there are sufficient provisos in sec. 45.07 (2) (g), Stats., whereby the commandant or the advisory board may prevent the law from operating with undue hardship in the instances which come within the terms of the proviso. It may be further noted that income applies to income received by an individual and that income received by a wife of an individual is not income received by that individual or vice versa.

NSB

Social Security Law — Old-age Assistance — Administrative officer's duty considered under sec. 49.23, subsec. (3), Stats., and material factors considered whereby administrative officer arrives at ultimate finding of fact as to whether transfer of property was for purpose of qualifying for old-age relief or otherwise to avoid provisions of act.

Sec. 49.23, subsec. (3), Stats., further considered in relation to sec. 49.23 (2) and secs. 49.24, 49.25 and 49.26, Stats.

April 10, 1939.

George M. Keith, Supervisor of Pensions,
Pension Department.

In your letter you state:

"Difficulty has been experienced in construing subsection (3) of section 49.23, Wis. Stats., which provides:
  "Old age assistance shall not be granted or paid to a person:
"Who has deprived himself, directly or indirectly, of any property for the purpose of qualifying for old-age relief."

(1931 c. 239 s. 1; 1935 c. 554)

"Your opinion is, therefore, requested on the following two principal questions:

1. What constitutes a contravention of section 49.23 (3)?

2. After contravention of section 49.23 (3), how long does ineligibility persist?

1. In considering the first question (contravention), some administrators urge strict construction, others liberal. Those urging strict construction point out the administrative difficulty of determining purpose or intent and the possibility or appearance of partiality and bias. These predict the ultimate breakdown of the barrier intended by the statute. On the other hand, those favoring liberal construction point to the word 'purpose' as the important element to be considered. These say that purpose is synonymous with intent, and that intent can be inferred from statement, overt acts, and objective facts and circumstances. They suggest the following tests as disclosing intent.

- Was a substantial equity transferred?
- Was there adequate and present consideration?
- Was transfer made to relatives or others who might be privy to an attempt to circumvent the provisions?
- Was transfer made under duress of circumstances, such as impending foreclosure?
- Does proximity of transfer to date of application for aid indicate intent to circumvent the statute?"

There is little doubt in our minds but that those urging what you call the liberal construction have the right approach to the problem. We think that the term "purpose" is synonymous with "intent", and that all of the circumstances outlined are material in arriving at the ultimate fact which the department must find in view of all the facts and circumstances of a particular case, namely: Was the property transferred for the "purpose" of qualifying for or otherwise avoiding the provisions of the act? All administrative bodies have to find ultimate facts upon which conclusions have to be grounded. It is not always easy to determine questions of ultimate fact. There are bound to be border-line cases. No rule of thumb has yet ever been devised which, when applied, will give the right answer to all circumstances and to all situations. Each individual case has
to be considered in view of all the facts and circumstances connected with that particular case. The problem is not essentially different from determining whether a deceased transferred the property in contemplation of death, which is the question of ultimate fact to be determined in computing inheritance taxes where there has been a transfer of property prior to death. The problem is not essentially different from any case where the rights of the parties are dependent upon whether a conveyance was made to hinder, delay and defraud creditors—whether the conveyance was fraudulent in view of all the facts and circumstances of the particular case. Under the law the administrators of the pension system are charged with the duty of determining this ultimate question of fact. No administrator is justified in ignoring the plain terms of the statute merely because he may be charged with partiality or bias in conscientiously endeavoring to arrive at the ultimate question of fact in any particular case. No law was ever yet devised that was so automatic in its workings as to relieve those charged with the administration of it from the onus of such accusations. An administrator will be successful as a good public servant to the extent that the records show that he acted conscientiously in the performance of his functions and his duties and that the accusations of bias and prejudice are without merit.

You further state:

"Another problem to be considered as to what constitutes a contravention of section 49.23 (3) is the relationship of the various subsections and sections of the law devoted to old-age assistance. These relationships may be divided into two categories, (1) the relationship of subsection (3) to the immediately preceding subsection (2) of section 49.23, and (2) the relation of section 49.23 (3) to the immediately succeeding sections 49.24, 49.25, and 49.26.

"With relation to the first category consider the following situations. One owning property of a value of $8,000 before application transfers one-half of said property for the purpose of reducing his property holdings below the $5,000 maximum provided in subsection (2) of section 49.23. Is he eligible? A variation of this situation is found where husband and wife each own property in severalty. For example, a wife, age 50, owns property of a value of $4,000 and her
husband, age 66, owns property of a value of $4,000. If the wife transfers her property, over which the husband has no control, is the husband eligible?"

As to the first case stated, we can see no reason why the applicant owning property of a value of $8,000 before application, who transfers one-half of said property with the conceded purpose of reducing his property holdings below the $5,000 maximum provided in subsec. (2) of sec. 49.23, Stats., is not clearly ineligible under the express provisions of sec. 49.23, subsec. (3), Stats. As to the second case stated, it seems to us that the ultimate fact to be determined is whether the wife's conveyance of her separate property was collusive and made for the purpose of qualifying the husband and with his tacit knowledge and connivance. A wife may do as she chooses with her separate property, and it stands to reason that a husband should not be deprived of the benefits of the act merely because the wife has made some conveyance of her property, and with respect to which conveyance, he had no knowledge. On the other hand, if the circumstances are such as to lead to the reasonable conclusion that the husband had knowledge of the conveyance, that he gave a real or tacit approval with respect thereto, or that he was an active party in the transaction, it is our opinion that such facts, when considered in relation to other facts and circumstances of the case such as discrepancy between actual value and consideration received, transfer made to relatives, proximity of date of transfer to date of application, etc., may well be such as to lead to the reasonable conclusion that the conveyance was made by the wife with the collusion of the husband for the purpose of qualifying for the act. If such is found to be the ultimate fact, it is our opinion that the husband does not qualify for relief.

You state further:

"With relation to the second category pertaining to relation of the statutes and still under the principal heading of what constitutes a contravention, consider the following situations. One holding realty of a value of $1,000 transfers his property for the avowed purpose of circumventing sections 49.25 and 49.26, the recovery provisions of the old-age statutes. Has he contravened section 49.23 (3)? Next, one owning realty of a value of $1,000 but encumbered by a
mortgage and delinquent taxes for the full value or more, deeds the property to a mortgagee to avoid foreclosure. Note that the mortgagor has parted with his equity of redemption and usually a period of occupancy. Has he contravened section 49.23 (3)? A common situation encountered is where the Federal Land Bank will permit (and usually encourages) the extension of a farm mortgage where title is transferred to a son who assumes the mortgage. The state pension department is presently faced with a great variety of such situations."

It is our opinion that one who owns realty of the value of $1,000 and who transfers his property for the avowed purpose of circumventing the provisions of sections 49.25 and 49.26, Stats., may be denied the benefits of the act. He probably has not contravened sec. 49.23, (3), of the act. Under the case cited, as the applicant would be eligible whether or not he retained the property, it seems doubtful that it can be said that the conveyance was made "for the purpose of qualifying for old-age relief" within the language of section 49.23 (3), Stats. Such a conveyance probably does not act as an absolute bar, but rather lies within the field of discretion wherein an administrative officer may deny an applicant the benefit of the act.

Sec. 49.21, Stats., provides as follows:

"Any person who shall comply with the provisions of sections 49.20 to 49.39, shall be entitled to financial assistance in old age. The amount of such old-age assistance shall be fixed with due regard to the conditions in each case, but in no case shall it be an amount which, when added to the income of the applicant, including income from property, as computed under the terms of this act, shall exceed a total of one dollar a day."

Any conveyance made without adequate consideration in preparation for application for pension obviously affects "the conditions in each case". It affects earnings of an applicant and it affects need of an applicant. The pension must be fixed, having due regard to earnings and need of an applicant. Sec. 49.26, as amended by ch. 7, Laws Special Session 1937, contemplates that the assistance furnished will be a lien upon all of the real property of an applicant, including his homestead. The administering officer is given
wide discretionary power as to release of all or any part of the real estate from the lien—but it is for the administrating officer to determine whether a particular parcel of real estate shall be released from the lien, rather than for an applicant for a pension to determine in advance of becoming a pensioner whether a particular parcel of real estate shall be subjected to the lien. If the circumstances with respect to a particular conveyance are such that the administrative officer, in the exercise of his discretion, would not have released the real estate in question from the lien of the assistance furnished, had application been made therefor under the provisions of sec. 49.26, (4), Stats., we think that it can be said that the applicant has not complied with the provisions of secs. 49.20 to 49.39, Stats., as required by sec. 49.21, Stats., and that the administrative official is well within his field of discretion if he denies the applicant the benefit of the act. The applicant thus denied the benefit of the act because of such a colorable conveyance, may, of course, regain title to the property transferred and subsequently apply for the benefits of the act.

The foregoing observations apply equally to a transfer of personalty which does not come within the provisos of sec. 49.26 (1) as amended by ch. 7, Laws Special Session of 1937, or within the language of sec. 49.23, (3), Stats. The administering officer has discretion as to whether he will require conveyance of the personalty to the county. If the circumstances are such that he would have required conveyance of such personalty to the county had it not been transferred prior to application, we think that he is within his field of discretion if he denies the applicant the benefits of the act until such time as the applicant is in a position to place the county in the position that the administering officer would have required in view of all the facts and circumstances of the particular case had the transfer not been made.

As to the situation where property mortgaged for full value or more is quitclaimed or deeded by an applicant to a mortgagee prior to application, we do not think that such transactions are very significant. It is true that the mortgagor parts with his equity or redemption, but the mortgagee also parts with any right that he may have to a de-
efficiency judgment against the mortgagor at the end of the foreclosure. Depending upon circumstances, a mortgagor may or may not be parting with a period of occupancy. If the circumstances are such as to justify the appointment of a receiver during the foreclosure proceeding, the mortgagor would not be giving up anything by way of right of occupancy. It would be an unusual case where such transactions are of any significance. Both mortgagor and mortgagee usually terminate their relationship in this manner because each concludes that it is to his mutual advantage to do so. It would take a strong showing to show that such is not the case.

As to the common situation encountered where the federal land bank permits and usually encourages the extension of a farm mortgage where title is transferred to a son who assumes the mortgage, the ultimate question of fact to be determined is whether such property was transferred for the purpose of qualifying for old-age relief within the meaning of sec. 49.23, (3), Stats., or for the purpose of otherwise contravening the act. If there was no substantial equity transferred, if the mortgagor was in default and had no reasonable prospect of making good the default, if the transfer to the son was made and the extension granted by the mortgagee was made at the instigation of and at the insistence of the mortgagee as an alternative to foreclosure, it would be hard to see where it could be said that there was any intent upon the part of the mortgagor to evade or contravene the terms of the act. If all or some of the facts were other than as above outlined, the administrator might well find that the intent was either to qualify for assistance or otherwise evade the terms of the act. The ultimate finding must be based upon all the facts and circumstances of the particular case. The problem is not essentially different from the problem first discussed in this opinion.

Lastly, you state:

"Reference is next made to the length of time ineligibility will persist. The statute is silent as to the length of time, but if strictly construed would forever bar one who had contravened it, and this regardless of the value of the property transferred. For example, suppose A owned a home valued at one thousand dollars, but mortgaged for $640,
thus having a net equity of $360. Then suppose A transferred this property to his son January 1, 1937 and the son thereafter supported his father for one year at a conceded cost of $360. Then suppose the son were to die or become unemployed and A therefore applies for old-age assistance. Is A ineligible forever, or may the county pension department find the ineligibility to have been purged—could the state pension department on appeal under section 49.50 (4) find such an applicant to be eligible?”

It seems apparent from the example cited that you are confusing two concepts. The conveyance, under the circumstances outlined, is not necessarily in contravention of any of the provisions of the act. Until it has been found that it was made with intent to evade the provisions of the act, there is nothing from which A need purge himself. A transaction of this kind may be made with the utmost good faith and if made in good faith and without any intent to evade the provisions of the act, there can be no problem with respect to how long ineligibility exists, as there never was any ineligibility.

Assuming, however, that there are other facts and circumstances in connection with the example cited which would justify the ultimate conclusion that the transfer was made either for the purpose of qualifying for old-age relief or for the purpose of evading the terms of the act and such a finding is made, the question is then presented as to whether time, and time alone, is sufficient to make that which was originally an evasion of the act a non-evasion of the act. We do not think that time, and time alone, is sufficient to accomplish any such result. In the first place, the time element is not apt to arise in relation to such a question. It usually arises in relation to the making of a finding as to whether the transfer was for the purpose of qualifying for old-age relief or otherwise to avoid the terms of the act. The time element involved between the transfer and the date of application is one of a number of other important factors to consider in arriving at the ultimate finding of fact. If the ultimate finding is that the property was transferred for the purpose of qualifying for old-age relief or otherwise to avoid the terms of the act, and the benefits of the act are accordingly refused an applicant, the order
should and probably will specify what the applicant must do with respect to those transfers before his application will receive any further consideration. Until the applicant offers an application showing that he has complied with the terms of the prior order, his application is without standing. Mere lapse of time after an application has been refused because of a transfer found to be colorable will not make that which was originally an evasion of the act, a compliance with the act.

NSB

Corporations — Co-operative Associations — Signers of articles of non-stock corporation organized under general corporation law or as co-operative association under ch. 185, Stats., may not revoke or amend articles under sec. 180.06, subsec. (5), Stats.

April 10, 1939.

FRED R. ZIMMERMAN,
Secretary of State.

Under date of March 28, 1939, you requested an opinion relating to the construction of subsec. (5), sec. 180.06, Stats. You ask: (1) whether a co-operative association incorporated under chapter 185 of the statutes without capital stock may revoke articles under this subsection by a revocation signed by all of the incorporators and properly acknowledged and verified as required by said subsection; (2) whether a corporation formed under the general law without capital stock may revoke its articles under this subsection; and, (3) whether a non-stock corporation formed either under the general law or under the law relating to co-operative associations may file an amendment under this subsection.

Sec. 180.06 (5) reads as follows:
"The signers of the articles or the survivors of them may abandon the organization and revoke the articles or amend the same at any time before fifty per cent of the stock has been subscribed and twenty per cent of its capital stock paid in, by signing and acknowledging a written revocation of, or amendment to the original articles of organization, and filing and recording the same or verified copies thereof, in the manner that articles and copies are required to be filed and recorded; and the register of deeds shall note on the margin of the record of the articles of incorporation the volume and page where such revocation or amendment is recorded, and shall forthwith transmit to the secretary of state a certificate stating the time when such revocation or amendment was recorded, and shall be entitled to a fee of twenty-five cents therefor."

This subsection by its terms appears to relate only to corporations having capital stock, the condition upon which the revocation or amendment privilege is granted therein being that such revocation or amendment may be accomplished at any time before fifty per cent of the stock has been subscribed and twenty per cent paid in. This is, of course, not consonant with any condition which might exist in a non-stock corporation. Should this subsection be held to apply to a non-stock corporation, the result would be that the signers might accomplish the abandonment of the organization and revocation or amendment of its articles at any time without consent of those who may have become members and after the corporation has commenced operation as such. Sec. 180.07 expressly provides for amendment of articles of non-stock corporations and sec. 181.03 expressly provides for dissolution of non-stock corporations. No mention of non-stock corporations being made in 180.06 (5), we can only conclude that the situation is to be dealt with in sections 180.07 and 181.03 and not in 180.06 (5). By ch. 246, Laws 1923, there was added as a part of an amendment to what are now subsecs. (5) and (6) of sec. 180.06, the phrase, "This section shall apply to corporations organized under other chapters of the statutes unless it conflicts with some special provision thereof." This phrase was removed by an amendment to section 180.06 by section 6 of chapter 534, laws of 1927. The removal of the phrase would seem to negative any implication that subsec. (5) of sec. 180.06 applies
to non-stock co-operative associations formed under chapter 185. Nor could subsec. (5) of sec. 180.06 be held to apply to non-stock co-operative associations by reason of sec. 185.20 since 180.06 (5) could not consistently be applied to any non-stock association or corporation.

The answer to each of the three questions presented is in the negative.

RHL

Banks and Banking — Corporations — Investment Associations — Sale of certificates evidencing interest in income or investment "plan" whereby investor makes monthly payments to issuing company, which company returns part of such payments and uses balance to buy stock of savings and loan or building and loan associations for investor and to pay premiums on life insurance policy issued to investor to assure completion of "plan" to maturity, company retaining possession of loan associations' stock and insurance policy and handling disbursement of funds resulting therefrom and certificate specifying definite amount due at maturity payable in one sum or as annuity at option of investor, funds paid by investors not being kept in separate trust fund and being mingled with moneys belonging to company, constitutes doing of banking business as defined in sec. 224.02, Stats. If not doing banking business as defined in sec. 224.02, such companies are investment companies within terms of sec. 216.01 and subject to regulation as such. Certificates in question also require registration under securities law.

April 11, 1939.

GREGORY BUENZLI, Acting Director,
Securities Division,
Public Service Commission.

Under date of March 28, 1939,* an opinion was rendered to the public service commission relative to the operations of certain companies selling income or investment "plans" and

*Page 174 of this volume.
issuing certificates evidencing interest and participation in these "plans". In that opinion it was held that these certificates were securities within the meaning of sec. 189.02, subsec. (7), Stats., and that firms and persons engaged in the sale of these certificates were agents and dealers within the meaning of sec. 189.02, Stats. You now ask whether the companies issuing these certificates are investment associations subject to regulation by the banking commission under the provisions of chapter 216, Stats.

From an examination of the certificates in question and the information submitted with respect to the nature of the operations of these companies, it would appear that these companies are doing business as investment companies within sec. 216.01, Stats., or are engaged in banking as defined in sec. 224.02 Stats.

Sec. 224.02 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, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal. Provided, however, that if money so left with an agent for investment shall not be kept in a separate trust fund or if the agent receiving such money shall mingle same with his own property, whether with or without the consent of the principal, or shall make an agreement to pay any certain rate of interest thereon or any agreement to pay interest thereon other than an agreement to account for the actual income which may be derived from such money while held pending investment, the person receiving such money shall be deemed to be in the banking business."

From the information furnished it does not appear that moneys received from individual members of the investing public by these companies are kept in separate trust funds, such moneys being apparently mingled with moneys provided by other investors and with moneys which, under the terms of the agreement between the investor and the company, belong to the company. Under these circumstances it
would appear that these companies are engaged in banking as defined in section 224.02 and that the solicitation, receipt or acceptance of funds by these companies pursuant to the said income or investment "plans", unless such companies are regularly organized and chartered as national banks, state banks, mutual savings banks or trust companies, constitutes a violation of section 224.03.

If the operations of these companies should be held not to constitute the doing of an illegal banking business, it is clear that they would be within the scope of sec. 216.01, Stats., which reads:

"No person and no copartnership, association or corporation, whether local or foreign, heretofore organized or which may hereafter be organized, doing business as a so-called investment, loan, benefit, co-operative, home, trust or guaranty company, for the licensing, control and management of which there is no law now in force in this state, and which such person, copartnership, association or corporation, shall solicit payments to be made to himself or itself either in a lump sum, or periodically, or on the installment plan, issuing therefor so-called bonds, shares, coupons, certificates of membership or other evidences of obligation or agreement, or pretended agreement to return to the holder or owner thereof money or anything of value at some future date, shall solicit or transact any business in this state unless such person, copartnership, association or corporation, shall have first complied with all the provisions prescribed in chapter 215 of the statutes required of foreign building and loan associations authorized to do business in this state."

Under these circumstances the solicitation and transaction of business by these companies without compliance with ch. 216 would constitute a violation of law under sec. 216.03 thereof. The fact being that the companies in question have not complied either with the banking laws or the laws relating to investment companies, it is not necessary to determine at the present time by which of these laws their operations are to be governed. Compliance with one or the other is necessary at the least.

As stated in our previous opinion and regardless of whether these companies are subjected to regulation as banks or investment associations, it appears that the certifi-
cates in question require registration under the securities law, chapter 189, Stats., such securities not being within the exemption provided by section 189.08, (1) (j), which provides for exemption from registration of securities issued by investment associations whose business is subject to the supervision and control of the banking department "providing such securities represent an obligation of such issuer or an interest in its assets and profits." The certificates issued by the companies with which we are concerned here do not appear to represent obligations of such companies or an interest in their assets and profits.

RHL

Bridges and Highways — State Highways — Sec. 88.03, subsec. (6), Stats., provides proper procedure by which county board may repair bridge on county trunk highway and charge forty per cent of cost back to town where bridge is located. Amount of special tax for such purpose charged back to town may not exceed one thousand dollars in any one year. If forty per cent of cost exceeds one thousand dollars excess must be carried to next ensuing year or years until whole thereof is paid.

April 12, 1939.

LLOYD C. ELLINGSON,
District Attorney,
Menomonie, Wisconsin.

You state that a single span steel bridge on a county trunk highway has been maintained by the county for the past three years and is now in need of repairs because of the undermining of the abutment at one end of the bridge.

In this connection you inquire whether the county may properly proceed to repair the bridge under sec. 88.03, Stats., and charge forty per cent of the estimated cost of ten thousand dollars back to the town in which the bridge is
located. You also inquire as to the amount which may be charged back to the town each year, and whether forty per cent of the cost may be prorated over a period of years so that one thousand dollars is charged back each year.

In XXIV Op. Atty. Gen. 297, it was pointed out that sec. 83.03, subsec. (6), Stats., provides the proper procedure for the county board to follow in improving or constructing a bridge on the county trunk system and in assessing part of the cost back to the town.

It is to be noted that sec. 83.03 (6) provides that the county may assess not more than forty per cent of the cost of such improvement as a special tax against the town in which the improvement is located and that the amount of such tax shall not exceed one thousand dollars in any one year. In XXVI Op. Atty. Gen. 508, 512, it was indicated that if the amount of the tax should exceed any constitutional limitation upon the taxing power of the town, the total amount could not be collected in one year, and in that event it would be necessary to carry any amount which it would be unconstitutional for the town to raise in a given year to the next ensuing year or years until the whole thereof is paid.

It would seem that the same reasoning should apply whether the limitation as to the amount of the tax to be raised in one year arises by virtue of a statute or by reason of a constitutional provision. The words "provided that the amount of such tax shall not exceed one thousand dollars in any one year" are not to be narrowed beyond the plain scope of their meaning. The limitation is merely as to the amount of tax in any one year and not as to the total amount of the tax when collected over a period of years. If the legislature had intended to set up an absolute limit of a one thousand dollar tax in connection with any one improvement, it could readily have said so. Its failure to say so negatives any such intent under the well known rule of statutory construction that the expression of one results by implication in the exclusion of others,—expressio unius est exclusio alterius. See cases cited under sec. 111 "Statutes" in Callaghan's Wisconsin Digest.

WHR
April 14, 1939.

Honorable Fred R. Zimmerman,
Secretary of State.

On March 29 you inquired as to whether or not you could legally honor a pay roll submitted by the department of commerce. As we understand the facts in the case, as gathered from information submitted by you and from other information at hand, the department of commerce went out of existence by reason of the action of the state legislature on March 17. Prior to the time the department went out of existence, the head of the department submitted a pay roll covering the period from March 1 to March 17, inclusive, and including also certain accrued vacation periods which had accumulated during the existence of the department. That is to say, as we understand the facts, the department head computed the vacation period of each employee according to the provisions of sec. 14.59, Stats., and included this vacation period in the pay roll. Thus, the vacations were actually granted at the rate set out by the law and were included in the pay roll as submitted to you.

The question you submit seems to arise from the difficulty of there being any compensable period of employment beyond the time when the department continued in existence.

We see no particular difficulty in this regard; neither do we consider that the payment of these vacation allowances would, in any sense, involve the payment of additional salaries for services actually performed. You refer in this latter connection to Op. Atty. Gen. for 1912, 869. That opinion stated that an employee could not work during the period provided by law for his vacation and receive both the allowance made by law and an additional allowance for such
work as was performed during the period. It did not, however, reach a situation such as that which you have here presented. According to the provisions of sec. 20.77, sub-
sec. (5), Stats., when an appropriation is repealed, any in-
debtedness incurred under authority of the appropriation
is to be paid out of the appropriation so repealed unless pro-
vision is otherwise specifically made by law. We consider
that in the instant case the state was actually indebted to
employees of the department of commerce to the extent that
they had earned vacation allowances at the time the law cre-
at ing the department was repealed. In addition to this, in
the present case, the department had actually granted these
vacation allowances. Consequently, we see no reason why
the secretary of state may not audit the pay roll. There cer-
tainly is no inconsistency in paying a vacation allowance
for a period subsequent to the time when an employee is
actually no longer rendering services. After all, it is not
contemplated that services shall be rendered during a vaca-
tion period. Whether the employee's services are terminated
by reason of a discharge from a department which contin-
ues to operate or whether his services are terminated by rea-
son of the discontinuance of any particular department, is,
according to our view, immaterial. In either case, where the
head of the department has granted the vacation allowance
prior to the separation of the employee from the state serv-
vice, he is entitled to receive that allowance.

JWR
Intoxicating Liquors — Intoxicating liquor dealer operating under "Class A" retail license only may not accept order for intoxicating liquor from hotel guest who is away from licensed premises and deliver liquor to such guest where sale of such liquor is not consummated on dealer’s licensed premises.

April 15, 1939.

Milton L. Meister,
District Attorney,
West Bend, Wisconsin.

You have requested the opinion of this office upon the following question:

"Is it illegal or unlawful for a dealer in intoxicating liquors operating under a retail class A license to enter a hotel to deliver liquor in the original container in case lots or otherwise to a guest at the hotel in his room where the guest has ordered the liquor directly from the dealer?"

From your question it appears that the guest at the hotel had ordered the liquor directly from the dealer but that the sale had not been consummated at the time that the dealer left his place of business to deliver the liquor. At most, the dealer had contracted to sell the liquor to the guest. If, at the time the liquor was delivered to the guest the latter was unable or unwilling to pay for the same, the sale probably would not have been completed.

Sec. 121.19, subsec. (5), Stats., provides:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

"* * *

"(5) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, * * * the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

See also Zank v. Jones et al., 178 Wis. 573, 190 N. W. 445 Sec. 176.01, subsec. (4), Stats., provides:
"As used in this chapter, or in any regulation made pursuant thereto, unless the context or subject matter otherwise requires:

"* * *

"(4) The term ‘sell’ or ‘sold’ or ‘sale’ includes the transfer, gift, barter, trade or exchange, or any shift, device, scheme or transaction whatever whereby intoxicating liquors may be obtained, but does not include the solicitation of orders for, or the sale for future delivery of, intoxicating liquors."

From your question it does not appear that the dealer in any way solicited the order for the intoxicating liquor or sold the same for future delivery. The order was given by the guest without solicitation, and the sale was completed at the time of the delivery of the intoxicating liquors. Under sec. 176.01, subsec. (4), intoxicating liquor was obtained by the guest and the sale of intoxicating liquor took place. The sale, however, took place at the hotel rather than at the dealer’s place of business.

Sec. 176.05, subsec. (2), par. (a), Stats., provides:

"* * * A retail license ‘Class A’ shall permit its holder to sell, deal and traffic in intoxicating liquors only in original packages or containers, in quantities of not more than three wine gallons, at any one time, and to be consumed off the premises so licensed, * * *.”

Sec. 176.05, subsec. (3), Stats., provides that the person desiring a “Class A” license shall state that he has not made application for more than one other such license “for any other location in the state.”

Sec. 176.05, subsec. (5), provides that the application for a “Class A” license shall “designate the premises where liquor is to be sold.”

Sec. 176.05, subsec. (11), speaks of the premises operated under a retail ‘Class A’ liquor license.”

Sec. 176.05, subsec. (14), provides for the transfer of a license “from one premises to another.”

Sec. 176.06, Stats., refers to “premises for which a retail liquor license has been issued.”

Sec. 176.07 provides a restriction on “premises licensed for the sale of intoxicating liquor at retail.”
Sec. 176.09, subsec. (1), provides that publication of the application for license to sell intoxicating liquor shall include "the location of the premises to be licensed."

Reference to these sections of the statutes is made for the purpose of indicating that the law contemplates that a "Class A" retail liquor license shall authorize selling, dealing and trafficking in intoxicating liquors only on specified premises. See also XXIII Op. Atty. Gen. 191, 207.

Sec. 176.66, Stats., provides:

"No person shall peddle any intoxicating liquor from house to house by means of a truck or otherwise, where the sale is consummated and delivery made concurrently."

Sec. 176.70, Stats., authorizes the issuance of a permit under which individuals, firms, partnerships, corporations or associations shall have the right to "solicit orders for, or sell for future delivery, any intoxicating liquor" under the restrictions and regulations provided in that section.

From the foregoing it is our opinion that, in the present case, the acceptance of the order by the dealer and his delivery to the hotel of the liquor so ordered, did not constitute a sale of the liquor. The sale of the liquor was consummated at the hotel, on premises where the dealer was not authorized to sell intoxicating liquor and hence such sale was illegal. This opinion is not to be construed as holding that a dealer in intoxicating liquor may not deliver intoxicating liquor to a hotel guest as an accommodation to, and as the agent of, such guest, if the intoxicating liquor has been previously purchased from the dealer on the dealer's licensed premises.

JRW
Banks and Banking — Trust Company Banks — Order of preference in matter of deposit of registered United States government bonds under sec. 223.02, Stats., is:— (1) assignment on back of bond, (2) assignment by separate instrument, and (3) merely depositing without assignment. All three methods are acceptable.

Deposit of United States registered savings bonds registered in name of depositing bank is not acceptable. Such bonds are acceptable only when registered in name of state treasurer in trust for depositing bank.

April 18, 1939.

John M. Smith,
State Treasurer.

In the matter of the duties of the state treasurer under sec. 223.02, Stats., relative to deposit of securities by trust company banks, you state:

"In compliance with the above section, the treasury holds among other securities and mortgage notes, certain registered:

(a) United States government bonds
(b) United States savings bonds

"Included with the first group are U. S. government bonds registered in the name of the depositing bank but unendorsed. In other instances we hold unendorsed bonds accompanied by a separate power of attorney. We have been advised by the federal subtreasury department that it will not recognize detached bond powers, but insists that transfers be made upon the reverse side of the bond itself.

"Under such circumstances it is our position that these bonds are not in proper negotiable form, and hence not available to the state in case of forfeiture.

"In a few cases we have asked the depositing banks to place their deposited bonds in good delivery form by direct endorsement, and they have complied. In other instances, however, they have demurred, presenting the following arguments:

"1. It is not necessary to endorse the bonds because in case of default of the bank, the state (banking commission) being the statutory receiver, could provide the endorsement and sequester the bonds anyway."
"2. The deposit, although in the possession of the state is held by the treasurer merely as custodian, but remains the property of the bank, and, so long as there is no default, the state has no right to take. Hence no continuing transfer is necessary.

"3. By leaving the bonds unendorsed in the custody of the state treasurer, the depositing bank escapes carrying insurance thereon. The treasury being statutory custodian, would be held responsible for their loss, and premium payments by the bank would be unnecessary.

"4. The expense of shipping the bonds, out and back would be burdensome, and since the deposit was once accepted by the banking commission, such bank should not be responsible for additional charges.

"As regards government savings bonds, these are made out in the name of the bank and bear the inscription 'This bond is not transferable'. They are not endorsed by the bank. It is our contention that these securities are likewise not in accessible form, and should be endorsed. On the other hand, some of the arguments enumerated above might also be applied to this group.

"The matter is respectfully submitted to your department for consideration and reply. Specifically, under provisions of Sec. 223.02:

(a) Are unendorsed, registered bonds acceptable by the treasurer?
(b) Are unendorsed registered bonds, accompanied by detached power of attorney acceptable?
(c) Are unendorsed U. S. savings bonds acceptable?"

The statute in question, sec. 223.02, with respect to trust company banks, provides as follows:

"(1) Before any such corporation shall commence business it shall deposit with the state treasurer not less than fifty per centum of the amount of its capital stock, provided, however, that no such corporation shall be required to deposit more than one hundred thousand dollars, such deposit to be in cash, or the securities specified in chapter 320, which cash, securities or notes secured by investments legal for trust funds shall be approved by the banking commission and shall be held by the state treasurer in trust as security for the faithful execution of any trust which may be lawfully imposed upon and accepted by it; such corporation may from time to time withdraw the said securities as well as the cash, or any part thereof; provided that securities or cash of the amount and value required by this section shall, at all times, during the existence of such corporation remain in the possession of the state treasurer for the purpose aforesaid and until otherwise ordered by a court of compe-
tent jurisdiction, unless released pursuant to subsection (2) of this section. The said treasurer shall pay over to such corporation the interest, dividends or other income which he shall collect upon such securities, or he may authorize the said corporation to collect the same for its own benefit. Upon such deposit being made and approved, the state treasurer shall issue a certificate of such fact and an amount equal to the sum stated in such certificate shall remain with him in the manner provided above; in case the capital stock shall be increased or diminished the amount of such deposit shall be increased or diminished to comply herewith and a new certificate of such fact shall be issued accordingly.

“(2) The securities and cash deposited pursuant to subsection (1) by any bank shall be released by the state treasurer and returned to the bank, whenever the commissioner of banking shall certify to the state treasurer that said bank no longer exercises fiduciary powers and that he is satisfied, after examination, that there are no outstanding trust liabilities, and that said bank has filed with the said commissioner a bond to the people of the state, in amount and form as demanded by him, conditioned upon the faithful execution of all trusts lawfully imposed and accepted by said bank.”

With respect to the United States government registered bonds, there can be no doubt that the order of preference in method of handling would be (1) assignment in trust on the back of the bond (2) assignment in trust by separate instrument, and (3) mere deposit with no assignment.

We are of the opinion, however, that any of the above three methods is acceptable and will accomplish the purpose of the deposit or trust provided by section 223.02, Stats. The registered bonds are probably nonnegotiable as they are not payable “to order or to bearer” which is an essential of negotiability, under sec. 116.02, Stats. See Grosfield v. First National Bank, 73 Mont. 219, 236 P. 250 (1925) and Novoprutsky v. Morris Plan Co., 319 Pa. 97, 179 A. 218, 98 A. L. R. 1486 (1935). However, negotiability or nonnegotiability of the bonds would not appear to be the determining factor.

The bonds are not inherently nontransferable, nonpledgeable, or nonassignable. While the government has certain rules and regulations which it will insist upon before a pledgee, transferee or assignee can enforce payment, these
rules and regulations appear to be established for the protection of the government and for the purpose of enabling the treasury department to ascertain that payment is being made to the person who is legally entitled thereto. The rules and regulations recognize pledgeability, assignability or transferability of the bonds.

If an instrument is such that it can be pledged, transferred or assigned, no particular form of assignment is necessary in the absence of a statute requiring a particular form. A delivery of an assignable chose in action is sufficient. Wooliscroft v. Norton, 15 Wis. 198. Citizens State Bank v. Southern Surety Co., 198 Wis. 416. 5 C. J. 903, sec. 69.

There can be no question but that deposit of such registered United States government bonds (registered in the name of the depositing bank) with the state treasurer is for the purpose and with the intent of complying with sec. 223.02, Stats. It does not seem necessary to decide whether such delivery constitutes technically an assignment, a pledge or a transfer. Perhaps it constitutes all three. In any event, such a delivery seems to establish a trust relationship between the state treasurer and the depositing bank. State ex rel. Sheldon v. Dahl, 150 Wis. 73. If the trust company were to meet with difficulty, were to become insolvent and taken over by the banking commission as statutory liquidation officers for the liquidation of insolvent banks and trust companies pursuant to the statutes, there would appear to be no good reason why these bonds thus deposited could not be sequestered by the liquidation officers along with all the other assets of the bank and the trust impressed upon said bonds. Upon such sequestration, the government would recognize the commissioner's title and right to receive payment.

The only issue that could be raised with respect to enforcement of the trust would appear to be an issue between the general creditors of the bank and the trust creditors of the bank. The bonds are deposited to insure performance of the trust functions of the bank. As they would seem to have been validly pledged, assigned or transferred for that purpose, there would seem to be no legal basis with respect to
which a general creditor of the bank would have any standing in an attempt to defeat the trust.

If the foregoing analysis is sound, then there is no particular problem with respect to the United States government registered bonds. Any one of the three methods suggested would be an acceptable method but in the order of preference hereinbefore stated.

A different problem is presented with respect to the undorsed United States savings bonds registered in the name of the depositing bank. These bonds in this form are by their terms nontransferable, nonassignable and nonpledgeable. There appears to be no good reason why the government may not, if it chooses, create an instrument with such inherent characteristics. 5 C. J. 875. All the government's rules and regulations with respect to such bonds are of like tenor and effect, namely that the bonds are nonassignable, nonpledgeable and nontransferable. Under such circumstances, it may be that any attempt to pledge, assign or transfer is of no significance. If subsequent liquidation were to ensue, it might well be that the general creditors of the bank could object to impressing such bonds with any trust in favor of the trust creditors of the bank because of the inherent nonassignable, nontransferable and nonpledgeable characteristics of the instruments.

While sec. 223.02 provides in part "such deposit to be in cash, or the securities specified in chapter 320, "and while chapter 320, sec. 320.01 (1), would make acceptable any bond, note or other evidence of indebtedness of the United States or which is unconditionally guaranteed as to the payment of interest and principal by the United States and while these bonds, therefore, qualify under chapter 320 of the statutes, we are of the opinion that the state treasurer need not and should not accept such bonds as an eligible deposit under sec. 223.02, Stats., when they are registered in the name of the depositing bank. The objection goes to the form of the bond rather than to the bond itself.

It is our opinion that United States savings bonds registered in the name of the depositing bank are not acceptable in form as a deposit under sec. 223.02, Stats., and that these
bonds should be accepted only when registered in the name of the state treasurer in trust for the depositing bank. The exact phraseology of the registration might well be worked out through correspondence with the United States treasury department.

NSB

_Fish and Game — Public Lands — Bird Refuges_ — State of Wisconsin has not ceded to federal government jurisdiction over area known as “the Necedah migratory waterfowl refuge” under either sec. 1.056 or 1.036, Stats., or otherwise.

Regulation of hunting and trapping in this area is vested in Wisconsin conservation commission under sec. 29.174, Stats., regardless of president’s executive order of March 14, 1939.

April 19, 1939.

**Conservation Department.**

You have called to our attention an executive order of President Roosevelt, under date of March 14, 1939, whereby a migratory waterfowl refuge, known as “The Necedah migratory waterfowl refuge,” is established. These lands, consisting of some 40,500 acres in Jackson, Juneau, Monroe and Wood counties, were acquired by the federal government under authority of Title II of the national industry recovery act, approved June 16, 1933 (48 Stats. 200), and the emergency relief appropriation act of 1935, approved April 8, 1935 (49 Stats. 115).

These lands have apparently been classified by the department of agriculture as submarginal lands, and it was planned to remove such lands from agriculture, in this area, which was designated as a sand erosion district.
It was originally contemplated that the state should lease from the counties under fifty year leases, all of the submarginal lands owned by the counties on tax deeds, and that the submarginal lands in private ownership would be purchased by the federal government and turned over to the state for conservation purposes, although later the federal government commenced the purchase of county-owned lands and the state discontinued its efforts to lease these lands.

The executive order, above referred to, among other things, provides:

"It is unlawful for any person to hunt, trap, capture, willfully disturb, or kill any bird or wild animal of any kind whatsoever within the limits of this refuge, or to enter thereon except under such rules or regulations as may be prescribed by the Secretary of Agriculture."

We are asked whether the state of Wisconsin has lost its sovereignty and jurisdiction over these lands, and whether the conservation commission is authorized to enter into long-term leases or treaties with the federal government respecting this area otherwise than as contemplated by sec. 1.056, Wis. Stats. You also inquire if this area may be established as a migratory waterfowl refuge pursuant to sec. 1.036, Stats., irrespective of sec. 1.056.

Sec. 1.056 was created by ch. 375, Laws 1935, and reads:

"Consent of the state of Wisconsin is hereby given to the United States to acquire by purchase, gift, lease or condemnation, with adequate compensation therefor, areas of land and water within boundaries approved by the governor and the county board of the county in which the land is located, for the establishment of state forests, state parks or other state conservation areas to be administered by the state under long-term leases, treaties or co-operative agreements, which the conservation commission is hereby authorized to enter into on behalf of the state with the federal government."

You state that this enabling act was passed at the request of federal authorities for the express purpose of providing for the administration of the area covered by the executive
order, and that upon the passage of such section United States Comptroller McCarl approved of payment for the lands in question with federal funds.

It is apparently now the position of the federal government, as evidenced by the executive order, that it has exclusive criminal jurisdiction over the area purchased by it, regardless of the provisions of sec. 1.056, and irrespective of the fact that the state of Wisconsin has not divested itself of jurisdiction over the lands.

It is true that a state may cede to the federal government the jurisdiction to define and try crimes under certain circumstances. This is exemplified in that portion of sec. 8, art. I, United States constitution, which grants congress the power,

"To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; * * *." 

Where the United States acquires title to lands which are purchased by the consent of the legislature of the state within which they are situated, for any of the purposes mentioned in sec. 8, art. I, above quoted, the federal jurisdiction is exclusive of all state authority. United States of America v. Francisco Unzeuta, (1930) 281 U. S. 138. It would seem, however, that under the decision of Arlington Hotel Co. v. Funt, 278 U. S. 439, the scope of the purposes to which such property may be put is as broad as the proper functions of government make desirable. Also, it is to be noted that where a state cedes land to the United States for any of the governmental purposes defined in sec. 8, art. I of the U. S. constitution, the jurisdiction of the United States is exclusive; but, if the land is acquired or held in any other way, the United States holds merely as a proprietor, and the jurisdiction of the state is complete, except that it cannot interfere with the use of such land for governmental purposes. Williams v. Arlington Hotel Co., (1927) 22 Fed. (2d) 669. Aside from the question of jurisdiction, the rights of the federal government as a proprietor may exceed
in some respects those of a private owner, as is pointed out in 24 California Law Review, 573, 575, but it is unnecessary for us to go into these distinctions here.

In the Williams case, supra, it was recognized that where the land is not acquired by the United States under the above mentioned constitutional provision, the state may cede such jurisdiction as it sees fit, and the extent of the jurisdiction of the federal government depends upon the terms of such cession. It is apparent that the lands in question were not acquired by the federal government for any of the purposes mentioned in art. I, sec. 8, U. S. Const. This being true, it is clear under the foregoing authorities, and under cases which we will discuss later, that we must find legislative consent on the part of the state of Wisconsin for the exercise of any sovereign jurisdiction over the area by the United States.

Mere ownership of lands and public use by the United States government in the absence of cession of jurisdiction by the state does not confer such sovereignty. United States v. San Francisco Bridge Co., (1898) 88 Fed. 891. In this case the court said at pp. 893-894:

"... It is not alleged in the information, nor does the fact otherwise appear, that the land upon which the new San Francisco post office is being constructed was purchased by the United States with the consent of the state, or that political jurisdiction over the same has been otherwise ceded to the United States by the state. Upon this state of facts, it must be held that the state of California retains complete and exclusive political jurisdiction over such land, and, this being so, there can be no question that persons there committing murder, or any other offense denounced by its laws, would be subject to trial and punishment by the courts of the state. 2 Story, Const. sec. 1227; People v. Godfrey, 17 Johns. 225; Ex parte Sloan, 4 Sawy. 330, Fed. Cas. No. 12,944; U. S. v. Stahl, 1 Woolw. 192, Fed. Cas. No. 16,373; U. S. v. Ward, 1 Woolw. 17, Fed Cas. No. 16,639; U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867. In the case last cited it was said by Mr. Justice Story:

"'But although the United States may well purchase and hold lands for public purposes, within the territorial limits of a state, this does not, of itself, oust the jurisdiction of sovereignty of such state over the lands so purchased. It remains until the state has relinquished its authority over the land, either expressly or by necessary implication.'"
Our own supreme court, in the case of *In re O'Connor*, (1875) 37 Wis. 379, 384, said:

"* * * But the United States, as a mere proprietor of land situated within the limits of a state, which was acquired by purchase, without the consent of the legislature, has no paramount authority derived from ownership of the soil. *United States v. Ames*, 1 Wood. & Minot, 76. 'The United States, holding lands within the state territory (unless in the cases specified by the constitution), hold them by the same tenure that individuals do.' Duncan, J., in *Commonwealth v. Young*, supra, 313. * * * 'The rights of sovereignty are never to be taken away by implication.' Spencer, C. J., in *The People v. Godfrey*.'

The only provision of our legislature other than sec. 1.056, above quoted, which might be deemed a consent to a migratory water fowl refuge by the federal government is sec. 1.036, Stats., which reads:

"Consent of the state of Wisconsin is given to the acquisition by the United States by purchase, gift, devise, or lease of such areas of land or water, or of land and water, in Wisconsin, by and with the consent of the governor of the state, as the United States may deem necessary for the establishment of migratory bird reservations in accordance with the act of congress approved February 18, 1929, entitled 'An Act to more effectively meet the obligations of the United States under the migratory bird treaty with Great Britain by lessening the dangers threatening migratory game birds from drainage and other causes by the acquisition of areas of land and of water to furnish in perpetuity reservations for the adequate protection of such birds; and authorizing appropriations for the establishment of such areas, their maintenance and improvement and for other purposes,' reserving, however, to the state of Wisconsin full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection, and control thereof by the United States under the terms of said act of congress.'"

It is to be noted, however, that both secs. 1.036 and 1.056 require the consent or approval of the governor, which we understand has not been obtained in the present instance. Furthermore, the Executive Order does not purport to cover areas acquired by the federal government under the act of
congress referred to in sec. 1.036 and, as previously sug-
gested, the extent of the jurisdiction of the federal govern-
ment depends upon the terms of the cession by the state. Consequently, the scope of sec. 1.036 is limited to areas pur-
chased by the federal government pursuant to the act of congress approved February 18, 1929.

It might well be that the conservation commission acting
under sec. 23.09 (7) (d) would have the authority to enter
into long-term leases and treaties with the federal govern-
ment for the taking over and administering of these lands
as a conservation project, independently of the authority
granted by sec. 1.056. Sec. 23.09 (7) (d) grants the com-
misson broad powers to acquire by purchase, condemnation,
lease or agreement, and to receive by gifts or devise, lands
or waters suitable for state forests, state parks, public shoot-
ing, trapping or fishing grounds or waters, fish hatcheries
and game farms, forest nurseries and experimental stations,
"gether with authority to maintain the same. This, how-
ever, would in no way increase the sovereignty of the fed-
eral government over such areas as respects the regulation
of hunting, fishing or trapping. On the contrary, this sec-
ction clearly contemplates maintenance and control by the
conservation commission rather than by some outside
agency. Moreover, the very fact that sec. 1.056 was speci-
ically passed for exactly the sort of project here considered,
as has previously been brought out, would indicate that the
legislature intended this statute should be used in making
long-term leases with the federal government rather than
sec. 23.09 (7) (d), which does not specifically mention
agreements with the federal government.

You are therefore advised that the sovereignty and juris-
diction of the state of Wisconsin include the area described
in the executive order, and that in so far as the order at-
ttempts to assert federal criminal jurisdiction over the area
in connection with hunting and trapping, it is void. Under
sec. 1.01, Stats., it is the duty of the governor and all of the
subordinate officers of the state to maintain and defend its
sovereignty and jurisdiction. Sec. 29.02 (1), Stats., pro-
vides that the legal title to and the custody and protection
of all wild animals within this state is vested in the state
for the purposes of regulating the enjoyment, use, disposi-
tion, and conservation thereof. The matter of providing for such regulation has been delegated to the conservation commission by sec. 29.174, Stats. Under subsec. (2) thereof, 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, and in view of the conclusion hereinbefore expressed, such jurisdiction of the commission includes the area described in the executive order establishing the Necedah migratory waterfowl refuge.

WHR

Public Officers — County Board — Service Officer — One who has been elected to membership on county board but who has refused to qualify is not within provisions of sec. 66.11, subsec. (2), Stats.

April 19, 1939.

GEORGE M. ST. PETER,
District Attorney,
Fond du Lac, Wisconsin.

Your request for an opinion contains the following statement of facts:

“A was elected at the spring election to succeed himself as supervisor on the county board for his village. If A fails or declines to qualify for the new election, may he be eligible for appointment (or election) to the position of county service officer, which at the present time is vacant, provided such election or appointment takes place at the May session of the county board?”

You have accompanied your request by a memorandum containing an analysis of the problem and a citation of various authorities which you considered to be in point. We
have examined the authorities so submitted and find that you have done a considerable amount of useful work in relation to answering the question propounded. We wish to express our deep appreciation of the manner in which you have thus presented the problem. If such a presentation were made by all district attorneys in connection with requests for opinions, the work in this office would be considerably lightened.

We are of the opinion that under the facts set out in your statement to us A may be eligible for appointment to the position of county service officer at the May session of the county board. The appointment to the position of county service officer is governed by the provisions of sec. 59.08, subsec. (23), Stats., which reads as follows:

"May create the position of service officer and elect for such office a veteran of a war, who was engaged in the service of the United States, to hold office for a term of two years, except in counties having a population of five hundred thousand or more wherein the term of such office shall be for an indefinite period pursuant to the provisions of sections 16.31 to 16.44, inclusive, of the statutes, and to receive such compensation, as the board may fix. If a vacancy shall occur during the term, the chairman of the board may appoint such a veteran to fill such vacancy for the unexpired term, except in counties having a population of five hundred thousand or more where such vacancy shall be filled in the manner of an original appointment. Such service officer shall advise with all veterans of wars, residents of the county, who were engaged in the service of the United States relative to any complaint made or problem submitted by them to him and shall render them such assistance as, in his opinion he may render. In counties having a population of five hundred thousand or more such service officer when appointed shall act as secretary of the soldiers' relief commission provided for in section 45.12. The board may provide such officer with clerical assistance and such other needs as will enable him to adequately perform his duties. The board may require such reports as it may determine."

There would be no question as to the right of A to receive the appointment were it not for the provisions of sec. 66.11 (2). Relevant provisions of this section are 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 which is vested in, such board * * * ."

While the appointment in the present case is apparently to be made by the chairman, we do not regard the circumstance as in any way affecting the principles of law involved. The disqualifications created by sec. 66.11 (2) relate to an office the selection to which is vested in the county board. Obviously, so far as the position of county service officer may constitute an office, it is an office the selection to which is vested in the county board, even though in a particular case a vacancy might be filled by appointment of the chairman of the board.

The reasoning upon which we conclude that A is not disqualified concerns a proper definition of the word "member" and a consideration of the purposes of the disqualification in question. Were Mr. A at the present time not a member of the county board by virtue of a prior election, the question as to whether he is or is not a member would depend upon whether or not his election, followed by his refusal to qualify, constitutes him a member. We are of the opinion that election without qualification is not sufficient to constitute one a member of the board. He is a member-elect under such circumstances and not a member. This distinction was clearly pointed out by Mr. Justice Van Devanter (then a circuit judge) in the case of United States v. Dietrich, 126 Fed. 676.

It is true, of course, that a member of the county board cannot by resigning his office escape the disqualification as to eligibility created by sec. 66.11 (2). There are many opinions and authorities so holding. Where, however, a person though elected to the office does not qualify for a membership and does not in fact become a member, it is extremely difficult to see how any provisions relating to members of county board can in any way affect him.

In this case, if and when A refuses to qualify for his office, it becomes vacant by reason of the provisions of sec. 17.03 (7), Stats. Such a refusal to qualify operates as well
to remove him from office as a hold over. That is to say, although according to the provisions of the law (sec. 61.23 Stats.) a village officer serves until his successor is appointed or elected and qualifies, his office becomes vacant by reason of the provisions of sec. 17.03 (7) upon the refusal of the successor to qualify. VIII Op. Atty. Gen. 18. Such being the case, it is rather apparent that the term of a hold over expires upon the refusal of a successor to qualify just as it would otherwise expire upon qualification of a successor. The hold over loses his office upon the failure of his successor to qualify, not by reason of any act of his own but by operation of the law which declares that a vacancy shall exist in such case. The law operates upon the term and in substance declares that it shall expire at that point.

Moreover, it is rather apparent that the case in question is as well without the spirit of the disqualification as it is without its letter. The law was enacted in order to prevent a member of the county board from utilizing his official position for the purpose of obtaining preferment in the way of election to offices to which the board was empowered to appoint. Where, however, a person though elected to the board had not qualified for membership and was not in fact a member of the county board, the same considerations of public policy would not be present. There would in such case be no inducement to logroll or to otherwise consider interests other than public interests in the affairs of the board.

In view of the foregoing, we conclude that if and when A refuses to qualify his office becomes vacant; that in such a case he does not hold over since his term as a hold over would have expired and that he would not be a newly elected member since he would not have qualified for membership. Since he would not in such a case be a member of the county board, there would be no reason why he would not be eligible for appointment as county service officer, pursuant to sec. 59.08.

JWR
Loan from Trust Funds — Public Lands — Public Officers — Commissioners of Public Lands — Notes or certificates of indebtedness held by commissioners of public lands under sec. 25.06, Stats., may be assigned in discretion of commissioners when it appears to them to be necessary or desirable to do so as matter of sound investment policy.

April 21, 1939.

LAND DEPARTMENT.

Attention T. H. Bakken, Chief Clerk.

You have inquired whether the commissioners of public lands have authority to assign to individuals or corporations notes or certificates of indebtedness acquired under sec. 25.06, Stats. upon receipt of the unpaid principal and interest to the date of the assignment.

Art. X, sec. 7, Wis. Const., provides:

"The secretary of state, treasurer and attorney-general, shall constitute a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office."

Art. X, sec. 8, Wis. Const., gives the commissioners the power to "invest all moneys arising from the sale of school and university lands, as well as all other university and school funds, in such manner as the legislature shall provide."

Sec. 25.06, Stats., to which you refer, reads:

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

In XXII Op. Atty. Gen. 97, this department ruled that the commissioners are vested with full discretion in determining the investment of trust funds as between any of the loans and investments authorized by the statutes. The conclusion of the opinion was stated in the following language at p. 100:

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

Referring for a moment to the word "invest" as used in art. X, sec. 8 of the constitution, it is to be noted that this word is not limited to a single investment. On the contrary, it has been held to contemplate a sale of property in which the money was originally invested and a reinvestment in other property. *Scottish-American Mortgage Co. v. Massie*, 94 Tex. 339, 60 S. W. 544.

Furthermore, a trustee within the limits of the authority conferred upon him has an implied and sometimes express power of discretion, although it must be honestly and faithfully exercised and must also be subservient to the main purposes of the trustee. 65 C. J. 645.

Obviously, it must have been the intention of the framers of the constitution, as well as the legislature, that the commissioners of public lands in their investment of funds entrusted to their care should have such investment powers as
might best conserve and increase such funds. This would seem to imply the power to sell and assign a loan which they had made, when, in the exercise of their discretion, it appears to be a matter of sound investment judgment to dispose of the same.

It is said:

"The right to receive money due or to become due under a contract, is not personal in nature, and as a general rule is assignable, except to the extent that this right of assigning is limited by statute." 6. C. J. S. 1060-1061.

We find no statute which either expressly or impliedly limits the right of assignment in this instance and, in the absence of such statutory limitation, we believe any holding to the effect that the commissioners are without power to assign might seriously handicap them in the proper investment and reinvestment of trust funds.

We are not unmindful of the fact that the details of the making of such loans and repayment of the same are set forth with considerable particularity in ch. 25, and that the argument might be made that since no express power of assignment is granted, none is to be implied. This, however, strikes us as being a too narrow construction, in view of the general purpose which is to be subserved by the investment of these trust funds, and, in the absence of a more compelling argument, we are reluctant to say that the commissioners are powerless to make an assignment when it appears to them to be necessary or desirable to do so.

If any serious difficulties are present in the situation, they arise rather in connection with the rights of the assignee in collecting the indebtedness thus assigned. This, however, is a matter for consideration by counsel for the assignee rather than for this office.

WHR
Minors — Child Protection — Adoption — Public Officers — District attorney is under no duty to initiate adoption proceedings arising under sec. 48.36, Stats., nor to prepare necessary papers in such proceedings.

April 24, 1939.

J. Henry Bennett,
District Attorney,
Viroqua, Wisconsin.

You ask to be advised whether it is the duty of the district attorney to "prepare adoption proceedings under section 48.36 Wisconsin statutes." The adoption proceedings referred to in subsec. (2) of sec. 48.36 are those outlined in ch. 322, Stats. Neither sec. 48.36 nor ch. 322 specifically imposes upon the district attorney the duty of appearing or taking part in such proceedings.

It does not follow, however, that the district attorney is to divorce himself absolutely from any interest in such matters. This department in September, 1936 (XXV Op. Atty. Gen. 549), issued a lengthy opinion concerning the duties of the district attorney. It was stated therein that the district attorney is the legal advisor and attorney for the county and in that capacity is required "to attend to all matters in his county in which the state or county has an interest, though that interest may be direct or indirect, and where there appears to be a probability of such interest at some future time, though there may be none at the time of the proceeding." P. 553.

In accordance with that rule it was held that it is the duty of the district attorney to appear, at the request of the board, at hearings for the determination of insanity (XXV Op. Atty. Gen. 549); to initiate proceedings to annul a marriage where one of the parties is feeble-minded and the marriage was performed in another state to evade the Wisconsin law (XXV Op. Atty. Gen. 549); to assist the juvenile court in delinquency proceedings (VII Op. Atty. Gen. 625); and to appear at hearings on applications for aid under the mother's pension law (V Op. Atty. Gen. 777). In none of
these cases was the duty specifically imposed by the statute upon the district attorney, but it was found that the interest of the state and the county was such as to necessitate the appearance of the county's legal representative.

Certainly the state and county are directly interested in the welfare of homeless and underprivileged children. The public interest, however, is identical with that of the child and the proceedings in ch. 322 are carefully designed to protect the interests of the child in every case through investigations by impartial officials or organizations. There is consequently no need for the appearance of the district attorney in such proceedings and we are of the opinion that he is under no duty to participate therein.

The actual commencement of the proceedings and the preparation of the necessary papers are matters which must be handled by the party seeking to adopt the child. If such party deems it advisable to have legal counsel, he may employ an attorney of his own choice. It is clearly no part of the district attorney's duties to represent private parties in such matters. Should the petitioner be financially unable to engage an attorney he may, in certain cases, avail himself of the provisions of sec. 253.17, Stats., which permit the county judge or his clerk, upon request, to draw the papers necessary in any proceeding for the adoption of dependent, neglected or delinquent children as defined in ch. 48. You are advised that the district attorney is under no duty to initiate adoption proceedings nor to prepare the necessary papers in such proceedings.

NSB
RK
Corporations — Securities Law — "Contract deposit certificates" issued by mutual savings bank whereby holders share in net profits of bank are securities as defined in sec. 189.02, subsec. (7), Stats., and salesmen soliciting purchasers of same are agents under sec. 189.02 (1) and required to obtain license under securities law.

April 25, 1939.

GREGORY BUENZLI, Acting Director,
Securities Division,
Public Service Commission.

You request our opinion as to whether a certain "contract deposit certificate" issued by a mutual savings bank is a security within the meaning of sec. 189.02, subsec. (7), Stats., so that agents selling these securities must be licensed under the securities law.

Under the terms of the "contract deposit certificate" the certificate holder makes monthly payments in the amount specified in the certificate. Part of such payments go into what is known as the current income account, which current income account is, according to the by-laws, used to help defray expenses of the bank and to develop new business. The monthly payments other than those paid into the current income account are deposited and credited to the account of the holder pursuant to certain optional plans which the holder may elect. The holder also has an option as to the manner in which the deposit shall be repaid. The arrangement contemplates in any event that the depositor's funds shall be enhanced by the payment in one way or another of dividends to be declared out of the net profits of the bank. This is the salient feature of the entire plan and the only one which we need to consider for the purpose of this opinion. Since the purpose of the deposit of the certificate holder's funds and the issuance of the "contract deposit certificate" is to give the holder a share of the earnings of the bank, it would appear that the "contract deposit certificate" constitutes a security, that term as defined in sec. 189.02 (7) in-
cluding "certificates of interest in a profit-sharing agree-
ment" and "any interest in the profits of a venture."

Thus the sale of these certificates by the bank's salesmen
constitutes such salesmen "agents" under sec. 189.02 (1)
and such agents are required to obtain a license as such
under the securities law.

RHL

__________________________

Intoxicating Liquors — When electors of town under sec.
176.38, Stats., vote at spring election in April to change
from licensing to nonlicensing status or vice versa, town
board has authority under sec. 176.38, subsec. (2), and sec.
176.05, Stats., to grant liquor licenses which will be effective
at once and terminate upon July first of that year.

April 25, 1939.

CLARENCE E. FUGINA,

District Attorney,

Arcadia, Wisconsin.

You state that Town A voted against the granting of
liquor licenses at the spring election of 1938 which was held
in accordance with sec. 176.38, Stats., and that the same
town voted to grant such licenses at the spring election of
1939.

You ask whether the town board has authority, by virtue
of the latter election, to grant liquor licenses which will be
effective at once and terminate on June 30, 1939, or whether
that board must wait until the license year begins on July 1,
1939, before granting such licenses.

Sec. 176.38 grants an option to towns, villages and cities
to petition for an election relative to the granting of liquor
licenses. After setting forth the manner in which such
elections shall be conducted, subsec. (2) of that section
provides:
"* * * The result shall be certified by the canvassers immediately upon the determination thereof, and be entered upon the records of the town, village, or city, and shall remain in effect until changed by ballot at another election held for the same purpose."

There is nothing in the above quoted language that would indicate that a vote one way at a spring election must obtain until June 30th of the following year, even though the voters at the next spring election vote to change the status of the town in relicensing or nonlicensing. The language of the statute is that the status voted upon at one election shall obtain "until changed by ballot at another election" and that the result of the election shall be certified "immediately" upon determination.

Sec. 176.05 relates to liquor licenses generally. Subsec. (1) thereof provides in part:

"Each town board, * * * 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 * * * for the sale of intoxicating liquors. * * *"

Subsec. (5) of the same section contains this provision:

"* * * Except as provided in subsection (6), all such licenses shall remain in force until the first day of July next after the granting thereof, unless sooner revoked; * * *"

Sec. 176.05, subsec. (6), deals with the granting of licenses for fractional parts of the license year. A portion of that subsection reads:

"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. * * *"

While this section was probably not enacted for the specific purpose of authorizing the granting of licenses between April and July 1 of a year in which the voters have voted a
change with respect to licensing or nonlicensing, certainly it cannot be said that it manifests any legislative intent that licenses cannot be granted to be effective during such period. If the section manifests any legislative intent in this regard, it must be that consistent with the interpretation which we have herein placed upon sec. 176.38 (2), Stats.

You are therefore advised that the town board of Town A has authority, by virtue of the election of 1939, to grant liquor licenses immediately for the remainder of the present license year upon payment of the proper proportion of the annual license fee.

NSB
NH

Municipal Corporations — Municipal Borrowing — Temporary loan made by county and repaid out of current funds pursuant to resolution authorizing loan, where such repayment occurs prior to time for making up next tax roll, eliminates necessity for carrying tax levied under sec. 67.12, subsec. (2), Stats., into next tax roll.

April 25, 1939.

WADE K. HALVORSON,
District Attorney,
Hudson, Wisconsin.

You state that it has been the practice at the November session of the county board to appropriate certain sums for road work during the ensuing year; this work is commenced in the spring, prior to the time when sufficient revenues are available to cover such expenditures, although the revenues by the end of the fiscal year are always sufficient to cover the appropriation for the road work which has been done. Under these circumstances, it has been customary to borrow money during the spring, under sec. 67.12, Stats., the tem-
porary borrowing statute, although there is no need to carry the tax into the succeeding year's tax roll, since there are always ample funds later in the year to retire the loan.

In view of the foregoing, you inquire whether it is mandatory to carry the tax into the next tax roll, as provided by sec. 67.12 (2), Stats., where the initial resolution has authorized repayment of the loans out of current funds.

"The governing body of any county, town, village or city about to solicit such a temporary loan, shall first adopt and record a resolution specifying the purpose and the amount of the loan, and levying a tax for the same amount to provide payment; which tax, after receipt of the borrowed money, shall become and continue irrepealable, and shall be carried into the next tax roll of the municipality and collected as other taxes are collected. The proceeds of such tax shall be kept in a distinct and separate fund and be used for the sole purpose of paying such temporary indebtedness. Such resolution shall be supported in a county, town, village or city by at least three-fourths of all the members-elect of its governing body."

While the language used in the foregoing statute is mandatory in form, in so far as it relates to your question, it would be obviously unreasonable to require the collection of a tax where the purpose for which it is levied no longer exists. The plain purpose of the mandate is to insure repayment of the loan and, the loan having been already repaid, the reason for the command falls. It has been said that where the purpose of a statute is clear, the legislative language should be construed strictly or liberally according to the effect as regards such purpose. *State v. Helmann*, 163 Wis. 639. Also it has been held that in construing statutes, the court should give effect to the legislative intent rather than to the letter of the law. *State v. P. Lorillard Co.*, 181 Wis. 347. Furthermore, statutes should not be so construed as to result in an absurdity. *Price v. State*, 168 Wis. 603.

No one is hurt, and the taxpayers are benefited where the initial resolution authorizes repayment out of current funds, and the money is loaned and repaid on that understanding. Under such circumstances, the statutory safeguards set up for the benefit of the lender can serve no useful purpose,
and, in fact, work a hardship upon the taxpayers, who are forced to pay additional taxes for a purpose which has ceased to exist.

Consequently, you are advised that when a temporary loan has been repaid out of current funds pursuant to resolution, and prior to the time for making up the next tax roll, it is not mandatory that the tax levied therefor be carried into the next tax roll, under sec. 67.12 (2), Stats.

WHR

Military Service — Naval Militia — Naval Reserve — Public Officers — Adjutant General — Specific language of sec. 22.02, Stats., relative to rank of officers in state naval militia controls more general provisions of sec. 22.04, and adjutant general therefore has no power to parallel grade and rank of officer serving in dual capacity in United States naval reserve and state naval militia and holding identical post in both cases even though rank as provided under sec. 22.02 is junior to rank provided in United States naval reserve.

April 25, 1939.

Ralph M. Immell,
Adjutant General.

It appears that officers occupying a dual status as officers in the United States organized naval reserve and in the Wisconsin naval militia are in certain cases required by reason of sec. 22.02, Stats., to serve in the state naval militia in a rank junior to the rank they have in the United States naval reserve, even though the posts they hold in each organization are identical. You ask whether the adjutant general has authority under the provisions of sec. 22.04, Stats., to raise the rank of such officers in the state naval militia to conform to their rank in the United States naval reserve.
Sec. 22.02 names the officers to be attached to the commanding officers' staff and fixes their rank. The language of that section is clear and positive, leaving no room for construction.

Sec. 22.04 provides in part:

“(1) The organization of the naval militia shall conform generally to the provisions of the laws of the United States, and the system of discipline and exercise shall conform, as nearly as possible to that of the United States navy, as now or hereafter organized; * * *.”

The language of the above quoted statute indicates clearly that the legislature did not intend to require conformity in every detail but only “generally”. Since the legislature has specifically designated the rank to be held by each of the officers mentioned in sec. 22.02, it is the opinion of this department that such specific provisions must control over the general provisions of sec. 22.04. To hold otherwise would be to violate a familiar rule of statutory construction, namely, that special or specific statutory provisions are controlling over general provisions. Fox v. Milwaukee Mechanics' Ins. Co., 210 Wis. 213; Wisconsin Gas & E. Co. v. Ft. Atkinson, 193 Wis. 232.

You are advised that the adjutant general has no authority to change the rank held by the officers named in sec. 22.02 to conform to the rank held by such officers in the United States naval reserve.

NSB
RK
Taxation — Tax Sales — Description of buildings assessed as real estate located on leased land merely as “Soo Line Leases—improvements on leased R. R. lands, city of Marshfield” is insufficient under sec. 70.25, Stats., and assessments thereon are void by reason thereof.

There is no limitation on time, at least up to fifteen years, under sec. 75.25, in which county may charge back taxes to city for reassessment because of erroneous description of property nor is there any limitation as to number of years for which taxes may be reassessed by city upon charge-back by county.

Amount of such taxes to be charged back under sec. 75.25 is amount ascertained by county board as justly chargeable under circumstances with interest thereon at rate of eight per cent per annum from time such tax was due and payable to end of year in which such tax will be levied.

Amount of tax so charged back to city and amount to be placed upon assessment roll by city after reassessment is amount of tax fixed under sec. 75.25 by county board as justly chargeable on particular property plus interest at eight per cent per annum from time when such tax was due and payable up to end of year in which such tax will be levied.

April 25, 1939.

CHARLES M. PORS,
District Attorney,
Marshfield, Wisconsin.

You state that certain buildings located on a railroad right of way leased to the owners of the buildings have been described in the tax roll of the city of Marshfield as follows: “Soo Line leases—improvements on leased R. R. lands, city of Marshfield.”

You also state that there are several of these buildings having separate owners which have been similarly described with no reference to the particular lease or location of the improvements on the right of way and which have been assessed as real estate, that the same descriptions are con-
tained in the tax certificates held by Wood county, that the
taxes have been returned delinquent for the years 1932 to
1938 inclusive, that the county now owns the certificates,
and that notice of taking tax deeds by the county has been
given but the claim has been raised by the county clerk that
the descriptions are insufficient.

You state you wish our opinion as to whether the descrip-
tions in the certificates are insufficient under sec. 70.25 and
also on the following questions:

(1) Whether there is any limitation as to the number of
years of taxes which can be charged back to the city by the
county for reassessment because of erroneous descriptions
or erroneous certificates.

(2) Whether there is any limitation as to the number of
years of taxes that can be reassessed by the city in case of a
charge-back by the county.

(3) Whether in charging the certificates back to the city
the face amount of the certificate which includes penalties
and interest on the original amount of the tax is used.

(4) Whether when the reassessments are placed on the
tax roll by the city they can include the penalty and interest
which has accrued or only the amount of the original tax.

In answer to your question as to whether the descriptions
are insufficient under sec. 70.25, it is our opinion that these
descriptions are clearly insufficient and that the assessments
are void by reason thereof. The remainder of your ques-
tions are answered as follows:

(1) It is our opinion that under sec. 75.25 there is no
limitation as to the number of years of taxes which can be
charged back to the city for reassessment because of the er-
v. Waukesha County, 140 Wis. 593, XXV Op. Atty. Gen. 57
than fifteen years prior to the sale are subject to such charge-
back and reassessment might be open to question under sec.
75.20 and the opinion herein expressed must not be deemed
to include a period of time in excess of fifteen years.
(2) The same considerations would apply to the power of the city to reassess taxes thus charged back by the county, there being no statute of limitations upon such power and it being specifically provided in sec. 75.25 that upon the amount chargeable being certified to the city clerk, the same shall be entered upon the tax roll in accordance therewith.

(3) By sec. 75.25, it is expressly provided that in ascertaining the amount of tax justly chargeable under the circumstances, this amount should 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 it is this amount which is to be charged as a special tax to the town, city or village in which the lands are situated. Thus, the amount of the tax so fixed as justly chargeable on each building plus eight per cent per annum from the time when such tax was due and payable up to the end of the year in which such tax will be levied should be charged back to the city.

(4) This question is answered by the answer to question (3), sec. 75.25 providing that the clerk of the town, city or village receiving the certificate from the county clerk, calculated as above described, should enter the same on the tax roll.

We understand that there is no question as to the identity and ownership of the various buildings involved so that the county board will have no difficulty in determining that the improvements of the particular owner in question are properly taxable within the rule laid down in Roberts v. Waukesha County, 140 Wis. 593, 598. We understand in the present case that, since the county board owns the certificates, there has been no order directing a refund nor has the treasurer withheld the lands from sale under the provisions of sec. 74.39 as specified in sec. 75.25. However, sec. 74.44, relating to the power of the county to become a purchaser of lands sold for taxes, states that "all laws relating to the sale or purchase of lands sold for the nonpayment of such taxes, and to the redemption of such lands, shall apply and be deemed to relate to the sale or purchase of such lands by the
county”, and it would appear in this connection that the provisions of sec. 75.25 would apply to certificates owned by the county. See XVI Op. Atty. Gen. 33.

In conclusion, the proper procedure here would appear to be to have the county board enter an order canceling the certificates in question, fixing the amount of tax justly chargeable on each of the buildings in question, directing 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. The county clerk in the next apportionment of taxes should then charge the same as a special tax to the city of Marshfield, specifying the particular buildings upon which the same are to be assessed, the amount chargeable to each, and the year when the original tax was assessed, and certify the same to the city clerk of Marshfield.

RHL

Unemployment Compensation — Local boards of vocational and adult education are employers under unemployment compensation act, ch. 108, Stats. Teachers, both full and part time, are, however, excluded from coverage of said act by sec. 108.02, subsec. (5), par. (f), subd. 4, Stats.

April 26, 1939.

GEO. P. HAMBRECHT, Director,

Board of Vocational and Adult Education.

You have requested an opinion as to the status of local boards of vocational and adult education under the unemployment compensation act, ch. 108, Stats. Sec. 108.02, subsec. (4), par. (a), Stats., defines an employer in part as follows:
"'Employer' * * * means any person, partnership, association, * * * including this state and any municipal corporation or other political subdivision thereof, * * *"

Bouvier's Law Dictionary defines the word "political" in part as follows:

"Pertaining to policy, or the administration of the government. * * * A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers have been delegated."

Webster's New International Dictionary defines the noun "subdivision" in part as follows:

"* * * A part of a thing made by subdividing. * * *"

Sec. 41.15 of the statutes provides in part as follows:

"(1) In every town, village and city of over five thousand inhabitants there shall be, and in every town, village or city of less than five thousand inhabitants there may be a local board of vocational and adult education, whose duty it shall be to establish, foster and maintain schools of vocational and adult education for instruction in trades and industries, commerce and household arts in part-time-day, all-day and evening classes and such other courses as are enumerated in section 41.17. * * *"

"(2) Such board shall consist of the city superintendent of schools (or the principal of the high school, if there be no city superintendent, or the president or director of the local school board in case there be neither of the above-mentioned officers), and four other members, two employers, and two representative employes who have no employing or discharging power and who are not foremen or superintendents, who shall serve without pay, and who shall be appointed by the local school board, or if there be more than one local board, by such boards jointly. If there be more than one city superintendent, principal of the high school, or president or director of the local school board, the ex officio member shall be selected by the appointing boards. * * *"

"(7) The board may purchase machinery, tools and supplies, and purchase or lease suitable grounds or buildings
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for the use of such schools; * * * All conveyances, leases and contracts shall be in the name of the municipality "* * *"

"(10) (a) * * * Said board may sue or be sued in the name of the municipality, and may prosecute or defend all suits brought under this section.

"(b) All contracts made by such local board for work or supplies or material, involving the expenditure of five hundred dollars, shall be awarded to the lowest competent and reliable bidder, in accordance with the provision of section 62.15, so far as applicable; and for that purpose the board of vocational and adult education shall perform the duties imposed and shall possess the powers conferred by said section upon public bodies, boards and officers.

"* * *"

"(d) Every such contract shall contain a provision that in case the contractor shall fail to fully and completely perform his contract within the time therein limited, he shall pay as liquidated damages for such default, a sum per day to be named in the contract, which shall be sufficient, in the judgment of said board, to save the municipality from any loss on account of such default."

Sec. 41.16 (1) provides in part as follows:

The local board of vocational and adult education shall annually report to the municipal clerk before September the amount of money required for the next fiscal year for the support of all the schools of vocational and adult education, and for necessary school sites, buildings, fixtures and supplies."

The balance of the section among other things provides for the handling of vocational school funds by the town, village or city treasurer, for the appropriation of money by the city councils, town boards, etc., and for the raising of money for buildings on bond issues of the governmental unit. It is therefore clear that the local boards of vocational and adult education are authorized to and do function as subdivisions of the municipal government.

Municipalities are employers within the specific language of subsec. (4), sec. 108.02 of the statutes, and become subject "employers" under the provisions of this section in the same manner as any other employer. Therefore, all employees of the vocational school board performing services
in a covered employment must be considered to be employees of the subject municipality, unless within the express terms of some of the exemptions specifically set out in the statutes in sec. 108.02 (5) (f).

Under sec. 108.02 (5) (f) certain types of employment performed for a governmental unit are excludable from the coverage of the act.

Sec. 108.02 (5) (f), Stats., so far as here material provides:

"The term 'employment,' as applied to work for a governmental unit, shall not include:
"1. Employment as an elected or appointed public officer;
"2. Employment by a governmental unit on an annual salary basis;
"3. * * *
"4. Employment, by an educational institution supported wholly or substantially from public funds, of any student enrolled in such institution and carrying at least half its full-time schedule in the most recent school term, or of any person as a teacher in such institution;
"* * *

Inasmuch as the local boards of vocational and adult education are branches of local governmental units, services performed for any of such boards in employment excluded under this subsection need not be considered employment within the meaning of the act. Thus, as the local boards of vocational and adult education operate educational institutions supported by public funds, by the express provisions of paragraph 4 of sec. 108.02 (5) (f), Stats., all persons employed thereby as teachers, whether full or part time, while performing services as such, are excluded from coverage under the unemployment compensation act, ch. 108, Stats. However, all services performed in employment not excluded under this subsection must be considered employment for unemployment compensation purposes.

Sec. 108.02 (5) (g), par. 7, provides:

"Employment of any person by a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."
This last quoted paragraph is not applicable to local boards of vocational and adult education upon two grounds. In the first place the legislature in the preceding subdivision, sec. 108.02 (5) (f), has set forth the types of work for a governmental unit which shall not constitute employment under the act. Such specific enumeration excludes all others. *Expressio unius est exclusio alterius.* Had the legislature intended that all employment by every educational institution should not come within the term “employment” as used in the unemployment compensation act it would have said so by use of simple language and there would have been no occasion for excluding merely teachers and students as set out in sec. 108.02 (5) (f) 4. It would have then used the language in sec. 108.02 (5) (f), 4 up to and including the words “public funds”.

It is therefore our opinion that local boards of vocational and adult education created pursuant to sec. 41.15, Stats., are branches of municipal or other political subdivisional governments and as such are integral parts of such governmental units and employers within the meaning of the unemployment compensation act, ch. 108, Stats. However, by the express provisions of sec. 108.02 (5) (f), Stats., certain persons employed thereby, among which are teachers, both full or part time, are excluded from the coverage of said act.

HHP
Bridges and Highways — Public Lands — Mendota State Hospital — Road laid out and constructed by state on Mendota state hospital grounds owned by state is not public highway even though within past seven years town in which it is located as accommodation to hospital and to town residents accustomed to use road resurfaced same and it has been used generally by those going to and from hospital.

April 27, 1939.

Grant C. Haas,

Director of Mental Hygiene.

You request the opinion of this department regarding the status of a road known as Cinder Lane, which runs along the eastern boundary of the Mendota state hospital grounds and connects Farwell Drive with the highway which leads to the entrance of the hospital. Due to the fact that certain private property owners desire to lay water and sewer mains along this road, it has become necessary to determine whether it is a private road or a public highway.

From a survey conducted by the state chief engineer, it appears that this road lies entirely within lands purchased by the state in 1854 as a location for the Mendota state hospital. It was originally laid out and constructed by the institution about 1904. There has been no dedication of the road as a public highway and the records of the clerk of the town of Westport indicate that it has never been platted.

The road was maintained entirely at the expense of the hospital until seven years ago, when it was resurfaced by the town of Westport as an accommodation to the hospital and to the town residents who are accustomed to use the road. Although we are informed that the general public has traveled over the road for some years, the exact period over which such use extends cannot be definitely ascertained.

Sec. 80.01, subsec. (1), Stats., provides:

"All highways which shall have been laid out by the supervisors of any town, the board of supervisors of any county, or by a committee thereof, or by commissioners ap-
pointed by the legislature, or by any other duly constituted authority, and recorded, any portion of which shall have been opened and worked for the term of three years shall be deemed to be and are hereby declared to be legal highways so far as they have been so opened and worked, notwithstanding the law may not have been in all respects complied with in laying out the same. The making of an order laying out any highway by the proper officers and filing the same or a certified copy thereof in the office of the town clerk of the town in which such road is situated shall be deemed a recording of such highway within the meaning of this section."

Since the road in question was laid out by the institution and since it was not recorded, the provisions of this section can have no application here.

Sec. 80.01, subsec. (2), provides in part:

"All roads not recorded which shall have been or shall be used and worked as public highways ten years or more shall be deemed public highways, * * *"

The term "worked", as it is used in this section, has not been directly construed in Wisconsin. Other courts, however, have interpreted that term when used in a similar statute to mean maintenance "done at public expense or by the public authorities." Town of Wells v. Sullivan, 125 Minn. 353, 355, 147 N. W. 244. Applying this construction, it is apparent that the problem under consideration does not fall within the terms of sec. 80.01, subsec. (2), since the road has not been maintained for ten years at public expense and by public authorities that have any duty to perform with respect to public roads.

Aside from these considerations, it is extremely doubtful whether statutes of this nature can operate to deprive the state of any interest in land which it owns since it is well settled that general statutes are not to be construed to include, to its hurt, the sovereign. Sullivan v. School District, 179 Wis. 502, 507, 191 N. W. 1020.

A situation is presented whereby the state could have lost title to these lands only by way of dedication. State v. Town Board, 192 Wis. 186. As no one could make a valid dedication without legislative sanction, the state has not lost title
by way of dedication. Nor could the state have lost title by way of adverse user from which a dedication may be presumed. In the absence of a statute specifically so providing, principles of adverse user are not applicable to the state or sovereign.

Sec. 330.10 was amended by ch. 79, sec. 34, Laws 1931. The portion added by amendment to that section reads:

"* * * But no person can obtain a title to real property belonging to the state by adverse possession, prescription or user unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years."

Since this section is not retroactive in effect, no period of adverse possession, prescription or user can begin to run against the state by virtue of travel over this road prior to 1931.

The fact situation relative to the origin and use of a road of this nature is difficult to develop since it is largely a matter of history. In view of such facts as are available, however, this department is of the opinion that at this time the road known as Cinder Lane retains its original status as a private way over state property. You are therefore advised that permission to lay the desired water and sewer mains should be obtained from the legislature.

NSB

NH
Legislature — Public Officers — Officers' Reserve Corps
Membership in officers' reserve corps does not constitute holding of office under government of United States within provisions of art. IV, sec. 13, Wis. Cost., while not in active service.

April 27, 1939.

OLIVER L. O'BOYLE, Corporation Counsel,

Milwaukee County,

Milwaukee, Wisconsin.

You have asked whether the acceptance by a member of the legislature of a commission in the officers' reserve corps is the acceptance of an "office, civil or military, under the government of the United States" within the meaning of art. IV, sec. 13 of the Wisconsin constitution.

Art. IV, sec. 13 of the Wisconsin constitution provides:

"No person being a member of congress, or holding any military or civil office under the United States, shall be eligible to a seat in the legislature; and if any person shall, after his election as a member of the legislature, be elected to congress, or be appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat."

If the word "office" is given its literal meaning, then obviously a member of the officers' reserve corps would come within the above constitutional prohibition solely by virtue of the fact that he is commissioned as reserve officer in the United States army. A number of opinions of this office have dealt with the meaning of the word "office" as used in the above section and in art. XIII, sec. 3 of our constitution. Op. Atty. Gen. for 1906, 206; V Op. Atty. Gen. 886; XIX Op. Atty. Gen. 241; XXII Op. Atty. Gen. 1032. See also State ex rel. Hazelton v. Turner, (1918) 168 Wis. 170, 169 N. W. 304. Distinction has been made between employees or holders of positions and officers.

In XIX Op. Atty. Gen. 241, several indicia of an "office" are set out. It must be shown that there is a public duty
or trust, that there is a fixed tenure of office, that an oath is 
taken or bond filed and that the person is invested with some 
portions of the sovereign functions of the government to be 
exercised by him.

The meaning of the word “officer” was considered by the 
supreme court of the United States in United States v. 
Mouat, (1888) 124 U. S. 303. There the court asked whether 
the person holds his place by virtue of an appointment, 
either by the president, a court of justice, or the head of a 
department and said that if he does then he is an officer of 
the United States.

The application of these tests would impel one to the con-
clusion that a member of the officers’ reserve corps occupies 
an “office” under the government of the United States 
within the terms of the aforementioned constitutional pro-
visions. The appointment is made by the president of the 
United States and the member receives a commission for 
five years as an officer in the army of the United States. 10 
USCA secs. 352, 355a, 358. The services which are per-
formed thereunder relate to the national defense which is a 
sovereign function and involve a public duty or trust.

However, the use of such tests is not conclusively deter-
minative. At best, they are general in nature and solely to 
be used as assistance in determining the construction to be 
given the particular provision. Essentially the problem is 
to ascertain what was intended to be covered by such provi-
sions. A determination of whether such constitutional pro-
hibitions were intended to apply to the instant facts must in-
volve a consideration of the objects and purposes intended 
to be effected.

The drafters of the constitution apparently felt that mem-
ers of the legislature could not effectively serve both the 
state and federal governments at the same time. Thus the 
restrictions contained in the provisions of art. IV, sec. 13 
were designed to eliminate any possibility of a conflict of in-
terest. The fundamental concept which motivated the adop-
tion thereof was that a person could not consistently with 
the existence of dual governments and a preservation of the 
independence thereof in their individual spheres perform du-
ties at the same time for both in the exercise of their re-
spective sovereign functions.
Thus it is not the mere possession of a title or designation from both governments that gives rise to a conflict of interest and is objectionable, but the doing of acts at the same time upon behalf of both as an officer thereof in performing sovereign functions that is prohibited.

The purpose of the officers' reserve corps is set out in 10 USCA, sec. 351, which provides:

“For the purpose of providing a reserve of officers available for military service when needed there shall be organized an Officers' Reserve Corps consisting of general officers and officers assigned to sections corresponding to the various branches of the Regular Army and such additional sections as the President may direct. The grades in each section and the number in each grade shall be as the President may prescribe.”

However, it is significant that 10 USCA sec. 369 provides that the president may order reserve officers to active duty at any time and for any period; but that except in time of a national emergency, expressly declared by congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent.

Until called for actual service the members of the officers' reserve corps perform no acts for the federal government, but merely hold themselves in readiness to serve as army officers when the need arises. They are not functioning as officers of the United States, but are potential officers—officers in name only. Their sole activity as such is in training and preparing themselves to function as officers when needed. They are merely civilians holding reserve commissions, who are prepared and trained to step in and function promptly and properly as officers in the military forces in the event of a national emergency.

It would seem that it was never contemplated that a citizen of a state, while preparing and holding himself available for active service as an officer in the army in the event of a national emergency, would be precluded by the provisions of art. IV, sec. 13 of the Wisconsin constitution from serving his state the same as any other citizen thereof.

The federal statutes, 10 USCA sec. 372, as recently amended, provide:
“Members of the Officers’ Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, oaths, commissions, or status as such, or any duties or functions performed for pay or allowances received as such, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States.”

While this may be controlling on the branches of the federal government and in questions arising under the federal law, it cannot be determinative of the meaning of the word “office” as used in our constitution, because that is beyond the scope of federal legislation or regulation. However, it does lend support to our conclusion.

It is therefore our opinion that a member of the officers' reserve corps while not actively serving as an officer in the United States army is not holding an office under the government of the United States within the meaning of art. IV, sec. 13 of the Wisconsin constitution.

HHP
Automobiles — Law of Road — Refund of Truck Fees — Corporations — Motor Transportation — Refund of Ton Mile Taxes — Where owner of truck applies for and receives truck license under sec. 85.01, subsec. (4), par, (c), Stats., for gross weight of 25,999 pounds specified in application, no refund of portion thereof can be made under sec. 14.68 (5) on owner’s theory that secretary of state is not authorized to license truck in excess of 23,999 pounds for operation on class “A” or class “B” highways. Such license in no sense purports to grant authority to violate other provisions of ch. 85, Stats.

Nor are taxes paid under sec. 194.48 refundable on this theory by public service commission. Such refund in any event would be governed by sec. 20.06 (2), requiring approval of governor, secretary of state, state treasurer and attorney general.

April 29, 1939.

Calmer Browy, Director,

Public Service Commission.

You state that in March, 1938, the Wisconsin Wholesale Grocery Company of Oshkosh obtained a license on a four-wheel, two-axle truck under ch. 85 for a gross weight of 25,999 pounds and that the company has made application to the secretary of state for a refund of the difference between the fee for a vehicle having a gross weight of 23,999 pounds and a vehicle having a gross weight of 25,999 pounds. You further state that the owner has also requested a refund of taxes paid under sec. 194.48, Stats., on the basis of the difference in these weights. We understand that the owner’s theory is that the secretary of state is not authorized to license a four-wheel, two-axle vehicle for operation on class “A” or “B” highways in excess of 23,999 pounds gross weight.

With respect to the refund of license fees paid under chapter 85 such refunds would appear to be governed by the provisions of sec. 14.68, subsec. (5), Stats., which provides that the secretary of state shall have power to receive
checks in payment of motor vehicle license fees, which checks are to be deposited with the state treasurer, and provides further that "any overpayment on account of any such license fees shall be refunded by the state treasurer on the certificate and audit of the secretary of state." The authority of the secretary of state to certify and audit refunds on license fees to be made by the state treasurer would appear to depend upon whether in the particular instance there has in fact been an "overpayment" of such license fees. The payment of license fees for trucks is governed by sec. 85.01 (4) (c), which specifies various fees according to gross weight in tons. It is provided in said subsection:

"* * * The gross weight in tons shall be in every case, except in the case of farm trucks, arrived at by adding together the weight in pounds of the motor truck or motor delivery wagon when equipped ready to carry a load and the maximum load carried by the vehicle in pounds, and then dividing the sum of the two by two thousand."

There is nothing in this subsection to indicate the meaning of the phrase "maximum load carried by the vehicle in pounds" and we must conclude that it is left to the owner, in making application for the license, to fix the maximum load which the vehicle is to carry, the intent being that a license fee corresponding with the gross weight which the owner wishes to carry shall be paid. That this is the correct interpretation of this phrase is made clear from a reading of sec. 85.01 (4) (j), providing penalties for fraudulent registration and providing that trucks may be registered in excess of the maximum gross weight according to the manufacturer's rating on payment of the proper fee for such weight, it being further provided that "such registration shall not exempt such a vehicle from compliance with all weight restrictions imposed by chapter 85." In the present case the owner's contention that a refund should be paid on the ground that the secretary of state may not license a vehicle in excess of a certain number of pounds for operation on class "A" and "B" highways has no merit. The authority to classify highways and the weight limitations fixed for travel on class "A" and "B" highways are found in secs.
85.46, 85.47, 85.48 and 85.49. Sec. 85.01 (4) (e), providing for the registration of motor trucks, expressly states:

"This section, however, shall not be construed to mean that any such vehicle may be licensed to operate in violation of any other provision of this chapter."

This provision as well as the provision of sec. 85.01 (4) (j), above quoted, makes it clear that the issuance of the license cannot and does not in any sense purport to grant any authority to violate any of the other provisions of ch. 85. Whether or not a vehicle of a particular weight could operate on class "A" and class "B" highways, it is obvious that such a vehicle might operate on highways not so classified upon issuance of a license for its actual gross weight and that unless so licensed it could not so operate.

In the present case we understand a license was issued in March, 1938, for a gross weight of 25,999 pounds as designated by the owner, which license expired July 1, 1938, and that a similar license was issued July 1, 1938, which will expire July 1, 1939. Thus, it appears that since March, 1939, this truck has been licensed and is at present licensed for a gross weight of 25,999 pounds and during this period of time the owner has enjoyed and continues to enjoy the right to carry a load in accordance therewith. Under these circumstances, it would not appear that there has been any "overpayment" within the meaning of sec. 14.68 and that no certificate and audit for a refund should be issued or made by the secretary of state. There is nothing to indicate that the owner did not intend to apply for a license for the weight specified in his application, and having received such a license, having enjoyed and continuing to enjoy the privileges thereof, there can be no valid claim for a refund.

The tax provided for by sec. 194.48 is likewise based on gross weight, which term is defined for the purposes of ch. 194 in sec. 194.01 (16) as being "the actual weight of such motor vehicle unloaded plus the licensed carrying capacity of such motor vehicle." The term "licensed carrying capacity" as used in this provision must refer to the licensed carrying capacity under sec. 85.01 (4) (c), which in this case is 25,999 pounds. There appears to be no provision in
ch. 194 for the refund by the public service commission of taxes paid under this section 194.48. Any refund paid thereunder would be governed by sec. 20.06 (2), relating to moneys paid into the state treasury in error and providing that "no such refund shall be made except upon the written approval of the governor, secretary of state, state treasurer and attorney-general." Further, there would appear to have been no error in the collection of the tax by the commission and its payment to the state treasurer in the present case and no such refund can be made either by the commission or by the state treasurer.

RHL

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Criminal Law — Fish and Game — Informers' Fees — Deputy sheriffs are not entitled to informers' fees under sec. 353.24, Stats., in case of arrests for violations of ch. 29, relating to fish and game, regardless of whether such arrests are made pursuant to request of conservation commission or its deputies under sec. 29.07.

April 29, 1939.

Conservation Department.

You have inquired whether deputy sheriffs are entitled to informers' fees under sec. 353.24, Stats., in the case of arrests for violations of ch. 29, relating to fish and game, and if it makes any difference whether or not the arrests are made at the request of the conservation commission or its deputies under sec. 29.07.

This department has ruled that deputy sheriffs are not entitled to informers' fees under sec. 353.24, Stats. See XXVII Op. Atty. Gen. 171.

Sec. 353.24, Stats., 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."

Sec. 29.07, Stats., reads:

"All sheriffs, deputy sheriffs, coroners, and other police officers are ex officio deputy conservation wardens, and shall assist the state conservation commission and its deputies in the enforcement of this chapter whenever notice of a violation thereof is given to either of them by the commission or its deputies."

Ex officio means:

"By virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office." 25 C. J. 169.

If a deputy sheriff is a deputy conservation warden by virtue of his holding the office of deputy sheriff, then it is his duty to inform against and prosecute violators of ch. 29, since sec. 29.05, subsec. (2), makes it the duty of such conservation officers, upon receiving notice or information that any provision of ch. 29 has been violated, to make a thorough investigation as soon as possible, and cause proceedings to be instituted if the proofs at hand warrant it. This being true, it is immaterial, as far as informer's fees are concerned, whether or not the arrest was made by the deputy sheriff at the request of the conservation commission or its deputies.

The provisions of sec. 29.07 with respect to assisting the conservation commission and its deputies in the enforcement of ch. 29 are apparently designed to eliminate conflicts between two sets of enforcement officers. Under this section it is the duty of the deputy sheriff to assist the conservation officers, and not the duty of such officers to assist the sher-
iff's department in the matter of game law violators, thereby avoiding conflicts in authority. Presumably special officers, such as conservation wardens, are more experienced and skilled in matters relating to game law enforcement than are general peace officers, such as deputy sheriffs. Therefore, the direction and control of game law enforcement activities are primarily delegated to the conservation department officers with the right to call upon deputy sheriffs for assistance when needed.

This does not mean, however, that in the absence of requests for assistance from conservation wardens or deputies, deputy sheriffs are absolved from all duties in connection with their offices as deputy conservation wardens ex officio. Entirely aside from the duties of deputy conservation wardens under ch. 29, sheriffs and their deputies are required by sec. 59.24 to keep and preserve the peace in their respective counties. It seems too clear to call for any extended argument that this would at least include the duty of informing against game law violators. Merely because the legislature in its wisdom has set up a special set of officers for the enforcement of the game laws does not give rise to the inference that peace officers, such as deputy sheriffs, are to shut their eyes to violations of the game laws, while being on the alert to report violations of other criminal laws. This is especially true where the legislature has made it clear, as in sec. 29.07, that deputy sheriffs are also game law enforcement officers, although acting in a subordinate capacity to the special officers appointed under ch. 29 for this work.

WHR
Agriculture — Taxation — Exemption — Chicken hatchery is exempt under sec. 70.11, subsec. (12), par. (a), Stats., if primary use is use in operation of farm and commercial use, if any, is merely incidental thereto. Such hatchery is not exempt if commercial use is primary and farming use incidental.

April 29, 1939.

James H. Larson,
District Attorney,
Shawano, Wisconsin.

You request the opinion of this department concerning the proper construction to be placed upon sec. 70.11, Stats., in determining whether a certain chicken hatchery comes within the tax exemptions provided by that section. You state that the farmer in this instance hatches eggs produced on his farm and also sells some of the chicks to other farmers. He claims that such activities are a part of his farming operations and that the hatchery is therefore exempt from taxation.

Sec. 70.11 provides tax exemptions as to certain classes of property. Subsec. (12), par. (a), thereof exempts

"* * * farm, orchard and garden machinery implements and tools, actually used in the operation of any farm, orchard or garden."

It is well settled that statutes conferring special privileges in the form of exemption from taxation are to be strictly construed and are to be read most favorably against the privilege. Armory Realty Co. v. Olsen, 210 Wis. 281, 246 N. W. 513.

In considering a statute of this nature, the Wisconsin court has said:

"* * * Such statutes conferring special privileges and in derogation of the sovereignty exercised over other property are to be strictly construed. If the meaning of such statute is fairly ambiguous or uncertain as to a specific piece
of property or owner, it is the duty of courts to resolve the
doubt in favor of the taxability of the property. It is for the
legislature to grant these special privileges, and it has al-
ways been held that courts will proceed upon the assumption
that whatever the legislature intends to exempt will be ex-
pressed in such clear language as to leave no doubt, and that
what has been left doubtful is not intended to be exempted.

* * * Katzer v. Milwaukee, 104 Wis. 16, 21, 80 N. W. 41.

And in M. E. Church Baraca Club v. Madison, 167 Wis.
207, 211, 167 N. W. 258, the court held:

"* * * But statutes exempting property from taxa-
tion are not to be enlarged by construction. Taxation is the
rule and exemption the exception. He who claims exemption
must bring himself within the terms of the exemption.
* * *" 37

With these concepts in view, it has become necessary to
develop classifications of the various types and uses of farm
equipment as different questions relating thereto have
arisen. Accordingly, as you state, the Wisconsin tax com-
mission has taken the position that farm equipment which
is used "commercially" does not fall within the terms of the
statute, since such use of equipment is not restricted to the
operation of a farm as a unit.

A determination of what constitutes a "commercial" use
as distinguished from a "farming operation" depends en-
itrely upon the particular facts involved. There is little
doubt but that a hatchery which is constructed and operated
wholly for purposes of marketing all of the chicks produced
would be subject to taxation. On the other hand, it is prob-
able that under this statute a hatchery which is used by a
farmer to hatch eggs produced on his farm solely for pur-
poses of supplying his own poultry needs, would be exempt.
The variations in degree between these two extremes must
be considered in the light of the particular facts and be re-
solved in accordance with the terms of sec. 70.11 (12) (a)
and the rules relating to the interpretation of exemption
statutes.

In the last analysis, the question must come down to pri-
mary as distinct from incidental use. If the primary use is
use in operation of the farm and any commercial use that there may be merely incidental to the primary use, it would seem that the equipment would be exempt. On the other hand, if the primary use is commercial and the farming use merely incidental, it would appear equally clear that the equipment is not exempt.

In determining a question of primary as distinct from incidental use, all factors having any bearing upon that question must be considered and given due weight. Your submission does not develop the factual situation in any amount of detail. From such facts as are given, it would appear that in all probability the commercial use is incidental to the farming use.

NSB
NH

Taxation — Exemption — Boats not exceeding forty feet in length owned and operated by commercial fishermen in Lake Superior which on occasions are used for hire to take persons out deep-lake fishing or trolling are not exempt from taxation under sec. 70.11, subsec. (12), par. (i), Stats.

April 29, 1939.

WALTER T. NORLIN,
District Attorney,
Washburn, Wisconsin.

You state that a number of motor driven boats of less than forty feet in length are operated in Lake Superior out of the city of Bayfield by the owners, who are engaged in commercial fishing and hold commercial fishermen's licenses. During the year on a number of occasions the owners, for a stipulated sum per day or hour, take persons out into the lake deep-lake fishing or trolling. You ask whether, in view of the taking of passengers deep-lake fishing for
hire, said boats are exempt from taxation under sec. 70.11 subsec. (12), par. (i), Stats.

Sec. 70.11 (12 (i) provides that there shall be exempt from taxation

“One boat, launch or vessel, not exceeding forty feet in length, operated by its owner and used exclusively for fishing purposes in Lake Winnebago and in the outlying waters of the state, together with all nets, hooks, reels and other fishing apparatus used in connection with such boat.”

Taxation is the rule and exemption the exception. Statutes conferring special privileges in the form of exemption from taxation are in derogation of the sovereignty exercised over persons and property subject to taxation. Therefore, statutes exempting property or persons from taxation are strictly construed and are read most favorably against the privilege. *State ex rel. Bell v. Harshaw, (1890) 76 Wis. 230, 45 N. W. 308; M. E. Church Bacara Club v. Madison, (1918) 167 Wis. 207, 167 N. W. 258; Armory Realty Co. v. Olsen, (1932) 210 Wis. 281, 246 N. W. 513.*

“* * * If the meaning of such statute is fairly ambiguous or uncertain * * *, it is the duty of the courts to resolve the doubt in favor of the taxability of the property. It is for the legislature to grant these special privileges, and it has always been held that courts will proceed upon the assumption that whatever the legislature intends to exempt will be expressed in such clear language as to leave no doubt, and that what has been left doubtful is not intended to be exempted. [Citing cases.]” Katzer v. Milwaukee, (1899) 104 Wis. 16, 21, 80 N. W. 41.

Not only are statutes exempting property from taxation not to be enlarged by construction, but he who claims an exemption must bring himself squarely within the terms of a statute providing for exemption. *M. E. Church Bacara Club v. Madison, supra; Armory Realty Co. v. O., supra.* The presumption is against the state’s having intended to grant an exemption, and he who claims the exemption must show that the statute under which he claims exemption authorizes the same in terms so clear as to dispel any doubt as to the propriety of the claim. *Milw. Elec. Ry. & Light Co., v. Tax Comm., (1932) 207 Wis. 523, 242 N. W. 312.*
For a boat to be exempt from taxation under the provisions of sec. 70.11 (12) (i), Stats., it must (1) not exceed forty feet in length, (2) be operated by its owner, (3) used by him for fishing purposes, and (4) such must be its exclusive use. If any of these prerequisites do not exist then the boat would not be entitled to the exemption.

When the owner of one of the boats mentioned by you rents it out or contracts for hire to take persons out on the lake so they can indulge in the sport of deep-lake fishing or trolling for lake trout, he is not then using the boat for fishing purposes but is using it to transport passengers for hire. On such occasions he operates it as a conveyance or livery for passengers and not as a fishing boat. Accordingly, as an owner so operating his boat is not using it exclusively for fishing purposes, the boat would not be exempt under sec. 70.11 (12) (i).

The apparent intention of the provisions of sec. 70.11 (12) (i), Stats., is to grant exemption from taxation to persons while engaged commercially in the business of catching fish in the lakes. It is to lend assistance to such persons in making a livelihood as commercial fishermen but not to persons in operating boats as carriers of passengers for hire. The fact that the passengers while being carried by the boat engage in fishing does not destroy the fact that the use the owner is then making of the boat is in carrying passengers for hire and not in engaging in fishing.

It is therefore our opinion that boats of forty feet or less in length operated in Lake Superior by commercial fishermen and used by them on frequent occasions to take persons for hire out deep-lake fishing or trolling are not exempt from taxation under sec. 70.11 (12) (i) but are taxable under sec. 70.15 (2), Stats.

HHP
Criminal Law — Libel and Slander — Public Health — Communicable Diseases — Information obtained by physician who is local health officer in his capacity as such officer in making examination under sec. 143.07, subsec. (2), Stats., is not privileged under sec. 325.21, there being no relationship of physician and patient.

In compelling physical examination under sec. 143.07 (2), local health officer who is physician should obtain authorization from state board of health or state health officer. What constitutes “reasonably suspected case” under this section depends upon facts and circumstances, statute permitting exercise of discretion in absence of malicious, arbitrary or unreasonable action.

Two witnesses other than one slandered must hear language used at identically same time for criminal slander prosecution under sec. 348.41 (3).

May 5, 1939.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You have asked for our advice in connection with a request for a prosecution under sec. 348.41, Stats., the criminal libel and slander statute. The request arises out of the following set of facts:

A minor daughter of a certain resident is alleged to have told another child that she had infected two boys with a venereal disease. The mother of the second child went to the local health officer, a physician, and reported the matter; he is supposed to have communicated with the state board of control, and was apparently advised to proceed under sec. 143.07, subsec. (2), Stats., with a physical examination of the children claimed to be diseased. The girl, who is purported to have told the story, was found free from disease, and her parents went to the physician for the purpose of discovering the source of his information. This he refused to disclose, although he was acting as a public health officer in making the examination, and not as a private physician.
You have inquired as to what constitutes "a reasonably suspected case" under sec. 143.07 (2) and what recourse, if any, the examined individual has when it is found that the allegation is without justification. Also you inquire whether the health officer's information is privileged under sec. 325.21, Stats., or whether he can be compelled to disclose such information in a John Doe examination and whether, to justify a prosecution under sec. 348.41, it is necessary that another person must have heard the statement when it was being disclosed to the health officer.

In answering these questions we will discuss them somewhat out of the order in which they are asked for the purposes of logical development of the general problem presented.

It seems to us that the essential thing to do first is to determine the actual facts, if possible. The key to this problem is mainly in the hands of the local health officer and it is, therefore, important to know at the outset whether or not his information is privileged under sec. 325.21, Stats., which reads:

"No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition."

The foregoing statute does not apply in the present instance because the local health officer was not attending a patient in a professional character in making the examination in question, nor was the information he sought to obtain of a character to enable him to professionally serve a patient, since the girl would have been entitled to receive treatment from a physician of her own choice had the health officer found her to be afflicted with a venereal disease. Furthermore, it has been held that the privilege granted by this
section is the privilege of the patient rather than that of the physician, and when waived by the former, the physician cannot refuse to testify. Markham v. Hipke, (1919) 169 Wis. 37; Angerstein v. Milwaukee M. Co. (1919) 169 Wis. 502. Here it is the girl herself or her parents who are seeking the information which the health officer refuses to disclose. It would therefore appear that the first step should be the examination of the health officer in a John Doe proceeding and, in order to eliminate any possible question of privileged communication, have the girl waive the privilege, if any, which the officer claims under sec. 325.21.

Also the woman who reported the situation to the health officer should be examined as well as the daughter who told the story to her. It can then be determined whether or not a prosecution under sec. 348.41 will lie and, as is indicated in XXV Op. Atty. Gen. 305, to which you call our attention, two persons other than the one slandered must both hear the language used at identically the same time. Otherwise, the parties must be left to their civil remedies, if any, and your responsibility in the matter ceases.

Sec. 143.07, subsecs. (1) and (2), Stats., provide:

“(1) Any person afflicted with gonorrhea, chancroid or syphilis in its communicable stage is declared a menace to the public health. A physician called to attend a person so afflicted shall report to the state board of health in writing, on blanks furnished by said board and as it directs, his age, sex and conjugal condition and the name of the disease.

“(2) An officer of the state board of health having knowledge of any known or reasonably suspected case of such a menace for which no treatment is being administered under the supervision of a physician authorized to prescribe drugs shall forthwith investigate or cause such case to be investigated by such means as may be necessary. Whenever, following a request of an officer of the state board of health, a reasonably suspected case of such menace shall refuse or neglect examination by a physician licensed to prescribe drugs, an officer of the state board of health may proceed to have such person committed in conformity with subsection (5) of this section, to an institution for examination or observation. A local health officer who is a physician may be authorized to make such investigation and take such commitment procedures in any specific case when directed to do so by the state board of health or the state health officer.”
The words "reasonably suspected case" as used in subsec. (2) must be given sufficient scope to carry out the obvious purpose of the law, and it is easy to see that such purpose would be readily defeated if the health officer were not free to make such investigation as might be necessary upon information and belief derived from the complaint of a presumably trustworthy resident. To disregard such information might well constitute a neglect of duty which would lead to serious consequences. Furthermore, if the information proves to be false, as in this case, it is in the public interest and also to the interest of the girl defamed that such a vicious story be disproved and the parties responsible for the story be punished.

It is difficult to lay down any hard and fast rules in such matters; each case must stand or fall on its own particular facts and circumstances. The officer concerned must be permitted the exercise of reasonable discretion and is to be regarded as acting within the scope of his authority as long as he does not act maliciously, arbitrarily or unreasonably. From your statement of the facts it would appear that this was ostensibly a "reasonably suspected case" within the meaning of the statute.

It should be noted, however, that the statutory authorization for making the investigation in the first instance is extended only to "an officer of the state board of health," and that "a local health officer who is a physician may be authorized to make such investigation" in any specific case only "when directed to do so by the state board of health or the state health officer." Consequently, the proper procedure for the local health officer to follow upon receiving information of this sort is to report the same to the state board of health or state health officer for directions before compelling any physical examinations.

WHR
Bridges and Highways — Law of Road — Exception contained in sec. 85.45, subsec. (2), par. (a), Stats., exempts farmer from eight-foot load width restrictions in hauling loose hay or straw or like in ordinary farming operations where temporary use is made of highway.

May 11, 1939.

Connor Hansen,
District Attorney,
Eau Claire, Wisconsin.

You state that it is the general practice in your community for farmers and others to carry loose hay and straw in trucks where the outside width of the trucks, including the load of loose hay or straw, is considerably in excess of eight feet in width.

We are asked whether this practice is in violation of sec. 85.45, subsec. (2), par. (a), Stats., which, so far as material here, reads:

“No vehicle including any load thereon, shall exceed a total outside width of eight feet, except that the width of a farm tractor shall not exceed nine feet and that the limitations as to the size of vehicle stated in this section shall not apply to implements of husbandry temporarily propelled or moved upon the highway * * *.”

In view of the wording of the foregoing statute, it becomes necessary to determine whether or not a truck load of hay or straw constitutes an “implement of husbandry temporarily propelled or moved upon the highway.”

The answer to this question must depend somewhat upon the particular facts and circumstances. An implement of husbandry is something necessary to the carrying on of the business of farming. See 31 C. J. 256. Obviously, a farmer needs some sort of vehicle to transport hay and straw from one part of his farm to another, and it seems immaterial to us whether this vehicle is a truck or a wagon equipped with a rack and pulled by horses or by a tractor or by a truck. Also in such transportation it frequently becomes necessary to make temporary use of the highways, and we therefore
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construe the exception in the above quoted statute in the light of the apparent legislative intent of not hampering the farmer in the conduct of his usual and ordinary farm operations. It is a matter of common knowledge that in the short hauls from fields to farm buildings the width of loads of hay or the like will often if not usually exceed eight feet in width.

However, the wording of the exception does not extend beyond such temporary uses of husbandry as above set forth.

WHR

Criminal Law — Gambling — Lotteries — Trade Regulation — Selling with Pretense of Prize — Device in nature of punch board whereby purchaser of chance in each case receives box containing merchandise, number of which corresponds to number on back of tab pulled off front of larger box, without knowing what articles are contained in smaller boxes, and said articles being diverse in kind and character, constitutes lottery under sec. 348.01; its use is also violation of sec. 100.16, Stats.

May 11, 1939.

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

You have brought to this office for examination a certain device in the nature of a punch board and have asked our opinion as to whether the device is in violation of any of the statutes. The device consists of a box upon the front of which are numerous tabs. Contained in the box are various smaller boxes containing various articles. These boxes are numbered from 1 to 80, which numbers correspond with numbers to be found on the back of the tabs which are on the front. Chances are sold for ten cents each, the purchaser being entitled to remove one of the tabs and becoming en-
an examination of the articles in the various boxes reveals a great divergence between them, at least in kind. Among the various articles are tooth paste, soap, hair curlers, beads and various tricks and novelties too numerous and diverse to describe. A few of the articles have prices stamped upon them by the original maker. A certain “hair make-up” has printed thereon a price of $1.00, a tube of dental cream is marked 50¢, and a cake of soap is marked 25¢. Thus, whatever their actual value may be, it would appear that the articles so marked were at one time offered or intended to be offered for sale for sums substantially in excess of ten cents. That some of them are worth less than ten cents would appear to be fairly obvious.

It is thought that this device is a lottery within the meaning of 348.01. The universal rule is that in every case of lottery, there must be present the elements of consideration, chance and prize. 38 C. J. 289. In ex parte Gray, (1922) 204 Pac. 1029, 1031, it is said:

“* * * But the mere fact that there are no blanks, and that every subscriber is sure to get something which has the actual or ostensible equivalent in value for the consideration paid, does not relieve the scheme of its character as a lottery where the prizes given are of unequal value.” (Citing numerous cases.)

No extended discussion is required in the present case to demonstrate that the device in question here falls within this language and within the general rule. There is no question but that the elements of consideration and chance are
present and the element of prize may be found in the fact that it is the obvious intent of the device to lead the purchaser to believe that he will receive an article of a greater value than ten cents upon the purchase of a chance. A purchaser of articles sight unseen would appear to have no other motive.

The use of this device would also seem to fall expressly and literally within the provisions of sec. 100.16, which 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 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."

Leaving out of consideration the words of the above section which may not apply, there can be no question but that by this device the purchaser is induced to believe that something of value may be won or drawn by chance by reason of the sale.

RHL

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**Taxation — Tax Sales** — Sale for face value in 1939 by county treasurer of county-owned 1931 tax certificates of sale of 1932 was valid under general authority of unrevoked or modified resolution of county board passed in 1931 and purchaser is entitled to interest thereon at fifteen per cent from date of certificate and not just from date of his purchase.

May 22, 1939.

GEORGE A. RICHARDS,

*District Attorney*,

Rhinelander, Wisconsin.

At the sale of 1932 the county purchased certain 1931 tax certificates, which, not having been redeemed, the county
treasurer sold on February 20, 1939, for the face amount thereof. He claimed to have authority to make said sale under a resolution passed by the county board on January 15, 1931. This resolution, which had not been revoked or superseded by any subsequent action of the board, read as follows:

"BE IT FURTHER RESOLVED that the county treasurer be authorized to sell at face all of the certificates on any land that the county holds five certificates or lands on which the county holds one or more certificates which are five years old."

On March 31, 1939, the owner of the lands tendered to the county treasurer in redemption the face amount of the certificates, plus interest thereon from the date the county sold them to the date of such tender. He contends that the authority granted to the treasurer by said resolution was limited to certificates owned by the county at the date of the resolution.

You ask whether the county treasurer had authority under sec. 75.34, Stats., sec. 75.35, Stats., or said resolution to so sell said 1931 tax certificates, and also whether the purchaser thereof is entitled to interest on the certificates at fifteen per cent from the date of the certificates or only from the date of his purchase thereof.

No mention is made of any action by the county board purporting to be applicable to the certificates in question, under sec. 75.01 (1m), Stats., as enacted by ch. 334, Laws 1933. Therefore, in this opinion, we assume the nonexistence of any such action and have given no consideration to the effect of any such action had the same been taken.

Secs. 75.34 and 75.35, Stats., as they existed at the time of the passage of said resolution and of said 1932 tax sale, so far as here material, provided as follows:

"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 of fifteen per cent per annum; * * *"
“(2) No county board shall, at any session thereof, sell, convey or transfer, or order or direct the sale, conveyance or transfer of any tax certificates owned or held by the county at less than the face value thereof unless such board shall have previously directed the county clerk to give notice of their intention so to do by publication thereof for four successive weeks in some newspaper published in the English language in such county and having a general circulation therein, and such notice has been so given. Any and all sales, conveyances or transfers of such tax certificates made in violation of these provisions shall be null and void.”

“Section 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, * * *”

Ch. 244, Laws 1933, changed the rate of interest in sec. 75.34 (1), Stats., from fifteen per cent to eight per cent, but expressly provided that such modification should apply only to tax certificates issued thereafter. In order to carry out the provisions of ch. 294, Laws 1937, the revisor of statutes changed the wording of sec. 75.34 (1) so that in the 1937 statutes it now provides for interest “at the rate specified in the certificates.” Except as above quoted, the provisions of secs. 75.34 and 75.35, as above quoted, have not been changed to date.

Thus, under sec. 75.34 (1), Stats., the county treasurer, unless the county board orders to the contrary, has power and authority to sell any county-owned tax certificates for the amount of the face thereof and the interest accrued thereon at the rate specified in the certificate. The statute specifically confers this authority and no county board action is required therefor. He has no authority thereunder to sell such certificates for less than the amount of the face value and the accrued interest. However, sec. 75.35, Stats., gives the county board the power to grant the county treasurer authority to sell county-owned tax certificates for less than the amount of the face value and accrued interest, by specifying the amount for which he shall sell the same. But sec. 75.34, subsec. (2), Stats., prohibits the county board from giving the county treasurer authority to sell county-owned tax certificates for less than the face value unless the
provisions of that subsection as to notice have been complied with. The resolution in question does not authorize the county treasurer to sell certificates for less than the face value and therefore the provisions of sec. 75.34, subsec. (2), Stats., would not have to be complied with.


It has also been recognized that a resolution of the county board authorizing the sale of tax certificates for less than the amount of the face value and accrued interest may be expressly applicable to future acquired certificates and that the authority so granted continues until revoked or modified. XIII Op. Atty. Gen. 274. Thus, the resolution of January 15, 1931, is valid under sec. 75.35 if it is construed as granting authority to sell certificates acquired by the county after the date of its adoption.

Nothing in the language used in the resolution in question specifically limits its application to certificates held by the county at the time of its adoption. Neither does it expressly extend the authority thereby granted to after-acquired certificates. The language is general and is as equally applicable to one as to the other. Neither is the resolution expressly limited in its application to certificates which were five years old or were on land on which the county held five certificates at the time of the passage of the resolution. The resolution is a general grant of authority to the county treasurer to dispose of county-owned certificates of a certain specified character. No restrictions being provided as to the time when the same shall be exercised, it is a continuing grant of authority until revoked or modified. XXVI Op. Atty. Gen. 115. It is the general rule that legislative acts are to be construed prospectively unless there is an express provision to the contrary. Lanz-Owen & Co. v. Garage Equipment Mfg. Co., (1913) 151 Wis. 555; Read v. City of Madison, (1916) 162 Wis. 94.
From the wording of your questions it is assumed that at the time of the 1932 sale there was in effect prior action of the county board fixing the redemption interest on tax certificates at fifteen per cent, pursuant to the provisions of sec. 75.01, subsec. (2), Stats. While ch. 24, Laws 1935, repealed sec. 75.01, subsec. (2) and amended sec. 75.01 (1m), Stats., by reducing the interest rate from fifteen per cent to eight per cent, it was expressly provided that it should not affect the interest rate on tax certificates previously issued. Likewise ch. 244, Laws 1933, which reduced the redemption interest provided by sec. 75.01 (1), Stats., from fifteen per cent to eight per cent expressly provided that it should apply only to tax certificates issued thereafter.

Thus the certificates in question when issued provided for fifteen per cent redemption interest. There is nothing in the provisions of secs. 75.34 and 75.35 or in the mere fact of a valid sale by the county of a certificate for an amount less than the face value and the accrued interest specified in the certificate, or even for less than the face value thereof, which in any way relates to the amount which must be paid in redemption thereof and which the purchaser is entitled to receive. The certificate when issued carried with it a certain specified redemption interest, which is a part of the obligation and liability evidenced thereby. The sale thereof for less than the total amount payable thereon neither precludes the purchaser from collecting the full amount nor relieves the taxpayer from the payment thereof. Nothing in said statutes or in the resolution in question purports to limit the purchaser of the certificates to the collection only of interest which accrues after his purchase of the certificates. The above mentioned statutes and the resolution in question make no change in the redemption interest payable under said certificates and do not purport to do so. All they do is to authorize the county to dispose of such certificates by selling them for something less than the total amount due thereon. The sale and transfer of a certificate for less than the total accrued thereon does not of itself operate to reduce the amount due and payable thereon.

The opinion in XXIV Op. Atty. Gen. 86, to which you refer, is upon a somewhat different set of facts. It apparently assumes that no action was taken by the county board pur-
suant to secs. 75.34 and 75.35, authorizing a sale of county-owned certificates for less than the amount of the face value and accrued interest and so the sale was unauthorized and invalid. In that situation it would, however, seem that, inasmuch as the county treasurer had authority to sell under sec. 75.34 (1), a valid assignment had been made but that the purchaser had not paid the county the full amount he should have and owed the county the remainder, so that upon redemption the full accrued interest would have been payable. That opinion, however, also seems to assume some action by the county board fixing the rate of redemption interest on county-owned certificates under sec. 75.01 (1m) as enacted by ch. 334, Laws 1933. The reference in said opinion to the eight per cent interest in sec. 75.01 (1), Stats., as applicable to the situation at hand would seem to overlook the express provisions of said ch. 244, Laws 1933, that it should apply only to tax certificates issued thereafter. By reason of the foregoing observations that opinion is not controlling and of no assistance in the present instance.

It is therefore our opinion that the county treasurer was authorized under the resolution of January 15, 1931, to sell the 1931 tax certificates on February 20, 1939, for the face amount thereof and that the purchaser thereof is entitled to interest on said certificates at the rate of fifteen per cent from the date of the certificates.

HHP

Public Officers — Superintendent of Public Instruction — State superintendent of public instruction has power to sponsor state-wide WPA recreational and educational projects where such sponsorship entails no state obligation.

May 23, 1939.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

It appears from your communication that for the past several years you, as state superintendent of public instruc-
tion, have approved and sponsored in your official capacity a so-called state-wide WPA project which involves many and various forms of recreational activities as well as instructional activities, such as instruction in various crafts, conduct of educational tours, safety instruction, etc. For administrative reasons WPA has found it desirable to set up such activities as a state-wide project under the sponsorship of a responsible state official. Such sponsorship entails no financial obligation on the part of the state but merely involves the state's facilitating through you as the chief educational officer these many and various programs throughout the state by the local communities.

If the project were not set up on a state-wide basis, each community desiring WPA assistance would have to set up a separate project, which in turn would involve so much paper work as to rather effectively discourage local communities sponsoring and engaging in said projects. Under the set-up as it has functioned in the past, when the project has been set up on a state-wide basis, local communities may in turn with facility and without any great amount of paper work become cosponsors of a particular activity. Any financial contribution or other assistance needed under WPA rules and regulations is furnished by the local cosponsor. As a result of state-wide sponsorship, you have been able to foster, promote and facilitate many worth while community projects which have educational, health and community value.

In spite of the set-up of the projects on a state-wide basis under your official sponsorship having functioned successfully over a period of some three years, some one in authority in the Washington office of WPA has challenged your authority to sponsor such projects. You have, therefore, requested us to render an opinion upon the question of whether you, as state superintendent, have authority to sponsor these projects.

We shall attempt to answer the question, fully cognizant of the fact that it is only upon rare occasions that we are called upon to answer questions of such far-reaching magnitude and of such vital and vast importance.

Art. X, sec. 1 of the Wisconsin constitution provides in part as follows:
"The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. * * *"

Sec. 14.57, subsec. (1), Stats., provides as follows:

"The state superintendent shall ascertain the conditions of the public schools, stimulate interest in education, spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools."

Under this section, it is the superintendent's duty to "stimulate interest in education." The legislature has not made any provision for manner, means or methods of stimulating education. The manner, means and methods are left to the state superintendent of public instruction. It is only when the manner, means and methods used have no reasonable relation to said stimulation of education that one can say as a matter of law that the state superintendent has exceeded his power or authority.

Under sec. 14.57 (10) (b) it is the duty of the state superintendent to prescribe a course in physical education and training and he is given general supervision of physical education in the public schools. The various local recreational projects that have been sponsored as a result of the statewide sponsorship appear to afford opportunity to those above school age as well as those of school age to participate in community programs by no means foreign to the physical education and to the educational programs conducted in the schools.

Under the circumstances, we are unable to say that the programs sponsored will not stimulate interest in the same activities carried on in the school. On the other hand, it appears quite probable to us that the programs not only stimulate but complement each other and make for a richer and fuller life—an objective which we have always assumed to be of major consequences in relation to all education.

We do not find it difficult to conclude that the relationship of these programs to the duties with which the state superintendent is charged is such that the state superintendent has
the power to sponsor these projects upon a state-wide basis, especially when such sponsorship entails no obligation on the part of the state.

NSB

School Districts — Taxation — When municipality is part of two school districts, one common school district and other union free high school district and insufficient taxes are collected to satisfy levies of both districts, there is no preference in distribution to common school district but amount available for payment to two levies should be prorated between two in proportion to amounts of respective levies. XXII Op. Atty. Gen. 507 adhered to.

May 23, 1939.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You request the opinion of this department on the following question:

"When a municipality is a part of two school districts, one being a common school district and the other a union free high school district, and an insufficient amount of taxes is collected to satisfy the levies of both districts, does the common school district take priority in the apportionment of the taxes collected under the provisions of section 74.15 subsection (2), or should the amount of the taxes collected be prorated?"

Sec. 74.15, subsec. (2), Stats., provides in part:

"Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, then the equalization tax levied by the county for school purposes, and shall then set aside all sums of money levied for school taxes, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then taxes for the payment of principal and interest on the
public debt, then taxes for bridge purposes, then for fire purposes, then for streets and other public improvements, and lastly county taxes. * * *’

This section fixes the order in which the local treasurers are duty-bound to make the various payments out of tax collections. It is to be noted that both the state tax and the equalization tax are to be paid prior to the setting aside of money levied for school taxes. Although your inquiry does not indicate whether these prior items have been satisfied, we assume, for purposes of this opinion, that this is the fact.

Your question is ruled by XXII Op. Atty. Gen. 507, in which opinion we considered a situation where, after payment of the state tax, a local treasurer had on hand a balance of $900 in tax collections, which sum was insufficient to meet the remainder of the tax levies. In that opinion it was ruled, pp. 508-509:

“The $900 on hand, therefore, must first be used to pay the school districts, whether common school or high school, the amounts levied by the respective districts.

“It will be seen that the statute quoted above [sec. 74.15 subsec. (2)], relating to preferences in payment, did not make provision for any preference between the various types of school districts. * * *

“It is our opinion, therefore, that the $900 must be distributed to the school districts in proportion to the amount levied by that district for school purposes, excepting from those amounts such as were levied for equalization purposes. * * *’

For a complete discussion of the problems, we refer you to the opinion cited.

Since sec. 74.15 (2) makes no provision for a preference between the various types of school districts, and since the districts in question serve an equally worthy purpose, there is no substantial reason why the common school district should take priority in the apportionment of the tax collections unless it can be said that art. X, sec. 3, Wisconsin constitution, making it mandatory upon the legislature to “provide by law for the establishment of district schools,” necessitates a different view. We do not think that the legislative
distribution of taxes provided by 74.15 (2) conflicts with art. X, sec. 3, Wisconsin constitution. We fail to see how it can be said that the legislature has not provided for district schools. If so, it has met the constitutional mandate. There is nothing in the constitution providing that district or common school taxes shall be preferred over taxes levied for high schools, etc. We are of the opinion that there is no such conflict between sec. 74.15 (2), Stats., and art. X, sec. 3, Const., that it can be said the legislature has failed to meet its constitutional duty. It must follow that sec. 74.15 (2) is constitutional legislation and within legislative power. As the legislature has failed to provide for common school district preference in distribution of taxes and has power so to do, it must follow that the funds available for distribution to the school districts must be prorated in accordance with the prior opinion of this department hereinbefore referred to.

NSB

NH
Municipal Corporations — Beer Licenses — Public Health — Cigarettes — State Fair — Class “B” retailers’ licenses under sec. 66.05, subsec. (10), par. (g), subd. 2, Stats., may be issued only to department of agriculture and markets on state fair grounds.

Concessionaire operating tavern on state fair grounds other than during fair week may be required to obtain Class “B” license and pay for full year; may be prosecuted by district attorney for failure to obtain such license.

Town board may not provide for regulations additional to those in statute for conduct of taverns on state fair grounds. Broad general powers of department of agriculture may not be interfered with by town.

Town board may require concessionaire on state fair grounds to obtain cigarette sales license and district attorney may prosecute for failure to do so.

Town board may not require concessionaire on state fair grounds to take out soda water license either during fair week or otherwise.

Lawrence R. Larsen, Chief Clerk, Senate,
Senate Chamber.

The control over the state fair and the state fair grounds in the town of Wauwatosa is vested in the state department of agriculture and markets, herein referred to as the department, and the department, by contract, has granted most of the concessions to a private firm which, in turn, sublets the concession rights to individual operators. The following questions relating to the application of regulations governing the sale of beer, cigarettes, and soda water by concessionaires on the state fair grounds have been presented to this office for opinion by the Wisconsin legislature, pursuant to Joint Resolution No. 23, S. (Jt. Resol. No. 33).

Question No. 1. “May the Class ‘B’ retailers’ license provided for in subdivision 2 of paragraph (g) of subsection (10) of section 66.05 covering the sale of beer on the state fair grounds during fair week be issued only to the department of agriculture and markets, which has control of the
fair grounds, or may the Wauwatosa town board issue such license to a private individual who by contract with the state department has the power to sublet all concession stands on the grounds for the sale of beer?"

Sec. 66.05, subsec. (10), par. (g), subd. 2, Stats., provides that Class “B” retailers’ licenses

"* * * may also be issued to * * * state, county, or local fair associations or agricultural societies * * * authorizing them to sell fermented malt beverages * * * during a fair conducted by such fair associations or agricultural societies, for which a fee of not to exceed ten dollars may be charged as fixed by the governing board [of the township or municipality]. * * * Such license when issued to the state fair * * * shall license and cover the entire fairgrounds where a fair is being conducted and all operators thereon retailing and selling fermented malt beverages from let stands. The state fair * * * to which such license is issued may let stands on such fairgrounds to operators who may retail and sell fermented malt beverages therefrom while the fair is being held, and no such operator is required to obtain an operator’s license when retailing or selling such beverages on grounds * * * of the state fair."

Sec. 66.05 (10) (g) 2 by its terms authorizes the issuance of these special Class “B” licenses to “state fair associations” or “state fairs.” The department of agriculture and markets, having control of the state fair and fairgrounds, would clearly qualify as a “state fair” designated by the statute. Since this is a special statute, granting a special license, its terms should be complied with; therefore, since the statute makes no provision for issuing the license to concessionaires, but only provides for issuance to “state fair associations” or “state fair,” it is the opinion of this office that the license should be issued only to the department or to its representatives rather than to private parties who, by contract, happen to have the concession rights.

This interpretation, too, is in accord with the provisions of sec. 93.07, which permits the commissioners of the department to exclude objectionable booths and exhibits. By
issuing the license directly to the department, the complete internal control of the fairgrounds remains with the department.

Question No. 2. “May the town board require each concessionaire who continues to operate a tavern on the state fair grounds after fair week and during the remainder of the year to obtain a Class “B” license and charge him the full license fee therefor?”

It seems clear that sec. 66.05 (10) (g) 2 provides for special Class “B” licenses which license the sale of beer “during a fair” and that the individual operators to whom stands are let may sell beer under the license “while the fair is being held.” From this language the conclusion seems inescapable that the special license provided for in sec. 66.05 (10) (g) 2 does not license the sale of beer at any time except during the conduct of the fair.

In XXII Op. Atty. Gen. 645, it was held that a person licensed to operate a stand or concession on the state fair grounds could be required to secure the regular license from the town of Wauwatosa before he was authorized to sell beer on the state fair grounds, even though the fair itself could sell beer under the special license of sec. 66.05 (10) (g) 2, as it then existed. (Stats. 1933.) Following this opinion the language was added to sec. 66.05 (10) (g) 2 by ch. 238, Laws 1935, which makes it clear that the special license, when issued to the fair, is intended to cover all operators on the fair grounds “while the fair is being held.” Hence the reasoning and authority of XXII Op. Atty. Gen. 645 would still apply to concessionaires who sell beer on the fair grounds while the fair is not being held; and on that reasoning and authority this office is constrained to hold that the concessionaires who sell beer on the fair grounds during the remainder of the year, not coming within any exception to the licensing statute, may be required to obtain the regular Class “B” license from the town of Wauwatosa.

It should be made clear at this point that no opinion is herein expressed on the question of how far the other provisions of sec. 66.05 are applicable to the state fair, nor on the question of whether the town of Wauwatosa may refuse
to license concessionaires whom the department of agriculture and markets has approved.

**Question No. 3.** "If question No. 2 is answered in the affirmative, then may a concessionaire failing to secure the required license, be prosecuted under par. (m) of subsection (10) of sec. 66.05 through proceedings instituted by the office of the local district attorney?"

Sec. 59.47 provides:

"The district attorney shall:

"(1) Prosecute * * * all actions, applications, or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; * * *"

Sec. 66.05 (10) (d) 1 prohibits the sale of fermented malt beverages without a license. Sec. 66.05 (10) (m) provides that any person who shall violate the provisions of this subsection (10) 66.05, or any municipal ordinance adopted pursuant thereto shall be deemed guilty of a misdemeanor.

Thus it appears that the sale of beer without a license is a violation of sec. 66.05, subsec. (10), and a misdemeanor under the state law. The failure to secure a license, being a violation of the state law, could be prosecuted by the district attorney; and from the answer given herein to question No. 2, this would apply to the sale of beer on the state fair grounds as well as elsewhere.

It should be understood, however, that this opinion does not in any way modify the rule expressed in XXIV Op. Atty. Gen. 39, wherein it was held that the local district attorney has no duty to prosecute the violation of local ordinances enacted under this subsection.

**Question No. 4.** "May the town board under paragraph (j) of subsection (10) of section 66.05 of the statutes provide additional regulations to those provided by statute for the conduct of taverns on the state fair grounds and enforce the same through the local justice of peace?"

It is the opinion of this office that despite the language of sec. 66.05 (10) (j) any additional regulations enacted by the town board will not be applicable to the state fair or fair
grounds, especially in view of the broad general power given to the department by sec. 93.07 (18) to police the fair grounds and the powers which must be implied from the control which the department has over the fair grounds. This control should be held free from the interference and conflict which might result from regulation under local ordinances passed in addition to the statute. In support of this holding see XIV Op. Atty. Gen. 210, wherein it is held that vehicles operated or parked on the state capitol driveways are not subject to municipal speed, light, and parking ordinances, and XX Op. Atty. Gen. 506, holding that the Milwaukee county dance hall ordinance does not apply to a dance hall operated on the state fair grounds under a concession from the department.

Question No. 5. “May the town board require each concessionaire to obtain a cigarette sales license?”

Sec. 352.50, subsec. (3), sets up what amounts to a state-imposed requirement of licenses for the sale of cigarettes, although the license fee is collected by the municipality. The statute contains no exceptions of any kind from which it might be inferred that it was intended to exempt the sale of cigarettes on the state fair grounds. Since this involves a state license requirement and not merely a municipal ordinance (although the licenses are issued by the municipality), it must be held that the specific statute requiring a license for the sale of cigarettes must control the general power given to the department to police and control the fair grounds. Hence it must be held that each concessionaire may be required to obtain a cigarette sales license.

Question No. 6. “May failure to procure a cigarette sales license be prosecuted through the district attorney’s office?”

This question must be answered in the affirmative, since sec. 352.50 (5) makes the unlicensed sale of cigarettes a misdemeanor. It is a violation of the state law and hence may be prosecuted by the district attorney for the reasons set forth above in the answer to Question No. 3. This conclusion is strengthened by the fact that sec. 352.50 is placed
in the section on crimes—"Offenses against public health"—all of which are punishable by the state.

**Question No. 7.** "May the town require concessionaires in the state fair park to take out a soda water sales license during fair week if their concession rights are for such week only?"

**Question No. 8.** "May the town require concessionaires in the state fair park to take out a soda water sales license where their concession rights extend beyond fair week and include the whole of or a part of the remainder of the year?"

**Question No. 9.** "Would the police power of the town of Wauwatosa extend over the state fair grounds so as to confer jurisdiction upon the local justice of the peace in the matter of a violation of such soda water ordinance?"

These three questions are all so closely related that it is appropriate to answer them together.

Sec. 66.05 (9m) permits municipal governing boards to grant licenses to such persons as they may deem proper for the sale of soda water beverages, and to adopt certain regulations pertaining to such licenses and sales. The town of Wauwatosa has enacted and now has in force such a licensing ordinance.

It is the opinion of this office that the state fair park concessionaires cannot be required to obtain such licenses for the sale of soda water beverages either during fair week or during the remainder of the year.

Sec. 66.05 (9m) provides for a purely municipal system of licensing the sale of soda water beverages. It does not provide for any state-imposed system as is provided by sec. 352.50 (3) for the sale of cigarettes; nor is there any expression of state-wide concern for uniform regulation such as is found in sec. 66.05 (10) (n) 1, in regard to the sale of beer. The purely local character of the licensing of soda water beverage sales and the submission to municipal enforcement which it entails leads to the conclusion that such regulation is inconsistent with the control over the fair grounds which has been granted to the department, and therefore must yield to it. See Milwaukee v. McGregor, 140
Wis. 35, 121 N. W. 642, holding that municipal building permit ordinances and building regulations do not apply to a state building, built under express legislative authority.

Accordingly, it must be held that the soda water beverage license adopted pursuant to sec. 66.05 (9m) does not apply to the sale of soda water beverages on the state fair grounds.

This answer to the 7th and 8th questions makes it unnecessary to further answer question No. 9 above.

It is appropriate to observe in conclusion that the questions herein presented are all very close questions of legislative intent, and the answers which have been given are not entirely free from doubt. A thorough search has revealed no direct judicial authority upon any of the questions involved.

Considerable doubt as to whether any of the license regulations in question should apply to the state fair is raised by the general principle of statutory construction to the effect that mere general statutes or ordinances thereunder do not bind the state or sovereign unless the legislative intent to do so is clear from express inclusion or from necessary implication. See, Milwaukee v. McGregor, supra. The state fair is a "governmental function," at least in so far as nonliability for torts is concerned. Morrison v. Fisher, 160 Wis. 621, L. R. A. 1915E, 469, and since the state could itself sell beer and cigarettes rather than letting out the concessions, there is some doubt as to whether the general license requirements should apply at all to the state fair grounds.

Further complications are introduced by the fact that the state fair has contracted with the concessionaire to furnish any licenses which might be required, and many conflicts might arise from any attempt to enforce the license provisions against the individual concessionaires. The existence of this agreement to furnish licenses cannot, however, have any bearing on the question of the legal right of the town of Wauwatosa to require such licenses from the individual operators.

These concluding remarks are presented for the purpose of indicating that many inconsistencies must inevitably remain after the questions presented for opinion have been
answered, and to point out that the entire matter is properly within the legislative power and an appropriate subject for legislative clarification.

WHR
OS

Courts — Witnesses — Chemists — Public Health — Basic Science Law — Out-of-state chemist otherwise qualified to testify as expert is competent as such in Wisconsin. Sec. 147.14, Stats., is not applicable and there is no statute requiring chemists to be licensed in this state before they are competent as expert witnesses.

May 23, 1939.

J. C. Raineri,
District Attorney,
Hurley, Wisconsin.

In your letter you state:

"I have a matter in connection with a murder case we are about to try here in the near future regarding the analysis of certain embalming fluid which was used in preparing the deceased for burial. It is essential in connection with this matter that a chemical analysis be made of the embalming fluid in question.

"We have a chemist at Ironwood, Michigan, who is a professor at the Junior College in Ironwood, who states that he is able to make this chemical analysis. The question has arisen in my mind as to whether because of the fact that he is from out of state he would be qualified to make an analysis of this fluid? * * *"

You further state that you have checked the question and do not find anything in the Wisconsin statutes which would prevent this witness from testifying in Wisconsin as an expert regarding the chemical contents of this fluid.

The doubt arises in your mind because of sec. 147.14, Stats., which in substance prevents physicians from testifi-
ing as experts (with certain exceptions not material) unless licensed to practice in this state. You feel that there may be some similar disqualification with respect to competency of an out-of-state chemist to testify as an expert and desire our opinion as to whether this witness, if otherwise qualified, is competent to testify although not licensed as a chemist in this state.

The general rule is that experts may testify as such upon a proper foundation being laid with respect to the witness's qualifications in the particular field in which it is proposed to use his testimony as an expert. It is for the court to determine whether the witness is properly qualified to testify as an expert in a particular field. 2 Jones on Evidence (4th ed.) 691. Sec. 147.14 constitutes an exception to the general rule. The section is limited to the testimony of medical or osteopathic physicians or practitioners testifying as such. It has no application beyond that field. State v. Law, 150 Wis. 313, 327.

We do not find where chemists are required to be licensed in this state but, even if they were required to be licensed in order to practice their profession in this state, a chemist practicing in another state, otherwise qualified as an expert, would be a competent expert witness in this state in the absence of a statute similar to sec. 147.14 applicable to one testifying as a chemical expert. We find no statute requiring chemical experts to meet certain prescribed standards, such as sec. 147.14, before they are competent to testify as experts in the courts of this state. In the absence of such a statute, the witness's competency to testify as an expert must be governed by the ordinary rules of expert testimony and without regard to whether the witness has or has not a license to practice his profession in this state.

NSB
Fish and Game — Wholesale Fish Markets — Sec. 29.48, Stats., relating to sale of fish and game, does not apply to sale of bullheads, pickerel and catfish by wholesale dealer licensed under sec. 29.135 where such fish were taken in another state during open season there.

May 23, 1939.

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

You state that a local operator of a wholesale fish market, who has the regular wholesalers' license issued by the state conservation commission of Wisconsin, as provided by sec. 29.135, Stats., has in his possession and is selling certain bullheads, pickerel and catfish, which he has received by wholesale shipments from the state of Iowa, where the season is open for such fish.

Admitting that such fish are considered "commercial fish" at this time in the state of Iowa, you inquire whether it is a violation of sec. 29.39 or sec. 29.48 for the local wholesaler to have these fish in his possession for the purpose of sale in Wisconsin during the closed season here.

Sec. 29.39 and sec. 29.48, Stats., read:

"29.39. No person shall have in his possession or under his control, or have in storage or retention or as common carrier, for any one person, any game, game fish, or other wild animal or carcass or part thereof, during the close season therefor, or in excess of the bag limit for one day or below the minimum size thereof at any one time during the open season, whether lawfully or unlawfully taken within or without the state."

"29.48 Except as provided by section 29.52 no person shall 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.”

The provisions of sec. 29.52 which are excepted from the
operation of sec. 29.48 refer to private fish hatcheries and
have no application here.

Sec. 29.135, subsec. (3), Stats., reads:

“Any person licensed under the provisions of subsection
(1) of this section may, at any time, sell, purchase or bar-
ter, or offer to sell, purchase or barter, or have in his pos-
session, or under his control, for the purpose of sale or bar-
ter, any commercial fish, which was lawfully taken either in
this or in another state. Such person shall keep a separate
record of the purchase of such fish in such form as shall be
required by the state conservation commission, and such
record shall at all times be open to its inspection and that of
its deputies.”

Secs. 29.39 and 29.48 were created by ch. 668, Laws 1917,
and sec. 29.135 (3), in its present form was created by ch.
out that sec. 29.135 (3) evidenced a legislative intent to ex-
empt wholesale fish dealers from the operation of sec. 29.39.
Thus your question is answered by our former opinion as
far as sec. 29.39 is concerned.

Sec. 29.48 raises a somewhat different question under the
facts stated, and it is unnecessary for us here to reconcile
this section with sec. 29.135 (3) or to determine whether
sec. 29.135 (3) constitutes an exception to sec. 29.48, for the
reason that sec. 29.48 by its very terms does not apply to the
fish mentioned in your statement of facts. As far as fish are
concerned, sec. 29.48 applies only to black bass, muskel-
lunge, sturgeon, pike from inland waters, or trout other
than lake trout, and to “any other game fish taken from in-
land waters” during certain seasons. Bullheads, pickerel
and catfish are “game fish” by virtue of the definition pro-
vided by sec. 29.01 (3). However, they are not game fish
“taken from inland waters” if they were lawfully caught in
Iowa as you state, since “inland waters” are defined for the
purposes of ch. 29 so as to include only certain waters
within the jurisdiction of this state. See sec. 29.01 (4), Stats.

It is therefore our opinion that secs. 29.39 and 29.48 have not been violated under the facts stated.
WHR

Oil Inspection — Police Regulations — Illuminating Oils
— Practice of selling at retail as two distinct trade-marked oils under two distinct names and at different prices is prohibited by sec. 168.097, subsec. (1), pars. (a), (b), (d) and (f), Stats., where oil in question is actually of one trade-mark and drawn from same storage tank.

Practice of retail dealers in liquid fuels buying one grade of liquid fuel and selling this grade under as many as seven different grades and prices is prohibited by sec. 168.097 (1) (a) where fuel is sold as of grade of higher quality than that actually purchased by retailer.

May 23, 1939.

LAWRENCE C. WHITTET, Supervisor,
State Inspection Bureau.

You state that you have information that a number of companies selling oils at retail are engaged in selling as two distinct trade-marked oils under the two distinct trade names and at different prices, whereas the oil in question is actually of one trade-mark and quality and is drawn from the same storage tank. You inquire whether such practice is prohibited by sec. 168.097, Stats.

There is no doubt in our minds but that such practice is prohibited by sec. 168.097, subsec. (1), pars. (a), (b), (d), and (f), Stats. All of the subsections quoted are aimed at the prevention of frauds and deceits as to the nature, quality or identity in the sale of liquid fuels, lubricating oils, greases or other similar products, and the last three paragraphs above noted prohibit and make it an offense to sell a trade-marked oil, etc., other than under the true trade-mark
name. In the problem which you put it is apparent that at least one trade-marked oil or similar product is being sold under the name of another trade-mark. Such practice is a fraud and deceit under sec. 168.097 (1) (a), Stats., and therefore a prohibited offense and is likewise specifically prohibited and therefore an offense under sec. 168.097 (1) (b), (d) and (f).

You further state that in the liquid fuel field you have information that retail dealers are engaged in the practice of buying one grade of liquid fuel and selling this grade under as many as seven different grades and at different prices. You inquire whether sec. 168.097 prohibits such practice where the fuel is sold as of a grade of a higher quality than that actually purchased by the retailer.

As this practice cannot be other than a sale in a manner "which deceives, tends to deceive, or has the effect of deceiving the purchaser as to the nature, quality or identity of the product so sold", you are advised that the practice is prohibited by sec. 168.097 (1) (a), Stats.

NSB

Automobiles — Law of Road — Sec. 85.84, Stats., as amended in 1937, does not authorize municipality to adopt ordinance providing for revocation of operator's license.

May 25, 1939.

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

Attention K. T. Savage, Assistant District Attorney.

You inquire whether, in view of the words "except the suspension or revocation of motor vehicle operators' licenses" added to sec. 85.84 of the statutes by the 1937 legislature, a municipality may now provide for the revocation of an operator's license for violation of its ordinance, where
such ordinance is the same as the statutory provision in all other respects, and you inquire further whether the municipal ordinance may now provide for revocation of such a license for a longer period than that provided by statute.

In XX Op. Atty. Gen. 981 it was expressed as the opinion of this department that an operator's license could not, under sec. 85.08 (10), be revoked for violation of a municipal ordinance covering the same offense as the state traffic code. It is still the opinion of this department that a municipality has no power to provide for revocation of an operator's license for violation of its ordinances, even though such ordinance covers the same offense as is covered by the state traffic code.

The words referred to above were apparently added to sec. 85.84 for the purpose of clearing up a doubt which was raised in XXV Op. Atty. Gen. 665. In that opinion some doubt was expressed as to whether a municipal traffic ordinance could be valid which did not provide for revocation where it covered the same offense for which the state traffic code did provide revocation of an operator's license. This doubt arose because of the requirement of sec. 85.84, as it then stood, that municipal ordinances must be in strict conformity with the state traffic code, and must impose "the same penalty for a violation of any of its provisions."

In order to clear up this doubt, sec. 85.84 was amended, by adding the words "except the suspension or revocation of motor vehicle operators' licenses." This amendment made it clear that the municipal ordinance covering the same offense as the state traffic code is valid, even though it does not provide for the revocation of an operator's license for a violation thereof.

It does not seem that it was intended to have any greater effect and, therefore, the opinion of this department set forth in XX Op. Atty. Gen. 931, is not affected by the amendment. For the procedure recommended in revoking an operator's license where both the state traffic code and the municipal ordinance have been violated, see XXVI Op. Atty. Gen. 250.

WHR
Opinions of the Attorney General 339

Counties — County Agricultural Agent — County Board
— Where housing of county officers, including that of county agent, elsewhere than at county seat involves expense to county, county board has power to determine where offices shall be located even though board locates offices elsewhere than at county seat.

May 25, 1939.

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

You state that Burnett county has established an agricultural representative and a special committee on agriculture under the provisions of sec. 59.87 of the statutes.

At its May meeting the county board passed the following resolution:

"Whereas the village of Webster has offered space in the community hall at Webster for use in housing the county sponsored offices now located at Siren and
"Whereas the use of this space has been offered heat and rent free
"Be it Resolved that these offices be moved from their present location to the community hall at Webster, Wis."

You state further that the special committee on agriculture is not in favor of this action and that since the committee contends that it has authority to designate the location of the agricultural representative's office, that representative refuses to move to Webster.

You ask whether the county board has authority to change the location of the office of the agricultural representative when such action is opposed by the special committee on agriculture.

Sec. 59.87, Stats., provides in part:

"(1) For the purpose of aiding in the agricultural development of the several counties in the state, any county is hereby authorized, through its county board, to establish and maintain an agricultural representative in accordance with the provisions of this section."
"(2) Such agricultural representative under the direction and supervision of the special committee on agriculture shall:

"* * *

(9) From and after the annual meeting of the county boards in November, 1919, the special committee on agriculture shall consist of the chairman of the county board of supervisors, the county superintendent or superintendents of schools, and three practical farmers representing the agricultural interests of the county, appointed by the county board of supervisors, one of whom shall be a member of the county board of supervisors, * * *

In considering sec. 59.87, subsec. (2), the Wisconsin court has held:

"Sub. (2) specifies the duties of an agricultural representative which are to be performed under the direction and supervision of the special committee on agriculture." Spaulding v. Wood County, 218 Wis. 224, 229, 260 N. W. 473.

Thus it appears that the function of the special committee on agriculture is limited to the direction and supervision of the duties of the agricultural representative as they are set forth in sec. 59.87, subsec. (2). A search of the statutes reveals no provision which grants any broader authority to this committee.

Sec. 59.07 (4), with reference to power of the county board, provides as follows:

"Build and keep in repair the county buildings and cause the same to be insured in the name and for the benefit of the county, and in case there are no county buildings, to provide suitable rooms for county purposes."

Sec. 59.07 (6) provides as follows:

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

It seems quite clear that the foregoing provisions of the statutes are sufficiently comprehensive in scope to give the
county board control over the internal affairs of the county, such as housing of its officers (at least where housing is at county expense), in the absence of a statute specifically delegating that power to some other county committee, board or agency.

Sec. 59.14 (1), which provides in part as follows:

"* * * The county board may also require any elective or appointive county official to keep his office at the county seat in an office to be provided by the county
* * *

cannot be construed as a limitation upon the general power of the county board in this regard. It is a specific grant of power with respect to a specific situation, the exercise of which would otherwise have to be grounded upon the more general provisions of the sections above cited.

We find no other section of the statute which in any wise limits the general power of the county board with respect to the problem presented, or which confers the power upon any other county agency or committee. You are accordingly advised that the county board has power to determine the location of county offices, including that of the county agent at least where the housing is at county expense. As the resolution submitted appears to be dictated because of saving of expense to the county, it appears to be well within the power of the county board to enact the same.

NSB
NH
Oil Inspection — Taxation — Motor Fuel Tax — Deputy oil inspector appointed under ch. 168, Stats., has no power as such to stop vehicle transporting more than twenty gallons of gasoline into Wisconsin, examine documents covering shipment, inspect gasoline and report to state supervisor of inspectors or to state treasurer origin and destination of shipment.

Such duties, however, may be conferred on such deputies by treasurer in performance of his duties under sec. 78.09, Stats.

May 31, 1939.

John M. Smith,

State Treasurer.

You inquire whether a deputy oil inspector appointed under ch. 168, Stats., has authority to stop vehicles transporting more than twenty gallons of gasoline into Wisconsin, examine the documents covering the shipment, inspect the gasoline, and report to the state supervisor of inspectors or to the state treasurer the origin and destination of the shipment, so that the state treasurer can check as to the payment of the tax thereon.

Ch. 168, Stats., does not expressly authorize such inspectors to interrupt the transportation of motor fuels in the manner you suggest. The legislature, in secs. 168.08 and 168.10, has defined the extent to which the supervisor of inspectors and his deputies, in the performance of their duties, may interfere with the affairs of oil dealers and transporters. Thus, they may "enter into or upon the premises of any manufacturer, refiner, or vendor of said illuminating oils, gasoline, benzine, naptha, and other like products of petroleum" to discover untested or unmarked products (sec. 168.08 (1) ); they may demand access to the books or records of any railway company or other transportation company, or any oil dealer showing the receipt or shipment of such products for the purpose of ascertaining the amount of said products shipped and received (sec. 168.08 (2) ); and they may inspect and test illuminating or heating oil and gasoline, benzine, or naptha, and other products of petro-
leum, in a tank or railroad tank car when standing upon a railroad track (sec. 168.10 (1) ).

It will be seen that the above provisions give no authority to deputy inspectors to stop shipments of motor fuel in transit either to make inspections or for any other reason. Neither is there any room for implying such authority from the powers expressly granted or from the nature of the duties imposed upon the inspectors. Furthermore every one of the powers given the inspectors is qualified by a declaration of the purpose for which such power may be exercised. Clearly these powers may be exercised only in the performance of their duties as oil inspectors, which duties do not include enforcement of the gasoline tax. It follows that deputy oil inspectors as such are not authorized to stop vehicles transporting gasoline into Wisconsin to determine whether the tax thereon has been paid.

You further inquire whether the state treasurer can confer "on such deputies the powers of the treasurer under chapter 78 as to such case." Apparently you refer to the powers given to the treasurer and his agents and employees by subsecs. (2) and (3) of sec. 78.09, Stats. Subsec. (2) of that section makes it unlawful for any person transporting motor fuel from outside the state or from place to place within the state "his agent or servant or driver to refuse at any time to divulge to the state treasurer or his duly authorized agents or employees any information demanded by said state treasurer, his agents or employes concerning the specific kind or trade name of motor fuel or kerosene being transported, the amount of each product, in said tank wagon or truck, the name and address of the person from whom said motor fuel was purchased or obtained and the name and address of the person to whom said motor fuel or kerosene is being actually and in fact delivered."

Subsec. (3) of the same section requires the driver of any such truck or tank wagon to have on his person all the documents covering the shipment and to present the same whenever requested to do so by the state treasurer, his duly authorized agents or employees.

Any authority conferred upon the state treasurer by the above provisions may by the terms of the statute be in turn
conferred by him upon his agents and employees. We can see no objection to the state treasurer designating one or more or all of the deputy oil inspectors appointed under ch. 168 as agents of the state treasurer for the purpose of making the investigations authorized in sec. 78.09. Ch. 168 does not require that the deputy oil inspectors devote all their time to the duties imposed upon them in said chapter; nor is there any provision in ch. 78 which can be construed to prohibit the state treasurer from appointing as his agents for enforcement of the motor fuel tax persons holding other positions in the state government. The additional duties appear to be compatible with "the qualifications and principal duties of such employes" and might therefore be assigned inter-departmentally under sec. 14.65, Stats. If the duties may be assigned inter-departmentally there certainly can be no good reason why they may not be assigned within one department.

You are therefore advised that the state treasurer may confer upon the deputy oil inspectors the authority to act as his agents in the enforcement of the motor fuel tax. As such agents they may exercise all the authority given by the legislature in ch. 78 to the agents or employees of the state treasurer.

NSB
Public Officers — State Treasurer — Trade Regulation — Negotiable Instruments — Checks — Under Bill No. 453, A., providing for signing of checks by facsimile signature of treasurer, unauthorized use of such signature would probably constitute forgery, but that question may be eliminated in any insurance against such loss whether insurance be forgery insurance or any other form of insurance designed to cover loss resulting from unauthorized use of machine by anyone by simple provision in policy to effect that such unauthorized use of such signature is within coverage of policy.

May 31, 1939.

John M. Smith,

State Treasurer.

You call our attention to Bill No. 453, A., which is now pending before the legislature and which proposes to amend sec. 14.42, subsec. (1), Stats., to read in part:

"* * * Checks on depositories in which moneys may be deposited shall be signed in one of the following methods:

"* * *

"(d) by placing on a check the facsimile signature of the treasurer adopted by him as a facsimile signature. Any depository shall be fully warranted and protected in making payment on any check bearing such facsimile notwithstanding that the same may have been placed thereon without the treasurer's authority."

If this bill becomes a law, the facsimile signature so authorized will be stamped upon checks by an electrically driven machine which is designed for that purpose. You ask whether the operation of this machine to produce that facsimile signature without the treasurer's authority would constitute forgery.

The term "forgery" has been defined innumerable times but no fixed definition is universally accepted. The essence of forgery, however, consists in making an instrument appear to be that which it is not. The Queen v. Ritson, L. R. 1 C. C. R. 200. Accordingly, courts which have considered cases involving the unauthorized use of a rubber stamp to
place a facsimile signature upon a check have held such use to be a forgery. *Robb v. Pennsylvania Co.*, 3 Pa. Super. Ct. 254, affirmed in 186 Pa. 456, 40 Atl. 969, 41 Atl. 49, 41 L. R. A. 695. See also discussion by I. J. Williams, “Forgery by means of a rubber stamp” in 37 Am. L. Reg. (N. S.) 745. In view of these authorities, the unauthorized use of a machine such as that which you propose to use would, in all probability, be held to constitute forgery.

You also request our suggestions as to the methods of protecting the state against loss which might result from such forgery.

Under the provisions of sec. 14.41 the treasurer has discretionary power to require a bond of each employee who might have direct access to the machine. Such bond is restricted to particular individuals, however, so that it would seem that forgery insurance or any other form of insurance designed to cover a loss from such a forgery committed by anyone would be the preferable type of insurance. We are not prepared to give you any data in respect to relative costs. The question of whether unauthorized use of such machine is a forgery and therefore covered by forgery insurance may easily be eliminated by a clause in the policy that such unauthorized use does constitute forgery within the meaning and coverage of the policy. The foregoing applies equally whether forgery insurance is purchased or any other form of insurance designed to cover a loss resulting from the unauthorized use of the machine by anyone, that is, whatever form of insurance is purchased, specific language should be used in the policy to the effect that such unauthorized use of the machine is within the coverage of the policy.

In considering a possible question regarding your authority to pay premiums for such insurance out of the appropriation made to your department by sec. 20.05 subsec. (1), we have found no statutory provision or case law which is controlling. For your protection, therefore, we suggest that you request the legislature to specifically authorize expenditures to be made from that appropriation for the purpose of carrying such insurance in the event that Bill No. 453, A., becomes a law.
In connection with the operation and custody of the machine, we suggest that each of the keys which must be used together to unlock the machine be entrusted to individual employees during office hours. We also deem it advisable that arrangements be made whereby the machine itself may be placed in a vault when not in actual use. These precautions will serve to reduce the premium rate of insurance and to discourage possible attempts at forgery.

NSB
NH

Counties — County Ordinances — Municipal Corporations — Beer Licenses — County has no power to pass tavern closing ordinance which provides that no premises in county for which retail liquor or beer license is issued shall be permitted to remain open for any purpose whatsoever during hours of 1:00 A. M. and 8:00 A. M."

May 31, 1939.

Clarence W. Wirth,
District Attorney,
Berlin, Wisconsin.

You inform us that the county board of Green Lake county has enacted a tavern closing ordinance which reads in part as follows:

"No premises in the county of Green Lake for which a retail or beer license is issued under the laws of this state shall be permitted to remain open for any purpose whatsoever during the hours of 1:00 A. M. and 8:00 A. M."

It is not necessary to consider all the questions you have asked concerning such ordinance, since the conclusion reached by this department is that a county board has no power to regulate taverns, restaurants, hotels, etc., simply because a retail liquor or beer license has been issued for such places.

As you indicate in your letter, the rule is that a county board has only such powers as are expressly granted by
statute or necessarily implied therefrom. *Frederick v. Douglas County*, 96 Wis. 411; *Spaulding v. Wood County*, 218 Wis. 224.

The ordinance in question groups all places licensed to retail liquor and beer in a class and attempts to regulate their operation. Examination of the Wisconsin statutes reveals no grant of power to the county board which would enable it to so regulate the places in question.

Subsec. (9), sec. 59.08, Stats., authorizes the 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 likes places of amusement."

Subsec. (15) of the same section authorizes the county board to "exercise all the powers conferred by law on cities to regulate by ordinance, dance halls, road houses, and other places of amusement outside the limits of incorporated cities and villages."

Obviously the statutes quoted above do not grant the county board power to regulate and control all retail dispensers of liquor and beer. Of course if such establishments chance to be dance halls or pavilions, road houses, or if they are operated in connection with a carnival or a similar place of amusement, the county board may regulate and control them by virtue of the above provisions. However, the ordinance in question does not purport to apply solely to those places over which the county board is given a measure of control by virtue of subsecs. (9) and (15) of sec. 59.08, Stats.; it seeks to regulate the operation of premises where liquor and beer are sold regardless of whether they fall within any of the classes enumerated in those statutes.

The ordinance is not grounded upon regulation as an incident of a granted power but is rather grounded upon attempt to exercise a power not granted, with any valid regulation that there may be a mere incident thereof. We know of no principle by which a county ordinance grounded upon any such attempted exercise of power can be sustained either in whole or in part. We conclude that the ordinance is void and of no force or effect.

NSB
**Public Health — Board of Health — Real Estate — Plats**

Section 236.06, subsec. (1), par. (g), Stats., requires approval of state board of health to recording of plats of lots abutting on lake, and the board, under secs. 236.04, subsec. (15), and 140.05, subsec. (7) may, to insure proper sanitary conditions, require such lots to exceed the minimum width and area prescribed by sec. 236.03, subsec. (7) for lots generally.

June 1, 1939.

**Board of Health.**

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

You state that an owner of a certain parcel of land located within the limits of the city, and adjoining a small artificial lake, desires to provide for lots having a width of 40 feet and a minimum area of 4,800 square feet.

We are asked whether the approval of the state board of health is required in order that the plat may be legally recorded and whether the state board of health has authority to require the lots to be of a minimum width of 60 feet, and of a minimum area of 8,000 square feet.

Sec. 236.04, subsec. (15), Stats., reads:

“All plats of land-divisions adjoining any lake or stream, or where provisions are made for access to any lake or stream, shall comply with the rules, regulations and standards of the state board of health enacted to insure proper sanitary conditions in the development and maintenance of lake and stream subdivisions pursuant to section 140.05.”

Sec. 236.06 (1) (g), provides that no plat for lands lying in any subdivision adjoining any lake or stream or where access is provided to any such lake or stream shall be valid or entitled to be recorded until it has been submitted to and approved by the state board of health.

Sec. 140.05 (7) provides that the state board of health

“* * * shall have power to make and enforce such rules, regulations and standards as it shall deem necessary to insure proper sanitary conditions in the development and maintenance of lake and stream shore plats and to comply with the provisions of section 236.09 of the statutes.”
Acting under authority of the foregoing statute, the state board of health promulgated the following rule on July 15, 1938:

“Section 5. Size of Lots. (a) The minimum width of lots measured at right angles to its depth or side line shall be 60 feet; the minimum area shall be 8,000 square feet. No building shall cover more than 20 per cent of the lot area and not more than one one-family residence, boathouse and private garage shall be located on any such lot.”

However, the owner of the land in question advances the argument that the situation is governed by sec. 236.03 (7), which reads:

“Each lot shall have an average minimum width of forty feet and a minimum area of four thousand eight hundred square feet.”

Attempt should be made to harmonize and give effect to all of the foregoing provisions so far as possible.

At the outset, there is a discrepancy within sec. 140.05 (7), which should be cleared up. This section authorizes the state board of health, among other things, to require compliance with sec. 236.09, Stats. Ch. 236 of the statutes was repealed and re-enacted by ch. 186, Laws, 1935. Sec. 236.09, prior to the change, related to plats and lake frontage.

Sec. 236.09, as it now reads, relates to surety bonds to insure public improvements, and since such bonds run to the municipality, rather than to the state or the state board of health, this section obviously can have no application to or proper place in sec. 140.05 (7), conferring certain powers upon the state board of health. The answer to this discrepancy is to be found in the rule of statutory construction that where one statute refers to another which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as such statute is concerned. See III Op. Atty. Gen. 300, and Shull v. Barton, 79 N. W. 732.

We are therefore of the opinion that sec. 236.09, as referred to in sec. 140.05 (7), is the sec. 236.09 that was repealed by ch. 186, Laws 1935.
While the foregoing discussion does not answer your questions, it does explain an apparent incongruity appearing upon the face of the statutes involved. However, the important part of sec. 140.05 (7), as far as present purposes are concerned, is not the reference to sec. 236.09, but rather the first part, which gives the board the power to make and enforce such rules, regulations and standards as it shall deem necessary to insure proper sanitary conditions in the development of lake and stream shore plats, and the question is whether such rule-making power may be exercised in the case of lake lots so as to require that such lots be greater in width and area than is prescribed in the minimum requirements specified by sec. 236.03 (7), Stats.

Sec. 236.03 (7) is a general statute in that it applies to all plats, whereas the provisions above mentioned relating to the powers of the state board of health are special, and relate only to lots abutting lakes and streams. In the construction of statutes special provisions relating to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. Kolleck v. Dodge, 105 Wis. 187. Or, to state the rule another way, where a statute contains a general provision covering a subject as a whole and also a special clause or provision relating to a particular element included in such subject, such special provision must prevail. State ex rel. Donnelly v. Hobe, 106 Wis. 411.

You state that the requirement of a 60-foot minimum width and of an 8,000 minimum area was established by the state board of health in order to assure sanitary conditions, and that there are numerous reasons why a lake lot only 40 feet in width would be unsanitary. We must therefore assume the facts to be that the rule in question was enacted in accordance with secs. 140.05 (7) and 236.04 (15) to insure proper sanitary conditions which the board deemed to be necessary in such cases. Consequently, such rule, having been adopted in accordance with the special statutory provisions relating to the subject, must stand in the absence of a showing to the effect that it is unreasonable, capricious or arbitrary, even though a lesser width and area would meet the minimum requirements of sec. 236.03 (7), relating to plats generally. This conclusion calls also for an affirmative
answer to that part of your question inquiring whether the approval of the state board of health is required in order that the plat may be legally recorded.

WHR

Bridges and Highways — Law of Road — Automobiles Tractor — Words and Phrases — Section 85.01, subsec. (4), par. (f), Stats., does not apply to truck used for hauling construction machinery from job to job and in the hauling of lumber used on the job.

June 2, 1939.

THOMAS W. FOLEY,
District Attorney,
Superior, Wisconsin.
Attention James C. McKay, Assistant District Attorney.

You call our attention to sec. 85.01, subsec. (4), par. (f), Stats., which 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."

We are asked whether this statute applies to a construction company using a truck to haul machinery from job to job and to haul lumber used on the job.

We assume, from the fact that the truck is used in hauling lumber on the job, that it is constructed as an ordinary single-unit motor truck, and is capable of independently transporting a load on its body as well as being capable of pulling or hauling machinery.

While the statutes contain no definition of the word "tractor" as used in sec. 85.01 (4), (f), we take it that the word is to be construed and understood according to its common and approved usage. See sec. 370.01 (1), Stats. This word
is defined in Webster's New International Dictionary as—
"That which draws, or is used for drawing; specif., a traction engine."

The words "tractors used exclusively for construction operations" would seem to refer to tractors or tractor engines used in pulling or propelling other machinery or vehicles while these other machines are being used on the construction job itself or to transport such machinery from job to job. Accordingly, we do not construe the words to apply to the hauling of materials as an independent load by a truck.

Likewise, while the definitions in sec. 85.10 do not apply to sec. 85.01, any analogy which might be drawn from the definitions therein set forth, would require that the vehicle described be classified as a "motor truck" under sec. 85.10 (5), since it would not qualify as a "truck tractor," "road tractor" or "farm tractor" under sec. 85.10, subsecs. (6), (7) or (8) respectively.

You are therefore advised that a truck which is used in hauling construction machinery from job to job and which is also used for the purpose of hauling lumber used on such jobs is not a "tractor" within the meaning of sec. 85.01 (4) (f) of the statutes.

WHR

Counties — County Ordinances — County Pension Department — Indigent Insane, etc. — Poor Relief. — Sec. 49.51, Stats., precludes county board from delegating to a committee all of its authority pertaining to the selection, retention, qualifications, and within limits, the compensation of the personnel of a county pension department.

June 2, 1939.

J. Henry Bennett,
District Attorney,
Viroqua, Wisconsin.

You state that the county board recently adopted an ordinance providing that all authority of the county board per-
taining to the selection, retention, qualifications and, within certain limitations, the compensation of the personnel of the county pension department be delegated to the county board advisory pension committee, although there is some question in your mind as to whether such committee has any legal existence. The county board in 1935 adopted a recommendation of the committee on ways and means, reading as follows:

"We further recommend that the county board elect an advisory committee of three members of the county board to act in an advisory capacity with the pension department."

No further action was ever taken with respect to an advisory committee.

In view of this situation, and also because of the provisions of sec. 49.51 relating to the appointment of pension personnel by the county board, you have questioned the validity of the attempted delegation of such power to a committee of doubtful existence, and have requested our opinion concerning the matter.

Sec. 49.51, subsec. (1), Stats., reads:

"The administration in counties of all laws of this state relating to old-age assistance, aid to dependent children and blind pensions shall be vested in the officers and agencies designated in the statutes to administer these forms of public assistance. The county board shall have the authority to provide assistants for such officers and agencies and to prescribe their qualifications and fix their compensation."

Sec. 49.51 (2), (b), Stats., provides in part:

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

The general rule with respect to delegation of its powers by a county board is stated as follows in 15 C. J. 465:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the
nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant. In some cases the legislature has expressly authorized the board to delegate its powers under certain circumstances, " * * * ."

Questions of delegation of powers by county boards have been considered by this department in several opinions:

In XXIII Op. Atty. Gen. 519, it was stated that the delegation of the power to borrow money was valid, since it was ministerial and not discretionary.

In XX Op. Atty. Gen. 276, the opinion was expressed that the power to appoint members of the county agricultural committee could not be delegated by the county board to the chairman of the county board. We consider this opinion important in the consideration of the question raised here.

In XXI Op. Atty. Gen. 146, in connection with abolishing the office of agricultural agent, it was stated that the county board could make its decision contingent upon the outcome of a referendum, but could not delegate to the voters the power to remove by a referendum.

It seems obvious, in view of the statutes involved and the foregoing discussion relating to delegation of powers by the county board, that the ordinance in question which purports to delegate all authority of the board relating to the selection, retention, qualifications and, to some extent, compensation of the personnel of the county pension committee, is invalid. This being true, it becomes unnecessary to discuss the legal status, if any, of the so-called county board advisory pension committee.

WHR
Labor — Labor Relations — Existing contracts between employer and labor organizations providing for check-off are not abrogated or voided by ch. 57, Laws, 1939, sec. 111.06, subsec. (1), par. (i) but are expressly saved by sec. 111.16 of said act.

June 5, 1939.

R. Floyd Green, Commissioner,
Wisconsin Employment Relations Board.

In your letter you state:

"We have been asked for an interpretation of subsection (i) of subsection (1) of paragraph 111.06, created by chapter 57 of the laws of 1939. This paragraph provides that it shall be an unfair labor practice for an employer to deduct dues or assessments from an employee's earnings unless presented with an individual order therefor. The question that has been raised is whether or not existing contracts providing for a check-off are in any way affected by this provision of the statute.

"It is our opinion that under section 111.16, clearly any contracts in existence at the time this act became in force are not affected, and that any contracts that provide for the deduction of labor organization dues or assessments by the employer must be recognized by our board."

Sec. 111.16 (to which you refer) provides as follows:

"Existing Contracts Unaffected. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof."

In view of the foregoing provision, we are of the opinion that you have correctly interpreted the law and your duty with respect thereto.

NSB
Automobiles — Motor Transportation — Privately owned trucks rented by WPA as a unit with driver (owner driven or driver furnished by owner) and the entire rental of which is paid for out of procurements, are not exempt from the provisions of ch. 194, Stats., under sec. 194.05, subsec. (1), Stats., as amended by ch. 62, Laws, 1939. Such trucks are exempt from the provisions of said chapter if the drivers are pay rolled and employed by the government.

June 6, 1939.

Calmer Browy, Director,
Public Service Commission.

Ch. 62, Laws of 1939, added the underscored sentence to sec. 194.05, subsec. (1), Stats., so that said section now reads as follows:

"Neither this chapter nor section 76.54 shall apply to motor vehicle or vehicles owned or operated by the United States, any state or any political subdivision thereof. This shall not exempt privately owned trucks operated on Works Progress Administration or other relief projects."

In view of said amendment, you have submitted three questions as follows:

"1. When WPA under the form of contract submitted to you in connection with our last inquiry employs the services of motor truck operators who operate the vehicle either (a) themselves, or (b) by their own employes.

"2. Where the contracts for the use of the vehicle are separated so that the payment of the operator is made from a payroll account as wages and thus paid for separately from the payment for the use of the vehicle itself.

"3. Where only the vehicle is contracted for and WPA operates it with its own employes."

The amendment must be read in the light of two prior opinions of this department on the subject, XXV O. A. G. 197 and our opinion of April 6, 1939 addressed to Mr. Lawrence R. Larson, Chief Clerk of the Senate, in response to a legislative request therefor. It seems fair to assume

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that the amendment is probably aimed particularly at the method of operation of WPA whereby WPA entered into a so-called rental contract with the owner of the truck and wherein the truck and driver (usually the owner—and if not the owner, the owner furnished the driver) was rented as a unit at a certain specified rental. Under such method of operation WPA recognized no employer-employee relationship between the government and the owner or his driver. The rental contracts were carefully drawn to avoid any such relationship. The truck owner, on paper at least, appeared to be an independent contractor and to come within the definition of a contract carrier, sec. 194.01, subsec. (11) of the so-called motor vehicle transportation act.

Some considerable dissatisfaction had been expressed from some parts of the state with respect to exemption of such independent contractors from the provisions of the contract carriers' law, in that, by the terms of the rental contract they appeared to be contract carriers subject to the laws and their exemption under sec. 194.05, subsec. (1), Stats., was doubtful.

In view of the prior ruling of this department in XXV O. A. G. 197 to the effect that trucks so used on WPA projects were within the exemption, in our opinion of April 6th, we adhered to the prior opinion and left it to the legislature to make the change, if change there were to be. The legislature has acted and presumably meant to deal with the situation that was analyzed at length in the opinion of April 6th. We must give effect to that intent. In answer to question 1, we hold that the privately owned truck rented by WPA as a unit either owner-driven or with driver furnished by owner and with the entire rental paid out of procurement funds, is not exempt from the provisions of ch. 194, Stats., under sec. 194.05, subsec. (1) as amended by ch. 62, Laws, 1939.

With respect to your questions 2 and 3, the amendment must be read in the light of existing definitions. Sec. 194.01, subsec. (11) defines a contract motor carrier as:

"'Contract motor carrier' means any person engaged in the transportation by motor vehicle of property for hire and not included in the term 'common motor carrier of property.'"
Sec. 194.01, subsec. (14) defines private motor carrier as follows:

"'Private motor carrier' means any person except a common or contract motor carrier engaged in the transportation of property by motor vehicle other than an automobile or two-wheeled trailer used therewith, upon the public highways."

If the government merely rents the truck and operates it by its employes, as it clearly does under your questions 2 and 3, we cannot see how it can be said that the owner of the truck is a contract carrier as defined by the act. He clearly is not such. The situations presented by your questions 2 and 3 are ruled by Standard Oil Co. v. Public Service Comm., 217 Wis. 563 to the effect that an employe who furnishes a truck to be used in his employer's business is not a contract carrier. One cannot be a contract carrier if he has none of the attributes of a contract carrier under the act. The language of Ch. 62, Laws of 1939 "This shall not exempt privately owned trucks operated on Works Progress Administration or other relief projects" must be deemed to be limited to those situations where the owner by contract with the government had the attributes of a contract carrier but was nevertheless deemed to be exempt under sec. 194.05, subsec. (1), Stats., as it then read, in view of WPA's actual method of operation thereunder.

NSB
Appropriations and Expenditures — Counties — County Orders — Social Security Law — Disbursement of pension money from county treasury may be made only on order of county clerk signed by chairman of county board.

The holder of a county order, whether for pension or otherwise, may maintain an action against the county after it has been presented to the county treasurer and payment refused, even though such refusal was for want of funds.

June 8, 1939.

Pension Department.

Attention—George M. Keith, Supervisor of Pensions.

You inquire whether the orders of the county or juvenile judge or county pension department granting blind pensions, aid to dependent children or old-age assistance confer upon the beneficiaries the right to collect the amounts granted. By way of making this question specific, you have divided it into two questions reading as follows:

"1. Could the county administrator (judge or pension department) issue an order directly to the beneficiary which the beneficiary could negotiate to a tradesman for commodities, and which when presented by the tradesman to the county treasurer would compel the latter officer to pay from county funds? In actual practice the procedure has been to file the granting orders in the county pension administration's files and submit a payroll of eligible persons to the county clerk where county checks are made out and signed by the county clerk and countersigned by the county treasurer.

"2. Is the right of the beneficiary ex statuto or ex contractu after he has been found eligible? It would seem that if the right were ex statuto, only mandamus would apply against the proper officers for the issuance of orders or checks; whereas, if the right ever becomes ex contractu, the beneficiary might sue the county, and if the county funds were insufficient to pay the judgment, might require the county to levy a tax pursuant to section 66.09, Stats."

The first question is fully answered in an opinion from this department to the Wisconsin Tax Commission, under date of October 7, 1937, XXVI Op. Atty. Gen. 454, where it
was held that disbursements of pensions from the county treasury require orders from the county clerk, signed by the chairman of the county board. Consequently, the granting order of the county pension administration cannot be negotiated to a tradesman for commodities so as to entitle him to payment upon presentment of the order to the county treasurer.

Your second question has been answered in several Wisconsin cases in which it has been held that the holder of a county order may maintain an action upon it against the county, after it has been presented to the county treasurer and payment refused even though such refusal was for want of funds. Savage v. Supervisors of Crawford County, 10 Wis. 44; Pelton v. Supervisors of Crawford County, 10 Wis. 63; Markwell v. Board of Supervisors of Waushara County, 10 Wis. 67.

In the Savage case it was pointed out that the statute (now sec. 59.76, subsec (1) ) insures the right of a holder of a county order to commence action thereon. Sec. 59.76, subsec. (1), Stats., reads in part:

"(1) No action shall be brought or maintained against a county upon any account, demand or cause of action when the only relief demandable is a judgment for money, except upon a county order, unless the county board shall consent and agree to the institution of such action, or unless such claim shall have been duly presented to such board and they shall have failed to act upon the same within the time fixed by law. * * *"

The exception was construed by the court in the above case at pp. 53-54:

"* * * as though the section had read, that no action shall be maintained by any person against a county, upon a claim, until it shall be presented to the county board for allowance, provided that this shall not apply to a county order, upon which an action may be maintained, without being first presented to the board, for allowance; thus by the strongest implication recognizing the right to maintain the action, when founded upon a county order, without any restriction whatever; but when the suit was instituted upon any other claim imposing the condition that it shall first be presented to the board for allowance, before the action can be main-
tained. We are unable to perceive how any other construc-
tion can fairly be placed upon this section. The plain, ob-
vious idea conveyed by the language used, seems to be what
we have above stated. Should this interpretation of the law
lead to injurious consequences, the remedy is with the legis-
lature, by amending the statute, and not with the courts,
whose duty it is to construe the enactment by the language
it contains."

The only statutory restriction upon the commencement of
actions upon county orders, other than the statute of limi-
tations, is that provided by the following language in sec.
59.76, subsec. (1):

"* * * No action shall be brought upon any county
order until the expiration of thirty days after a demand for
the payment thereof has been made; and if an action is
brought without such demand and the defendant fails to ap-
ppear and no proof of such demand is made, the court or the
clerk thereof shall not permit judgment to be entered, and
if judgment is entered it shall be absolutely void."

In the Pelton case the court at p. 72 furnishes the follow-
ing discussion as to the nature of a county order:

"It is analagous to a check drawn by an individual upon a
bank, for the payment of money; though probably the rules
of commercial paper do not apply to a county order; still, it
is the evidence of a county liability, and an action upon it
must be commenced within the time required by law.

"It was suggested that a county order, under the laws of
the State, was in the nature of a judgment, and might be
regarded as a speciality; or was like a promissory note,
signed in the presence of an attesting witness, etc. It would
hardly be correct to say, that a county order was a judg-
ment, in the peculiar and restrictive sense in which that
word is used in the statute, or that it is a promissory or
bank note. County orders constitute a form of indebtedness
well known to the laws of the state; and it is very conven-
ient for the board of supervisors, upon settling and allowing
charges against the county, to evidence the indebtedness in
this way. No advantage is gained by likening them to a
judgment, speciality, or promissory note, although they may
possess some of the characters, and perform some of the
functions of each. We think they are a peculiar form of
county indebtedness, and that the statute of limitations runs
upon them, as upon a simple contract. Although an action
might be barred upon them in six years, still, orders are available to the amount of their face, in the payment of county taxes, under the provisions of the statute; so that though an action will not lie upon an order upon which the statute of limitations has run, still it is not lost to the holder thereof."

It is thus apparent that our court considers the rights of a holder of a county order to be *ex contractu* rather than *ex statuto*. Upon reducing such rights to judgment the provisions of sec. 66.09 with reference to compelling the levy of a tax for purposes of satisfying the judgment would apply, assuming that the refusal to pay the county order in the first instance was based upon want of funds.

WHR

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**Public Officers — Sheriff and Deputies — Clerk of Circuit Court and Deputies** — Neither sheriff nor his deputies are entitled to per diem provided by sec. 59.28, subsec. (22) where sheriff is compensated upon a salary basis even though the salary resolution reads that it "shall not be construed to include fees or per diem earned by the sheriff in civil actions or for private individuals.

Neither clerk of circuit court nor his deputies compensated upon a salary basis is entitled to per diem provided by sec. 59.42, subsec. (41), par. (b) nor is such item an item of taxable costs.

June 8, 1939.

**Leo W. Bruemmer,**

*District Attorney,*

Kewaunee, Wisconsin.

You state that the county board of Kewaunee county has passed a resolution regarding the salaries of the county officers which provides in part:

"**Resolved,** By the county board of supervisors of Kewaunee county, Wisconsin, that the salaries of the county
officers for the next ensuing term which commences on the first Monday in January, 1989, be and the same are hereby fixed at the following amounts per annum, to wit:

"Clerk of circuit court -------------- $900.00

"BE IT FURTHER RESOLVED, That the salary of the sheriff be and the same is hereby fixed at $1200.00 per annum, payable monthly; that in addition thereto, the sheriff shall be and he is hereby allowed the additional sum of $35.00 per month for the maintenance and operation of his automobile; that such salary and allowance shall be in lieu of all other fees, per diem or service for the said sheriff or any of his deputies except in cases of emergency requiring a large number of deputies rendered for or on behalf of the county and for which it may be liable, * * *

"BE IT FURTHER RESOLVED, That this resolution shall not be construed to include fees or per diem earned by the sheriff in civil actions or for private individuals.

"RESOLVED FURTHER, That the compensation of the sheriff for the board of prisoners at the county jail shall be limited to the actual necessary expense incurred therefor.

"RESOLVED FURTHER, That the salary fixed for the clerk of circuit court shall be in lieu of any further compensation for deputy or clerk hire to be rendered in said office.

Your first question is whether the sheriff or his deputies are entitled under this resolution to per diem for attendance in court as set forth in sec. 59.28, subsec. (22).

Sec. 59.28, subsec. (22) provides a per diem for:

"Attendance upon the circuit or county court, three dollars per day to the sheriff and two dollars each per day to the necessary deputies, to be paid out of the county treasury; * * *

Sec. 59.15, subsec. (1) 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, except the following additions: * * *"
The additions enumerated under this subsection need not be considered here.

Sec. 59.15 provides further:

"(5) The county board may at any time change the compensation of any county officer from fees collected and retained by him to a salary, and may fix the annual salary of such officer.

"(7) Any officer who shall receive a salary in lieu of fees shall collect the fees appertaining to the office and turn them over to the county treasurer. He shall keep such books of account as the county board may order showing the fees charged and collected.

"(8) When a salary has been fixed for any county officer in lieu of fees such officer shall keep an accurate account of all fees collected by him and pay the same over to the county treasurer. He shall also make a quarterly statement duly verified of all such fees collected and file such statement with the county clerk.

"(9) In this section the term 'county officer' means any elective officer whose salary or compensation is paid in whole or in part out of the county treasury, including salaries or compensation so paid for which compensation is made by the state."

In considering a salaried officer's right to fees, the Wisconsin court has held:

"* * * The time of a salaried public official consumed in work incidental to his official duties and done during office hours belongs to his employer and not to him, and if a charge is made for such work it inures to the benefit of the employer and not to that of the public employee. Any other rule would tend to make a salaried public office a place for private gain in addition to the salary. It was to abolish the difficulties connected with the fee system that salaries were substituted. Fees should not be allowed to creep in again except by express legislative direction. We therefore hold that, in the case of salaried public officials who are required to turn in all fees of office, fees for work done during office hours and incidentally connected with their official duties belong to the public and not to the employee unless there is a clear, valid direction to the contrary, * * *"

Gregory v. Milwaukee County, 186 Wis. 235, 238-9, 201 N. W. 246.
In XXIV Op. Atty. Gen. 545 this department ruled that neither a salaried sheriff nor his deputies were entitled to per diem for attendance in circuit court. See also XVIII Op. Atty. Gen. 170. The case and opinion cited rule your first question. Neither the sheriff nor his deputies are entitled to per diem for attendance in circuit court. The clause in the salary resolution to the effect that the resolution "shall not be construed to include fees or per diem earned by the sheriff in civil actions or for private individuals" cannot affect the problem as by the express language of sec. 59.28, subsec. (22) such per diem, if payable at all, is payable out of the county treasury. So far as we know, such per diem never was an item taxable as costs in civil cases.

Secondly, you ask also whether the clerk of the circuit court or his deputy is entitled to per diem for court attendance as fixed by sec. 59.42, subsec. (41), par. (b). That section provides in part:

"Except as otherwise provided by law, the clerk of the circuit court shall collect the following fees:

"* * *

"(41) In counties wherein he is compensated otherwise than by salary, he shall be entitled to:

"* * *

"(b) Three dollars per day for each day's attendance upon a session of any regular or special term of the circuit court of his county, or as much more as the county board directs; and for similar attendance and service by his deputy the latter shall be paid the same amount. * * *"

It is apparent that this section does not contemplate the payment of per diem to a clerk of the circuit court or to his deputy when such clerk is compensated by a salary. The words "or as much more as the county board directs" were evidently included to authorize the county board to increase such per diem in its discretion in cases where the clerk is not compensated by salary. This item is not an item of clerk's fees to be taxed as such when the clerk is compensated upon a salary basis, as sec. 59.42, subsec. (41), par. (b) is applicable only when the clerk is compensated otherwise than by salary".

NSB
June 13, 1939.

WILLIAM LEITSCH,

District Attorney,

Portage, Wisconsin.

Under date of May 18, 1939 you requested our opinion relative to a certain ordinance and a certain resolution relating to the annual audit of the affairs of the office of county clerk, clerk of court, county treasurer and county highway departments of Columbia county. You enclose a copy of an ordinance which we understand was enacted several years ago and has not been repealed or amended by any subsequent ordinance, which, among other things, provides as follows:

"There shall be a detailed audit made once each year of the affairs of the office of county clerk, clerk of court, county treasurer and county highway departments. Such detailed audit is to be made by and under the supervision of the Wisconsin tax commission."

At the May, 1939 session of the county board you state that bids were received from auditors not associated with the Wisconsin tax commission for the performance of the work provided by said ordinance. These bids were referred to the Committee on Finance, which committee reported back to the board with the recommendation that the bid of a certain auditor be accepted. On motion of one of the members of the board the recommendation of the Committee on
Finance was adopted. You enclose a copy of the report of the Committee on Finance recommending that the auditor in question be employed “to audit the accounts and records of Columbia county for the calendar year 1938 for the fee of $925.00 and if said audit be satisfactory, the sum of $825.00 be paid him for the audit of the year 1939.”

You inquire whether the board proceeded correctly in providing by ordinance for the making of an audit. You also state you wish our opinion as to whether or not the resolution supersedes the ordinance, or whether the resolution can only be changed or altered by a subsequently enacted ordinance.

In answer to the first question, it would appear that the board acted properly in providing by ordinance for the making of the annual audit by and under the supervision of the Wisconsin tax commission. Sec. 59.02 provides that the powers of a county may be exercised by the county board “in pursuance of a resolution or ordinance adopted by such board.” The general powers of the county board are set forth in sec. 59.07 and special powers of the board are set forth in sec. 59.08 and elsewhere. With respect to the general powers conferred by sec. 59.07, it is provided in some instances that these powers are to be exercised by ordinance and in other instances there is no specification of the manner in which the county board shall act. It is provided in subsec. (5) of sec. 59.08 that the special powers conferred by said section should be carried into effect by the enactment of ordinances. Throughout ch. 59 in some other instances it is also provided that certain powers shall be exercised only by ordinance with apparently no definite system being prescribed or ground of distinction noted. There is no express grant of power relating to the annual audit of the books of the various departments of the county and it would appear that in providing for such an order the county board might, under sec. 59.02, act by either resolution or ordinance. See Meade v. Dane County, 155 Wis. 632. Until such ordinance is in some manner amended or superseded, it would appear that such ordinance would require the annual audit to be made by the tax commission under sec. 73.03, subsec. (14), par. (a) which provides, among other things, that it shall be the duty of the tax commission and
it shall have power and authority "to audit the books of a
town, village, city, county, school district or board of edu-
cation upon the request of the town or village board, city
council, county board, school district or board of education,
or upon its own motion."

Your second question as to whether or not the resolution
in question supersedes the ordinance is answered in the neg-
ative. An ordinance of a county board must, under the pro-
visions of sec. 59.09, be published and in this respect, at
least, differs from a resolution. It is the general rule of law
applied to municipal corporations that an ordinance cannot
be amended, repealed or suspended by a resolution, and that
such amendment, repeal or suspension can only be done by
ordinance enacted with all due formality. Dillon Municipal
Corporations, (5th) Par. 572; McQuillin Municipal Corpora-
tions, (2d) Par. 664. These authorities would appear to
apply in the present instance.

Aside from the two questions which we have discussed
heretofore, there would appear to be other questions which
might be raised relative to the validity of the present action
of the county board in providing for the employment of a
private accountant to perform the annual audit. Counties,
of course, have only the powers conferred upon them by
statute or which may be implied from the powers con-
ferred. See Frederick v. Douglas County, 96 Wis. 411. The
power to employ a private accountant to perform the annual
audit would, if existent at all, have to be implied from pow-
ers expressly granted and any such implication would tend
to be negatived by express provisions of the statutes provid-
ing for such audit. Sec. 59.81, subsec. (1) provides as
follows:

"In counties having a population of less than three hun-
dred thousand, according to the last preceding state or
United States census, the county clerk shall act as auditor,
unless an auditor is appointed as provided in subsection
(2), and, when directed by resolution of the county board,
shall examine the books and accounts of any county officer,
board, commission, committee, trustees or other officer or
employee intrusted with the receipt, custody, or expenditure
of money, or by or on whose certificate any funds appropri-
atated by the county board are authorized to be expended,
whether compensated for services by fees or by salary, and
the books and accounts of justices of the peace, and all original bills and vouchers on which moneys have been paid out and all receipts of moneys received by them. He shall have free access to such books, accounts, bills, vouchers and receipts as often as may be necessary to perform the duties required under this subsection and he shall report in writing the results of such examinations to the county board."

From the foregoing quoted subsection, it is evident that where the county clerk is requested by the county board to examine the books and accounts of other county officers, boards or commissions, he would be performing functions similar in nature to those which might be performed by a private accountant in making an annual audit. Under sec. 59.72, subsec (2) a county auditor may be appointed to perform such functions. Thus we find that, in the first instance, it is the clerk who acts as "auditor" at all times (his duties in this regard being presumably to examine the various bills presented to the county and to make some check as to their validity and correctness at the time when they are presented), secondly, such clerk may make an examination of the books and accounts of other officers, boards or commissions including an examination of original bills and vouchers, and thirdly, that such audit may be performed by a county auditor if the county board so provides. For a discussion of the duties of a county clerk and also a county auditor under sec. 59.72, see XXIV Op. Atty. Gen. 787. Further provision for the auditing of the books of counties is, as we have seen, also made in sec. 73.03, subsec. (14), par. (a). Under said subsection the tax commission may audit the books of a town, village, city or county, et al either upon request or upon its own motion, the request in the case of counties being made by the county board. In VI Op. Atty. Gen. 462, it was held that the town board under this section of the statutes had authority to obtain an audit of the town books and to appropriate money therefor and it was further stated in the opinion that "probably it would be held that if an audit is obtained it must be at the hands of the tax commission." In Evenson v. State, 186 Wis. 312, it was held with respect to the audit of the books of a town performed by the tax commission that even where the request for the audit was improperly made, in that it was made at a town
meeting instead of by the town board, that such audit would be held to have been performed by the tax commission "upon its own motion" and that the town was required to pay the tax commission for such audit. The statute was sustained as not being a deprivation of property without due process of law. The fact that the tax commission may at any time audit the books of a county on its own motion would appear to be an additional reason for holding that if an audit is to be made, such audit must be by the tax commission. It is conceivable that after the books had been audited for a particular year by a private accountant employed by the county that the tax commission might, in good faith acting upon its own motion, decide to make its own audit of the books of the county for the same year for which audit the county would be compelled to pay under the authority of Evenson v. State, supra. Under these circumstances the legislative intent would appear to be that all such audits should be made by the tax commission since it could not be intended that the taxpayers of a county should be compelled to pay for two audits in the same year. Further, the fact that express provision for the making of audits of county books is found in the statutes would appear to preclude a holding that the county board has any implied powers to have an audit made in a manner not specified by statute.

RHL
Counties — Indigent, Insane, etc. — Poor Relief — Taxation — Tax Sales — Tax Deeds — County on county system of poor relief has no general or necessarily implied power under any and all circumstances to acquire title to real estate by purchase for the purpose of housing relief clients in individual housing units. Such power, however, is necessarily implied where circumstances are such that the county can meet the problem in no other practicable or feasible manner.

County may acquire property by tax deed and use property so acquired for such purpose.

June 13, 1939.

John H. Matheson,
District Attorney,
Janesville, Wisconsin.

You ask whether Rock county, which has adopted the county system of poor relief, has power to acquire title to real estate either by tax deed or purchase, for the purpose of housing relief clients. Your question is directed to board power to acquire individual tracts of land for housing individual relief clients and their families in separate housing units. As you point out in your letter, no such power is specifically granted by the statutes. The rule accepted by our court and repeatedly followed in the opinions of this department is that counties have only those powers specifically granted or necessarily implied. Frederick v. Douglas County, 96 Wis. 411; Spaulding v. Wood County, 218 Wis. 224.

Sec. 59.01, Stats., provides:

"Each county organized in this state is a body corporate, empowered to sue and be sued, 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, * * *.""

While the section quoted above is very broad in its scope, it is our opinion that it was merely intended to define the
nature of the county as a body corporate and that the provision referring to the power to purchase and hold real estate merely endows the county with the capacity to purchase and hold land for public uses. It was not intended as a general authorization to purchase land for any purpose which might be termed a "public use", and under any and all circumstances. This construction seems sound in view of the fact that the nature of the county as a political unit has been the subject of much controversy and its status as a true corporation with the ordinary powers thereof has been frequently challenged. Thus a county is quite generally termed a "quasi-corporation." 1 Dillon, (5th ed.) Mun. Corp., secs. 35, 37; 1 McQuillan, (2d) Mun. Corp., sec. 136.

The legislature in sec. 59.01 undoubtedly intended to clarify the nature of the county as a corporate body and to remove all doubt as to its capacity to purchase and hold realty. The fact that the legislature deemed it necessary to authorize counties to acquire land for specific purposes indicates that sec. 59.01 was not intended as a general authorization to do so. While the following is not an all-inclusive list, specific grants of county power to purchase land are found in secs. 59.98, subsec. (2), 27.065, 59.07, subsec. (17m), 59.865, 59.67, 59.68, 59.69, 49.14 and 49.145.


We must conclude that there is no general authority for counties to purchase real estate for public purposes under any and all circumstances and for the particular purpose specified.

Can it be said that the power of a county to purchase realty to house relief clients is necessarily implied from the fact that such county is authorized and required to relieve and support the indigent? A necessary implication within the meaning of the law governing construction of statutes has been variously defined as one the contrary of which cannot be reasonably supposed (First Nat. Bank v. De Berriz, 87 W. Va. 477, 105 S. E. 900), or is improbable or absurd (Foster v. Board of Ed. of City of Topeka, 131 Kan. 160, 289 P. 959), or one which is absolutely necessary and un-

Conceding that relief of the poor includes furnishing housing, there may be no necessity for the county to purchase real estate in order to provide such housing. Homes may be rented by the county or the relief clients may be given cash payments to rent quarters themselves. Under ordinary circumstances, the advantages of purchasing houses over such methods are not such as would justify holding that the conclusion is unavoidable that the legislature intended that counties have power to buy realty for this purpose under any and all circumstances, nor that the opposite conclusion is improbable or absurd. The relief load is not static. The number of relief clients varies, and were the county to purchase land and build houses for those on relief, it might very easily find itself holding a number of unoccupied buildings should there be a marked decrease in the number of persons dependent upon the county for shelter.

We conclude that the rule of strict construction applicable in this situation necessitates conclusion that the power on the part of counties to purchase land under any and all circumstances for the purposes specified is not necessarily implied from the provisions of Ch. 49, Stats.

The foregoing does not mean that the county has no such power under all circumstances. Neither circumstances nor emergencies can create power but both may furnish the occasion for the exercise of power. Home Building & Loan Assoc. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413. Both may furnish the occasion whereby the power is necessarily implied. For instance, if the county poor farm were filled to capacity, if suitable shelter could not be provided except at atrocious rentals, if there were no tax delinquent lands with respect to which the county might readily acquire title, suitable, adequate or feasible for such housing and if the county were unable to meet its statutory duty of providing shelter to the poor in any other practicable or feasible manner, we are of the opinion that the county would have the power in question. Under such circumstances the power would necessarily be implied. The county must necessarily have such power as is necessary to enable it to meet its statutory duty. Of course the foregoing suppositious case presents a very
unusual situation but if a county were to encounter that situation, we are of the opinion that the county has power to meet it.

We are further of the opinion that should the county acquire title to realty by tax deed, there seems to be no objection to the county using such property for relief purposes. Counties are specifically authorized to bid in lands sold for taxes for the amount of the taxes, interest and charges (secs. 74.42 and 74.44) and to take tax deeds on such lands (sec. 75.36). Upon the receipt of such a tax deed the county acquires “an absolute estate in fee simple” according to the words of the deed prescribed by the legislature in sec. 75.16 and the county has the same title to such land as in any lands the county may own. XXVII Op. Atty. Gen. 467. Under sec. 59.07 (1) the county board is empowered to “make such orders concerning the corporate property of the county as they may deem expedient.” Since the county has an absolute title in and holds such land acquired under a delinquent tax deed as any other corporate property, there seems to be no reason why the county board may not utilize it for any authorized public purpose it sees fit.

It follows that the county board may use property acquired under a tax deed for the purpose of providing shelter for relief clients. This power should, however, be exercised cautiously. The county should not have its hands tied by long term leases and especially is this true where the property so acquired and used is situated in a municipality with respect to which there are large excess delinquent tax rolls.

NSB
RK
School Districts — Compulsory Insurance on School Busses — Insurance — Education — Vocational Agriculture Teacher — Public Officers — Liability of Teachers —

Sec. 40.345, Stats., relative to compulsory insurance on school busses has no application to local vocational agriculture teachers who, as a part of their work, are required to do supervised practice work out in farm communities and who are paid for use of their car in such work a flat allowance to cover expenses of operating the car, and who occasionally transport pupils enrolled in their classes to visit the farm projects.

It is not deemed that such use is within the ordinary exclusion clauses of automobile accident policies. Any doubt that there may be upon the subject may be avoided by attachment of a rider in use and which is recommended.

June 13, 1939.

GEORGE P. HAMBERECHT,

Board of Vocational Education.

In your letter you state:

“A matter of state-wide concern with reference to the transportation problem of local teachers of vocational agriculture has been brought to my attention. These local teachers are required to do supervised practice work out in farm communities as part of the school classes in vocational agriculture. Incident to this work the teacher uses his car in the transportation of pupils when convenient.

“These teachers receive either a mileage allowance or a flat allowance for the year for the use of their automobiles. This is to cover expenses for transportation in connection with such things as supervision of the farming programs of the boys enrolled in their classes, conducting part-time and adult classes for farmers and farm boys out of school, and activities of that kind. These instructors occasionally take boys with them to visit the farm projects of other boys or to judge stock on farms of the community or for other purposes where the boys go to farms for studying various agricultural enterprises. The agricultural teacher does not, of course, receive any additional compensation for carrying boys under these conditions; he simply takes them with him for their accommodation.”
You request an opinion as to whether such teacher's automobiles, when used to carry students as above outlined, may be classified as "school busses". Apparently you wish to determine whether sec. 40.345, Stats., is applicable to such vehicles. That section provides:

"(1) No motor vehicle shall be used under contract or for compensation to transport school children as provided in section 40.34, except when the contract is made with, or compensation is paid to, the parents of the children to be transported, unless a policy of insurance, agreement of indemnity or corporate bond in a corporation authorized to do business in this state, covering liability or loss arising by reason of the ownership, maintenance or use of such motor vehicle is first secured and filed with the board of the school district in which the children for whom transportation provision is made reside. Such policy of insurance, agreement of indemnity or corporate bond shall provide for indemnity of at least ten thousand dollars to any one person sustaining loss or damage on account of injury to person or property through the negligent use of such motor vehicle and at least fifty thousand dollars for injury to person or property arising out of any one accident through negligent use of such motor vehicle.

"(2) The school district in which the children reside for whom a motor vehicle is provided for such transportation shall be liable for and pay the premiums or cost of such insurance, agreement of indemnity or corporate bond covering such motor vehicle."

The above section was intended to apply only to vehicles used to transport school children "as provided in section 40.34." The latter section deals exclusively with the regular transportation of children to and from school when such children are enrolled in the regular public school system. It has no reference to any type of transportation except that which the school district must or may provide under sec. 40.34, Stats. That section 40.345 was designed to apply only in such circumstances is apparent from the provisions of subsec. (1) which requires the policy to be filed with the board of the school district, and of subsec. (2) which requires that the school district pay the premiums. Sec. 40.345 was obviously intended to supplement sec. 40.34. The theory that sec. 40.345 has any broader application is negatived by the express words of the statute.
It follows that the instructor's automobiles do not come within the provisions of sec. 40.345 even though it is assumed they are transporting school children "under contract or for compensation." However, we are of the opinion that such instructors are not using their cars "under contract or for compensation to transport school children" within the meaning of that section when they carry students under the circumstances you relate. The words used in the statute are clearly to the effect that it must be a contract to transport children or the compensation must be for transporting the children. As you point out in your letter, the allowance received by the teachers is a travel allowance to defray the expense of the necessary travel connected with the duties of a vocational agriculture instructor. The transportation of students is occasional and incidental and the instructor receives no additional compensation therefor.

You are advised that the use of instructor's automobiles in the manner you indicate does not operate to bring them within the terms of sec. 40.345.

Whether or not such a use will permit insurance companies to avoid liability in the event of an accident depends upon the terms of each individual policy. Liability policies written in recent years commonly except from the coverage thereof accidents occurring while the vehicle is used for carrying passengers for hire or for a consideration. Such provisions have frequently been the subject of litigation. Although we do not find where the particular facts here involved have ever been presented, the reasoning of the cases on the subject indicate that the use in question is not such as is included in the ordinary clause excepting liability incurred while carrying passengers for a consideration. There are a number of attendant circumstances which the courts consider of particular importance in determining whether there was a carrying of passengers for hire within the meaning of the clause. The relationship of the parties is carefully examined to determine whether they are strangers or friends and associates who have a common interest in making the trip. Other circumstances of importance are the existence of a reason for making the trip on the part of the owner other than the consideration paid by the passengers; a deviation from the route the driver or owner would other-
wise have taken, and the relation of the amount paid to the actual cost of operating the automobile.

Where, as in this instance, the parties involved are not strangers but have a common interest in making the trip, their destination is the same, and the amount paid is intended simply to pay the expense of operating the car, the courts hold that liability on the part of the insurance company cannot be avoided under a clause of such a nature. See *State Farm Mut. Auto. Ins. Co. v. Self*, 93 F. (2d) 139; *Myer v. Ocean Acc. & Guar. Co.*, 99 F. (2d) 485; *Park v. National Casualty Co.*, 222 Ia. 361, 270 N. W. 23; *Gardner v. Boyer's Estate*, 285 Mich. 80, 280 N. W. 117.

When in addition no consideration is received directly for carrying passengers but an allowance is made to compensate the owner for the use of his car as a means of conveyance for himself when traveling in connection with his work, there can be little doubt that the use which you describe is permitted under the ordinary policy terms.

Such doubt as there may be on this latter question can be easily avoided by a rider attached to the policies of instructors in agriculture, which you state is in more or less common use, as follows:

"'In consideration of the premium stated in this Policy it is understood and agreed that the coverage provided by the Policy shall apply while students and other persons, associated with the Named Assured in the conduct of his duties as instructor of vocational subjects, are transported by the Named Assured in the automobile; and that the allowance granted to the Named Assured for the operation of the automobile shall not be considered to constitute consideration for the transportation of passengers.'"
Criminal Law — Indigent, Insane, etc. — Poor Relief — False Representations — Sec. 49.124, subsec. (1), rather than 49.124, subsec. (2), Stats., should be followed in the prosecution of persons who make false representations with the intent to secure relief for themselves or others. Subsec. (2) applies to all other acts intended to interfere with the proper administration of relief and regardless of whether or not the offender is a relief recipient.

June 19, 1939.

JOHN P. McEVOY,
District Attorney,
Kenosha, Wisconsin.
Attention—K. T. Savage, Assistant District Attorney.

You state that Kenosha county has prosecuted relief frauds in several instances under sec. 49.124, subsec. (1), Stats., and in other instances under sec. 49.124, subsec. (2), but that it is more expeditious and less expensive to prosecute under subsec. (2), since a preliminary hearing is required under subsec. (1).

We are asked whether or not the provisions of subsec. (2) are applicable to relief recipients or merely to third persons, who, in some manner, other than by fraudulently obtaining relief for themselves, interfere with the administration of relief.

The statutes referred to read as follows:

"(1) Any person, who, with intent to secure relief whether for himself or for some other person, shall wilfully make any false representations shall upon conviction be punished as provided in section 343.25."

"(2) Any person who wilfully does any act designed to interfere with the proper administration of relief shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten nor more than one hundred dollars or be punished by imprisonment in the county jail for not less than ten nor more than sixty days."

Subsec. (1) expressly includes persons other than relief recipients, as well as relief recipients, and the language of subsec. (2) is also broad enough to cover all persons.
However, it is our opinion that the offense of obtaining relief by false representations was not intended by the legislature to be included under subsec. (2), since this offense is specifically covered in subsec. (1), while subsec. (2) is more general in its nature and relates to interference with the proper administration of relief which might include a number of things.

Where a statute contains a general provision covering a subject as a whole, and also a special clause or provision relating to a particular element included in such subject, the special provision should be followed. State ex rel. Donnelly v. Hobe, 106 Wis. 411.

It is important to observe the distinctions between subsecs. (1) and (2) of sec. 49.124 as far as penalties are concerned. The penalty for the violation of subsec. (1) is to be found in sec. 343.25 relating to the obtaining of money by false pretenses. This section provides for a penalty of imprisonment in the state prison not more than five years nor less than one year, or for imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars or less than two hundred dollars where the amount of money or property received exceeds the sum of one hundred dollars. This section also provides for punishment by imprisonment in the state prison or county jail not more than one year or by a fine not exceeding two hundred dollars where the amount of money or property received does not exceed one hundred dollars.

Thus one guilty of violating subsec. (1) may be guilty of a felony if the amount involved is sufficient, whereas a violation of subsec. (2) is defined as a misdemeanor.

In view of the foregoing, we conclude that subsec. (2) does not apply to relief recipients making false representations with the intent of securing relief, and that it applies only to persons, whether relief recipients or otherwise, who interfere with the proper administration of relief in respects other than that specifically covered by subsec. (1). In other words, subsec. (1) must be used where the specific offense consists of obtaining relief by false representations, regardless of whether the person making the false representations does so to secure relief for himself or for some other person.

WHR
Automobiles — Trailers — Bridges and Highways — Law of Road — Triangular steel frame mounted upon four dual-tired wheels, designed only for carrying a power shovel from place to place, and further designed for attachment to independent motive power, is nevertheless a trailer as defined by sec. 85.10, subsec. (11), Stats., and subject to registration pursuant to sec. 85.01, subsec. (4), par. (e), as amended by ch. 84, Laws, 1939. Mere fact that the use is limited or that it is designed for one particular purpose does not prevent it from being a trailer if the vehicle otherwise answers the statutory definition thereof.

June 20, 1939.

C. G. CHADEK,
District Attorney,
Green Bay, Wisconsin.

With your letter you enclose two photographs of a vehicle consisting of a triangular steel frame mounted upon four dual-tired wheels. A platform tongue which is hinged to the front axle is designed to guide the vehicle when it is being towed. You state that this conveyance is a part of the equipment of a power shovel and that it is used to haul such a shovel from one job to another in order to avoid damage to the highways.

You ask whether this vehicle can be properly classified as a "trailer" for purposes of requiring the registration fee provided for by sec. 85.01, subsec. (4) (e), Stats.

That section, as amended by ch. 84, Laws, 1939, provides:

“For the registration of each trailer or semitrailer, designed to be hauled by a motor vehicle, and having a gross weight of one and one-half tons or less, if used for hire, a fee of three dollars; for every trailer or semitrailer having a gross weight of more than one and one-half tons, a fee one-half of the fee specified in paragraph (c) of this subsection for a motor truck of the same gross weight. The gross weight in tons of the vehicles specified in this paragraph shall be in every case arrived at by adding together the weight in pounds of the vehicle when equipped ready to carry a load and the maximum load carried by the vehicle and then dividing the sum of the two by two thousand. Pro-
vided, where two or more trailers or semitrailers, not used for hire, but used exclusively for transportation on or about the premises of the owner of such trailers or semitrailers, or for transportation to and from a railroad freight station, platform or car located not more than two miles from the premises of such owner, are hauled interchangeably by registered motor vehicles, so that not more than one of such trailers or semitrailers is operated on the streets or highways at any one time by each such registered motor vehicle, the registration fees for such trailers or semitrailers shall be as follows: A fee as hereinabove prescribed in this subsection shall be paid for one trailer or semitrailer for each registered motor vehicle used by the same owner for the purpose of hauling such trailers, such fee to be based upon the gross weight of the heaviest trailer or semitrailer so hauled by such registered motor vehicles; and a fee of five dollars, regardless of gross weight, for each additional trailer or semitrailer hauled by such registered motor vehicles."

The fees required by this section were imposed to aid in meeting the cost of highway maintenance and repair which is necessitated by the travel of vehicles. They are fixed according to the weight and carrying capacity of the particular trailer regardless of its purpose or type of construction.

Sec. 85.10, subsec. (11) defines a "trailer" as follows:

"Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

This definition is substantially the same as those which appear in court decisions regarding this problem. See, Allrel. v. J. C. Engelman, Inc., 54 S. W. (2d) 352; Leamon v. State, 17 Ohio App. 323, 326.

The vehicle under consideration is a separate unit which is designed to carry a power shovel wholly upon its own structure. For this purpose it must necessarily be hauled by an independent motive power. It appears therefore that the vehicle comes squarely within the terms of the above statutory definition.

In view of the definition contained in sec. 85.10, subsec. (11) and the purpose of sec. 85.01, subsec. (4) (e), this department is of the opinion that the vehicle in question may be properly classified as a trailer and that it is therefore
subject to the registration requirements of sec. 85.01, sub-
sec. (4), par. (e).

Appropriations and Expenditures — Emergency Board —
Public Officers — Board of Dental Examiners — The fact
that the appropriation of the Wisconsin Board of Dental
Examiners is derived entirely from licensing members of the
dental profession does not render the appropriation immune
from reduction by the Emergency Board, pursuant to the
provisions of sec. 20.746, Stats.

June 26, 1939.

DR. S. F. DONOVAN, Secretary-Treasurer,
Wisconsin Board of Dental Examiners.

The Wisconsin Board of Dental Examiners has requested
an official opinion from this department on the legality of
the ten per cent reduction of the board's appropriation for
the last fiscal quarter. You point out that the board does not
receive any appropriation from the state, but operates on
the receipts derived from the annual registration fees of
dentists and dental hygienists and from the examination
fees paid by candidates for licenses to practice dentistry or
dental hygiene.

You undoubtedly refer to the provisions of secs. 152.03
and 152.05, Wis. Stats.

Sec. 20.45, Stats., provides:

"All moneys collected or received by each and every per-
son for or in behalf of the state board of dental examiners
shall be paid within one week after receipt into the general
fund, and are appropriated therefrom for the execution of
the functions of the board. Of this there is allotted:

"(1) * * *
"(2) * * *"

The general ten per cent reduction in appropriations was
ordered by the emergency board, pursuant to sec. 20.746,
Stats.
In our opinion the emergency board was empowered to reduce the appropriation and nothing is pointed out in your request to show that the power was improperly exercised. We are, accordingly of the opinion, on the basis of the facts submitted, that the reduction was in all respects legally accomplished.

It is rather apparent that the license fees provided by Ch. 152, Stats., have for their purpose the financing of the regulatory provisions of that chapter. Thus, they are probably imposed as an exercise of the state's police power, rather than of its taxing power, although there can be no question but that dentists may be subjected to an occupational tax. Cf. Art. VIII, sec. 1 of the Wisconsin Constitution.

Viewed as a tax, there is no reason why these license fees may not be treated by the state precisely as are other taxes. Viewed as a license fee imposed in the exercise of the police power, there is no constitutional inhibition, so far as we know, against their use in a reasonable degree for purposes other than that for which they may be imposed. There is no constitutional requirement that such license fees be devoted exclusively to the regulatory purpose for which they may be imposed. In cases where a license fee may be exacted for regulatory purposes but not for purposes of revenue, it may be overthrown, if on its face, it is greatly in excess of the amount needed for regulatory purposes. On the other hand, unless there is such a disparity the imposition is uniformly sustained. See as to these matters, 87 C. J. 171.

These premises being accepted, it is rather apparent that they control the situation presented for our opinion. Assuming that we have here a license fee exacted in pursuance of the police power, the action of the emergency board resulted indirectly in a diversion of ten per cent of the receipts for purposes other than regulatory purposes. If the legislature could have constitutionally created this disparity in the first place through failing to appropriate for regulatory purposes ten per cent of the amount of the receipts, we know of no constitutional bar against accomplishing the same result through reducing an appropriation already made.

JWR
Civil Service — Municipal Corporations — Ordinances — School Districts — City Board of Education Employes — Library Employes — Doubt expressed as to whether employes of a board of education, operating under secs. 40.50 to 40.60, come within the purview of a civil service ordinance adopted pursuant to sec. 66.19. Library employes considered to come within purview of said section.

June 26, 1939.

LAWRENCE R. LARSEN, Chief Clerk, Senate, Senate Chamber.

By resolution No. 18, S., the senate has requested this department for an opinion as to whether sec. 66.19, Stats., in its present form, is applicable to employes of a city library board and to employes of a city board of education, or whether it is necessary to adopt bills No. 458, S., and 459, S., so as to make sec. 66.19 applicable to such employes.

Sec. 66.19 relates to the establishment of municipal civil service systems. Bill No. 458, S. amends sec. 66.19 so as to specifically include the employes of the municipal library board of any city of the second or third class, and bill No. 459, S. amends sec. 66.19 so as to specifically include the employes of the board of education in cities of the second or third class.

We will first consider whether employes of a board of education come within the provisions of a municipal ordinance adopted pursuant to sec. 66.19.

The status of board of education employes, as far as civil service is concerned, was first discussed in an official opinion to the state superintendent of public instruction, under date of April 2, 1938, XXVII Op. Atty. Gen. 207. In holding that a board of education may not be divested of its power to select its employes pursuant to sec. 40.53, this office said, at pp. 208-209 of the foregoing opinion, after quoting from State ex rel. Harbach v. Mayor, 189 Wis. 84, and Manitowoc v. Board of Education, 201 Wis. 202:

"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. *

* *

"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."

That opinion made no reference to sec. 66.19, but in a later opinion to the board of vocational and adult education, dated May 26, 1938, XXVII Op. Atty. Gen. 358 the earlier opinion was reviewed, and the provisions of sec. 66.19, so far as applicable to the situation, were discussed. It was held that a board of vocational and adult education, as well as a city board of education, still had control over the selection, demotion and discharge of its employes, despite a civil service ordinance adopted pursuant to sec. 66.19. The opinion did advise that such an ordinance should be followed by the board of education when selecting, demoting and discharging its employes. In discussing the effect of sec. 66.19, on the power granted boards of education by sec. 40.53, it was said at pages 360-361:

"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."

The problem was last considered in an opinion to the department of public instruction, dated August 23, 1938, XXVII Op. Atty. Gen. 578. There it was asked whether the employes of the city of Milwaukee's annuity board came within the provisions of that city's civil service ordinance. In holding that they did not, the attorney general said at pages 579-580:

"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. * * *

The opinion, it is true, was concerned with employes of the city of Milwaukee's annuity board, but the reasoning applies to the selection of board of education employes. As pointed out in XXVII Op. Atty. Gen. 358, the legislature has set up a separate and distinct plan of administering school districts operating under the city school plan. Secs. 40.51 to 40.60 of the Statutes. It was apparently recognized by the legislature that municipal control over the administration of educational systems might not be to the best interests of the schools. A separate plan of administration was therefore set up.

In our opinion, that plan may not be modified by municipal ordinance, in the absence of express statutory authority. Such authority has not been conferred by sec. 66.19. It was, of course, suggested in XXVII Op. Atty. Gen. 358, that a board of education should comply with the requirements of an ordinance adopted pursuant to sec. 66.19, but in the opinion it was carefully pointed out that this statute made no substantial change in the power granted the board of education over its employes by sec. 40.53.

It is, therefore, the opinion of this department that if it is the legislative policy to extend the provisions of sec. 66.19 to employes of boards of education operating pursuant to secs. 40.53 to 40.60, Bill No. 459, S., should be adopted.

We now turn to the question of whether employes of a library board come within the purview of a city civil service ordinance, adopted pursuant to sec. 66.19. This section reads in part:

"* * * 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 ap-
Opinions of the Attorney General

Applicable to all municipal personnel * * *. Such system may also include uniform provisions in respect to attendance, leave regulations, compensation and pay rolls for all personnel included thereunder."

Municipal libraries may be established and maintained by cities of the second, third and fourth class. Sec. 43.25, sub-
sec. (1), Stats. Such libraries are to be administered by library boards, whose members are appointed by the mayor with the approval of the council. Sec. 43.26, subsec. (1). That section further provides that the superintendent of schools or other supervisor of the schools shall be a member of the board and that a member of the council may also be appointed thereto. Sec. 43.27, subsec. (1) gives the library board exclusive control over the expenditures of moneys appropriated by the council or received as gifts. Any action or claim against the board is brought against the city under subsec. (3) of this section. Subsec. (4) provides:

"The board may appoint a librarian and such other assistants and employees as they deem necessary, and prescribe their duties and compensation. The librarian in charge of a library established by a county shall hold a first grade certificate as provided in section 43.165."

All library buildings and fixtures therein are purchased by the city rather than by the board under sec. 43.28, sub-
sec. (1).

Under the foregoing statutes a library board constitutes an arm or instrumentality of the city rather than a separate and independently operating entity. The municipality may provide for a library, raise taxes for its upkeep, appoint members to the board, have one of the council's members on the board, and have complete control over the purchase of library property. It is true that the library board is given exclusive control over the expenditure of funds appropriated to it, and that it may select the necessary librarians and assistants.

However nowhere in the statutes has the legislature indicated that a library board shall be a unit separate from other municipal boards or officials. The fact that a member of the council may serve on the board indicates that close supervision by the city over library affairs was intended.
A similar situation involving an interpretation of the New Jersey statutes was considered in the case of Directors of the Free Library v. Civil Service Commission, 83 N. J. L. 196, 83 Atl. 980. Under the New Jersey law the state civil service commission was given authority to classify all municipal employes so as to bring them within the provisions of the civil service law. The commission classified the Newark library board employes as city employes. Action was brought to test the validity of this classification.

The court held that such employes could be classified as city employes and in so holding pointed out that the city levied all taxes for library support, purchased all buildings and equipment, and had a member of the council on the library board. Since the council had such complete control over library affairs, the court felt that its employes should be considered to be city employes.

The reasoning in that case would apply to library boards operating pursuant to secs. 43.25 to 43.28, Stats., since the city council levies all taxes for library purposes, purchases all library buildings and equipment and may have a member of the council on the library board. It may be argued that public libraries are operated in almost the same manner as are city schools, and that consequently the reasoning applied to schools should control. However, as was pointed out in XXVII Op. Atty. Gen. 578, it has been held that the administration of schools is strictly the state's function and not a subject of municipal regulation in the absence of a statute permitting such regulation. Ordinarily, this is not true of libraries, since their creation and operation is usually considered a municipal function. Vol. I, McQuillin Mun. Corp. (2d) par. 339, Vol. 2, id. par. 458. This being true, a statute relating to municipal employes need not be so explicit in order to encompass library employes within its provisions. Sec. 66.19 is probably specific enough to include employes of a library board operating pursuant to secs. 43.25 to 43.28, Stats.

It is, therefore, our opinion that employes of a library board are "municipal personnel," within the meaning of sec. 66.19, as it now stands, and that bill No. 458, S. need not be adopted to accomplish such result.

WHR
Counties — Dance Hall Ordinances — County dance hall ordinance adopted pursuant to secs. 59.08, subsec. (9) and 351.57, Stats., and containing a definition of a public dance hall which includes roadhouses providing place or space for dancing, applies to taverns having floor space where the public is admitted and does dance. The source of music, type of the floor, the number of couples involved, and whether or not the dancing is merely incidental to the tavern business, are not determining factors under such definition.

June 26, 1939.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

You have requested an opinion as to whether the following situations come within the purview of your county dance hall ordinance:

A tavern 24 feet x 20 feet in size, has a space 12 feet x 20 feet in area, where dancing takes place; the floor is of concrete and hence not particularly suited for dancing; no musicians are hired, and the music is furnished by an electric record-playing orthophonic; from four to six couples at the most may dance at the same time; more often there is no dancing, or perhaps but one couple dancing; the proprietor neither encourages nor discourages dancing; his income is derived from the sale of drinks, and we assume that he may have some interest in the receipts from the orthophonic, if it is of the coin-operated type.

Another situation arises where a tavern provides a hardwood floor, polished and waxed and used for dancing to the extent of a space 12 feet x 20 feet; there is no regularly hired orchestra and no dancing is advertised or admission charged, although parties are advertised, to which the public is invited; music is also furnished by an orthophonic in this case, and five or six couples may dance at the same time; the source of the income is the same as indicated in the first situation.

Counties are permitted to adopt ordinances for the licensing of dance halls by secs. 59.08, subsec. (9) and 351.57, Stats., but these sections do not define public dances.
In XXIII Op. Atty. Gen. 478, it was held that a dance, so far as sec. 351.57 is concerned, is one to which the public is generally admitted without discrimination and admission to which is not based upon personal selection or invitation. It was also stated in that opinion that a rural tavern, having a small room where music is played for entertainment of tavern patrons and some dancing is occasionally permitted, does not constitute a public dance requiring a license, so long as dancing is a mere incident of the general tavern business.

This opinion was based upon a careful study of the available decisions on the subject and was in accordance with the majority of the cases. However, this opinion cannot be considered as controlling where, as in your county, the county board in its dance hall ordinance has specifically given the term "public dance hall" a somewhat more comprehensive definition than that which it might ordinarily receive. This proposition is amply illustrated in the case of Stetzer v. Chippewa County, et al., 225 Wisconsin, 125, decided subsequent to our opinion in XXIII Op. Atty. Gen. 478, and in which our supreme court sustained a county dance hall ordinance, which defined a "public dance" as any dance at which admission can be had by the public generally with or without the payment of a fee, and defined a "public dance hall" as any room or place or space at which a public dance may be held.

In this case there was no entrance or cover charge and no charge for the privilege of dancing. The sole source of income was from the sale of food and refreshments at the bar, tables and booths. The total area of the building was about 4,480 square feet, and the area suitable for dancing was about 592 square feet. A three-piece orchestra played daily for the entertainment of the patrons of the tavern, whether anyone danced or not. The court said at p. 134:

"* * * It appears from the allegations of the complaint that appellant maintains a place for dancing. The public is admitted and does dance. An orchestra is in daily attendance to furnish the music. An officer of the law is usually in attendance every evening to maintain law and order. The fact that no charge is made for dancing and 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 business 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.

* * *

Whether the court would have reached the same conclusion in the absence of the rather stringent definitions contained in the county ordinance, is, of course, a matter for speculation, but it clearly appears from the decision that the court will sustain a county dance hall ordinance containing a very comprehensive definition of a "public dance" and a "public dance hall."

Your county dance hall ordinance, among other things, provides:

"No person shall hold, conduct or be present at a public dance within the county of Door except such as may be held within a public dance hall or pavilion or place of amusement or roadhouse on premises duly licensed and to be used as such under the provisions of this ordinance.

"The term 'public dance hall' as used herein shall be taken to mean any room, place or space at which the public dance may be held, * * *

"* * * Roadhouses, dance halls, pavilions, and other places of amusement, providing place or space for dancing are all within the provisions of this ordinance and required to have the license hereinafter provided for."

It seems perfectly clear from the facts stated that the taverns in question do provide "place or space for dancing" and that the public is admitted and does dance. The source of the music, the type of the floor, the number of couples involved, and whether or not the dancing is merely incidental to the tavern business, are not determining factors under the definitions provided in your ordinance, regardless of the bearing which these factors might have in the absence of the comprehensive definitions contained in your ordinance.

WHR
Public Health — Pharmacy — Except for short absences which may be reasonably necessary in the case of registered pharmacist in charge, an establishment using the title “pharmacy,” “drug store,” “pharmacist,” or “apothecary” may not, in view of the provisions of sec. 151.02, subsec. (9), Stats., be kept open in the absence of the registered pharmacist, even for the serving of meals and the sale of other commodities and regardless of the fact that drugs are kept in a separate room and locked when the pharmacist is not present.

June 26, 1939.

STATE BOARD OF PHARMACY,
Milwaukee, Wisconsin.
Attention Sylvester H. Dretzka, Secretary.

You state that a restaurant owner, who is not licensed as a pharmacist, has made application for a permit to conduct a pharmacy in a separate room in his establishment. He proposes to hire one licensed pharmacist, who would be in attendance from 7 A.M. to 9:30 P.M. after which time no drugs would be sold. However, the remainder of the establishment, including the restaurant and space used for sale of proprietary medicine, would be open from 7 A.M. to 2 A.M. leaving a period of 4 1/2 hours daily during which there would be no licensed pharmacist on the premises.

The state board of pharmacy has refused to grant this applicant a permit under sec. 151.02, subsec. (9), Stats., and you inquire if, under the circumstances, a permit should be issued.

Sec. 151.02, subsec. (9), Stats., provides in part:

“No drug store, pharmacy, apothecary shop, or any similar place of business, shall be kept open for the transaction of business until it has been registered with and a permit therefor has been issued by the state board of pharmacy; provided, however, that this section shall not be construed to apply to any store or stores opened for the sale of proprietary or so-called patent medicines. Every pharmacy and store conducted under the supervision of a registered pharmacist shall be annually registered on the first day of June with the state board of pharmacy, on application forms pro-
vided for that purpose by the board, on request, and the board shall thereupon issue a suitable certificate of registration which shall be conspicuously displayed in the respective place of business. Applications for registration as a pharmacy or drug store shall include information regarding the names of all pharmacists, assistant pharmacists and registered apprentices who are employed therein. Only places in charge of a registered pharmacist may use the title 'pharmacy,' 'pharmacist,' 'apothecary,' or 'drug store,' and each must be under the separate management of a registered pharmacist, who shall not engage to manage or supervise more than one such place, but nothing contained in this section shall prevent a person from owning and conducting more than one pharmacy; provided, each be under the separate supervision of a registered pharmacist. * * *

Sec. 151.04, subsec. (2), with certain exceptions mentioned therein, and in subsec. (3) prohibits the retailing, compounding or dispensing of drugs, medicines or poisons except by a registered pharmacist.

Thus it appears that except as otherwise provided in sec. 151.04, subsecs. (2) and (3) a registered pharmacist must be in charge of a drug store during the time the establishment is open.

We assume that in the case you mention the title "drug store" or "pharmacy" or some similar designation is carried on the front of the establishment, and that such sign will not be removed during those hours when the establishment is open but unattended by a pharmacist. The fact that the inside room in which the drugs are kept is locked is not controlling in our opinion. Otherwise, any drug store, whether it had a restaurant division or not, might keep open regardless of the statute, by merely locking the door to the prescription department, which is usually in the rear of the store. We understand that your board has never construed the statute as permitting this practice, and we can see no good reason for extending any greater privilege to the drug store proprietor who also engages in the restaurant business.

This administrative interpretation accorded the statute by the board charged with its enforcement, and such interpretation, extending over a long period of time, is entitled to great weight, and the supreme court has said that such ad-
ministrative construction is oftentimes decisive. *State v. Johnson*, 186 Wis. 59.

Furthermore, the statute should be viewed from the standpoint of its legislative intent. Why did the legislature, in the exercise of its police power, prescribe that only places in charge of a registered pharmacist may use the title “pharmacy,” “drug store,” “pharmacist,” or “apothecary”? It seems obvious that the legislature must have had in mind the protection of public health and safety, and that it also wanted to prevent deception of the public. By limiting the use of the sign “pharmacy”, “drug store,” etc. to places in charge of a registered pharmacist, the likelihood of drugs being sold by unregistered persons is greatly diminished. Thus the regulation appears to be appropriately adopted in the interests of public health and safety.

The sign “drug store” on an establishment apparently open for business is clearly deceptive if the customer is to find upon entering the store that drugs are not for sale, and the chances of illegal sales being made are greatly increased once the customer has been lured into the place and has made his wants known. By passing sec. 151.02, subsec. (9), the legislature has in effect said to the public that the sign “drug store” or “pharmacy” etc., on an establishment open for business may be relied upon as indicating that a registered pharmacist is in charge, and that except possibly for short temporary absences, will be available to render such professional services as may be needed.

It is true that short absences by the pharmacist may occasionally be necessary. In XIX Op. Atty. Gen. 337, it was pointed out in construing secs. 151.02, subsec. (9) and 151.04, subsec. (2) that to be “in charge” of an enterprise does not ordinarily connote the continuous presence of the person in charge. However, it was stated that to have a drug store for an entire day or longer without a pharmacist or assistant pharmacist in charge, would constitute a violation and that even shorter periods of absence might also be held to constitute a violation if indulged in as a regular practice as a means of thwarting the purpose of the statute. See also, *State v. Levine*, 173 Minn. 322, 217 N. W. 342, where under a somewhat similar statute the court indicated that it was permissible for the registered pharmacist to step
outside the store for meals or other temporary errands of a few minutes duration.

It is to be noted also that sec. 151.02, subsec. (9) prohibits the pharmacist from managing more than one pharmacy. This further demonstrates that the legislature contemplated the presence of the pharmacist in the store where he is in charge, except for short temporary absences.

The length of the absences here, coupled with the fact that they occur daily, would clearly take them out of the exceptions discussed above, and you are, therefore, advised that the proposed plan would be in violation of sec. 151.02, subsec. (9), Stats., regardless of the fact that the room containing the drugs would be locked, in the absence of the pharmacist.

WHR

Taxation — Tax Sales — Tax Deeds — Counties — Under section 75.36, Stats., county secures fee simple title to lands acquired by tax deed where proper steps are followed in the taking of the tax deed.

County may refuse to sell such lands to private owners and may lease the same to the conservation commission under secs. 59.01 and 23.09, subsec. (7), par. (d), Stats.

Charles M. Pors,
District Attorney,
Marshfield, Wisconsin.

June 26, 1939.

You state that Wood county leased to the state of Wisconsin, through its conservation commission, for a term of twenty years, some twenty thousand acres of contiguous lands in the southwestern part of the county for a public fishing and hunting grounds. Wood county acquired these lands by tax deeds, and most of the land is located in the town of Remington, which town claims that the county has no power to refuse to sell any of these lands to private own-
ers, whereby the lands would again be placed on the tax roll to the benefit of the town of Remington.

While the county does not have abstracts to these lands, it has recorded the tax deeds, and the county treasurer will certify as to all of such lands that tax deeds were obtained by the county on tax certificates upon proper and legal notice to all parties entitled to the same under the statutes, and that none of the land has been redeemed.

We are asked whether the county's title to such lands is sufficient to justify the conservation commission in proceeding under the lease, and whether such lands must be sold to private owners.

Sec. 75.36, Wis. Stats., reads in part:

"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, witnessed, sealed and acknowledged and 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 land sold for nonpayment of taxes; but no deed shall be issued until the county board shall, by resolution, order the same. The county taking such deed shall not be required to pay any delinquent or outstanding taxes on such land, the redemption value of any outstanding tax certificates, or interest or charges until the land is sold by the county."
(3) has been changed by the express provisions of sec. 75.36, quoted above, but the Spooner case has not been overruled, according to Town of Bell v. Bayfield County, 206 Wis. 297, except in so far as the statute involved has been changed. Therefore the parts of the decision not affected by the change in the statute still stand. Moreover, sec. 75.36, which changed the effect of the decision, is the same statute which states that the deed shall have the same effect in the case of a county as it does where the tax deed is taken by an individual. Thus it appears that the county acquires a title in fee simple to lands taken on tax deeds.

The county is expressly given the power to lease such land in sec. 59.01, which reads in part:

"Each county organized in this state is a body corporate, empowered to sue and be sued, to purchase, take and hold real and personal estate for public uses, including lands sold for taxes, to sell, lease and convey the same. * * *"

Sec. 23.09, subsec. (7), par. (d), provides that the conservation commission has the power,

"To acquire by purchase, condemnation, lease or agreement * * * lands or waters suitable * * * 3. For public shooting, trapping or fishing grounds or waters for the purpose of providing areas in which any citizen may hunt, trap or fish."

There appears to be no provision anywhere in the statutes under which a town may force the county to sell such lands to private owners, nor have we found any cases so holding.

The sufficiency of the county's title to any particular description must depend upon whether or not proper steps were followed in the taking of the tax deed or deeds. We strongly advise actions to quiet title in all such instances. To cut down the costs of such actions, the county might combine a number of descriptions in one action. See XXVI Op. Atty. Gen. 18, to the effect that misjoinder of causes of action by the county in suits to quiet title to lands is waived if objection is not raised by demurrer or answer.

However, it is not customary for the conservation department to request this office to pass upon titles to property
about to be leased by that department, particularly where it does not contemplate valuable improvements as lessee. Consequently, we assume that abstracts of title will not be called for in connection with this lease, and that the questions which have been raised by the town of Remington and the conservation department are not raised for the purpose of questioning the procedure followed by the county in the taking of the tax deeds, but relate rather to the powers of the county and the conservation commission to enter into a lease respecting such lands after the deeds have been taken, and upon the assumption that they were properly taken.

WHR

Courts — Estates — Minor — Indigent, Insane, etc. — Poor Relief — Estate of minor whose parents are on relief must be expended for his support and education before he is entitled to public relief, but may not be used for the support of the indigent parents.

June 26, 1939.

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

You ask whether the estate in the hands of a guardian of a minor representing the proceeds of a recovery of damages for personal injuries sustained by the minor should be used to support the minor where its parents are indigent and on relief before said minor is granted relief directly or along with its parents. You also ask whether such estate can or may be used to support the indigent parents of the said minor.

Sec. 319.26, Wis. Stats., 1937, provides as follows:

“Every guardian shall * * * apply the personal property or 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, * * *. If the personal property and income from the real estate shall be insufficient for those purposes, the guardian may sell or mortgage the real estate, upon obtaining a license therefor, as provided by Chapter 296, and shall apply the proceeds as far as may be necessary for such maintenance and support."

This section applies to all guardians including those of minors. It authorizes and directs that the property of a ward shall be used to provide him with support, maintenance and education "as far as may be necessary." That which gives rise to the authority under the statute to the use of the estate for such purpose is the existence of a necessity therefor. When such necessity exists this statutory mandate becomes operative.

Obviously, if the ward is entitled to support and education from sources independent of his estate, and the same is available, necessity does not exist. It is well established that parents have a legal duty to support and educate their minor children. Thus, if the parents are able to do so, no necessity arises for using the minor's property. However, where they are indigent and without means and the minor has no other available source of support, there exists a necessity that he be furnished support and education, in which case sec. 319.26, Stats., affirmatively says the property of the minor in the hands of the guardian shall be used for that purpose.

In our opinion, upon the presentation of facts showing that it is necessary to use the estate of a minor in order to furnish him support and education, the court has no alternative under the provisions of sec. 319.26, Stats. but must authorize the same.

Sec. 319.14, Stats., 1937 provides:—

"If any minor has property which is sufficient for his maintenance and education in a manner more expensive than his parents can reasonably afford, regard being had to the situation and circumstances of the family, the expenses of his education and maintenance may be defrayed out of his property in whole or in part, as shall be judged reasonable and be directed by the county court."
This last section has an entirely different purpose from sec. 319.26 and is applicable to situations not covered thereby. The application of sec. 319.26 is restricted to instances of necessity, but sec. 319.14 is founded upon considerations other than necessity and authorizes the use of a minor's estate in certain situations where necessity therefor may not exist. Sec. 319.14 is intended to provide for the use of a minor's estate for his support and education where, in view of the size, character or nature of his estate and the circumstances of the family, it would be unreasonable to restrict the minor to the support and education which his parents furnish, thereby denying him the advantages and benefits consistent with the ownership of such estate. Sec. 319.14 permits the use of the estate in that situation, and thus authorizes a use thereof which is not allowed under sec. 319.26.

The test to be applied under sec. 319.14 is not necessity but the reasonableness and propriety of such use under all the circumstances. This is a matter which involves the exercise of discretion and judgment. The language of this statute expressly states that the property may be used thereunder "as shall be judged reasonable and be directed by the county court." Thus, any use of a minor's property under section 319.14 is subject to the discretion and judgment of the county court.

But, under sec. 319.26 the controlling factor is the existence of a necessity for the use of the estate. A determination thereof is not a matter within the discretion of the court but is a question of fact for judicial determination. If the necessity exists in fact then under sec. 319.26 the court has no power to exercise its judgment and discretion as to whether it is reasonable and proper to use said estate for the minor's support and education. That statute does not put the matter within the discretion and judgment of the court as is done in sec. 319.14 but conclusively determines the question itself. It clearly prescribes that whenever the necessity arises for the use of the property of a minor in order to provide for his support and education it shall be so used.

On the other hand, eligibility for relief is set out in sec. 49.01, Stats. 1937, which provides:—
“Every town, village and city shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof, * * *.”

It seems apparent from the language of this statute that as long as a minor has property which can be used to provide for his maintenance and education he would not be eligible for public relief. He is neither a “poor” or indigent person, nor in “need” of relief, within the meaning of those words as used in this statute. As was stated by the court in Town of Rhine v. City of Sheboygan, (1892) 82 Wis. 352, at page 354:—

“* * * In order to entitle a person to relief from a town, * * * he must be so completely destitute of resources, property, or means of security as to be unable to obtain the absolute means of subsistence. While such person is possessed of property not absolutely indispensable for daily use, he must apply it to his support by sale or by way of security. * * *; it is the pauper, and not the poor man in the ordinary sense of the term, the man not only in want, but who has no means or resources for relieving it, who is entitled to the statutory aid provided in obedience to the dictates of the humane policy of the statute relating to the poor. * * *.”

Furthermore, if public relief were granted to a minor while he had property in the hands of his guardian available for his maintenance, it would be recoverable from his estate under the terms of sec. 49.10 Stats. 1937, which provides:—

“If any person at the time of receiving any relief, support or maintenance at public charge, under this chapter * * * is the owner of property, the authorities charged with the care of the poor of the municipality * * * chargeable with such relief, support or maintenance may sue for and collect the value of the same against such person and against his estate. In any such action or proceeding * * * the court may, in its discretion, refuse to render judgment or allow the claim in favor of the claimant in any case where a parent, wife or child is dependent on such property for future support. * * *.”

Under this statute the only instance in which the court could in the exercise of its discretion, refuse to grant a re-
Opinions of the Attorney General

covery for relief furnished would be where a parent, wife or child of the minor is legally dependent upon the minor's estate for future support. As there was no liability of a child at common law to support its parents, if there is any present legal liability so to do it must be found in the provisions of the statutes. Guardianship of Heck, (1937), 225 Wis. 636, 275 N. W. 520. The only pertinent present statute is sec. 49.11, Stats. 1937, which provides:—

"(1) The father, mother, husband, children and wife of any poor person who is blind, old, lame, impotent, or decrepit so as to be unable to maintain himself, shall, relieve and maintain such poor person, so far as they are able, having due regard for their own future maintenance and making reasonable allowance for the protection of the property and investments from which they derive their living and their care and protection in old age, in a manner approved by the authorities having charge of the poor in the municipality, or by the board in charge of the institution, where such poor person may be; but no child of school age shall be compelled by this section to labor contrary to the child labor laws."

The last clause of this section in making mention of the child labor laws shows that the section is as equally applicable to minors as to adults. The obligation thereby imposed in respect to the support of parents thus falls alike upon minor and adult children.

But by the express language of sec. 49.11 the duty to support is imposed only when the poor person is "blind, old, lame, impotent or decrepit". It does not impose the obligation in a case of indigency. Thus, in a suit under sec. 49.10 Stats. to recover from a minor's estate for relief furnished to him while he had available assets, the court could not refuse to allow the claim upon the ground that an indigent parent is legally dependent upon the minor for support because no such liability exists. It is to be noted that such liability as is imposed by section 49.11 Stats. arises only where the assets of the person made liable are more than sufficient to discharge his own needs and a determination of liability has been made in proper proceedings as prescribed in subsection (4) thereof. Guardianship of Heck, supra.

In DeMarco v. Seaman, (1934), 283 N. Y. S. 697, 157 Misc. 390, a distinction is made between guardianship
estates based upon the source from which the property is derived and it is held that even though the parents are on relief a minor's funds awarded to him as damages for permanent injuries may not be used for his necessary support but he should be furnished support by public relief. This decision is however without support by other authorities. In addition nothing in our statutes indicates that a minor's estate consisting of the proceeds of a recovery for his personal injuries is to be subjected to use for his necessary support any differently than a minor's estate acquired by inheritance or gift.

Upon the foregoing, it is our opinion that the estate of a minor whose parents are indigent and receiving public relief must be expended for his necessary support and education before he is entitled to public relief, but may not be expended for the support of his indigent parents.

HHP

Constitutional Law — Agriculture — Dairy Products —
An assembly bill providing for an excise tax upon sale of butterfat and providing for the deduction of the tax from milk checks is not unconstitutional in so far as the provision as to the deduction is involved.

June 29, 1939.

LAWRENCE R. LARSEN, Chief Clerk, Senate,
Senate Chamber.

On June 21 you enclosed to us a copy of senate resolution No. 24,S. The material parts of the resolution read as follows:

"RESOLVED by the senate, That the attorney-general be and he is hereby respectfully requested to render to the senate as soon as possible, an official opinion on the constitutionality of that feature of Bill No. 734, A. which provides for a deduction from the farmer's milk check of a certain percentage to be used for advertising purposes."
We are of the opinion that if bill No. 734, A., is otherwise valid, it is not rendered unconstitutional by the provisions relating to deduction from milk checks of the tax there imposed.

It seems to us that any question as to the validity of the method of collection is determined in favor thereof by the case of Travis v. Yale & Towne Mfg. Co., 252 U. S. 60. In that case the state of New York had enacted an income tax law which provided for a tax upon the salaries of nonresidents earned within the state. The law also provided that an employer of employes subject to the tax should deduct and withhold the tax from the salary or wage due to the employe. The employer was thus classed as a withholding agent and was required to pay to the taxing authorities the amount withheld. The court held the methods of collection to be constitutional.

We see no difference in substance between the method of collection which was held to be valid in the Travis case and the method of collection for which provision is made in bill No. 784, A.

We may say further that in later years it has become quite common for taxing units to employ similar methods in the collection of revenue. The various social security taxes, the motor fuel tax, the privilege dividend tax, general sales taxes, and other such taxes are, in many respects, comparable to the tax provided for in bill No. 734, A., in so far as the method of collection is involved. Some of these taxes have been specifically held by courts of last resort to be constitutional, while others have been generally accepted as such for many years past.

As indicated, therefore, we are of the opinion that the method of tax collection provided for in bill No. 734, A., does not fall within any constitutional inhibition.

JWR
Taxation — Tax Sales — Taking of tax deed is not limited to within six months after expiration of period redemption. Issuance of a tax deed to a county in replacement of a void tax deed is governed by sec. 75.18 Stats. Sec. 74.455 Stats. providing for proceedings to correct errors in tax deeds is applicable to deeds to a county and exclusive. County may take tax deed upon valid subsequent certificate where tax deed on prior certificate is void.

Sidney J. Hanson,
District Attorney,
Richland Center, Wisconsin.

You state that your county holds a tax deed taken on October 19, 1938 upon certain lands set out in the list of unredeemed lands published in December, 1935 pursuant to sec. 75.07 Stats. and specifying June 10, 1936 as the date of expiration of time for redemption. The notice of application for tax deed dated July 26, 1937 was served on the occupant of the land on August 17, 1937 and stated that the county would apply therefor on or after October 26, 1937. Upon this set of facts you ask several questions.

(1) Must a tax deed be taken to delinquent tax lands within a period of six months after the expiration of the period of redemption or may it be taken regardless of the time after the expiration thereof?

There is nothing in the language used in sec. 75.12 Stats. 1937 that limits the time within which a tax deed must be issued or applied for. That section merely sets up the giving of notice of application for tax deeds as a prerequisite to the issuance thereof and defines the instances and manner in which such notice shall be given. The "six months" therein specified is not measured from the date of expiration of the time for redemption but from the "time when the tax deed * * * shall be applied for". Likewise, sec. 75.07 Stats. 1937 contains nothing limiting the time for applying for tax deed. All that it does is prescribe one of the procedural steps that must be taken and the time for doing the same. The only provisions in the statutes limiting the time within
which a tax deed must be taken are those contained in sec. 75.20 Stats. 1937. The very existence of the express limitation in sec. 75.20 supports not only the conclusion that secs. 75.07 and 75.12 do not cover that subject but that they were not so intended.

(2) In the event that a tax deed is taken after such lapse of time as set forth in the above statement of facts is the same void?

In view of our answer to your first question there is nothing in the mere fact that the tax deed was issued more than six months after the expiration of the period of redemption which renders it void. However, you state that the notice that a tax deed would be applied for on or after October 26, 1937 was served on the occupant on August 17, 1937. This did not give the occupant the three months notice required by sec. 75.12, subsec. (1) Stats. It has been held that sec. 75.12 is applicable to a county. XXIV Op. Atty. Gen. 398. Accordingly, it is our opinion that, even though the deed was not issued until more than three months after the service of the notice, such notice was insufficient under sec. 75.12 Stats. and therefore the tax deed issued thereon is void.

(3) In the event that the deed is void under question (2) can another notice of application for tax deed be served based upon the same publications and a new deed taken thereon which would be valid?

Sec. 75.18 Stats. 1937 expressly provides that where a void tax deed has been issued, no new deed shall be issued in replacement thereof except by following the procedure therein outlined. It is our opinion that this section is applicable to tax deeds to a county. It is possible, however, that because of the use of the word "person" in sec. 75.18 as contrasted with the language of secs. 75.12 and 75.14 Stats., sec. 75.18 might be held inapplicable to a county. If that were true, then the tax deed being void, we find nothing barring the issuance of a new deed under sec. 75.14 Stats. upon the giving of a new notice fully complying with the provisions of sec. 75.12 Stats. In view of the foregoing, it might be advisable to proceed in a manner that would be "double-barreled" and comply with both secs. 75.12 and 75.18 at the same time. Also the remedy provided by sec. 75.19 of fore-
closing the certificate upon which the void deed was issued would appear to be available as a solution of the problem.

You also ask whether, in instances where the assessment rolls contain the correct descriptions but clerical errors occurred in copying the descriptions in the tax certificates, new certificates containing the correct descriptions as set out in the assessment rolls may now be issued and signed by the former treasurer who was in office when the certificates were issued, and the old certificates destroyed or must the correction be made by proceedings in accordance with sec. 74.455 Stats.? We find no authority for making correction of errors in the manner you suggest and it is our opinion that the remedy is that provided by sec. 74.455, Stats. 1937. Your attention is, however, directed to the opinion in XXVI Op. Atty. Gen. 488.

In several instances you state that tax deeds have been issued to the county under sec. 75.14, Stats., which are subject to attack because of errors in the publication of notices and other irregularities. You ask whether in these instances there is any bar to the county taking another tax deed to the same land on a tax certificate of a sale subsequent to the one upon which the former void deed was issued?

We find nothing that would prevent the county from taking a deed founded upon a valid certificate of a subsequent tax sale where the tax deed previously taken by the county on a certificate of a prior sale is void. If the tax deed taken by the county were valid and effective so that it acquired title to the land then all certificates of subsequent sales would merge in the title. In re Dancy Drainage Dist., (1929) 199 Wis. 85, 90, 225 N. W. 873. But, where the prior tax deed is void there would be no such merger and the certificates of the subsequent sales, until redeemed, outlawed under sec. 75.20 Stats., cut off by tax deeds taken upon subsequent sales or in some other way discharged, would continue to exist as effective liens upon which tax title could be founded.

HHP
Tuberculosis Sanatoriums — Chapter 65, Laws, 1939 and more particularly new sec. 50.07 of said chapter does not affect county rights acquired under sec. 50.07, subsec. (2), par. (d) 1 to 4, inclusive, Stats. 1937.

July 1, 1939.

A. W. Bayley, Secretary,

Board of Control.

You call our attention to ch. 65, Laws, 1939, which became effective May 12, 1939, and inquire as to the effect of this legislation and particularly sec. 50.07 of said chapter with reference to counties which, under sec. 50.07, subsec. (2), par. (d), subds. 1 to 4 inclusive, Stats. 1937, expanded and improved their county tuberculosis sanatorium facilities.

The subsection of the 1937 statutes in question in substance provided that "as an emergency measure to encourage the expansion and improvement of the facilities of county tuberculosis sanatoria, the state board of control shall, in the determination of actual per capita cost to be charged by a county tuberculosis sanatorium for state-at-large and other county patients, include a sum to apply on the cost of new additions" thereafter made to such sanatorium, the sum to be added to what would otherwise be the annual per capita cost of maintenance to be arrived at by taking five per cent of the actual expenditure and dividing by the total number of all patients for a fiscal year, such method of computation to continue for a period of twenty years. Under such scheme the county at the expiration of twenty years would recoup their expenditure for expansion and improvement of the sanatorium facilities except such part of the annual maintenance charge as was attributable to the county's own patients.

Ch. 65, Laws, 1939, effective May 12, 1939, repealed sec. 50.07, Stats., and created a new sec. 50.07 which reads in part as follows:

"(3) Each county maintaining in whole or in part such an institution shall be credited by the state, to be adjusted as provided in section 46.10, for each patient cared for therein at public charge, as follows:
“(a) For each such patient whose support is chargeable against said county, seven dollars per week.
“(b) For each such patient whose support is chargeable against some other county, the total cost of his maintenance as determined by the board of trustees of the institution and the state board of control; and the state shall charge over to such other county the difference between such total cost and seven dollars per week provided through state aid.”

The question presented is as to the effect of said chapter and particularly the section above quoted upon counties which, under the inducing legislation of 1937 and while said legislation was in effect, embarked upon a program of expanding and improving the sanatorium facilities. Are such counties no longer permitted to add annually to what would otherwise be per capita cost of maintenance, the five percent expenditure computed as hereinbefore set forth? The question is difficult both from the standpoint of legislative power as well as legislative intent. The question of legislative intent cannot be divorced from the question of legislative power. Analyzed from the standpoint of legislative power, we do not consider it at all certain that such counties do not have a vested right beyond legislative power to disturb. The cases dealing with legislative power in this regard cannot be cited with any finality to the effect that the legislature has power to disturb county rights acquired under the 1937 law. See, for instance, Town of Milwaukee v. City of Milwaukee, 12 Wis. 99; State ex rel. v. Haben, Treasurer, 22 Wis. 660; Will of Heinemann, 201 Wis. 484; State ex rel. Voight v. Hoeflinger, 31 Wis. 257; Richland County v. Richland Center, 59 Wis. 591; Town of Bell v. Bayfield County, 206 Wis. 297.

It seems clear from the foregoing cases that while the legislature has plenary power in legislating with respect to counties in most respects, the county, acting as a creature of the legislature and under legislative authority, may acquire vested or contract rights beyond the power of subsequent legislatures to disturb. The boundary of those rights is not well defined. For purposes of determining the problem under consideration, it is not necessary to reach any conclusion as to whether the legislature could, if it would, disturb county rights acquired under the 1937 law. It is sufficient
to conclude and determine that it is extremely doubtful whether the legislature could do so.

Any construction of a statute which will render it of extremely doubtful constitutionality is to be avoided. Given a choice between a construction which will render a statute of extremely doubtful constitutionality or validity and one which is not subject to such objection, the latter construction must be adopted. \textit{Harriman v. Interstate Commerce Com.}, 211 U. S. 407; \textit{United States v. Delaware & Hudson Co.}, 213 U. S. 366; \textit{United States v. Jin Fuey Moy}, 241 U. S. 394. Accordingly, we look to ch. 65, Laws, 1939, to determine whether the language is such as to permit of such choice. There is no language in Ch. 65 and more especially in the new section, 50.07, which compels any conclusion that the legislature intended to destroy county rights acquired under the 1937 law. The statute is certainly subject to the interpretation that the legislature had determined that the emergency was over and that counties should no longer be encouraged to expand their sanatoria facilities by legislation such as the 1937 legislation; that expenditures incurred in expanding and improving such facilities from and after the effective date of the act should not thereafter be included in arriving at per capita cost. But there is no compelling language in the act to the effect that counties that did avail themselves of the provisions of the 1937 law shall not be permitted, after the effective date of ch. 65, Laws, 1939, to determine per capita cost in accordance with the law in existence at the time the expenditures were incurred and encouraged. It will be noted that the new sec. 50.07, subsec. (3), par. (d) and sec. 50.075 do not provide what items the board shall take into consideration in determining “total cost” of maintenance. The legislature obviously left some discretion in the board and the trustees of the institution. It is entirely conceivable and probable that the legislature intended the board to consider rights acquired by counties under the 1937 law in arriving at total cost of maintenance per person as applied to any particular institution.

It is a well settled and fundamental rule of statutory construction that all statutes are to be construed as having only a prospective operation and not as operating retrospectively
or as having a retroactive effect. The legislative intent to give a retroactive effect to the legislation must appear, as variously expressed, positively, explicitly, unambiguously, unmistakably, unequivocally. 59 C. J. 1167. The foregoing rule, however, does not apply in general to repealing statutes. 59 C. J. 1185. The rule does apply, however, even in the case of repealing statutes as applied to rights vested or accrued while a statute was in force. 59 C. J. 1187. There thus appears to be no express language in ch. 65, Laws, 1939 nor any rule of statutory construction which compels the conclusion that the legislature intended by said chapter to interfere with rights acquired under the 1937 law. Under the circumstances, we are of the opinion that that construction must be adopted which renders the act free from constitutional attack. That construction is that ch. 65, Laws, 1939, does not affect counties' rights acquired under the 1937 law while that law was in force and effect.

NSB

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Counties — Loans to drought-stricken farmers — Appropriations and Expenditures — Wisconsin Home and Farm Credit Administration — Home and farm credit administration, functioning under sec. 15.89, Stats., need take no further steps with respect to a balance owing from a grant in trust made to a county than the certifications required by sec. 15.89, subsec. (4), par. (e), even though it appears that a particular county made loans from the grant in trust as late as April 15, 1938. The state's collection is assured through the certification procedure provided for in sec. 15.89, subsec. (4), par. (e).

July 1, 1939.

GORDON W. GUNDERSON, Director,
Wisconsin Home & Farm Credit Administration.

You state that the Wisconsin home and farm credit administration granted the sum of five thousand dollars to X county under the provisions of sec. 15.89 for the purpose of
making loans to drought-stricken farmers. Although a portion of that sum was remitted by the county on June 1, 1938, a substantial balance remained unpaid as of June 1, 1939. You state further that in checking the records of that county you have discovered that the county drought relief committee completed its loaning operations and transferred its books and accounts to the county treasurer about June 1, 1937. On April 15, 1938, however, that committee met as a body and granted eight additional loans totaling five hundred seventy dollars which sum was paid out upon order by the county treasurer from the drought relief fund then on hand. This action was taken without consulting your department or obtaining its approval.

You ask what steps, if any, should be taken by your department regarding the loans made in 1938.

Sec. 20.73, Stats., provides:

"There is appropriated from the general fund to the Wisconsin home and farm credit administration, on the effective date of this section, one million dollars for emergency drought relief purposes, such amount to be allotted, distributed, repaid and remitted as provided in section 15.89."

Sec. 15.89, Stats., provides in part:

"The funds made available under section 20.73 shall be allotted, distributed, repaid and remitted as follows:

"(1) The Wisconsin home and farm credit administration is authorized and empowered to make grants in trust to the several counties for the benefit of drought-stricken farmers, subject to the conditions, terms and provisions of this section.

"(3) Each county making application for such grant shall provide for the appointment of a county drought relief committee, which shall consist of three members, at least two of whom shall be persons actively engaged in farming.

"(4) The Wisconsin home and farm credit administration shall receive and consider the applications of the several counties for grants in trust for drought relief purposes and shall make such grants to them on the basis of their proportionate or comparative drought relief need and the funds available; "

"* * *
"(e) On June 1, 1938, and on June 1, 1939, the county treasurer of each county receiving a grant under the provisions of this section shall remit or transfer to the Wisconsin home and farm credit administration the cash then on hand in the county drought relief trust fund, but not to exceed in the aggregate the total amount of the grant to such county. The Wisconsin home and farm credit administration shall pay or transfer all amounts or credits received under this paragraph into the state treasury to become a part of the general fund. If the cash remitted or transferred to the Wisconsin home and farm credit administration on June 1, 1938, shall be less than one-half of the total amount of the grant made to such county, the said administration shall certify to the secretary of state and the state treasurer the amount of such difference for such county, and such amount shall be deducted by the state from the total of the next and the total of succeeding allotments to be made to the cities, towns and villages in the county under subsection (2) of section 139.28 and subsection (5) of section 20.07 until such amount is made up in full, and the amount so deducted shall be credited to the remittance or transfer made on June 1, 1938. If the cash remitted or transferred to the Wisconsin home and farm credit administration on June 1, 1939, shall be less than the balance of the total amount of the grant made to such county, the said administration shall certify to the secretary of state and the state treasurer the amount of such difference for such county, and such amount shall be deducted by the state from the allotments mentioned in this paragraph in the same manner as provided in the case of the difference certified on account of the remittance or transfer made on June 1, 1938, and the amount so deducted shall be credited to the remittance or transfer made on June 1, 1939. The amount of any deduction for any county made as herein provided shall be prorated among the cities, towns and villages by such county in the same proportion as revenues are shared by them under subsection (2) of section 139.28. The balance of the total allotments to cities, towns and villages in such county remaining after any deduction is made as herein provided shall be distributed to such cities, towns and villages in the county in the manner provided by subsection (2) of section 139.28. All payments on drought relief loans made to the county treasurer after June 1, 1939, and any balance remaining in the county drought relief trust fund after such date shall be distributed promptly by the county treasurer to the cities, towns and villages of the county in the same proportion and for the same purpose as revenues are allotted and distributed to them under subsection (2) of section 139.28.
“(f) The Wisconsin home and farm credit administration shall assist and supervise the county drought relief committee of each county in the execution of its duties and functions and shall make such rules and regulations as are necessary to insure the observance of the terms, conditions and provisions prescribed in this section and the proper accounting and reporting of drought relief funds by such county or county drought relief committee.

“(5) The county drought relief committee of any county receiving a grant in trust under the provisions of this section shall receive and consider applications from drought-stricken farmers and shall make loans of cash or credit for the purchase of seed and live stock as expeditiously as possible after the effective date of this section. As soon after June 1, 1937, as may be practicable, such county drought relief committee shall complete its loaning operations and transfer its books, accounts, records, documents, notes, mortgages and other instruments and assets to the custody of the county treasurer. The county board in its discretion may require each member of such drought relief committee and the county treasurer to execute and file an official bond in such sum as it may determine for the faithful discharge of their duties under this section, which shall be approved in the manner provided by section 59.13.

"* * *"

From an analysis of the plan outlined by this section, it appears that the fund appropriated by the state was apportioned by the Wisconsin home and farm credit administration as "grants in trust" to those counties which made application therefor. The various counties then, in turn granted loans from such trust fund to drought-stricken farmers, taking as security therefor individual promissory notes which were made payable to the treasurer of the county which granted the loan. The statute contains no provision as to the means of securing loans made by the counties. The repayment of the various county grants to the state, however, is positively insured by the provisions of sec. 15.89, subsec. (4), par. (e) under which any deficiency existing after the payments due on June 1 of 1938 and 1939 is made a charge to be deducted from future allotments to be granted by the state to such county under sec. 139.28, subsec. (2) and sec. 20.07, subsec. (5). Such a provision is a significant indication of an intent upon the part of the legislature that each county should be the obligor as to the state
for the total amount of its particular grant in trust since, after the remittance of one-half of the amount of the grant or as much of the trust fund as is on hand as of June 1, 1938, the county is charged with any balance on the total grant which might remain unpaid after June 1, 1939, whether that county has completed its collections on such loans or not.

It is doubtful whether sec. 15.89, subsec. (5) which requires that the loaning operations of the county drought relief committees be completed "as soon after June 1, 1937, as may be practicable," may be so broadly construed as to authorize the granting of such loans as late as April 15, 1938. In view of the structure of the emergency loan plan as a whole, however, it appears that any question of this nature arising out of the loaning operations within a county must necessarily be disposed of by the county itself since such county must repay the total amount of its grant by June 1, 1939 or suffer the consequent deduction in its future allotments. Hence the modus operandi is such that the problem which you describe need not become a concern of a state department, since it is impossible for the plan to operate to the financial detriment of the state itself.

The certificate submitted by your department to the state treasurer and the secretary of state concerning the deficit outstanding against X county after its remittance of June 1, 1939, will necessarily include the unpaid aggregate amount of the loans made by that county on April 15, 1938 as a part of the balance due. You are therefore advised that after filing such a certificate, the Wisconsin home and farm credit administration need take no further action in regard to the loans granted by X county in 1938.

NSB
NH
Mothers' Pensions — Aid to dependent children — Prisons — Parole — IX Op. Atty. Gen. 521 and X Op. Atty. Gen. 384, to the effect that aid to dependent children may be granted under sec. 48.38, subsec. (5), par. (d), where the father, who has been sentenced to a penal institution for a period of at least one year is either placed on probation or paroled, reaffirmed. To qualify for aid in such cases the children must also be dependent upon the public for proper support.

July 1, 1939.

STATE PENSION DEPARTMENT.

Attention George M. Keith, Supervisor of Pensions.

You have inquired whether the following cases come within the purview of sec. 48.33, subsec. (5), par. (d), Stats.:

Case 1. Mrs. A has two children under sixteen years of age. Her husband was committed to the state prison at Waupun, where he served for a period of two years, but he has been recently paroled and is now living with his wife and children.

Case 2. Mrs. B has three children under sixteen years of age. Her husband was recently found guilty of committing a certain crime and was placed on probation for a period exceeding one year.

Case 3. Mrs. C has two children under sixteen years of age. Her husband was recently found guilty of committing a certain crime and was sentenced to the state prison for two years, although the sentence was suspended or stayed, and he has been placed on probation.

Sec. 48.33 (5) (d), Stats., reads in part:

“Aid shall be granted to the mother or stepmother of a dependent child who is dependent upon the public for proper support if such mother or stepmother is * * * the wife of a husband who has been sentenced to a penal institution for a period of at least one year * * *.”

In IX Op. Atty. Gen. 521, it was ruled that the fact that a husband sentenced to a penal institution for one year or more, was paroled after being sentenced, did not take away
from the wife the right to apply for a mother's pension under the above statute. Similarly, in X Op. Atty. Gen. 384, it was stated that aid might be granted, in the discretion of the court, to a wife who was receiving moneys earned by her husband under the Huber law while serving a term in prison. These views were re-affirmed in an unofficial opinion to your department, under date of December 22, 1937.

The foregoing rulings are criticized on the grounds that the words "probation" and "parole" are used interchangeably in these opinions; whereas, each has a distinct and separate meaning. Further criticism is made as to the correctness of these opinions in construing the legislative intent, and it is submitted on behalf of the Pension department, that the legislature must have meant, as a condition precedent to the granting of aid, that the husband must be actually and physically incarcerated in a penal institution for a period of at least one year, since if he were out on probation or parole, he could work and support his family, thus preventing them from becoming public charges.

In answer to the comment concerning the loose use of the words "probation" and "parole" in our prior opinions, we agree that these words have separate and distinct meanings, and that for the sake of accuracy, if for no other reason, they should not be used interchangeably, but we fail to see that the correct use of these words would have compelled any conclusion other than the one previously reached, since where the other requirements of the statute are met, it is the sentence to the penal institution for a period of at least a year, which qualifies the applicant for aid, as was pointed out in the prior opinions, rather than the individual treatment accorded the defendant subsequent to the sentence. In IX Op. Atty. Gen. 521, 522 it was said—"No exception is made to cover a case where the husband has been paroled." It is equally true that the statute makes no exception to cover the case where the husband has been placed on probation.

Hence, we deem it immaterial as far as your problem is concerned, whether the husband is placed on probation or parole.

We are more impressed with your second contention to the effect that an able-bodied man on probation or parole
(we note that you also use these terms interchangeably), is in no materially different position from that of any other husband, so far as support of his family is concerned, and to rule that his wife is eligible for aid to dependent children, results in a grant not intended by the legislature under such circumstances.

However, we believe your contention is one that goes to the matter of legislative policy rather than to the question of statutory construction. Perhaps the legislature should have excepted the cases you mention, but has it done so?

The language of the statute is very clear and express. It has been held that construction of a statute may be resorted to only where ambiguity exists. Rusk Farm Drainage Dist. v. Industrial Comm., 186 Wis. 232. As was said in Wadham's Oil Co. v. State, 210 Wis. 448, 458:

"The question is not what the legislature intended but what did it mean when it used the language quoted. If the legislature had intended to be all-inclusive, other appropriate language might have been used."

You have called to our attention no ambiguity nor words of doubtful meaning in sec. 48.33, subsec. (5), par. (d), and we perceive none. Consequently, no good reason suggests itself for now reversing an opinion of this department which has stood and been followed for nearly twenty years. Assuming that there were ambiguity in the statute, it has been held that repeated construction of a statute by the attorney-general without change in the law by subsequent legislatures, is significant, although not controlling, in determining the construction thereof. Union F. H. S. Dist. v. Union F. H. S. Dist., 216 Wis. 102.

However, it is to be noted that the granting of aid is not mandatory in all cases where the husband has been sentenced to a penal institution for a period of at least one year. Otherwise, the wife of a millionaire who had been sentenced could demand and receive aid for her children. The statute sets up a second requirement: She must be the mother or stepmother "of a dependent child, who is dependent upon the public for proper support." It may well be that the earnings of a father, who has been sentenced for a
year, and who is either placed on probation or paroled, are such in a particular case as to take the child out of the category of a child "who is dependent upon the public for proper support," and it is clear that in such a case no aid should be granted, regardless of the father's sentence.

It is possible that failure to consider this second requirement, namely, that of dependency upon the public for proper support, is responsible for the confusion which has arisen on the subject. In none of our prior opinions on the effect of a sentence for one year or more, followed either by probation or parole, have we indicated in any way that this second requirement is to be waived, and these opinions should not be extended by implication so as to arrive at any such absurd result. All we have said is that a sentence followed by either probation or parole comes within the statute. It is assumed, of course, that all other requirements of the statute, including that of dependency upon the public for support, have been met. As was pointed out in V. Op. Atty. Gen. 589, all conditions required by the statute must concur to justify the granting of aid. We believe this disposes of the first three questions which you have submitted.

Lastly, you call our attention to the definition of a dependent child, found in sec. 48.33, subsec. (12), and in view of the words "continued absence from the home" contained in this definition, you ask the following questions:

"1. If a man on either parole or probation is living with his family and earning only a small wage or his wages are subject to demand set up by order of the court, is it mandatory that the budgetary deficiency of the family be made up by an aid-to-dependent-children grant?

"2. If a man on either parole or probation is living with his family but is earning sufficient for their support, is it mandatory that aid to dependent children be granted for the benefit of the dependent children in the home?

"3. Would it make any difference in your answers to the above cases if the man on either parole or probation was not living at home with his family?"

In answering these questions we wish to point out that the granting of aid is not mandatory, but rests within the sound discretion of the granting authority, as was pointed out in IX Op. Atty. Gen. 521, X Op. Atty. Gen. 384 and the unoffi-
cial opinion to which you refer. In so far as you find any conflict between secs. 48.33, subsec. (5), par. (d), and 48.33, subsec. (12) in the granting of aid under sec. 48.33, subsec. (5), par. (d), the provisions of the former should prevail, since it is a special statute governing the very thing being administered, whereas subsec. (12) is general in its application. Hence the words "continued absence from the home" in subsec. (12) would have no application to the situation mentioned in your first question where the husband was sentenced and is now living with his family after having been either placed on probation or paroled. This situation is governed by the prior opinions previously discussed.

Moreover, the situation mentioned in your second question does not fall within the statute, since it is obvious that the children involved are not "dependent upon the public for proper support," if the father is earning sufficient for their support.

In answer to your third question, we have already pointed out that as far as sec. 48.33, subsec. (5), par. (d) is concerned, the statute makes no distinction between a man who has been sentenced and is serving his sentence, and one who, on the other hand, has been sentenced and who is either placed on probation or who is subsequently paroled.

WHR

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Legislature — Veto of legislative act — A valid veto of a legislative act in pursuance of the provisions of Art. V, sec. 10, Wisconsin constitution, requires that the bill be returned with the governor's objections to the house in which it originated; a return without objections is insufficient.

July 5, 1939.

THE SENATE.

We are in receipt of a copy of a resolution adopted by the Senate and reading as follows:

"WHEREAS, Bill No. 43, S. passed both houses of the legislature and was presented to the governor on May 26, 1939; and"
"WHEREAS, The governor on June 2, 1939, the sixth day after said bill was presented to him (excepting Sunday), sent a communication to the senate stating that he was returning Bill No. 43, S. unsigned for reasons which were being fully set forth to the senate; and
"WHEREAS, Under date of June 6, 1939, the governor sent to the senate his objections to Bill No. 43, S.; and
"WHEREAS, a point of order has been raised that the governor's veto did not conform to the requirements of Section 10 of Article 5 of the Wisconsin constitution and that Bill No. 43, S. therefore became a law and that no question relating to said bill is properly before the senate. Now, therefore, be it
"RESOLVED by the senate, That the Attorney-General be and he is hereby respectfully requested to render to the senate at the earliest date possible, an official opinion as to the validity of the governor's attempted veto of Bill No. 43, S. and as to the status of said bill in the senate; and as to what further action, if any, on the part of the senate is necessary relative to said bill. Be it further
"RESOLVED, That a copy of this resolution be sent to the Attorney-General."

Further inquiry into the circumstances attending the action of the governor in connection with bill No. 43, S. develops the fact that the bill was returned unsigned together with a memorandum in the following language:

"I am returning herewith Bill No. 43, S., unsigned for reasons which are being fully set forth to your honorable body. * * *"

The reasons referred to in the foregoing memorandum were presented to the senate in another memorandum submitted to it under date of June 6, which reads in part as follows:

"It is proper, at this time, to give my reasons for vetoing bill 43-S which was presented to me for signature. "* * *

We are of the opinion that, in view of these circumstances, the governor's action in disapproving the bill was ineffectual to constitute a valid exercise of the veto power, within the provisions of article V, section 10 of the Wiscon-
Opinions of the Attorney General

sin constitution. The provisions referred to, so far as they are material here, read as follows:

“Approval of bills. Section 10. Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. * * * If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.”

It has been unanimously held by the courts of last resort in jurisdictions having constitutional provisions substantially identical with the one above set out that, in order to effectuate a valid veto of a legislative enactment, it is necessary for a governor to comply strictly with the provision that the disapproval shall be accompanied by a return of the bill with his objections within the period allotted for executive action.

Some of the authorities are collected in Arnett v. Meredith, 275 Ky. 223, 121 S. W. (2d) 36. See also, Statutes, Nos. 32 and 33, American Digest System.

Here the governor’s reasons or objections were not returned to the senate within the six day period allowed for executive action. Since there was no such return of the bill with objections, the return was ineffectual for any purpose and the situation is precisely the same as though the governor had held it without action beyond the six day period allowed for his consideration. And the constitution is explicit that if a bill is not returned within the six day period (Sundays excepted), it shall become law, notwithstanding the governor’s failure to approve it, unless the legislature shall by adjournment prevent its return.

In view of what has been said, we think that nothing further remains to be done by the Legislature in connection with bill No. 43, S. The chief clerk of the Senate should enclose the enrolled Bill to the Secretary of State with directions to publish it. If the chief clerk does not do so, it will, in the usual course, be turned over to the Secretary of state
at the close of the session and it will then become the duty of
the Secretary of State to publish it. The Wisconsin Supreme
Court so held in *State ex rel. Sullivan v. Dammann*, 221 Wis.
551.

JWR

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*Criminal Law — Embezzlement — Larceny — Venue of
prosecution* — Where A employs B in one county and au-
thorizes him to sign checks on A for a specific purpose, and
B goes into adjoining county and signs check on A for his
own purpose, contrary to his authority, B is guilty of either
embezzlement or larceny if check is paid.

Venue in prosecution should be laid in county where check
was signed and delivered rather than in county where B was
employed by A.

Embezzlement may be prosecuted either under sec. 343.17
or sec. 343.20, Stats. It is suggested that prosecution be in-
stituted under sec. 343.17 so that conviction for larceny may
result if either theft or embezzlement of money is proved.

July 5, 1939.

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

From your request for an opinion, it appears that one A is
the owner of a poultry and egg business in the city of Dodge-
ville, Iowa county, Wisconsin. He has agents who go out
from Dodgeville by truck and make purchases of poultry and
eggs in Grant county, Wisconsin. B, a resident of Iowa
county, was one of A's agents, who had been authorized to
make purchases of poultry and eggs for A. In connection
with the making of such purchases, B carried with him a
number of checks, each of which had A's name printed
thereon. B had authority from A to countersign these
checks only for the payment of poultry and eggs purchased
for A. B, without the knowledge or consent of A, purchased
an automobile at Fennimore, Grant county, Wisconsin, and there signed one of A's checks payable to an automobile dealer in that city for the sum of twenty-five dollars, as part payment for said automobile. B took title to the automobile in his own name. A learned of the transaction only after B had left A's employment. Presumably the check was paid although you do not specifically so state.

It appears to you that B is guilty of embezzlement and it is your further opinion that had B been carrying on his person cash which he embezzled, B could be prosecuted in either Grant or Iowa County, under the provisions of Sec. 343.20, subsec. (2), Stats. However, as B carried only checks and signed the check in question in Grant County, you inquire whether venue should be laid in Iowa or Grant county. You refer to holdings to the effect that where an agent is bound to account at a certain place for moneys or property in his possession, venue in a prosecution of such agent for embezzlement may be laid in the county where he is bound to account. You have also referred to the opinion in XXIII Op. Atty. Gen. 665, and the recent case of Podell v. State, 228 Wis. 518, 279 N. W. 653.

Sec. 343.20, subsecs. (1) and (2), provide in part:

“(1) * * * any bailee, * * * employe or servant of any private person * * * who, by virtue of his business or employment, shall have the care, custody, or possession of or shall be entrusted with the safe-keeping, disbursement, investment or payment of any money, or shall have the care, custody or possession of * * * any * * * property or thing which is the subject of larceny, belonging to such other person * * * shall embezzle or fraudulently convert to his own use or to the use of any other person except the owner thereof, or shall take, carry away or secrete, with intent to convert to his own use or to the use of any other person except the owner thereof any such money, * * * or * * * other property or thing shall be punished * * *.”

“(2) * * * The offense of embezzlement may be prosecuted and punished in any county in which the person charged had possession of the property or thing alleged to have been embezzled.”

Sec. 343.17, Stats., provides in part:
"* * * Whoever being a bailee of any chattel, money or valuable security shall fraudulently take or fraudulently convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof of an indictment or information for larceny, and upon such conviction be punished as hereinbefore prescribed."

Previous to the enactment of that part of Sec. 343.17, quoted above, it had been essential, in order to convict for larceny, to prove that the element of actual trespass was present in gaining original possession (Topolewski v. State, 130 Wis. 244, 109 N. W. 1037), except where the property was taken by artifice, fraud, or false pretense. Vought v. State, 135 Wis. 6, 114 N. W. 518.

"Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." Moore v. United States, 160 U. S. 268, 269-270.

In the case of State v. Burke, 189 Wis. 641, 646, 207 N. W. 406, it was said:

"* * * The general rule of law is that if through fraud one obtains title as well as possession to money he is guilty of obtaining money under false pretenses. If through fraud he obtains possession of money and then converts it to his own use he is guilty of larceny, and if he is lawfully in possession of money and then converts it to his own use he is guilty of embezzlement. Whether the latter offense is punishable under Section 4415 (sec. 343.17) it is not necessary to decide. The statute seems to make no distinction between possession obtained lawfully and possession obtained through fraud or otherwise unlawfully. It seems to include all bailees. * * *""

The purpose of the above amendment to Sec. 343.17,

"* * * was to abolish the distinction between conversion by a bailee of an entire thing, as a quantity of property in a package of some kind, and the unlawful breaking of
the package and conversion of part or all of the contents,—
whether preceded by the element of breaking bulk with in-
tent to permanently deprive the owner of the thing appro-
priated or not,—making the latter a statutory class of lar-
cenies, differing only from ordinary larcenies, by absence in
the former of the element of trespass in gaining original
possession, which is essential to the latter. * * * "
Burns v. State, 145 Wis. 373, 382, 128 N. W. 987.

In the case of Vought v. State, 135 Wis. 6, 114 N. W. 518,
the court had decided that, by Sec. 343.17 "* * * em-
bezzlement is made larceny * * *." (page 15). And in
Brockman v. State, 192 Wis. 15, 17, 211 N. W. 936, it was
stated:

"* * * By ch. 278 of the Laws of 1887 this statute
(343.17) was amended so as to include as larceny the fraud-
ulent taking or converting of any chattel, money, or val-
uable security by a bailee, thereby covering as larceny that
which would be clearly embezzlement or conversion by a
bailee. See Vought v. State, 135 Wis. 6, 15, 114 N. W. 518,
646, 32 L. R. A. n. s. 234; Burns v. State, 145 Wis. 373, 382,
128 N. W. 987 * * *." See also Bergeron v. Peyton,
106 Wis. 377, 380, 82 N. W. 291.

It was also held in I, O. A. G. 161, and VIII O. A. G. 298,
that larceny by bailee may be prosecuted either under Sec.
4415 (343.17) as larceny or under Sec. 4418 (343.20) as
embezzlement.

The following note on embezzlement appears in Vol. 98 of
American Decisions, pages 161 and 162:

"The general rule is, that some act of appropriation or
conversion must be alleged and proved to have taken place
within the jurisdiction of the court: See Larkin v. People,
61 Barb. 226; State v. Bancroft, 22 Kan. 170. And where
there are continuous acts constituting one embezzlement,
the trial may be had in any county where any of the several
acts of conversion were committed, or in the county where,
on being called upon to account, the accused denied receiv-
ing the money or property: See 1 Wharton's Crim. Law, sec.
288; Rex v. Hobson, Russ. & R. C. C. 56; Rex v. Murdock,
2 Den. C. C. 298, S. C. 8 Eng. L. & Eq. 577; Rex v. Taylor,
3 Bos. & P. 596; Campbell v. State, 85 Ohio St. 70. Proof
that the defendant received the money in question from his
employer, in the county named in the indictment, is enough,
in the first instance, in the absence of evidence from the defendant that he carried the money into another county in the course of his duty, and before any unlawful conversion of it: State v. New, 22 Minn. 76. But if the act of conversion was performed in another county, he cannot be tried in the county where he received the property, unless he conceived the intent of committing the crime when he received it: People v. Murphy, 51 Cal. 376. * * * So where an agent of a company in California embezzled its money by drawing a check in another state, in his official capacity, in favor of his broker, who obtained the money in California and converted it to his principal's use, the courts of California had jurisdiction of the offense, the agent having been arrested in that state: Ex parte Hedlay, 31 Cal. 108.

Because of its pertinence it is deemed advisable to quote at length from the case of Territory v. Hale (N. Mex.) 81 Pac. 583, 585-586:

"* * * It appears from the proofs that the collector and treasurer of Mora county deposited the public funds of the county in the First National Bank of Las Vegas, in San Miguel county. The collector and treasurer authorized and directed the bank in writing to pay all checks signed in a designated way by defendant out of an account which he kept in the bank as collector and treasurer. The deposit was not special, but general, and like that of any ordinary depositor in a bank. Defendant drew a large number of checks on the bank against this account, and sent them through the mails, or delivered them to various persons, who presented the same and received payment thereon. Defendant never had possession of any actual money, but accomplished the embezzlement, if at all, in the above manner. Does this amount to embezzlement of money? In the first place, it is clear that when the money of Mora county was placed on general deposit with the bank the same became, for some purposes at least, the money of the bank, and the relation of the debtor and creditor between bank and depositor arose. Bank v. Millard, 10 Wall. 155, 19 L. Ed. 897. But when a check is drawn there is a segregation of that much money from the general funds of the bank, which becomes the property of the depositor. This may be placed to the credit of the payee of the check, or it may be handed him in money, or otherwise disposed of, as the parties may elect. But for a space of time, however short, the money of the depositor is being dealt with. And so it has been held under statutes against embezzlement of money.
that such embezzlement is accomplished by the drawing of a check upon a bank where such money is deposited. *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Bartley v. State*, 53 Neb. 310, 75 N. W. 744; *Bork v. People*, 16 Hun (N. Y.) 476; *People v. McKinney*, 10 Mich. 54. Contra, *Carr v. State*, 104 Ala. 43, 16 South. 155. Another view has been advanced for the same holding to the effect that the word 'money' in embezzlement statutes relating to public funds is used in a generic, and not a specific, sense; that is to say, that it includes all actual moneys, all credits and funds of every kind belonging to the public. We can see no impropriety in such view. The result must be salutary, and can in no way impair the rights of defendants. The holding in this case that the facts support a conviction of embezzlement of money may well rest upon either view above suggested.

"Another point is urged as to the venue. As already appears, the funds of Mora county were deposited in a bank in San Miguel county. The money was drawn out by means of checks sent or given to various persons, who in due time presented and had them paid in San Miguel county. It is claimed by defendant that the crime, if committed, was committed in the latter county. It will be noticed, in the first place, that every act of the defendant in connection with the crime charged was performed in Mora county, where the indictment was found. He drew the checks there, and either sent them by mail or delivered them personally to the respective payees. All things which were afterwards done were the result of instrumentalities which he, in Mora county, had set in motion. His purpose was effectuated in another county by means of these instrumentalities. Whether section 3398, Comp. Laws 1897, is not broad enough in its terms to authorize a prosecution in either county where embezzlement is effected by drawing a check in one county upon an account in a bank in another county, we do not decide, as we do not deem it necessary. We think the crime was clearly committed in Mora county, where the venue was laid.

"Much confusion arises from a failure to distinguish between the conversion and the evidence of it. The possession being lawful, the conversion may consist in a mere act of the mind whereby the character of the possession is changed and the holding becomes adverse. If this holding is with the intent to deprive the owner permanently of his property, the offense is complete. This intent may be manifested by various acts: such as making false entries, denial of receipts of money, not accounting when it should be done, rendering false accounts, or practicing any form of deceit, or running away with the money, or actually expending the money for defendant's own uses contrary to his directions, or other-
wise diverting the course of the money to make it his own. See Bish. Cr. Law, sec. 373; State v. Baumhager, 28 Minn. 226, 9 N. W. 704; 12 Cyc. 232. These acts, and many others which might be mentioned, are but the evidence of the felonious intent and of the changed character of the holding. The actual expenditure of the money is not necessary. It would simply be the evidence of the adverse holding, the same as any other act showing such fact. No man, of course, can be convicted upon a criminal intent alone, unaccompanied by some act to carry the intent into execution. The act in case of embezzlement is mental, in that the possessor changes the character of his holding to one adverse to the owner, and may or may not be accompanied by some physical act designed to make some actual disposition of the property. A defendant who has thus mentally begun to hold the money adversely while it is still in his possession and unexpended or otherwise dealt with, has, nevertheless, committed embezzlement. He cannot be convicted of the same, however, until by some physical act or omission of his he has furnished the evidence of such adverse holding. * * *

In the case of Ex parte Hedley, 31 Cal. 108, 112, it was held that an agent can commit the crime of embezzlement by drawing a draft on his principal payable to a third person, the same as though he received the money in person, if the principal pays the draft. It was there stated:

"That the relation of principal and agent existed between the prisoner and Wells, Fargo & Co. is not disputed; and it is apparent that the money received by Burling was received, in legal effect, by Hedley, Burling's employer. In that particular the case stands as it would if Hedley had received the money in person * * *."  

In the case of State v. Krug, 12 Wash. 288, 307-308, which was a prosecution of a city treasurer for embezzlement, the court stated:

"In charge No. 6 the court instructed the jury that if they believed from the evidence that there was money deposited to the credit of the city in the Washington National Bank, and if the defendant drew an instrument, signing the same as city treasurer, directing Henry Fuhrman to be paid $10,000, and that the Washington National Bank obeyed the direction and charged on its books the money to the city and lessened its credit $10,000, that such was a payment of
money, and that the jury should construe the check or instrument merely as the instrumentality by which the city of Seattle's money was transferred from the possession of the defendant to Henry Fuhrman; and upon these facts, if the transfer was a profit, they must find the defendant guilty as charged. We think this instruction was exactly right. The facts proven upon which the instruction was based were substantially as follows: The defendant gave Henry Fuhrman a check on the Washington National Bank for $10,000. Fuhrman presented the check for payment. The bank had more than enough city funds on hand to pay it in money, but the defendant preferred New York exchange, which he received. The exchange was sent to New York and paid, and Fuhrman got the $10,000. Under these facts the appellant claims there was only an exchange of credits and no money was paid. The instruction of the court is based upon the theory that, in contemplation of law at least, this was money. It would be a travesty upon the administration of the law, if treasurers who are the custodians of the funds of the people should be allowed to escape the penalty of embezzlement by any such subterfuge as this theory would protect. * * *”. The practical result of the transaction in this case was that, when this check was given to Fuhrman and was paid to Fuhrman by the New York exchange, and that amount charged to the account of the city, the city of Seattle had its account decreased to the amount of the check, and it was just as much a disposition of that $10,000 by the treasurer as though he had gone to the bank and got the money himself and paid it to Fuhrman, or had loaned him that amount of money out of the specie which he received, before it had been taken to the bank at all. * * *".

See also People v. Damron, 145 N. Y. S. 239 and Bartley v. State (Neb.) 73 N. W. 744. Incidentally our own court has held that to constitute a bailment it is not necessary that property be received, to be returned in specie to the owner. State v. Dohn, 216 Wis. 367, 257 N. W. 21.

In the case of Dix v. State, 89 Wis. 250, 61 N. W. 760, it was held that where the crime of embezzlement which is charged consists in a failure to account, the venue should be laid in the county where defendant was under an obligation to account, or declined to do so on proper demand.

This rule applies, however, only when a demand is necessary to prove embezzlement, and a demand is not necessary in order to prove the fraudulent conversion of the money
which is the essence of the offense. *Prinslow v. State*, 140 Wis. 131, 121 N. W. 637.

Since the decision in the *Dix case*, supra, the last sentence of Sec. 343.20, subsec. (2), which is quoted above, was enacted. In XXI Op. Atty. Gen. 1051 it was stated, at page 1052:

"Prior to 1898 it was held in the case of *Dix v. State*, 89 Wis. 250, that a person could be prosecuted in a county in which a demand for the moneys was made upon the person. However, it would seem that since the change in the law in 1898 it will probably be necessary to submit proof that the person charged with embezzlement had the money in the county in which he is prosecuted * * *".

However, it would appear that the conclusion reached in this opinion was incorrect because our court held, in the case of *Podell v. State*, 228 Wis. 513, 279 N. W. 653, that the amendment to Sec. 343.20, subsec. (2), made in 1898, did not limit, but rather extended, the venue in embezzlement. In XXIII Op. Atty. Gen. 665 it was held that the crime of embezzlement must be prosecuted in the county in which the crime was committed. That opinion referred to Sec. 356.01 of the statutes and made no reference whatsoever to the last sentence of Sec. 343.20, subsec. (2) which permits prosecution for embezzlement in any county in which the person charged had possession of the property or thing alleged to have been embezzled.

It does not appear that any demand was made upon B by A, in Iowa county, so the applicability of the rule impliedly adopted in the *Dix case*, supra, need not be considered.

At most, the twenty-five dollars on deposit in an Iowa county bank, subject to draft by B while acting within the scope of his employment, was only constructively in B's possession in Iowa county. Whether such possession would support venue in Iowa county under Sec. 343.20, subsec. (2) is at least questionable. Although the intent to use the twenty-five dollars for his own purpose may have been formed in Iowa county, the only unmistakable manifestation of that intent by overt acts occurred in Grant county where the check was signed and delivered, and the automobile procured. Hence, it is our opinion that it would be advisable to
institute prosecution in Grant county rather than in Iowa county regardless of the fact that the 1898 amendment to Sec. 343.20 extended the venue in embezzlement rather than restricted it as was indicated in XXI Op. Atty. Gen. 1051.

It appears from your statement of facts and from the foreign authorities cited herein that there was a bailment, and subsequently an embezzlement, of money, which offense could be prosecuted in Grant county under either Sec. 343.17 or 343.20.

Your attention is directed to the case of State v. Kube, 20 Wis. *217, *225-*226, in which the court said:

"* * * The author says: 'For, supposing that the fraudulent means used by the prisoner to obtain possession of the goods were the same in two separate cases, but in the one case the owner intended to part with his property absolutely, and to convey it to the prisoner, but in the other he intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself; the latter case alone would amount to the crime of larceny, the former constituting only the offense of obtaining goods by false pretenses.' 3 Greenl. Ev., Sec. 160. In State v. Watson, 41 N. H., 533, and 2 East's P. C., 671, the same distinction is made, and it is undoubtedly the law upon the subject. * * *" See also Brockman v. State, supra.

Because of the possibility that our court may feel that the money used by B in part payment for the automobile was never lawfully in the possession of B, and that he was not a bailee of that money, or that B had "* * * temporary possession for a limited and specific purpose * * *" only, with ownership remaining in A, in our opinion it would be advisable to include in the information a count under Sec. 343.17. Thus a conviction may result if it is proved that B either stole the twenty-five dollars or, being a bailee thereof, embezzled the same.

JRW
Dairy and food — Butter substitutes — The sale of Jelke’s Good Luck Vegetable Shortening and Jelke’s Good Luck Vitamin Fortifier considered with reference to the provisions of sec. 97.42, Stats.

July 5, 1939.

RAYMOND P. DOHR,
District Attorney,
Appleton, Wisconsin.

You submit the following to us and state that you desire an opinion with respect thereto:

"X company sells in the City of Appleton and vicinity a product known as Jelke’s Good Luck Vegetable Shortening composed entirely of cottonseed oil. It is similar to Spry and Crisco sold generally by grocery and food stores in Wisconsin. X company also sells Jelke’s Good Luck Vitamin Fortifier which is a liquid, yellow in color, composed of Vitamin A in cottonseed oil, vitamin D and other compounds. Neither product contains any milk. Each product is contained in a single package and may be purchased separately, although both products are commonly, but not invariably, sold together in separate packages.

"They are never mixed by X company either before or after being sold, nor are there any directions or instructions on either package informing the purchaser to mix the products together. Purchasers sometimes combine the two products into a mixture which is used for cooking, and baking, and may be used as a spread for bread or a substitute for butter.

"Does Section 97.42 of the Wisconsin Statutes require X company to secure a license from the Department of Agriculture and Markets to sell these products?

"About a year ago X company was convicted in the circuit court of this county for selling the same products in one combined package. The court found that these products, when mixed together, constituted oleomargarine or a similar substance. The court held that the sale of the products in this manner constituted the sale of oleomargarine. During the course of the trial of this case, in open court, former Deputy Attorney General Vaudreuil stated that, in his opinion, the sale of the product in separate packages, and without a license, constituted no violation of the law. I am also of that opinion."
“I am enclosing a copy of an opinion rendered by the Supreme Court of Tennessee on the same set of facts stated above for your information. There is also enclosed a carton in which the vegetable shortening is packed and, under separate cover, I am sending you a glass of the Vitamin Fortifier.”

It is our opinion that a license may or may not be required, depending upon the circumstances under which the vegetable shortening and the fortifier may be sold.

Following the receipt of your request, we communicated with the State department of agriculture and markets and enlisted the aid of that department in the preparation of this opinion. As you, of course, know, the department of agriculture and markets is the agency which is charged with the duty of issuing licenses pursuant to the provisions of sec. 97.42, Stats. You perhaps are likewise aware of the fact that the department has other duties in connection with the enforcement of the law in question.

Our inquiry developed further data bearing upon the situation at hand which is, in our judgment, highly significant. We are advised, for example, that it is quite common to advertise the two products together as oleomargarine or as a butter substitute, and that it is quite common to sell the two products in response to a request for oleomargarine. In other words, we are advised that the two articles are in many cases advertised and sold together as oleomargarine. It has likewise developed that the department has been unable to find any use for the fortifier except its use with the vegetable shortening in preparing the butter substitute, described as oleomargarine.

It is our opinion, in view of the decision by the circuit court for Outagamie county, to which you refer, that under circumstances such as those set out by the department of agriculture and markets the sale of the two articles constitutes a sale of “oleomargarine, butterine or similar substance”, and that its sale requires a license pursuant to the provisions of sec. 97.42, Stats. Notwithstanding any admission that may have been made at the trial of the case referred to it is our opinion that there is no substantial difference between selling the two articles in one package as oleomargarine and selling them in two packages as oleomar-
garine. In either case the result is precisely the same, and we do not think that the law is so oblivious to reality as to give substance to any such distinction.

We do not find it necessary here to determine as to whether or not the case mentioned in your request was correctly decided by the circuit court for Outagamie county. It is sufficient to say that since the court decided the case as it did, you should govern yourself accordingly until the decision has been reversed or overruled by the supreme court. And, these premises being accepted, we hold that the rationale of the court's decision extends to the sale of the two articles separately under the circumstances set out.

We may say, however, that we think there are circumstances under which the sale of the two articles may not constitute the sale of oleomargarine, butterine, or similar substance so as to require a license pursuant to the provisions of sec. 97.42, Stats. If, for example, they are placed upon the shelves as separate articles,—if each is sold upon its own merits without regard to the other,—if no attempt is made to sell the two together as a butter substitute, we know of no reason why the license should be required. We agree to this extent with the decision of the Supreme Court of Tennessee, as reported in Goodman v. Jacobs Packing Co., 126 S. W. (2d) 309. This is the case referred to in your request for an opinion.

We may say further that while you do not cover the matter in your request for an opinion, there is a likelihood that any purchaser who purchased the two articles and thereafter mixed them together and used them would be required to obtain a license and pay the tax imposed under the provisions of sec. 97.42, subsec. (9), par. (a), Stats. This license and tax, however, would not apply unless the products were sold under circumstances which would not require the seller to obtain a license.

JWR
Corporations — Amendments to Corporate Articles — An amendment to corporate articles providing that the number of directors may vary, depending upon certain contingencies, is permissible under the provisions of Ch. 180, Stats.

Fred R. Zimmerman, Secretary of State.

You have submitted the following statement to us:

"Section 180.02 of the Wisconsin statutes requires articles of incorporation to state the number of directors. Section 180.07 indicates that a change in number must be made by an amendment of articles. A corporation has submitted a proposed amendment of articles which provides for a board of seven directors and further provides that in case of specified number of defaults in the payment of dividends on preferred stock the preferred stockholders voting separately as a class, shall be entitled to elect two additional directors to hold office during the continuance of default. It is further provided that if the occasion arises for the election of such additional directors, the corporation shall certify that fact to the secretary of state and that the corporation shall certify to the secretary of state when the term of such additional officers shall have ended."

You then ask whether the above provisions are permissible under Wisconsin law so as to entitle the amendment to be filed by you.

In our opinion the proposed amendment is permissible under the laws of this state. The only statutory provisions in point read as follows:

"180.02 Articles. (1) Contents. The persons desiring to form a corporation shall sign and acknowledge articles containing:

"* * *

"(e) The designation of general officers and the number of directors, which shall not be less than three; * * *"

"180.07 Amending articles; filing and record; change of name. (1) Any corporation organized for any of the purposes authorized by this chapter, may, by a vote of two-
thirds of all the stock outstanding, and entitled to vote, or one-half of the members of a corporation without stock, unless a greater vote shall be required in its articles, amend its articles so as to modify or enlarge its business or purposes, change its name or location, increase or diminish its capital stock, change its officers or its directors, or provide anything which might have been originally provided in such articles, but no corporation without stock shall change substantially the original purposes of its organization. The amendment shall be adopted only in accordance with the articles, if a mode of amending the same shall have been therein prescribed."

The provision that articles of incorporation shall state the number of directors does not, in our judgment, prohibit the suggested amendment because it is perfectly clear that, as amended, the articles will state the number of directors. The number, it is true, may vary depending upon the happening of certain contingencies, but the contingencies themselves and the consequent variation in number are set out. The statute does not expressly or by implication suggest that the number shall remain constant.

Neither does the suggested change run contrary to the provisions of sec. 180.07, subsec. (1), Stats., set out above. Here, such change as is being made is made by amendment.

JWR
Fish and Game — Outlying Waters — Inland Waters — Words and Phrases. — Little Sturgeon Bay, Rileys Bay, Egg Harbor, Fish Creek Harbor, Eagle Harbor, Baileys Harbor, Mud Bay, North Bay, Rowley’s Bay, Washington Harbor, Jackson Harbor and Detroit Harbor and the other bays and harbors of Door County on Green Bay or Lake Michigan are outlying waters within the meaning of sec. 29.01, subsec. (4).

A question of fact is involved in determining whether a particular body of water is an outlying water or an inland water within the meaning of sec. 29.01, subsec. (4).

July 10, 1939.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

You have requested our opinion relative to the distinction made in the statutes between outlying and inland waters, especially with reference to waters in and around Door County. Sec. 29.01, subsec. (4) Stats. states:

“All waters within the jurisdiction of the state are classified as follows:
“Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer’s harbor, and the Fox river from its mouth up to the dam at De Pere are ‘outlying waters.’ All other waters, including the bays, bayous and sloughs of the Mississippi river bottoms, are ‘inland waters.’”

You call attention to sec. 29.33, subsec. (4) setting up certain “reserve waters” and providing that in certain bays named therein, both on the Green Bay side and the Lake Michigan side of Door county, no set-hooks or nets shall be used, and to sec. 29.345 wherein certain bays in Door county and elsewhere in the state are bounded and described. You also call attention to the opinion in XXI Op. Atty. Gen. 469 holding that Little Sturgeon Bay, Riley’s Bay, Egg Harbor, Fish Creek Harbor, Eagle Harbor, Bailey’s Harbor, Mud Bay, North Bay, Rowley’s Bay, Washington Harbor, Jackson Harbor and Detroit Harbor in Washington Island are
classified as inland waters. You further state that there are certain other bays and harbors in Door county, principally Garrett Bay, Ellison Bay, Europe Bay, Horseshoe Bay, Whitefish Bay, Sand Bay, Lily Bay and Sister Bay, which according to the foregoing opinion, would apparently be classified as outlying waters, when in fact by their nature these bays would appear no more to be outlying waters than those mentioned in the said opinion. The opinion was predicated on the theory that the bounding and describing of the waters therein named in sec. 29.345 evinces an intention on the part of the legislature to differentiate these bodies of waters from Green Bay and Lake Michigan so that they would not be within the waters classified as outlying waters in sec. 29.01. Another opinion in XXII Op. Atty. Gen. 266 holds that the legislature has not laid down a rule as to the dividing line between outlying waters and inland waters and that a question of fact is involved in determining this point. You desire our opinion as to whether or not the opinion in XXI Op. Atty. Gen. 469 is adhered to.

A careful consideration of the statutes involved impels us to the conclusion that the opinion in XXI Op. Atty. Gen. 469 will not be followed. The fact that sec. 29.345 bounds certain bays along the coast line of Door county and the fact that certain of these bays are designated as "reserve waters" by sec. 29.33, subsec. (4) would not appear to be especially significant in construing sec. 29.01, subsec. (4). Neither sec. 29.345 nor sec. 29.33, subsec. (4) makes any attempt to classify the waters named therein either as inland or outlying waters, the bounding and designation of waters in these sections being for a purpose entirely removed from the purpose for which waters are classified as outlying or inland waters in sec. 29.01, subsec. (4). This is demonstrated by the fact that Sturgeon Bay is among the waters listed in both sections 29.345 and 29.33, subsec. (4), yet is classified as an outlying water by sec. 29.01, subsec. (4). There is no ambiguity in the language of sec. 29.01, subsec. (4) so that the only question left for determination in ascertaining whether a specific body of water is an outlying water within the enumeration of such waters in sec. 29.01, subsection (4) is whether the water in question is in fact an "other water" within the meaning of said subsection. The
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Statutes give no clue as to whether within the meaning of sec. 29.01, subsec. (4) the term "other waters" may be held to mean waters which are directly connected with the waters therein enumerated but are individualized to the extent that they bear separate names. Surely, for all practical purposes it would appear that the waters of the various bays and harbors on either side of Door county and on Washington Island are in fact the waters of Green Bay or Lake Michigan as the case may be. The question seems to arise chiefly in connection with determining which bays and harbors may be fished without a rod and reel license, and the legislature not having made any distinction between various waters for this purpose except the classification made in 29.01, subsec. (4), the waters of Green Bay and Lake Michigan and the waters of the various bays of Door county would appear to be identical for this purpose at least.

Our present opinion then is that the various bays and harbors of Door county, whether on Lake Michigan or on Green Bay are, within the classification of sec. 29.01, subsec. (4), outlying waters.

RHL

Taxation — Tax Sale — Tax Deed — Notice of Application for — Notice of application for tax deed given by county during its ownership of certificate subsequently sold is substantial compliance with sec. 75.12, Stats., so purchaser of certificate may be issued tax deed.

July 10, 1939.

Lloyd C. Ellingson,
District Attorney,
Menomonie, Wisconsin.

While the county owned a tax certificate it gave notice of application for tax deed in accordance with the provisions of sec. 75.12, Stats., but before taking the deed it sold and assigned the certificate to a private individual. You ask
whether the notice given by the county is sufficient to entitle the purchaser to a tax deed upon such certificate or must he serve a new notice pursuant to sec. 75.12, Stats.

Sec. 75.14, subsec. (1) Stats. 1937 provides:

"* * * the county clerk shall, * * * on presentation to him of the certificate of such sale and proof of service of notice upon the occupant or that the lands are unoccupied as prescribed in the preceding section, execute * * * to the purchaser, his heirs or assigns, a deed of the land * * *.""

As this language is of no assistance upon the question reference must be made to the statutory provision requiring the giving of notice of application for tax deed which are set out in sec. 75.12, subsec. (1) Stats. 1937 as follows:

"* * * such deed shall not be issued unless a written notice shall have been served upon the owner or occupant, * * * by the holder of such certificate at least three months prior thereto, stating that he is the owner of such certificate and setting forth the date thereof, and giving notice that after the expiration of three months from the service thereof such deed will be applied for. * * *"

The present problem revolves around the meaning of the word "holder" as used in this section. It is susceptible of two interpretations. It may be read as referring to the person who holds the certificate at the time of the application and issuance of the tax deed, or to the person who holds the certificate at the time of the giving of the notice. We must determine which time is referred to.

If the first interpretation is proper then the statute requires that the person who makes the application for tax deed must have given the notice of application therefor provided by sec. 75.12 Stats. and a notice given by a previous owner of the certificate during the time that he owned the same would not be sufficient. On the other hand giving the word "holder" the second meaning then there is no requirement that the applicant for a tax deed must have himself given a notice of application therefor and he would be entitled to a tax deed upon a showing that he is the owner thereof and that a proper and timely notice of application
for tax deed was given by a prior owner of the certificate during the time such prior owner owned the same. It is obvious that regardless of which is the proper interpretation of the word "holder", the language used necessarily requires that the notice must be given by the person owning and holding the certificate at the time the notice is given. The second construction of this statute seems to be the literal one. It would also appear to comply with the intent and purpose underlying the requirement of the giving of notice of application for tax deed before the same can be issued. This requirement is designed to bring to the attention of those whose rights are to be divested that a tax deed will be taken and given a last opportunity for redemption. Such provisions for notice are for the benefit and protection of those whose rights are to be divested. Klug v. Soldner, 228 Wis. 348, 280 N. W. 350.

Such purpose would be as effectively discharged and the parties whose rights are to be divested by the tax deed would obtain the same protection under either interpretation of the meaning of the word "holder". The owner or occupant of the land would have the same opportunity for redemption in either case. In view thereof the giving to this section the literal interpretation as merely requiring that the notice of application for tax deed must be given by the person who holds the certificate at the time of such notice is in full conformity with the rule that such provision should be liberally construed in favor of the persons whose rights are to be protected.

There thus does not appear to be any good reason for restricting the construction of sec. 75.12 Stats. to requiring that the notice of application for tax deed must be given by the person who holds the certificate at the time of the application for and issuance of tax deed and therefore the literal interpretation should be given thereto. Furthermore, the issuance of a tax deed upon due and proper notice given by a previous owner would appear to be a substantial compliance with the requirements of sec. 75.12. It has been held "that substantial compliance with the form prescribed by the statute is all that is required; that omissions and blunders that do not prejudice or deceive anyone or affect the substance of the conveyance do not militate against the rule

The question, however, is not free from doubt and in view of the strictness with which proceedings in obtaining tax titles are viewed by the courts, if the present owner of the certificate desires to rely upon the prior notice given by the assignor county he should be issued a tax deed upon the certificate. The construction to be given the statute is so uncertain that we cannot say that under the circumstances the clerk should question the right to a tax deed and refuse to issue the same. The purchaser takes his own chances as to the validity of such deed and if the notice is not sufficient then by the provisions of the last sentence of sec. 75.12, Stats. he has no recourse against the county by reason thereof and his only remedy to procure a valid deed would be to proceed under sec. 75.18, Stats. The safe and cautious course for the purchaser to follow would be for him to give a new notice of application for tax deed pursuant to sec. 75.12 Stats. after he has acquired title to the certificate.

HHP

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**Counties — County Board — County Board Resolutions** — County is without power, emergency or otherwise, to provide by resolution that it will not continue a husband and wife on its payroll at the same time nor employ any man whose wife is gainfully employed nor any woman whose husband is gainfully employed.

July 15, 1939.

**Clive J. Strang,**

_District Attorney_,

Grantsburg, Wisconsin.

In your letter you state:

“At the May meeting of the County Board of Supervisors of Burnett County the following resolution was adopted:
"Whereas, the unemployment in the State of Wisconsin is very great, and
"Whereas, Burnett County has been called upon to do what it can to relieve the situation,
"Therefore Be It Resolved, that beginning July 1st, 1939, Burnett County will not continue a husband and wife on its payroll at the same time, nor employ any man whose wife is gainfully employed, nor any woman whose husband is gainfully employed."

"After an investigation that gave me very little material to decide the question I was of the opinion that under emergency conditions that this could be done by the County Board, but that under ordinary conditions would be unlawful as a breach of the Constitutional rights of a person's right to work at anything he saw fit."

You wish our opinion as to whether the resolution is valid.

We shall approach the problem from the standpoint of legislative power in the same field, as it is obvious that the county can have no greater power than the legislature. It is well settled that no one has any constitutional right to public office or employment and that the holding of either is a privilege rather than a right. State ex rel. Tesch v. Von Baum-bach, 12 Wis. 310; State ex rel. Buell v. Frear, 146 Wis. 291; Ekern v. McGovern, 154 Wis. 157. It is equally well settled that as to all offices or employments other than constitutional offices where the constitution prescribes the qualifications for office, the legislature has a wide latitude in prescribing qualifications that are reasonably germane to the duties which an officer or employe must perform—reasonably germane to qualifications for a particular office or employment. See cases cited above and also State ex rel. Gubbins v. Anson, 132 Wis. 461; Fordyce v. State ex rel. Kelleher, 115 Wis. 608; State ex rel. Williams v. Samuelson, 131 Wis. 499; State ex rel. Bloomer v. Canavan, 155 Wis. 398.

The foregoing statement of the rule suggests that legislative power to prescribe qualifications is subject to limitations. The cases cited would indicate, if they do not squarely hold, that the limitation is that of prescribing a qualification germane to fitness or capacity for a particular office or employment.

None of the cases seem to analyze the question of why the legislature is so limited in its exercise of power. It would
seem that the probable constitutional limitation upon legislative power in this regard is Art I, sec. 1 of the Wisconsin constitution (held to be the state equivalent to the equal protection of the laws clause, Fourteenth Amendment to the Constitution of the United States) (Pauly v. Kehbler, 175 Wis. 428), as well as the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. While there is no constitutional right to a public office or employment, it is deemed that these constitutional provisions do guarantee to the citizens of the state the equal right to compete for public office or employment subject to such regulations by way of qualification as the legislature may prescribe germane to the duties of a particular office or employment. Where the qualification (classification) is germane to such duties, there is no denial of equal protection by the laws. Where the qualification (classification) is not germane to the duties, it would seem that the legislation must fall within that sphere of legislation deemed arbitrary and unconstitutional as a denial of equal protection of the laws.

If the resolution in question is tested by the foregoing analysis of legislative power, it is apparent that the resolution must be condemned as the resolution is not even remotely connected with qualifications, capacity or fitness for public office or employment. We agree with you that in the absence of an emergency, the county would be wholly without power to pass any such resolution. Can the resolution be justified as emergency legislation? Neither circumstances nor emergencies can create power, but both may furnish the occasion for the exercise of power. Home Bldg. & Loan Assoc. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413. The declared purpose of the resolution is that of relieving the unemployment situation. To meet this situation, the county classifies married and unmarried persons. Married persons are employed upon the basis of need. There is no similar requirement with respect to unmarried persons. Granted that the legislature in an emergency could give some weight to need as a qualification for public office or employment (we have found no case that has ever so held). It would seem that under the constitutional provisions of both the state and federal constitutions above cited, the legislature would
be prohibited from resorting to an arbitrary classification. Can it be said that the resolution in question gives married persons the equal protection of the laws? It seems to us that it cannot be so said; that the classification is entirely arbitrary and the resolution therefore void.

The legislature of Massachusetts recently had under consideration six separate bills aimed at restricting public employment of married women. Because of the doubtful constitutionality of these bills, the senate and house requested an advisory opinion of the supreme judicial court of that state in respect to the constitutionality of these several bills. The court, under date of June 29, 1939, held all of the six separate bills to be unconstitutional as a denial of the equal protection of the laws to married women under the various constitutional provisions of that state. The constitutional provisions cited in the opinion and relied upon are not essentially different than our own. While the court did not find it necessary to determine whether the legislation in question was violative of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, it is apparent that the court arrived at its conclusion by giving controlling weight to the state constitutional provision equivalent to the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

While the county resolution that you submit is not subject to the same arbitrary discrimination against public employment of married women as the six measures under consideration by the Massachusetts court, it is deemed that your resolution does result in an arbitrary classification within the analysis of the opinion of the court and that this opinion is consistent with that analysis.

NSB
Courts — Criminal Law — Recognizances in Murder Cases — Under sec. 361.20, Stats., only recognizances given in cases of murder must be docketed in the office of the clerk of the circuit court.

July 15, 1939.

JAMES H. LARSON,
District Attorney,
Shawano, Wisconsin.

You inquire as follows:

"Under 361.20 of the Wisconsin Statutes, may all recognizances be docketed upon the docket of judgments of the Circuit Court?

"Subsection (1) of this statute discusses bail and recognizance generally and also specifically as related to murder. Subsection (2) begins 'Such recognizance'. Does that refer to all recognizances or does it limit it just to murder?

"It would seem to me that it would be proper for all recognizances to be filed, else what benefit would there be in the sureties informing the judge that they have sufficient property for the bond, if the day after he signs as a surety he could dispose of all this real estate."

Sections 361.20 and 361.21, Stats., read as follows:

"361.20 (1) The amount of penalty of the recognizance or bail bond shall be in such sum as, in the opinion of the officer taking the same, will secure the appearance of the accused for trial. In cases of murder the recognizance shall be signed by the accused and at least two sureties, who shall severally swear that they each own and possess unencumbered real estate, within this state, not exempt from sale on execution, worth a certain sum mentioned, which sums so sworn to by such sureties shall in the aggregate be double the amount specified in said recognizance; but no surety shall be accepted who shall not justify in at least one-third of the amount fixed in said recognizance; and when required by the district attorney or court shall give a full description of such land and in what county such land is situated.

"(2) Such recognizance shall, immediately after its execution, be filed in the office of the clerk of the circuit court and docketed upon the docket of judgments therein, in the
same manner as judgments are required to be docketed in such office; and a transcript thereof shall be immediately filed in every county where such lands are situated. The said recognizance, from the time the same is executed before such judge, shall bind and be a charge upon the lands and tenements, real estate and chattels real of the parties executing such recognizance, whether owned by them jointly or either of them severally and wherever the same may be situated in this state, until such recognizance shall be fully paid and satisfied or otherwise discharged by due course of law."

"361.21 No recognizance taken by any court or magistrate, except as provided in section 361.20, shall bind any lands, tenements or real estate or other property; but such recognizance shall be deemed to be mere evidence of debt."

In the revised statutes of Wisconsin for 1849, chapter 145 was entitled—"Of the Arrest and Examination of Offenders, Commitment for Trial and Taking Bail."

That chapter was divided into thirty-one sections. Sections 1 to 16, inclusive, corresponded very closely to present Sections 361.01 to 361.17. Sec. 18, Chap. 145, Stats. of 1849, read exactly the same as present Sec. 361.18, except for punctuation. Sections 19 to 23, inclusive, and 25 to 31 inclusive, of Chap. 145, Stats. of 1849, corresponded very closely to present Sections 361.22 to 361.33. Sec. 17, Chap. 145, Stats. of 1849, read as follows:

"Persons charged with an offence punishable with death shall not be admitted to bail, when the proof is evident or the presumption great, but for all other offences, bail may be taken in such sum as, in the opinion of the magistrate, will secure the appearance of the person charged with the offence, at the court, where such person is to be tried."

Chap. 102, revised Statutes of 1849, was entitled "Of Judgments and Executions, of the Exemption of Property therefrom and the sale thereon, and of the Redemption of Lands, etc."

Sec. 19 of that chapter read:

"No recognizance taken by any court or by any officer, shall bind any lands, tenements or real estate or other property; but such recognizances shall be deemed to be mere evidences of debt."
In the revised statutes of 1858 the material previously found in Chap. 145, Stats. of 1849, was placed in Chap. 176. No substantial changes were made in this material, however, except that old section 17 was omitted and new sections 17 and 18 were inserted, reading as follows:

"Sec. 17. No officer other than a judge of the supreme court, or judge of the circuit court, or judge of the county court, shall hereafter be authorized to admit to bail any person charged with the crime of murder."

"Sec. 18. The amount of penalty of the recognizance or bail bond, shall be in such sum as, in the opinion of the officer taking the same, will secure the appearance of the accused for trial. The recognizance shall be signed by the accused and at least two sureties, who shall severally swear that they each own and possess unincumbered real estate, within this state, not exempt from sale on execution, to at least double in value the amount of the recognizance. Such recognizance shall, immediately after its execution, be filed in the office of the clerk of the circuit court, and docketed upon the docket of judgments therein, in the same manner judgments are required to be docketed in such office. The said recognizance, from the time the same is executed before such judge, shall bind and be a charge upon the lands and tenements, real estate and chattels real, of the parties executing such recognizance, whether owned by them jointly or either of them severally and wherever the same may be situated in this state, until such recognizance shall be fully paid and satisfied, or otherwise discharged by due course of law."

In the revised statutes of 1858, what had been Sec. 19 of Chap. 102, Stats. of 1849, became section 40 of Chap. 132 but the language was in no way altered.

By chap. 157, Laws 1876, Section 18 of Chap. 176 of the revised statutes of 1858 was amended by adding the following words which still appear in Sec. 361.20, subsec. (1):

"* * * and when required by the district attorney or court shall give a full description of such land and in what county such land is situated."

In the 1878 statutes, Sec. 18 of Chap. 176 of the revised statutes of 1858, became Sec. 4794, and, as approved by the legislature in chap. 2, Laws, Extra Session of 1878, it read as follows:
“The amount of penalty of the recognizance or bail bond, shall be in such sum as, in the opinion of the officer taking the same, will secure the appearance of the accused for trial. In cases of murder, the recognizance shall be signed by the accused, and at least two sureties, who shall severally swear that they each own and possess unincumbered real estate, within this state, not exempt from sale on execution, to at least double in value the amount of the recognizance; and when required by the district attorney, or court, shall give a full description of such land, and in what county such land is situated. Such recognizance shall, immediately after its execution, be filed in the office of the clerk of the circuit court, and docketed upon the docket of judgments therein, in the same manner as judgments are required to be docketed in such office; and a transcript thereof shall be immediately filed in every county where such lands are situated. The said recognizance from the time the same is executed, before such judge, shall bind and be a charge upon the lands and tenements, real estate and chattels real of the parties executing such recognizance, whether owned by them jointly or either of them severally, and wherever the same may be situated in this state, until such recognizance shall be fully paid and satisfied, or otherwise discharged by due course of law.”

It will thus be seen that the words—“in cases of murder”—appeared for the first time in the revised statutes of 1878.

In the statutes of 1878 what had been Sec. 40 of Chap. 132, Stats. of 1858, became Sec. 4795, and read:

“No recognizance taken by any court or magistrate except as provided in the preceding section, shall bind any lands, tenements, or real estate, or other property; but such recognizance shall be deemed to be mere evidence of debt.”

Thus, in 1878, what is now 361.21 was, for the first time, placed with the other sections relating to recognizances.

Chap. 379, Laws, 1885, was entitled: “AN ACT to Amend Section 4794, of the Revised Statutes, relating to bail in murder cases.” (Italics ours). From the effective date of Chap. 379, Laws of 1885, down to 1925, Sec. 4794 of the statutes read exactly the same as present Sec. 361.20, except that it was not divided into subsections.

Section 4795 also continued unchanged.

Chap. 4, Laws, 1925, was—“AN ACT to Complete the Re-numbering of Sections of the Statute according to the deci-
mal system Established by Section 35.19 of the Statutes.” By that chapter Sec. 4794 became Sec. 361.20, and Section 4795 became Sec. 361.21. Sec. 3 of said Chap. 4 provided:

“This act is not intended to and does not change the substance or meaning of any statute, the sole purpose being to renumber sections in connection with the revision of the Statutes of Wisconsin.”

Said Chap. 4 did not divide the newly renumbered Sec. 361.20 into subsections. Sec. 361.20 was divided into Subsections (1) and (2) by the revisor of statutes pursuant to Sec. 43.08 of the statutes and appeared in its divided form for the first time in the Statutes of 1925.

In the Statutes of 1925, the revisor substituted the words —“Section 361.20” for “preceding section”, where said words appeared in Sec. 4795, now Sec. 361.21.

From the foregoing history of Sec. 361.20, it will be observed that originally it related to all recognizances. While the words “in cases of murder” were inserted for the first time in the revised statutes of 1878 by the revisors, the legislature by chap. 379, Laws, 1885, specifically approved this change, and by the title of that chapter, indicated that in their opinion it related to “bail in murder cases.”

Since chap. 4, Laws, 1925, was not intended to change the substance of what was Sec. 4794, present Sec. 361.20 which was divided into subsections by the revisor of statutes pursuant to Sec. 43.08, must be construed as though it were not divided into subsections.

The only authority of a magistrate to require a statement concerning unencumbered real estate, when accepting a recognizance, is in cases of murder. Consequently, the words, “such land”, when used in Sec. 361.20, subsec. (1) in reference to the land whose description and location may be required by the district attorney or court, must refer to the only land previously mentioned, towit: the land which the sureties swear that they own and possess in connection with the furnishing of recognizance in cases of murder. Also, bearing in mind that no significance should be attached to the fact that Sec. 361.20 is divided into subsections, and applying the rule of the last preceding antecedent, the words “such recognizance” appearing at the be-
ginning of Sec. 361.20, subsec. (2) must refer to the recognizance last mentioned above, which is a recognizance in case of murder. Jorgenson v. City of Superior, 111 Wis. 561, 87 N. W. 565. Dagan v. State, 162 Wis. 353, 156 N. W. 158.

Regardless of what conclusion might be drawn from the origin, and from the language of present Sec. 361.20, as found in the earlier statutes, the statute must be interpreted as it now reads:

"The question is not what the legislature intended but what did it mean when it used the language quoted. * * *" Wadhams Oil Company v. State, 210 Wis. 448, at 458, 245 N. W. 646.

Sec. 361.21 also indicates that there may be some valid recognizances which shall not bind any lands, tenements, real estate, or other property, but shall be mere evidences of debt.

Consequently, it is our opinion that Sec. 361.20 requires that only those recognizances given in cases of murder must be filed in the office of the clerk of the circuit court and docketed upon the docket of judgments therein.

JRW

Courts — Juvenile Court — Indians — Minors — Ch. 48, Stats., does not authorize juvenile court to commit to the state public school a dependent Indian child who resides on the reservation and who maintains his tribal relations.

July 15, 1939.

BOARD OF CONTROL.

Attention—A. W. Bayley, Secretary.

You state that a dependent child, age twelve, is an enrolled Indian residing with relatives on restricted land on the Lac du Flambeau Indian Reservation, and you inquire if such child may be brought into juvenile court for the pur-
pose of being committed to the State Public School at Sparta, at the expense of the county.

The relationship between the federal government and tribal Indians residing on a reservation is said to be that of guardian and ward. In general, the federal government has exclusive jurisdiction over the Indian tribes, their territory, their persons, and their property, at least in so far as the activities of Indians on a reservation are concerned.

Congress has enacted certain criminal laws applicable to tribal Indians residing on a reservation. See, 25 U. S. C. A. No. 217, 218; 18 U. S. C. A. No. 548. The several states are entirely without jurisdiction over the actions of an Indian on the reservation even though such action may constitute a violation of state law and regardless of the fact that Congress has not enacted any statute relating to the particular type of offense involved. See State v. Rufus, 205 Wis. 317, and cases cited.

Although it is expressly declared that juvenile court proceedings under Ch. 48, Stats., are not criminal proceedings, they nevertheless are sufficiently in the nature of criminal proceedings to make applicable the foregoing principles of exclusive federal jurisdiction. Moreover, it would be quite incompatible with the position of the federal government as guardian over its Indian wards, if the state were to be permitted to take such a ward off the reservation into a state institution under the direct guardianship and control of a state agency which would be the result under sec. 48.22, subsec. (2), Stats., if the child were committed to the state public school.

Congress has passed an act permitting the Commissioner of Indian Affairs to designate “Indian Reform Schools” and to make rules and regulations for such schools. 25 U. S. C. A. No. 302. Congress has also enacted legislation whereby state authorities, under certain circumstances, may enter upon Indian lands for the purpose of enforcing certain state laws relating to health, sanitation, and education, but it has nowhere authorized the states to infringe upon federal guardianship in the manner contemplated by Ch. 48, Stats., regardless of the beneficent purposes of this chapter.

You are therefore advised that a state juvenile court is without jurisdiction to commit to the state public school a
dependent Indian child who resides on the reservation and who maintains his tribal relations.

WHR

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Criminal Law — Gambling — Lottery — Scheme of "Treasure Chest" (a somewhat modified form of "Bank Night") is a lottery.

July 17, 1939.

JOHN P. MCEVOY,

District Attorney,

Kenosha, Wisconsin.

In your letter you request you state as follows:

"Since the Supreme Court’s decision in the matter of State ex rel. Robert S. Cowie versus La Crosse Theatres Company, a domestic corporation, a local theatre has introduced a new plan of drawing which is called 'Treasure Chest.' I am enclosing a coupon upon which are printed some of the rules.

"Registration is free of charge to everyone and is permitted on Tuesday, Wednesday and Thursday of each week at the theatre or at any one of the numerous business places which have been provided with registration facilities. Registration must be made each week to be eligible for the drawing on that particular week. For the greater convenience of all persons, the registration desk at the theatre has been placed in the outer lobby of the theatre. No one has to pay any monetary consideration for the privilege of either registering or drawing a prize.

"In the operation of the plan, there is to be no discrimination between those registering at the theatre or those registering elsewhere, or between those in the theatre at the time of the drawing and persons not therein; or between those purchasing a ticket at the time of registration and those not so doing. Attendance at the theatre is completely separate and apart from the registration feature.

"The merchants receive no consideration from the theatre for having registration facilities at their stores nor do they pay the theatre anything for such registration facilities."
"The person winning the prize will have the same forwarded to him by the management of the theatre regardless of whether he is present at the time of the drawing or whether he has purchased a ticket.

"It is claimed for the plan that it is an advertising medium for the theatre. You will note that on the reverse side of the registration blank which is retained by the registrant, the theatre has caused to be printed advertising material showing what features are to play for the balance of the week. It is claimed that the plan will be conducted in such a manner as to give all registrants a fair and equal opportunity to win the weekly award irrespective of theatre attendance."

You wish to be advised whether, in our opinion, "Treasure Chest" is a lottery within the ruling of State ex rel. Cowie v. La Crosse Theatres Company, 232 Wis. 153, 286 N. W. 707. You make no comment as to the salient feature of the plan which, in our opinion, would be determinative of the question and that is the proposition of whether the plan in actual operation does increase theatre attendance upon "Treasure Chest" night. If it does, and presumably it does, as "it is of course manifest that the theatre receives from the sales of its tickets enough to make it pay to maintain the practice, else it would not continue it," La Crosse Theatres Case, supra, then we can see no distinguishing feature in law upon the question of lottery or no lottery between "Treasure Chest" and "Bank Night" as operated in the La Crosse Theatre Company case.

You state that "it is claimed for the plan that it is an advertising medium for the theatre." That has been the claim of "Bank Night" since its inception. The claim is by no means new. "Bank Night," "Treasure Chest" and all similar schemes of advertising which involve (1) prize, (2) chance and (3) increased profits as a result thereof (the consideration), appear to be lotteries within the rule of the La Crosse Theatres Company case. The actual mechanics of operation or scheme of the plan would appear to be quite immaterial if the three foregoing elements are present in the plan. If the increased profits were not present in the plan, the scheme as "so-called advertising" would be ineffective and fall of its own weight. The actual scheme of operation or method employed can be as varied as the limits of human
ingenuity but if the three elements above cited are found in
a particular ingenious scheme or device under consideration,
that scheme or device would seem to be a lottery within the
rule of the La Crosse Theatre Company Case.

The plan under consideration upon its face does not ap-
ppear to have quite the magnetic lure and in the same pro-
portions as the scheme under consideration in the case re-
ferred to. But the magnetic lure is nevertheless present else
the plan would be ineffective and would be abandoned. It
may not result in increased profits to the same extent as the
scheme in the case referred to—but it is obviously aimed at
increasing profits or it would not be used, and if it does do
that, it is a lottery. The magnitude of the profits does not
determine the question of a lottery. The question is whether
there are profits as a result of the scheme regardless of mag-
and 764.

 NSB

Public Lands — Taxation — Tax Collection — Refunds
— Where, unknowingly, individuals placed improvements
on unpatented government land and said improvements were
erroneously assessed to the owners of adjoining land and
taxes on said improvements were paid for the years 1927 to
1930 inclusive, voluntarily and without protest, said taxes
may not now be recovered under either 74.64, 74.73, subsec.
(1) or at common law.

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

In your county there are, according to the original gov-
ernment survey of 1863, a number of government lots. For
many years prior to 1935 certain improvements had been
taxed as part of the valuation of government lots 6, 7 and
8. In 1935, upon application by certain individuals, the department of the interior made a survey of the area adjacent to said lots 6, 7 and 8. The 1935 survey disclosed that about one hundred and ninety-three acres of land had previously been omitted from the original government survey. As a result of the 1935 survey, the one hundred and ninety-three acres, previously omitted, were plotted into lots. The 1935 survey also revealed the fact that the improvements which had been assessed against government lots 6, 7 and 8 were actually on the one hundred and ninety-three acres omitted from the original survey. The owners of the said government lots 6, 7 and 8 had been paying taxes on the improvements assessed against said lots but which improvements were, in fact, on the omitted lands belonging to the U. S. Government and on which patents are now being issued. The taxes assessed for the many years prior to 1935 on these improvements amount to a substantial sum, and the owners of the original government lots 6, 7 and 8 are now making a claim for refund of 1927-1930 taxes paid on such improvements, claiming that such taxes were illegal.

It is your opinion that the taxes assessed against these improvements previous to 1935 are illegal. You refer to Sec. 74.73, and inquire whether or not "* * * the county is liable for the recovery of such illegal taxes."

In XXIV Op. Atty. Gen. 401, this office ruled that privately owned improvements on government owned lands could be assessed and taxed. This opinion was based entirely upon construction of the Wisconsin taxation statutes, but the courts of various states have held that improvements upon land of the United States are subject to taxation by the state. This principle was enunciated upon the theory that the enabling act and the tax exemption statutes are solely for the benefit and protection of the federal government, but that this protection is not violated by assessing and taxing to private citizens the improvements which those citizens have made upon public land. The improvements are recognized as a species of property subsisting in the hands of the citizen. The possession and use of these improvements are taxed to the citizen who enjoys, for those improvements, the protection of the state. **Sioux County v. Tucker**, 38 Nebr. 56, 56 N. W. 718; **Crocker v. Donovan**, 1
Okla. 165, 30 P. 374. See also Percival v. Thurston Co., 14 Wash. 586, 45 P. 159.
In the Crocker case the court rejected the claim that the improvements were part of the real estate and thus exempt from taxation.

Approximately two months after the opinion in XXIV Op. Atty. Gen. 401 was rendered, the legislature passed chapter 372, Laws, 1935, which became Sec. 70.174 of the statutes and reads as follows:

"Improvements made by any person on land within this state owned by the United States may be assessed either as real or personal property to the person making the same, if ascertainable, and otherwise to the occupant thereof or the person receiving benefits therefrom."

This statute only stated what had already been held. Under this statute and the opinion in XXIV Op. Atty. Gen. 401, and cases cited above, improvements on public land which are made by individuals, are subject to assessment for taxation. It does not appear that the improvements were separately assessed in a manner which would make their assessment legal, and for purposes of this opinion it is assumed that the taxes were illegal. There is nothing in your statement of facts to indicate that any of the taxes were paid either involuntarily or under protest. Apparently, until the survey of 1935, the facts which gave rise to the claim that the taxes were illegal, were not known.

Sections 74.64 and 74.73, subsec. (1) provide as follows:

74.64 "If any person, within two years after the payment of any state or county tax by him, can satisfactorily show to the county board that the same was improperly assessed or was paid by mistake when it was not justly chargeable, the said board shall order the same to be repaid by the county treasurer; and if the taxes so refunded or any portion thereof be properly chargeable to any town, city or village it shall be so charged."

74.73 (1) "Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city, or village, whether incorporated under general law or special charter, which collected such tax in the manner prescribed by law for filing claims in other cases, and if it shall appear that the tax for
which such claim was filed or any part thereof is unlawful and that all conditions prescribed by law for the recovery of illegal taxes have been complied with, the proper town board, village board, or common council of any city, whether incorporated under general law or special charter, may allow and the proper town, city, or village treasurer shall pay such person the amount of such claim found to be illegal and excessive. If any town, city, or village shall fail or refuse to allow such claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected of him. Every such claim shall be filed; and every action to recover any money so paid shall be brought within one year after such payment and not thereafter."

Sec. 74.64 directs the county board to refund state and county taxes paid by an individual, provided said individual can, within two years after the payment of said tax, satisfactorily show to the county board that the same was improperly assessed or was paid by mistake when it was not justly chargeable. Obviously, this section does not authorize the county to refund any tax paid in 1936 or prior thereto inasmuch as more than two years have expired since such payment.

Sec. 74.73, subsec. (1), authorizes an individual, aggrieved by the levy and collection of an unlawful tax assessed against him, to file a claim therefor against the town, city, or village which collected such tax, provided all conditions prescribed by law for the recovery of illegal taxes have been complied with. Under this statute, however, every such claim must be filed, and every action to recover any money paid for taxes must be brought, within one year after such payment and not thereafter. XXIII Op. Atty. Gen. 572. Moreover, this section does not authorize the filing of any claim against a county or the commencement of an action against a county. Neither does it authorize the filing of a claim or the commencement of an action where the payment is neither involuntary nor under protest.

It was held in State ex rel. Sheboygan v. Sheboygan Co., 194 Wis. 456, at 461, 216 N. W. 144:

"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: Keystone Lbr. Co. v. Pederson, 93 Wis. 466, 67 N. W. 696.

Obviously, therefore, under this section, the county would not be liable for repayment of these taxes or any part of them.

The fact that the owners of government lots 6, 7, and 8 cannot avail themselves of the provisions of either Sec. 74.64 or 74.73. subsec. (1), does not, of itself, mean that they are without remedy. See XI Op. Atty. Gen. 483.

“It has been held that a statutory method of this sort for preserving the right to recover an invalid tax once paid is not exclusive of the common-law right to recover it where it was paid under compulsion. Ward v. Board of Commissioners of Love County, 253 U. S. 17, 40 Sup. Ct. 419; Carpenter v. Shaw, 280 U. S. 363, 50 Sup. Ct. 121; Security Nat. Bank v. Young (C. C. A.), 55 Fed. (2d) 616 * * *,” Interstate Department Stores v. Henry, 224 Wis. 394, 396, 272 N. W. 451.

“Where a statutory remedy is provided for the enforcement of a common-law right without expressly, or by necessary inference, interfering with freedom to resort to the old remedy, the new one is cumulative unless the court, on grounds of public policy, sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted * * *.” Field v. Milwaukee, 161 Wis. 393, 395, 154 N. W. 698.

“Counsel is in error as to its being necessary in order to secure the benefit of sec. 1164 [74.73] for the person aggrieved to wait until there is duress of property before making payment of the tax. Independently of the statute, if one pays a tax involuntarily, as to relieve his property from a levy existing thereon, or to prevent a threatened and impending levy, he may sue to recover back the tax. No statute was ever considered necessary for that purpose. Matheson v. Mazomanie, 20 Wis. 191; Parcher v. Marathon Co., 52 Wis. 388, 9 N. W. 23; Ruggles v. Fond du Lac, 53 Wis. 436, 10 N. W. 565; Western Ranches v. Custer Co. 89 Fed. 577.

It will be observed that an action based on involuntary payment of an illegal tax was held to be maintainable in this state before the passage of the law of 1870, now embodied in the section referred to. The rule in respect to the matter, supported by many authorities, is thus stated in 27 Am. & Eng. Ency. of Law (2d ed.) 762:
‘Where the payment is involuntary, protest is not necessary, in the absence of statute, to entitle the taxpayer to recover taxes paid under compulsion. And where illegal taxes are voluntarily paid a protest will not enable the taxpayer to recover, unless it is provided by statute that a recovery may be had where the payment was made under protest.’

“That rule is fully discussed in Western Ranches v. Custer Co., supra.

“The statute under consideration was doubtless passed for the very purpose of permitting a person aggrieved by illegal taxes assessed against his property to prevent undue prejudicial enforcement thereof, by paying the same under protest, notifying the officer at the time of such payment that he claims the taxes to be illegal and will seek his remedy to recover back the money. This court said in the first case decided after passage of the law in question:

‘Should the officers of the town attempt to . . . assess a tax wholly unauthorized and illegal . . . the plaintiffs will have their action at law to recover back the money if paid under protest or on levy or distress of personal property . . .’ Judd v. Fox Lake, 28 Wis. 583, 587.

“Thus recognizing the statutory right as distinct from the common-law right. That was repeated in Sage v. Fifield, 68 Wis. 546, 32 N. W. 629. * * *” A. H. Stange Co. v. Merrill, 134 Wis. 514, 518-519, 115 N. W. 115. Also see: Welch v. Oconomowoc, 197 Wis. 173, 221 N. W. 750 and Fox Valley Canning Co. v. Hortonville, 207 Wis. 502, 242 N. W. 142.

At the common law a person who voluntarily paid a tax lost the right to bring an action to recover it or to question its legality.

“It is very well settled that by the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived. Custin v. Viroqua, 67 Wis. 314, 30 N. W. 515. The principle is a salutary one. It tends to quiet disputes, diminish litigation, and relieve from embarrassment the transaction of public business. If a person could, without any coercion, fraud, or mistake of fact, pay a tax without objection and afterwards demand his money back and successfully maintain an action to recover it because he forgot at the time of payment that he proposed to contest the tax or because he did not know the legal effect of a voluntary payment, the door would be opened wide for actions to recover back payments made voluntarily, but subsequently repended of. We decline to open that door
State ex rel. Marshall & Illsley Bank v. Leuch, 155 Wis. 499, 500, 144 N. W. 1121. See also: Powell v. St. Croix County, 46 Wis. 210, 50 N. W. 1013; and Parcher v. Marathon County, 52 Wis. 388, 9 N. W. 23.

These latter two cases were decided after the enactment of Sec. 74.73, which, however, the court, as well as counsel, apparently overlooked, (Welch v. Oconomowoc, supra, p. 179); hence, they must be regarded as enunciating rules of the common law. At the common law the important question was not whether the tax was paid under protest, but whether it was paid involuntarily.

"It is fundamental that in order to constitute an involuntary payment there must be some form of coercion. This coercion may be in the form of a threat on the part of the tax collector to levy on the goods of the taxpayer if he does not pay, or it may be in the nature of heavy penalties visited by law upon the taxpayer in case of nonpayment. In this case there was no threat on the part of any one to make levy, or pursue any other remedy for the purpose of making collection of the tax. If we find any coercion here it must be due to the penalties resulting from a failure to pay the tax."

** That penalty is interest at the rate of six per centum per annum. A payment, to avoid such a penalty does not constitute an involuntary payment, even though accompanied by a formal protest." Beck v. State, 196 Wis. 242, 244-245, 247, 219 N. W. 197.

** All tax payments are presumed to be voluntary until the contrary is made to appear, and it is settled that if the payment of a tax is a voluntary payment, it cannot be recovered except under a statute which operates regardless of whether the payment is voluntary or compulsory. Beck v. State, 196 Wis. 242, 219 N. W. 197. See 3 Cooley, Taxation (4th ed.) p. 2561, sec. 2382. Sub. (9) provides a way in which the taxpayer may readily prove the involuntary character of his payment by registering a protest at the time of payment. Where he has not taken advantage of this method, as here, his failure to protest itself might be regarded as an indication of voluntary payment, but in any event a sufficient complaint must allege facts indicating a resistant attitude and circumstances capable of overcoming that attitude."

** Interstate Department Stores v. Henry, supra, page 397.
It was indicated in the case of *State ex rel. Marshall & Ilsley Bank v. Leuch*, supra, that a tax might be recovered if paid under coercion, fraud, or mistake of fact.

In the case of *State ex rel. Pabst Brewing Co. v. Kotecki*, 163 Wis. 101, 157 N. W. 559, it was held that a tax could be refunded where a mistake of fact upon the part of the tax authorities amounted to a fraud which prevented a voluntary payment.

In the case of *Harrison v. City of Milwaukee*, 49 Wis. 247, 5 N. W. 326, it was held that a fraudulent misrepresentation of the city officers, which resulted in payment of a double assessment, prevented the payment of such assessment from being voluntary and hence did not preclude recovery.


In *San Diego Land & Town Co. v. La Presa School District*, 122 Cal. 98, 54 Pac. 528, it was held that if property is assessed in a district where it is not situated, one voluntarily paying the tax cannot recover where he had the means of discovering the mistake. See also: *Louisiana Realty Co. v. McAlester*, 25 Okla. 726, 108 Pac. 391, and *Welton v. Merrick Co.*, 16 Nebr. 83, 20 N. W. 111.

Mistake or ignorance of fact is not ground of recovery where the public records show the facts, since public policy requires that taxpayers be presumed to know facts appearing of record. *Miner v. Clifton Tp.*, 30 S. D. 127, 137 N. Y. 585.

The circumstances in the case at hand are not akin either to those in *Fremont E. & M. V. R. Co. v. Holt County*, (Nebr.) 45 N. W. 163, where it was held that taxes were recoverable when paid to a collector no longer having authority to collect them and hence where no question of voluntary payment of illegal taxes arose; or to those in *Pederson vs. Stanley County*, (S. D.) 149 N. W. 422, where the money was recoverable because the property was not within the jurisdiction of the municipality seeking to impose the tax which was construed as, in effect, no tax at all.
In the present instance the taxes for which recovery is sought were paid under a mistake of fact which the taxpayer could have discovered at any time in the manner by which it was eventually discovered, that is, by reference to the original survey and by application for a new survey.

In addition, it is also to be pointed out that a common law action to recover taxes is *assumpsit* for money had and received. *Grand Rapids v. Blakely*, 40 Mich. 367; *Garland Co. v. Gaines*, 47 Ark. 558, 2 S. W. 460.

Courts of equity have no original jurisdiction in actions to recover taxes. *Bower v. Amer. Lbr. & Export Co.*, 195 Ala. 572, 71 So. 100.

Consequently, if the taxes in question were paid to the county and a common law action commenced against it to recover said taxes, the six year statute of limitations prescribed in Sec. 330.19, subsec. (3), would probably operate as a bar to the maintenance of the action.

From the foregoing discussion, it is our opinion that no recovery of the taxes could be had either through a statutory or a common law action.

JRW

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*Taxation — Reassessments — Supervision of Assessments — Public Officers — Tax Commission* — Tax commission may modify or amend order under sec. 70.75, Stats., to provide for supervision instead of reassessment previously ordered.

July 21, 1939.

**TAX COMMISSION.**

In March of this year certain taxpayers of the city of Superior filed with you a petition requesting reassessment of all the taxable property therein for the year 1938 pursuant to sec. 70.75, Stats. Thereafter, upon due notice a public hearing was held and upon the evidence there introduced the commission, by an order dated April 21, 1939, after find-
ing that the assessment for the year 1938 was not in substantial compliance with law and that the interest of the public would be promoted by a reassessment thereof, ordered a reassessment for the year 1938.

After the supervisor and the other persons appointed had proceeded with the work of reassessment, the reports thereof demonstrated that the consequences of a continuation thereof were so involved and extensive that the interest of the public would be better promoted by supervision of the assessment of the succeeding years rather than a reassessment of the year 1938. The supervisor of said reassessment, the mayor and finance committee of the city council and the taxpayer who initiated the proceedings have all advised the commission that in view of all of the facts as they now appear it is their opinion that the interests of all of the taxpayers of such district would be best promoted by supervision of future assessments instead of a reassessment of the year 1938 and requested that the commission take steps to effectuate such supervision. The work that has already been done although pointed toward reassessment of the year 1938 is identical with work required for future supervision and may be utilized just as effectively therefor without loss or additional expense.

You request an opinion as to whether under the foregoing facts the commission has power at this time to modify or amend its order of April 21, 1939 so as to provide for supervision of future assessments under subsec. (3) of sec. 70.75 Stats. rather than reassessment of the previous year, and adopt the work that has already been done for the purposes of and carry over the cost thereof to such future supervision.

Sec. 70.75, subsec. (1) Stats. provides *inter alia*:

"Whenever it shall satisfactorily appear to the tax commission upon written complaint made by the owner or owners, or their legal representatives, of taxable property in any taxation district, * * * and upon full investigation, that the assessment of property in such taxation district is not in substantial compliance with law and that the interest of the public will be promoted by a reassessment thereof, said commission shall have authority in its discretion to order a reassessment of all or of any part of the taxable property in such district * * *". The filing in the
office of the commission of the application for such reassessment, signed by the required number of taxpayers or their legal representatives, shall impose upon the tax commission the duty, under the powers conferred by subsection (1) of section 73.03, to review the assessment complained of and, if, in its judgment upon full investigation, it shall find such assessment not in substantial compliance with law and that public interest will be promoted by a reassessment, to correct such assessment by a reassessment as herein provided * * *. As a part of its investigation of the assessment complained of, the tax commission shall hold a hearing at some convenient place within or near the taxation district which is sought to be reassessed. At such hearing testimony may be offered as to the inequality or equality of the assessment, whether or not the public interest will be promoted by a reassessment and as to such other matters as may be desired by the commission. * * *".

Sec. 70.75, subsec. (3) Stats., provides in part as follows: "Whenever the commission shall determine after the hearing provided for in subsection (1) of this section, that the assessment complained of was not made in substantial compliance with law but that the interests of all of the taxpayers of such district will be best promoted by special supervision of succeeding assessments to the end that the assessment of such district shall thereafter be lawfully made it may proceed as follows: It may designate some person or persons in the employ of the commission or appoint some other qualified person or persons to assist the local assessor in making the assessment to be made thereafter in such district. * * * The cost of making such special supervision shall be borne by the taxation district and paid in the manner provided for upon a reassessment of such district; * * *".

The court in State ex rel South Range v. Tax Comm., (1918) 168 Wis. 253, 169 N. W. 555, in referring to the above quoted statutes, said:

"It is quite evident from the legislation upon the subject that the cardinal thought of the lawmaking body was to provide an efficient means of securing just assessments, and that whenever it is made to appear to the tax commission, in the manner provided by law, that such an assessment has to be made in any assessment district and that the interests of the public will be promoted by a reassessment, then the commission may, in its discretion order one to be made. * * * The legislation in question seeks a just and equitable distribution of tax burdens and should be liberally construed to effectuate that desirable result."
This language was quoted with approval by the court in *Knaus v. Roloff*, (1922) 178 Wis. 579, 190 N. W. 463.

Sec. 78.03, subsec. (1) Stats. specifically confers upon the tax commission power and authority:

“To have and exercise general supervision over the administration of the assessment and tax laws of the state, over assessors, boards of review, supervisors of assessments, and assessors of incomes, and over county boards in the performance of their duties in making the taxation district assessment, to the end that all assessments of property be made relatively just and equal at full value and that all assessments of income may be legally and accurately made in substantial compliance with law. It shall be the final assessing body of the state and the final administrative authority in the determination of contests concerning assessments. All applications of whatever nature to the tax commission to correct or revise assessments are administrative and not judicial reviews, and when its powers to correct any assessment have been invoked in the various ways set forth in chapters 70 to 76, inclusive, the assessment complained of shall not be final and complete until final action upon it has been taken by the tax commission.”

The provisions of sec. 70.75 Stats. thus must be given that liberal construction which will effectuate and give force to the legislative intent that the best interests of the public be served.

Where the commission is in accord with the views of the supervisor of assessments, the mayor and finance committee of the city, and the initiating taxpayer that the facts disclosed by the reassessment work as it has progressed, together with those presented at the hearing presently show that the magnitude of a reassessment of the year 1938 is so great that a continuation thereof will not promote and serve the best “interests of all the taxpayers of such district” but that the same would be best promoted and served by supervision of the subsequent assessments, a continuation of the reassessment is not justifiable. Certainly, the statutes do not contemplate or require that the commission shall carry on and perform acts which are contrary to the best interests of the public. The underlying purpose of these statutes is to effect “a just and equal distribution of tax burdens” in a manner that serves the best interests of the public.
Whether after it had previously ordered reassessment the commission would have power to order supervision of future assessments over the objection by the initiating taxpayer is not here involved. Under the facts here presented, and particularly the fact that the initiating taxpayers, the representatives of the city and the tax commission all agree that the interest of the public will be best served by supervision of future assessments rather than correction of the past assessment, it is our opinion that under sec. 70.75, Stats., the commission may properly amend or modify its former order so as to provide for supervision of future assessments and adopt the work that has already been done in lieu of doing the same anew for the purposes of supervision, the same identical work being necessary if not so adopted, and in the interests of equity and economy transfer the cost and expense thereof to such future supervision.

HHP

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Municipal Corporations — City Ordinances — Closing-out Sales — Trade Regulations — Merchant selling out seasonable merchandise at close of season, is not required to obtain license for “closing-out” sale, under sec. 66.35, subsec. (1), Stats.

E. E. Hohman,
District Attorney,
Wausau, Wisconsin.

You inquire whether it is necessary for a merchant to obtain a license under sec. 66.35, subsec. (1), Stats., for a closing-out sale of seasonable merchandise where the merchant does not intend to vacate the premises, but wishes only to avoid carrying over seasonable goods to another season. You also state that there is no ordinance in your city concerning such licenses.
Sec. 66.35, subsec. (1), reads in part:
"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. Every person shall obtain a city license before retailing or advertising for retail any merchandise represented to be merchandise of a bankrupt, insolvent, assignee, liquidator, adjuster, administrator, trustee, executor, receiver, wholesaler, jobber, manufacturer, or of any business that is in liquidation, that is closing out, closing or disposing of its stock or a particular part or department thereof, that has lost its lease or has been or is being forced out of business, that is disposing of stock on hand because of damage by fire, water, smoke or other cause, or that for any reason is forced to dispose of stock on hand. * * *"

From the wording of the statute it appears that it was intended to apply where the merchant is closing out all or a part of his stock permanently, and not to the situation where seasonable merchandise is sold at special sale at the end of the season.

This result seems more reasonable in view of the purpose of this type of legislation.

In State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A. L. R. 1336, 1340 (1935), which determined the constitutionality of a similar statute, the court said in its discussion of the basis for such laws:

"* * * that frauds might be practiced upon the unsuspecting and gullible public, who, thinking that they would be able to purchase goods at less cost, might be attracted by the advertisement, which in fact was false, we likewise have no doubt. To prevent the possibility of such a fraud, parties engaged in such business were required to procure a license, and before such license could issue, a showing verified by affidavit was required, * * *"

It is a well known fact that in order to completely dispose of a stock of goods where the merchant is going out of business for one reason or another, substantial discounts will have to be made, and possibly certain items will even have to be sold at a loss. Consequently, the public may expect to purchase real bargains at such a forced sale, if the sale is a bona fide "closing-out sale." The apparent purpose of our statute in licensing these sales is to furnish such supervision
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and control as may be necessary to insure that a sale advertised as a "closing-out sale" is one in fact, and not merely a bait or lure to attract bargain hunters to the sales conducted by more or less itinerant merchants who make a profession of selling their wares at all times under the guise of "closing-out sales" but at no real sacrifice in price.

The situation is entirely different in the case of the permanently located merchant who merely wants to dispose of seasonable goods at some discount rather than to carry them over to the next season. He will presumably continue in business, and the public knows that while he is not really forced to sell at a loss, there will, nevertheless, be reasonable discounts so as to enable the merchant to stock his shelves with new goods for the coming season. Otherwise, he will be forced to store the seasonable goods until the next appropriate season, entailing expense and depreciation through changes in styles and the like, while at the same time having his money invested in the goods which cannot be moved until the following year.

For these reasons it is our opinion that sec. 66.85, subsec. (1), does not apply to a so-called "closing-out sale" of seasonable merchandise where the merchant is continuing in business and will presumably carry the same line of goods when the season for selling such goods comes around again.

WHR

Automobiles — Law of Road — Dealer’s License Plates —
A service vehicle may not be operated on dealer’s license plates within the provisions of sec. 85.02, subsec. (3), Stats., even though it may be offered for sale.

July 29, 1939.

Fred R. Zimmerman,
Secretary of State.

You have submitted the following statement of facts:

"The Dealer’s License Law, Section 85.02 (3), provides that motor vehicle dealers shall register in the regular man-
ner, service vehicles owned by them, excepting only vehicles displayed for retail sale or used for demonstration purposes.

"It has come to the attention of this department that a number of motor vehicle dealers licensed under Section 85.02 to sell automobiles, and in most cases motor trucks, are also engaged in the sale of farm machinery, such as mowers, binders, plows, tractors, cultivators, etc. Some of these dealers have constructed specially designed trailers, and others have constructed specially designed motor trucks for the purpose of hauling and delivering farm machinery sold by them.

"Some of these dealers have been operating these vehicles with their dealer's license plates attached, contending that they are entitled to do so because the trucks or trailers are for sale, and, therefore, legally entitled to be operated on dealer's license plates. One dealer, in particular, makes a business of building these specially designed trucks to haul farm machinery, and uses them for that purpose in delivering machinery sold by him, and often sells these specially designed trucks to other implement dealers, both within and outside the State of Wisconsin."

You then inquire our opinion as to whether or not it is permissible for motor vehicle dealers to use their dealer's license plates on trucks or trailers used for the delivery of farm machinery under the circumstances as set out above.

In our opinion such use is improper. Sec. 85.02, subsec. (3), Stats., provides that all service vehicles owned by dealers, distributors or manufacturers shall be registered in the same manner as are other vehicles but excepts "* * * vehicles displayed for retail sale or used for demonstration purposes by a dealer, distributor or manufacturer."

It is the obvious intent of the subsection to require the ordinary motor vehicle license in the case of all service vehicles used by motor vehicle dealers in the pursuit of their business. A service vehicle, within the meaning of this law, refers to any vehicle which is used for any purpose other than for purposes of demonstration or for display.

It is quite apparent that in the cases to which you refer the vehicles in question are being used for other purposes.

It is a cardinal rule of statutory construction that where possible, statutes are to be given a meaning that will avoid absurd consequences. If any construction other than the one suggested were to be adopted in this case it would be possi-
ble for a dealer, simply by offering a service truck for sale, to escape the requirement of the license fee otherwise imposed upon such vehicles.

We are of the opinion that the legislature intended no such absurd consequence and that if the question of construction were doubtful, a construction leading to such a consequence should be avoided if possible. Here it can be avoided simply by giving the words employed their usual and accepted meaning.

JWR
Banks and Banking — Reconstruction Finance Corporation — State Banks — Corporations — The provisions of section 221.55 do not apply to the Reconstruction Finance Corporation in connection with the purchase by that corporation of preferred stock and debentures of a state bank.

August 1, 1939.

FRANK H. BIXBY, Commissioner, Banking Commission.

You have requested our opinion relative to the application of section 221.56 of the Wisconsin statutes to the Reconstruction Finance Corporation in connection with the purchase of preferred stock and debentures of a Wisconsin state bank by that corporation. Section 221.56 contains four subsections which may be summarized as follows:

Subsection (1) provides that any domestic corporation or trust owning a majority of the stock in a state bank shall be deemed to be engaged in the business of banking and subject to the supervision of the state banking department. The subsection contains further provisions relating to the filing of reports, the withholding of dividends on bank stock from such corporations and certain other powers of the banking commission over such corporations.

Subsection (2) provides that subsection (1) shall apply to any foreign corporation, association, etc. authorized to do business in Wisconsin.

Subsection (3) requires that every foreign corporation owning stock in a state bank or trust company shall be liable to the creditors thereof for assessments. Provision is made for the deposit of securities with the state treasurer by such foreign corporation in an amount equal to fifty per cent of the par value of the bank stock held, and it contains certain other provisions relating to the enforcement of assessments.

Subsection (4) relates to matters with which we are not presently concerned.

With respect to subsection (1) it will be noted that in accordance with the provisions of subsection (2), this subsection applies only to a foreign corporation, association, in-
vestment trust or other form of trust which shall be authorized to do business in Wisconsin. The Reconstruction Finance Corporation is, of course, not required to seek any authority from the state of Wisconsin in order that it might carry out its functions here. It is not "authorized to do business" in Wisconsin under the provisions of chapter 226, Wisconsin statutes. By section 226.01 of that chapter, it is provided that said chapter does not apply to corporations not organized or conducted for profit and these terms would appear to exclude the Reconstruction Finance Corporation from the operation of the statutes. These and other considerations are discussed in VII Opinions of Attorney General 498 and further amplification does not appear to be necessary. See also XXVIII Op. Atty. Gen. 3.

With respect to subsection (3), the provisions relating to assessability will not apply since the purchase in the present case by the Reconstruction Finance Corporation is a purchase of preferred stock and debentures. By section 221.046, subsec (3) it is provided that debentures shall in no case be subject to any assessment and by section 221.047, subsec. (5) it is provided that preferred stock shall in no case be subject to any assessment. With respect to the provision of subsection (3) of 221.56 requiring the deposit of securities in the amount of fifty per cent of the par value of stock in a state bank owned by a foreign corporation, it is obvious that this provision does not apply to a purchase of preferred stock. The provisions of subsection (3) were enacted prior to the enactment of section 221.047 wherein the issuance of preferred stock by state banks was authorized. Such requirement would appear to be for the sole purpose of securing payment of assessments on stock and where the stock is by statute not assessable, such provision would not apply.

RHL
Counts — County Clerk — Public Lands — Public Officers — Mortgages, Deeds, etc. — Warranty Deed — A county clerk has no implied authorization to convey county lands by warranty deed.

Aug. 2, 1939.

E. E. HOHMAN,
District Attorney,
Wausau, Wisconsin.

You submit the following statement of facts and question:

"The County acquired title to lands for highway purposes. The land in question was transferred to the County. Subsequently the County Board, by formal resolution, authorized the transfer of a portion of said lands which were not necessary for right-of-ways to be sold for One Dollar. This resolution did not authorize transfer by warranty deed. In accordance with said resolution the County Clerk transferred the land by Warranty Deed. This warranty deed did not refer to the resolution of the County Board authorizing the transfer of the lands.

"Question. May a County transfer title to lands by warranty deed, thereby making the County liable for antecedent defects in title?"

In our opinion the county clerk did not have authority to convey the lands involved by warranty deed.

It has been held, and so far as we know there is no holding to the contrary, that in the absence of a statute so authorizing, a county cannot convey lands by warranty deed. Harrison v. Palo Alto County, 104 Iowa 383, 73 N. W. 872; see also, 15 Corpus Juris 539.

As to whether or not the Marathon county board could have authorized a conveyance by warranty deed pursuant to the provisions of sec. 59.01 and sec. 59.07, subsec. (2), Stats., we are not here called upon to decide. Whatever may be the power of the county board in the premises, it is apparent that the power of the clerk is restricted to executing the direction of the county board. Cf. 59.67, subsec. (2), Stats., and cases cited thereunder in the Wisconsin Annotations.
The Iowa case cited above (Harrison v. Palo Alto County, 104 Iowa 383, 73 N. W. 872) turned upon the ground that the power of the county board to convey lands by warranty deed could not be implied since it was not necessary in order to effect a transfer. By the same process of reasoning such power cannot be implied in the county clerk under similar circumstances.

It is, of course, understood that a county is not bound by the unauthorized acts of its officials. XXV Op. Atty. Gen. 689.

JWR


August 2, 1939.

Raymond P. Dohr,
District Attorney,
Appleton, Wisconsin.

You have requested an opinion on the following question: Is the amount that a candidate for judge of the circuit court may expend in his campaign for election governed by the limitation of par. (d) of subsec. (1) of sec. 12.20, Stats. 1937 or by the provisions of par. (h) of subsec. (1) of sec. 12.20, Stats. 1937?

By the provisions of sec. 12.20, Stats. 1937, a candidate shall not expend in his campaign for election **in excess of one-half of the amounts herein specified, namely**:

"(a) For United States senator, five thousand dollars.
"(b) For representative in congress, seventeen hundred and fifty dollars."
"(c) For governor, four thousand dollars. For judge of the supreme court or state superintendent of schools, three thousand dollars.

"(d) For other state officers, fifteen hundred dollars.

"(e) For state senator, one thousand dollars.

"(f) For member of assembly, one hundred fifty dollars.

"(g) For presidential elector at large, five hundred dollars, and for presidential elector for any congressional district, one hundred dollars.

"(h) For any county, city, village or town officer, for any judge or for any officer not hereinbefore mentioned, who, if nominated and elected, would receive a salary, a sum not exceeding one-third of the salary to which such person would, if elected, be entitled during the first year of his incumbency of such office. * * *

If the office of circuit judge is included within the words "state officer" as used in subsec. (d) it then quite clearly is not included within the words "any judge" as used in subsec. (h), and the expenditure that could lawfully be made by a candidate for circuit judge in his campaign for election would be limited to seven hundred fifty dollars. The question then resolves itself into whether the office of circuit judge is included within the term "state officers" as used in par. (d) of subsec. (1) of sec. 12.20, Stats.

The term "state officer" is one of varying import. It has been frequently considered by the courts, and various meanings have been accorded to it. Although many tests have been devised by the courts to determine whether or not a particular officer was a "state officer", no one test of itself has been held to be decisive. The meaning accorded the term "state officer" has varied according to the context and the nature and purpose of the constitutional or statutory provision in which it is found.

It is true that in the case of Milwaukee County v. Halsey, (1912) 149 Wis. 82, 136 N. W. 139, a circuit judge is spoken of as a "state officer". However, the statute involved in the said case, and construed by the court, related to the creation, tenure and salary of circuit court judges, which the court held to relate to an office, but not to a county office. The language of the court in the said case would be strongly persuasive in construing the statute here in question, in the absence of something indicating that a different construc-
tion might be given to the words "state officers" as used therein. The meaning of "state officer" in the statute with which we are concerned, however, must be determined by a construction consistent with the nature and purpose of the statute.

In *State ex rel Milwaukee Medical College v. Chittendon*, (1906) 127 Wis. 468, 107 N. W. 500, the question arose as to whether members of the state board of dental examiners were state officers within the meaning of a statute which prescribed the place of trial of all actions against "state officers". In construing the meaning of "state officers" as used therein, the court said that the term bears two possible meanings. In its more comprehensive sense the term includes every person whose duties appertain to the state at large, but in the more restrictive sense it embraces only heads of executive departments of the state elected by the people at large, such as governor, lieutenant governor, state treasurer, secretary of state, attorney-general and the like. The latter is the ordinary and usual meaning attributed to the term "state officers". The court construed the term, as used in the statute there in question, to include only the heads of departments who have their official office in the capitol of the state and who are expected to keep their office there open during business hours.

An examination of the statute reveals that the term "state officers" has not been used consistently in either its restrictive or comprehensive sense.

The statutes relating to nominations are not entirely consistent but seem to indicate that the term "state officers" is used in its restrictive sense. Sec. 5.05, subsec. (5), par. (a) provides that all signers of nomination papers shall reside in the same ward, town, or village, except as to the nomination papers of "state officers, representative in congress and all judicial officers elected by the voters of one or more counties". It then continues and says that as to "state officers, congressmen and all judicial officers elected by the voters of one or more counties" the signers of the nomination papers shall reside in the same county. The term "state officers" is quite obviously there used in its restrictive sense.

Sec. 5.20, subsec. (1), Stats. 1937, relating to party platform conventions and state central committees, in using the
words "state offices" quite clearly does not include therein candidates for the office of circuit judge, for circuit judges are elected on a non-partisan basis and not as members of political parties. Likewise in sec. 5.26, wherein it is specified what number of signatures must be obtained upon nomination papers by candidates for offices, the number required by judicial candidates is specified separately from and is a different number than that required by candidates for the office of governor, lieutenant governor, secretary of state, and attorney-general. Yet by the provisions of subsec. (6) of sec. 5.26 the nomination papers of a candidate for circuit judge would be filed with the secretary of state the same as the nomination papers of other state officers. Further, under sec. 8.05 it would appear that the election of a circuit judge would be governed by the same provisions as relate to general elections, and thus, a certificate of election would be issued to such person under sec. 6.72 by the secretary of state.

In respect to the election of circuit judges, Art. VII, sec. 7, Wisconsin constitution, provides that the circuit judges shall be elected by the qualified electors of the circuit. In other words, a circuit judge is not elected by the voters at large, as are the governor, lieutenant governor, secretary of state, state treasurer, and attorney-general. Further, the general provisions relating to the election of judicial candidates are contained in Ch. 8, while the provisions relating to state officers, other than the superintendent of public instruction, are contained in Ch. 6. Strangely, provisions relating to the election of the superintendent of schools is provided for in Ch. 6, along with judicial officers.

In respect to the oath to be taken, subscribed to and filed, sec. 256.02 provides the form and contents thereof for circuit judges as well as the judges of all other courts of record. However, the oath of office to be filed by those more commonly thought of as "state officers", to wit: governor, lieutenant governor, secretary of state, state treasurer, attorney-general, and state superintendent of schools, is prescribed by sec. 14.08. In this connection it is significant to note that Ch. 14 of the statutes, which is entitled and denominated "state officers" contains no reference to or mention of the office of circuit judge. In other words, Ch. 14
deals with the election, qualification, duties and various provisions concerning the "state officers" embraced within the restrictive use of the term.

While, by the provisions of Art. VII, secs. 2 and 8, of the Wisconsin constitution, the jurisdiction of the circuit court extends to all civil and criminal matters within this state, and under sec. 252.08, Stats., circuit courts have general jurisdiction and may issue processes throughout the state, and under sec. 252.13, Stats., a circuit judge may hold court and perform any judicial act in any circuit in the state when called upon to do so, he can preside only over court in the circuit in which he is elected, unless requested to hold court in other circuits. The "state officers", commonly thought to include the governor, lieutenant governor, secretary of state, treasurer, and attorney general, however, can, and it is their duty, to perform functions throughout the state generally.

There are numerous provisions relating to the salary of the circuit judge. Art. VII, sec. 7, of the Wisconsin constitution, provides that the circuit judge shall receive such compensation as the legislature shall prescribe. Sec. 20.66 fixes the salary of the circuit judges and provides that it shall be paid from the general fund of the state. Sec. 252.071 provides for the payment by certain counties, out of county funds, of a salary to the circuit judge in addition to the salary payable out of the state general fund as provided for by sec. 20.66.

The method by which "public officers" resign is provided for in sec. 17.01. Although the subsections thereof include practically all officers connected with government functions, a separate subdivision thereof is provided for judges of the various courts, indicating that the judges of the various courts are not in the same category as other state officers provided for in other separate subdivisions. Furthermore, sec. 17.06 provides that "any civil officer of the state" may be impeached by the assembly as provided in Art. VIII, sec. 1 of the constitution of Wisconsin, whereas supreme court justices and circuit court judges may be removed, as provided for in Art. VII, sec. 13, of the constitution of Wisconsin, only by a two-thirds vote of the members of each house of the legislature. Here again the statutes and the constitution differentiate between a circuit judge and other officers of the state.
In respect to the filling of vacancies, sec. 17.19 provides that vacancies in elective state offices shall be filled as provided therein. Subsec. (2) thereof specifies the method of filling the vacancies in the office of justice of the supreme court or judge of the circuit court, whereas subsec. (4) thereof relates to other elective state officers, including the secretary of state, treasurer, attorney-general or state superintendent. Here again judges of the circuit court are regarded as belonging to a different class than "state officers". Inconsistently, however, sec. 17.20 uses the term "state officer" in its comprehensive sense as applied to vacancies in offices in the state government filled by appointment, which offices obviously include others than the constitutional state officers mentioned in sec. 14.01 and judicial officers, which would include circuit judges.

From this comprehensive survey of the statutes it is our conclusion that the term "state officers" as used in the statutes does not include circuit judges unless the context of the statute is such as to show an intention to include them within the provisions thereof.

It is of no little significance that there is not one instance in which "state officer" has been used in the statutes so as to expressly include the office of circuit judge. Wherever the words "state officers" have been used in their comprehensive sense the context of the statute in which the same had been used is such that it would not and could not apply to circuit judge.

The ordinary and usual understanding of "state officer" includes those who serve the state at large and also whose functions and duties relate to state administration and business exclusively. Although a circuit judge's functions are performed in behalf of the state, yet his functions are not true state functions in the sense that he is performing functions relating to the administration of purely state matters. Much, if not most, of a circuit judge's time is devoted to litigating the rights of private citizens.

Further, it is a fundamental rule of statutory construction that the legislature must be presumed not to have used words or phrases in a statute in vain. In par. (h) of subsec. (1) of sec. 12.20, the words "for any judge" are meaningless and unnecessary unless construed to include circuit
judges. Supreme Court judges are dealt with in subsec. (c) thereof. "For any county, city, village or town officer", in subsec. (h) includes and embraces the county and other municipal judges. Sec. 17.09, Stats., includes under the heading of "Elective County Officers" the county judge. Thus the words "for any judge" in par. (h) of subsec. (1) of sec. 12.20 were unnecessary and surplusage, unless taken to mean and include circuit judges. Since, as aforesaid, the legislature must be presumed not to have used words in a statute in vain, the words "for any judge" in par. (h) must be taken to include circuit judges.

It is our opinion that the words "state officers", as used in par. (c) of subsec. (1) of sec. 12.20 were used in the restrictive sense and do not include the office of circuit judge. Thus, the amount of money that a candidate for circuit judge may expend in his campaign for election is governed by par. (h) of subsec. (1) of sec. 12.20.

HHP

Detectives — Words and Phrases — Private Detective — Employes of a corporation engaged in making investigations and reports with respect to efficiency and honesty of employes of a certain business, are private detectives within the meaning of sec. 175.05, et. seq., Stats., and required to be licensed and bonded pursuant to the terms thereof.

August 2, 1939.

CLARENCE G. TRAEGER,
District Attorney,
Horicon, Wisconsin.

You state that several business establishments in your county retained the X Corporation, whose principal office is in Chicago, for the purpose of conducting investigations relative to the efficiency and honesty of their employes. The investigators employed by the X corporation called at these
stores and places of business at least once a day for a certain period, each time making a purchase of merchandise, sometimes paying the exact amount of the purchase and on other occasions presenting currency which required that the clerk make change. After each such purchase the investigator made out a report as to the date of the purchase, the amount, the items purchased, and details concerning the clerk's efficiency, politeness and ability.

Thereafter the investigators checked the cash register tape of each store in order to determine whether the particular clerk made a proper record of the various sales. In the event of any indication of dishonesty, the investigators made arrangements through the employer to question the clerk involved in an endeavor to obtain an admission of guilt. If such guilt was established and a restitution was made to the employer, the X Corporation shared a percentage of the recovery.

You ask whether the investigators employed by the X Corporation may be properly classified as "private detectives" for purposes of the license and bond requirements of sec. 175.07, Stats.

That section provides in part:

"(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) The term 'private detective' shall include among others those persons known as inside shop operatives, that is, persons who do not undertake direct employment whether in shops or otherwise with the owner of a place of employment, but who are engaged by some independent agency to operate or work in such place of employment, and to render reports of activities in such place of employment, to such independent agency, or to the owners of the place of employment under the direction of such independent agency.

"(3) The provisions of this section shall apply to copartnerships and corporations, and to the agents, servants and employes of any copartnership or corporation or person.

* * *"
The inherent nature of detective work is such as to require a high degree of competence and ability on the part of those so engaged in order to avoid violation of the private and personal affairs of those under investigation. In *State ex rel. Russel, Inc. v. Fire and Police Commr's.*, 182 Wis. 249, 253, 196 N. W. 242, the court said:

"The powers exercised by a private detective are important and often delicate, and in their use require exceptional tact, honesty and good judgment."

It is apparent that the legislative purpose in enacting the provisions of sec. 175.07 was to insure the integrity and competency of those who engage in the business of ferreting out and reporting facts relating to the personal or business character of others.

In *X Op. Atty. Gen. 899*, this department ruled:

"A detective is ordinarily understood to mean one employed to detect rather than prevent; it is his business to secure evidence of suspected conduct or crime."

And in *Smith v. S. H. Kress & Co.*, 210 Ala. 436, 98 So. 378, 380, the court quoted the following definitions with approval:

"'A detective is one whose business it is to detect criminals or discover matters of secret or pernicious import, for the protection of the public.' 'A private detective is one engaged by individuals for private protection.' 18 C. J. 979. A private detective has again been defined to be 'a person unofficially engaged in obtaining secret information for the use and benefit of those who choose to employ him and to pay his compensation.' *Frost v. Am. Surety Co.* 217 Mass. 294, 104 N. E. 750, Ann. Cas. 1917A 583."

Hence it appears that no fixed definition of the term "private detective" is universally accepted and that each case must necessarily be governed by its own particular facts. See XVI Op. Atty. Gen. 788.

As we read the definition of the term "private detective" as contained in sec. 175.07, subsec. (2) the language in which that section is framed would seem to apply directly to
the situation under consideration. In the light of the object and purpose of sec. 175.07 it appears that persons engaging in such activities as you describe must come directly within the terms of the statutory definition. This view is in accord with the decision in *State v. Helmann*, 163 Wis. 639, 643, 158 N. W. 286, wherein the court held that the rule that a penal statute should be strictly construed does not mean that it should be so construed for the purpose of minimizing its effect, but that it should be so construed as to effect the legislative intent.

You are therefore advised that when the investigators employed by the X Corporation engage in the activities which you describe, they may be properly classified as "private detectives," as that term is defined in sec. 175.07 and that, accordingly, they must comply with the license and bond requirements of that section.

While we have arrived at our conclusion independent of the administrative interpretation placed upon the statutes in question by the secretary of state's office (the state agency charged with administering the law), we have checked our conclusion with that office and find that the conclusion is in accord with the uniform interpretation placed upon the statutes by that department since the law was enacted.

NSB

NH
Automobiles — Law of Road — Revocation of driver's license — Sec. 85.08, subsec. (19) refers to the return of proof of financial responsibility furnished pursuant to both subsecs. (10) and (11) of sec. 85.08. Such proof so furnished must be maintained for a period of three years from the date of filing of such proof except that secretary of state shall direct the return of money or collateral before the expiration of such three-year-period in specific cases enumerated in subsec. (19) of sec. 85.08.

August 3, 1939.

FRED R. ZIMMERMAN, Secretary of State.

After a person has been convicted for any of the offenses enumerated in Sec. 85.08, subsec. (10), paragraphs (a) to (j) inclusive, and his driver's license has been suspended, it is your practice to require him to file proof of financial responsibility in the amounts and in the manner set forth by statute in order to gain his reinstatement; and you further require him to maintain such proof on file for a period of three consecutive years from the date it is first filed. It has been contended that your practice in this respect is in error, and you request our opinion upon this question.

It appears that when a person has had a judgment taken against him and his driver's license and registration certificates have been suspended pursuant to the provisions of Sec. 85.08, subsec. (11), within a period of three years after the entry of such judgment you have refused to issue a new license to him unless such judgment is paid and he furnishes proof of financial responsibility. This practice was sanctioned in XX Op. Atty. Gen. 915. If such person pays up the judgment in less than three years from the date of entry thereof and does not drive an automobile until the expiration of such three-year period, upon application you have then issued a new license to him without requiring him to furnish proof of financial responsibility. This practice was at least impliedly approved in an opinion rendered to you March 2, 1939.* Also see Sec. 85.08, subsec. (1), par. (f). Hence, it will be seen that a distinction is made in the matter of furnishing proof of financial responsibility between the case of the person convicted of an offense enum-

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erated under Sec. 85.08, subsec. (10), pars. (a) to (j) inclusive, and the case of a person against whom a civil judgment has been entered.

In our opinion the following statutes are deemed material:

85.08 (10)—“The motor vehicle driver's license and all of the registration certificates, including those issued in accordance with sections 85.01 and 85.02, of any person who shall by a final order or judgment have been convicted of or shall have pleaded guilty to or shall have forfeited any bond or collateral deposited to secure the appearance for trial of the defendant (where such forfeiture shall not have been vacated) for any of the following offenses, or offenses coming within any of the following classes, * * *.

* * *

“(j) * * *; shall be suspended forthwith without notice or hearing by the secretary of state, and 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. * * *”

85.08 (19)—“The secretary of state shall cancel such bond or return such proof of insurance, or the said treasurer shall, with the consent of the secretary of state, return such money or collateral to the person furnishing the same at any time after three years shall have elapsed since the filing of such bond or proof or the making of such deposit provided that during the three years' period immediately preceding, such person shall not have been convicted of, pleaded guilty to or forfeited bond or collateral given for any of the offenses specified in subsection (10) of this section, and provided further that no suit or judgment against him for damages as aforesaid arising from the ownership, maintenance, use or operation hereafter of a motor vehicle shall then be pending or outstanding and unstayed or unsatisfied, as aforesaid; * * *”
Under Sec. 85.08, subsec. (10), paragraph (j), the motor vehicle driver's license must be suspended and "* * * shall not at any time thereafter be renewed * * *" until proof of financial responsibility is furnished. Under Sec. 85.08, subsec. (19) with certain exceptions which are not presently material, the secretary of state does not have authority to return proof of insurance until "* * * three years shall have elapsed since the filing of such bond or proof * * *". This section applies to the proof of financial responsibility furnished pursuant to both sections 85.08, subsec. (10) and 85.08, subsec. (11) because, unless so construed, there is no provision for the return of the proof of financial responsibility which may be in the form of cash or collateral (85.08, subsec. (14), par. (d).)

Thus, if an individual has had a civil judgment taken against him, and within three years after the entry of such judgment pays the same and furnishes proof of financial responsibility, such proof of financial responsibility must be maintained for a period of three years from the date of filing thereof. If such individual pays the judgment within the three-year period and does not drive an automobile until the expiration of three years from the date of the entry of such judgment, he does not need to furnish any proof of financial responsibility whatsoever, and obviously, does not need to maintain such proof for a three-year period.

A person whose driver's license has been suspended because of his conviction for an offense enumerated under Section 85.08, subsec. (10), paragraphs (a) to (j), must file proof of financial responsibility before his license can be renewed regardless of how many years may have expired from the date of his conviction, and must maintain such proof of financial responsibility for a period of three years from the date of filing thereof.

The above statements are intended to enunciate the general rules with reference to return of proof of responsibility. Under Sec. 85.08, subsec. (19), the secretary of state shall cancel the bond or return the proof of insurance, and the state treasurer shall, with the consent of the secretary of state, return money or collateral furnished, at any time after three years shall have elapsed since the filing of such bond or proof or the making of such deposit, only if
"* * * during the three years' period immediately preced-\niding * * *" the person who furnished the same shall \nnot have been convicted of, pleaded guilty to, or forfeited \nbond or collateral given for any of the offenses specified in \nsubsec. (10) of Sec. 85.08, and no suit or judgment against \nhim for damages arising from the ownership, maintenance, \nuse, or operation of a motor vehicle shall then be pending or \noutstanding and unstayed or unsatisfied. Also, Sec. 85.08, \nsubsec. (19), specifies certain cases in which the secretary \nof state shall direct the return of money or collateral within \na period less than three years from the date such money or \ncollateral was filed.

The proof of financial responsibility which is filed is usu-\nally in the form of an insurance policy. If this insurance \npolicy is cancelled within three years after the same is filed \nand no other satisfactory proof of financial responsibility \nsubstituted therefor, the suspension of the driver's license \nagain becomes effective (XXII Op. Atty. Gen. 847 at 849) \nand the license must be returned to the secretary of state \n(Sec. 85.08, subsec. (18). Sec. 85.08, subsec. (19), does not \npermit tacking of non-consecutive periods during which \nproof of financial responsibility is maintained to satisfy the \nrequirement that such proof be maintained for a period of \nthree years from the date of the filing thereof. Hence it is \nour opinion that where an individual elects to file proof of \nfinancial responsibility, whether within the three year pe-\nriod after the entry of a civil judgment against him or at \nat any time after his conviction for an offense enumerated in \nsec. 85.08, subsec. (10), paragraphs (a) to (j) inclusive, \nsuch proof of financial responsibility must be kept on file for \nthree consecutive years.

Before closing this opinion it is deemed advisable to again \nrefer to the opinion in XXII Op. Atty. Gen. 847 which, at \npage 848, reads in part as follows:

"You desire to be informed as to when the period for \nmaintaining proof of financial responsibility commences, \nparticularly whether it is on the date of conviction, or the \ndate upon which you receive proof of the same. It is our \nopinion that the period for maintaining proof of financial \nresponsibility starts as soon as judgment is entered. \n* * * *"
From the fact that the word "conviction" appears in the above quotation it might be inferred therefrom that it was intended to hold that the period for maintaining proof of financial responsibility commences from the date of a conviction in a criminal action. However, as the caption would indicate, it was the intention of that opinion to hold that, under sec. 85.08, subsec. (11), the period for maintaining proof of financial responsibility commences from the date of the entry of a judgment for damages.

JRW

Agriculture — County agricultural societies — Words and Phrases — Public Agency — Proposed bill to create sec. 94.035, Stats., declaring county agricultural societies to be public agencies with power to sponsor WPA projects, accept and receive grants or loans and enter into contracts, is within legislative power.

August 3, 1939.

RALPH E. AMMON, Director,
Department of Agriculture.

You have submitted to us a bill to create sec. 94.035, Stats., relating to the powers of county agricultural societies consisting of two sections, as follows:

"Section 1. There is created a new section of the statutes to be numbered and to read: 94.035. Federal Projects. County agricultural societies organized or existing under section 94.03 are hereby declared to be public agencies with power to accept and receive grants or loans from federal agencies and to enter into contracts or agreements with such agencies in accordance with federal and state statutes for the use of said grants or loans, the ownership and title of property, and improvements acquired, in whole or in part, by the use of said grants or loans, and the maintenance and operation thereof. Except in pursuance of a contract or agreement theretofore entered into, the powers conferred by this section shall not be exercised after December 31, 1941.

"Section 2. This act shall take effect upon passage and publication."
At the request of the Washington office of WPA, you request our opinion as to whether such proposed bill, together with existing statutes, secs. 66.33 and 94.03, will make county agricultural societies public agencies with power to sponsor and operate WPA projects.

The question seems to assume that the term “public agency” has a definite meaning in law and that we can answer the question as to whether these societies come within that meaning. The term has no definite meaning or significance. It, like the term “public instrumentalities,” is variously used in both statutes and decisions with reference to agencies possessing many shades of governmental power (sovereign or otherwise) and likewise with reference to private corporations possessing no governmental powers but which are appropriate instrumentalities or means that the government may select for carrying out a governmental function or which are appropriate instrumentalities or means through which the government may expend public monies for a public purpose. McCulloch v. Maryland, 4 Wheat. 316 (1819); Osborne v. Bank of United States, 9 Wheat. 738 (1819); Brush v. Comm’r. of Internal Revenue, 300 U. S. 352, 57 Sup. Ct. 495 (1937); Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342 (1910); Helvering v. Powers, 293 U. S. 214, 55 Sup. Ct. 171 (1934); Ohio v. Helvering, 292 U. S. 360, 54 Sup. Ct. 725 (1934); Fidelity Deposit Co. v. Pennsylvania, 240 U. S. 319, 36 Sup. Ct. 298 (1916); Baltimore Ship Bldg. Co. v. Baltimore, 195 U. S. 375, 25 Sup. Ct. 50 (1904); Gromer v. Standard Dredging Co., 224 U. S. 362, 32 Sup. Ct. 499 (1912); Central Pacific R. R. v. California, 162 U. S. 91, 16 Sup. Ct. 766 (1896); South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110 (1905); Thomson v. Union Pacific R. R. Co., 9 Wall. 579 (1870); Union Pacific Ry. Co. v. Peniston, 18 Wall. 5 (1873); Shaw v. Oil Corporation, 276 U. S. 575, 48 Sup. Ct. 333 (1928); Choctaw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531, 41 Sup. Ct. 582 (1921); Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422 (1899); State ex rel. W. D. A. v. Dammann, 228 Wis. 147 (1938).

The question in each case must be: In what sense has the legislature used the term in a particular statute in question,
and is the particular authority conferred within legislative competence or authority? We shall direct our attention to those questions.

Obviously the term "public agencies" as used in the bill in question is not intended to confer upon county agricultural societies any powers of government, sovereign or otherwise. Under the statutes, these corporations are organized as private corporations. Their purpose is public (largely that of promoting agriculture); they are not organized for profit. Most of them exist largely through the efforts of public spirited citizens who are oftentimes willing to donate not only time but cash contributions to the organization in order to keep it alive. The fairs which these organizations promote are institutional and have always been looked upon as a rather vital part of the life of the community. By the proposed bill, the legislature has simply declared in so many words that county agricultural societies are sufficiently public in purpose and scope as to be an appropriate agency for the expenditure of appropriated federal monies for public purposes.

Since the inception of the state, the legislature has treated county agricultural societies as appropriate agencies for the expenditure of appropriated state monies for public purposes (advancement of agriculture). See appendix to the brief filed on behalf of the Wisconsin Agricultural Authority in *State ex rel. W. D. A. v. Dammann*, supra. Upon authority of this last cited case, as well as the continuous and uninterrupted legislative precedent since the inception of statehood, there can be no question under state law but that county agricultural societies are appropriate means or agencies through which the state may expend public monies in the advancement of a statewide public purpose. If such societies are appropriate means or agencies for expenditure of state funds for public purposes, there would seem to be no reason why the legislature is not perfectly competent to designate such societies as an appropriate means or instrumentality for the expenditure of appropriated federal monies, in so far as it is within state power to do so, and there would further appear to be no legitimate reason why the agricultural societies so designated by the bill will not possess, so far as their power under state law is concerned, all of the powers conferred by the act.
It is our opinion that the proposed bill makes these societies a public agency of the nature described above, confers upon them all the power which the act purports to confer and that these societies will be eligible and possess ample power under state law if they are otherwise eligible under federal law and the rules and regulations of WPA.

NSB

Taxation — Tax Collection — Payment to Local Treasurer — Extension of Taxes — Social Security Law — Old-Age Assistance — Under sec. 74.28, Stats., county may offset the amount of special tax owed county by town under sec. 49.37 against any amount of taxes that county owes town, regardless of year and regardless of whether the taxes were collected by county because of affidavits extending time of payment pursuant to sec. 74.037, Stats.

August 9, 1939.

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

In your letter you state:

“At the time the Town of Ainsworth made settlement with Langlade County on its 1936 and 1937 tax levy, it did not remit to the county in cash any portion of the Old Age Assistance charged back to the town, as provided for in Chapter 49.37 of the Wisconsin Statutes. On the basis of the taxes collected by the town, it should have remitted $78.92 and $192.26 in cash of the amount charged back for Old Age Assistance in 1936 and 1937 respectively.

“On the basis of the tax collected by the Town of Ainsworth on the 1938 levy, it should likewise have remitted to the County in cash an amount of $293.39 on the $602.20 of Old Age Assistance charged back to the Town in the 1938 levy.

“At the last county board meeting in November of 1938, the county board passed a resolution authorizing and direct-
In the present case the County Treasurer immediately began to withhold all tax collections due the Town of Ainsworth on their excess rolls for the years 1932, 1933, and 1934 taxes, and is also now holding the 1938 tax collected on affidavits by the County, due the Town, in the amount of $1488.32, of which the town owes the County on Old Age Assistance the sum of $564.57, which is the total of the proportionate share of Old Age Assistance charged back for the years of 1936, 1937, and 1938, now due and owing the county.

"The Town of Ainsworth is demanding the full payment of $1488.32; the County of Langlade is demanding the sum of $564.57.

"I would like to know if the County Treasurer has the right to withhold the excess tax collections due the town for the years 1932, 1933, and 1934 for the payment of the proportionate share due the County of Old Age Assistance charges, back on the 1936, 1937 and 1938 levy, and also, can the County Treasurer withhold the 1938 tax collected on affidavit?"

Sec. 49.37, subsec. (3), Stats. 1937, provides as follows:

"The county clerk shall charge the amount so determined to such city, town or village and shall certify the same to the city, town or village clerk. Each city, town or village shall annually levy a tax sufficient to meet such charges, and shall pay over to the county the amount so certified as hereinafter provided. Such tax shall be deemed a county special tax for tax settlement purposes but the town, city or village shall pay over to the county on or before the twenty-second day of March in each year the percentage of such tax actually collected, which percentage shall be determined by applying the ratio of collection of the entire tax roll of such town, city or village excepting special assessments and taxes levied pursuant to section 59.96 of the statutes to the amount of such county special tax so certified and levied. If any town, city or village shall fail to raise and pay over such money to the county, in the manner above specified, the county board shall have authority to compel such payment."

Sec. 74.28, Stats., provides as follows:

"Each county treasurer shall pay to the several town, city or village treasurers in his county, on demand, all money
collected or received by him and belonging to such town; but he may retain in the county treasury all amounts due from any town, city or village to the county except as otherwise provided in subsection (3) of section 74.19 of the statutes of 1931 as amended by this act for counties containing a population of five hundred thousand or more.”

In *Town of Bell v. Bayfield County*, 206 Wis. 297, it was held that under the statutes, a county is not entitled to credit upon the claim of a town for delinquent taxes collected by the county treasurer during a given period, for uncollected taxes returned by the town in the delinquent list of a subsequent period. Upon the basis of this decision, as to general taxes, counties may not offset subsequent excess delinquent tax rolls against sums which they would otherwise owe to towns, cities or villages for collections in prior years, because as to general taxes, towns, cities and villages do not owe the counties anything because of return of an excess delinquent tax roll.

Your particular problem does not involve general taxes, it involves a special tax, and by the express provisions of sec. 49.37, subsec. (3) the amount of this tax actually collected by the town (determined pursuant to the ratio provisions of the statute) is actually due and owing the county. To the extent that this special tax collected by the town is actually due and owing, the county pursuant to the provisions of sec. 49.37, subsec. (3), it is our opinion that sec. 74.28 controls rather than the principle of *Town of Bell v. Bayfield County* case hereinbefore discussed. That being true, upon your statement of facts there is now due and owing the county from the town in question the sum of five hundred sixty-four dollars and fifty-seven cents of this special tax which the town has actually collected and which the town should have paid over to the county. Instead of that, the town has apparently treated this special tax in making its return the same as all general taxes collected are treated and has applied the money in satisfaction of the town levy rather than to the satisfaction of the special county tax. This sum is unquestionably due and owing the county and the county has express authority to collect it. Under sec. 74.28 the county has ample authority to collect said tax from
any sums which it in turn owes the town; in short, it has the right to offset this sum against taxes collected which it would otherwise owe the town. We think that the county may offset either against sums which it is owing the towns with respect to prior excess delinquent tax rolls or from 1938 taxes which the county has collected by reason of affidavits extending the time of payment pursuant to the provisions of sec. 74.087, Stats.

The county should not, however, withhold payment of all monies that it is owing to the town because of the situation disclosed. The county should determine promptly from what source of monies owing the town it intends to collect this money, credit the town with the money collected from such source and promptly account to the town for balance owing. It is apparent from your statement of facts that after the county exercises its right of offset in order to effect the collection in question, there will be a balance owing the town.

NSB

Social Security Law — Poor Relief — Mother's Pensions — XXV Op. Atty. Gen. 441 and XXVI Op. Atty. Gen. 206, holding grants made and not amounts actually paid to beneficiaries are to be used as the basis for figuring reimbursement of counties and prorating among counties under secs. 47.08, 48.33, 49.38, and 49.51, Stats., approved.

Under federal social security act funds are available only in amount of sums actually expended.

When state reimburses county for deficiency in past months, payments are to be made by county to beneficiaries as provided in subsec. (4) of sec. 49.51, Stats., except in cases where beneficiary is dead or is no longer eligible for assistance.

August 9, 1939.

STATE PENSION DEPARTMENT.
Attention—George M. Keith, Supervisor of Pensions.

You ask several questions concerning the interpretation of certain provisions of the aid-to-dependent-children and
old-age assistance laws, particularly relating to the prorating of state appropriations.

You inquire what is the meaning of the words "amount due," as found in secs. 47.08, subsec. (11) and 48.33, subsec. (11), (b), Stats., and the words "approved amount paid," as found in secs. 47.08, subsec. (11) and 49.38, subsec. (1), Stats.

Sec. 47.08, subsec. (11), as amended by ch. 110, Laws, 1939, reads in part:

"Monthly the county treasurer and county pension administrator of each county shall certify under oath to the state pension department at such time and in such manner as the department may prescribe, the claim of the county for state and federal reimbursement under the provisions of this section, and if the state pension department shall approve it shall certify to the secretary of state for reimbursement to the county eighty per cent of the approved amount paid by such county for blind pensions pursuant to the provisions of this section. If the total amount due all counties shall exceed the sum appropriated by subsection (4) of section 20.18, the same shall be prorated by the state pension department among the various counties according to the amounts due them."

Sec. 48.33, subsec. (11), par. (b), as amended, reads in part:

"If the state pension department shall prorate the sum remaining after the payment in full of all claims under paragraph (c) of subsection (5) among the various counties according to the amounts due them."

Sec. 49.38, subsec. (1), Stats., as amended reads in part:

"If the state pension department shall be satisfied that the amount claimed has actually been expended in accordance with the provisions of sections 49.20 to 49.38, it shall certify to the secretary of state eighty per cent of the approved amount paid by each county."

In XXV Op. Atty. Gen. 441 and XXVI Op. Atty. Gen. 206 we held that reimbursements were to be figured according to the amount of the original grant. Hence it is eighty per cent
of that amount which the state is to pay back to the various counties. That, then, is "the amount due"; and the "approved amount paid" is the amount of the grant made by the county. There is no reason to modify these opinions at this time because of any changes made by ch. 110, Laws, 1939.

Your second question involves the difficulties which arise in connection with the sums available from the federal government and we are asked as to the legal obligation or responsibility resting upon your department, the state treasurer and the secretary of state in so far as the federal law conflicts with the state law.

The federal social security act (Title I, sec. 3 (a), Title IV, sec. 403 (a), and Title X, sec. 1003 (a) ), provides that federal funds shall be available equal to one-half (or one-third in the case of aid to dependent children) of the "total of the sums expended" under the state plan.

Thus the federal government pays according to the sums actually expended under a state plan. No more can be obtained from the federal government since, as you state, there is no way to recapture federal funds once they are lost. The matter of correcting any inconsistency between the state and federal laws is one of legislative policy rather than a responsibility resting upon your department, the state treasurer and the secretary of state.

You ask next whether the correct method of determining the amount of reimbursement due each county under the provisions of secs. 47.08, 48.33, 48.331 and 49.20 to 49.51, Stats., is not that of calculating the reimbursement on the basis of amounts actually expended rather than on amounts awarded but reduced in exercise of statutory prerogative vested by virtue of secs. 49.38, subsec. (2) and 49.51, subsec. (4), Stats.


You also mention some of the difficulties which arise when administering sec. 49.51, subsec. (4), Stats. To illustrate: If money paid by the state to a county is in turn paid to a beneficiary, that money might increase his grant so that the
total grant would exceed the one dollar limitation found in sec. 49.21, Stats. Furthermore, many beneficiaries may no longer be eligible, or may be dead when money reimbursed by the state is available for payment to such beneficiaries.

In view of the above you ask whether sums paid to the county by the state under sec. 49.51, subsec. (4), Stats., should be paid to ineligible beneficiaries, or to the estates of deceased beneficiaries.

Sec. 49.21, Stats., specifically provides that a grant for old-age assistance shall in no case exceed a total of one dollar a day. This maximum may not be exceeded under any circumstances. Therefore, in cases where the sum to be paid a beneficiary under sec. 49.51, subsec. (4), Stats., when added to a beneficiary's grant exceeds one dollar a day, such beneficiary would not be entitled to the excess.

In reference to the second portion of your question, sec. 49.51, subsec. (4), Stats., provides that "* * * whenever the state shall reimburse the counties for this unpaid amount, the county shall in turn pay the full amount to the beneficiaries entitled thereto." It is noted that payments under this section are to be made to beneficiaries "entitled thereto." If a person is not eligible for any reason at the time that money is available under this section, it is obvious that he is not entitled to any payments under the law. The condition of the beneficiary at the time payment is to be made, not his status at the time aid was reduced, controls. To give the statute any other construction would be to ignore the plain requirements for the granting of aid under the old-age assistance, aid to dependent children, and blind pension laws. Thus, payments should not be made to beneficiaries able to support themselves nor to estates of deceased beneficiaries.

WHR
Municipal Corporations — Public Health — Sewage Systems — Public Officers — Public Service Commission — Public service commission has no jurisdiction under the general provisions of sec. 66.06 (22) (k) to hold a hearing for purpose of determining reasonable rates to be charged a municipality by another municipality for sewage service where the service was acquired by order of the state board of health under sec. 144.07, which latter section confers the right and under subsec. (3) thereof provides a specific remedy.

August 9, 1939.

CALMER BROWY, Director,
Public Service Commission.

You ask whether the public service commission is authorized to conduct hearings and prescribe rates for sewage service pursuant to paragraph (k) of subsec. (22) of sec. 66.06 in those cases in which the complainant is a municipality which receives such service from another municipality by order of the state board of health, issued under the power and authority of sec. 144.07, Stats.

Sec. 144.07 authorizes the state board of health to order the sewage system of one municipality connected with that of another and provides that when one municipality renders sewage service to another pursuant to sec. 144.07, reasonable compensation shall be paid. Subsec. (3) of sec. 144.07 provides:

"If the governing body of any municipality deem the charge unreasonable, it may by resolution within twenty days after the filing of the report with its clerk,

"(a) Submit to arbitration by three reputable and experienced engineers, one chosen by each municipality, and the third by the other two. * * *

"(b) Commence an action in the circuit court of the county of the municipality furnishing the service to determine the compensation. * * *"

Thus sec. 144.07 sets forth a procedure by which the sewage system of one municipality may be made available to another. At the same time, in the same section and as a part
of that procedure, the legislature has enumerated the remedies available should the municipality receiving the service deem the charges made therefor unreasonable. In view of the rule of statutory construction "expressio unius est exclusio alterius," it must be held that the express enumeration of the remedies available operates to exclude any others. Jansen v. Schoepke, 214 Wis. 350, 253 N. W. 554; State ex rel. Owen v. McIntosh, 165 Wis. 596, 162 N. W. 670.

Paragraph (k) of subsec. (22) of sec. 66.06 providing for a hearing before the public service commission applies to "any user of the service" which language would normally be considered broad enough to include municipalities. But in the case in question, the remedies available are prescribed by the specific section under which the municipality receives its service and these specific provisions, according to rules of construction, must control over the general provisions of sec. 66.06 applicable to all sewage systems. Wisconsin Gas & E. Co. v. Ft. Atkinson, 193 Wis. 232, 213 N. W. 873.

You are advised that the public service commission has no jurisdiction in the matter and that a municipality which has acquired its sewage service under the provisions of sec. 144.07 must pursue the remedies set forth in that section if it deems itself aggrieved by unreasonable rates.

NSB
RGK
Prisons — Prison Labor — Public Officers — Police Justice — Persons sentenced to a county jail whether for violation of a municipal ordinance or otherwise are to be placed at labor under the provisions of sec. 56.08 and not under sec. 56.14.

A police justice may sentence violators of city ordinances prescribing such punishment to both fine and imprisonment.

August 11, 1939.

William Leitsch,
District Attorney,
Portage, Wisconsin.

You request our opinion relative to secs. 62.24, 56.14 and 56.08 of the statutes. The facts are as follows:

The city of Portage, a city of the fourth class, has by city ordinance established a police court pursuant to sec. 62.24 and the police justice thereof has adopted the practice of committing prisoners sentenced under city ordinances to the county jail. The city officials have requested that the sheriff receiving prisoners so committed place such prisoners at hard labor under sec. 56.14 which reads:

"The common council of any city of the fourth class, however organized, and every village board shall have power to compel any person committed to the watch-house or place of confinement of such city or village who is not physically disabled, to perform labor upon any public work under such supervision and control as such city or village may provide, and for each day's labor performed, said person so sentenced shall be credited with the sum of two dollars, which shall apply on such fine and costs until the same are paid or until such person is released from custody."

The question is whether prisoners so committed may be placed at labor under the terms of sec. 56.14 or whether such prisoners should be placed at labor under the provisions of sec. 56.08.

It is our opinion that under the circumstances described, persons who are sentenced under city ordinances to serve terms in the county jail are to be placed at hard labor under the provisions of sec. 56.08 rather than under the provisions
of sec. 56.14. It does not appear that these sections are conflicting. Sec. 56.08 relates to prisoners “sentenced to imprisonment in the county jail” and there is no distinction made therein between persons thus sentenced for violations of municipal ordinances or for violation of state laws. Sec. 56.14 relates to prisoners “committed to the watchhouse or place of confinement” of a city. Cities of course have the power to prescribe by their ordinances imprisonment as a punishment for the violation thereof. See Milwaukee v. Johnson, 192 Wis. 585; Hack v. Mineral Point, 203 Wis. 215; Janesville v. Heiser, 210 Wis. 526. Such punishment might be either by imprisonment in a city jail, where existent, or in a county jail. Under these circumstances it would not appear that a county jail wherein imprisonment is prescribed under a city ordinance is a “place of confinement of such city” within the meaning of sec. 56.14. Nor would the fact that under sec. 62.24, subsec. (2), par. (e) prisoners confined in a county jail for violation of a city ordinance are to be kept at the expense of the city in any way effect such a result. In its plain terms, sec. 56.08 sets up a complete scheme for putting persons sentenced to imprisonment in the county jail at hard labor without distinction between the violations for which such persons may have received such sentences. The municipality in enacting its ordinances would appear to have its choice as to whether the sentence should be to a municipal jail, in which case the provisions of 56.14 would apply, or whether the sentence should be to the county jail in which case the provisions of sec. 56.08 would apply.

You also call attention to the provisions of sec. 62.24, subsec. (2), par. (e) providing:

“The police justice may punish violation of city ordinance by fine or imprisonment, or both, and may sentence any person convicted of violation of city ordinance, or of a misdemeanor, to pay a fine and the costs of prosecution or be imprisoned in the county jail, and may order the prisoner, if able, to be kept at hard labor. * * *”

Our opinion is requested as to whether, under these provisions, a police justice may sentence to both fine and imprisonment.
In view of the express provision that the police justice may *punish* by both fine and imprisonment, the sensible construction would appear to be that the portion relating to *sentencing* is to be construed in connection with the portion relating to punishing so that if the punishment prescribed was both fine and imprisonment the sentencing might be likewise. In any event the sentence to be imposed in a particular case would appear to be governed by the terms of the particular ordinance under which the sentence is meted out, and under the authorities which we have heretofore cited there is no question but that such ordinance might provide for both a fine and imprisonment and that sentence might be imposed in accordance therewith.

RHL

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August 16, 1939.

RAY J. HAGGERTY,
District Attorney,
Phillips, Wisconsin.

You have submitted the following questions for our opinion thereon:

“(1) The Federal Statutes, Section 191 (R. S. No. 3466) provides that whenever the estate of any deceased debtor is insufficient to pay all the debts due from deceased, the debts due the United States shall be first satisfied. Our state statute, Section 313.16 provides that the necessary funeral expenses and the expenses of the last sickness have priority over debts having a preference under the laws of the United States. In your opinion, which statute should be followed by the County Court?

“(2) Does the state statute of limitations as to the time of presenting claims against the decedent’s estate apply as to debts due United States, that is, are debts due United States barred unless presented within the time provided by our state statutes.”

Necessary funeral expenses are regarded as an administration expense and have been held to take precedence over debts due the United States in the application of the statute in question. *In re Stiles’ Estate*, 215 N. Y. S. 134; *U. S. v. Eggleston*, Fed. Cas. No. 15,027.

It has been held that pursuant to sec. 191, 31 U. S. C. A., a claim of the United States against the estate of a deceased taxpayer was not barred by reason of the failure to file a claim within the period provided by state statute for filing general claims. *Harrison v. Deutsch*, 294 Ill. App. 8, 13 N. E. (2d) 511.

Other authorities to the same effect as the above and authorities dealing with related problems may be found in the annotations in 31 U. S. C. A. sec. 191. We assume that you have access thereto.

JWR
Loans From Trust Funds — Public Officers — County Treasurer — Taxation — Tax Collection — Tax Sales — Real Estate — It is the duty of the county treasurer to pay to the state treasurer out of tax moneys collected either before tax sale or by sale of tax certificates, the installments of principal and interest due on the trust fund loans of all municipalities in the county, even though the money to pay such installments has not been turned over to him by the town treasurers.

When all of the real estate located in a municipality having a trust fund loan is acquired by the county through tax deed before the trust fund loan is repaid, and said loan can be collected in no other way, the proceeds of such real estate when sold by the county should be applied on the trust fund loan installments due from said municipality and unpaid.

August 16, 1939.

T. H. Bakken, Chief Clerk,
Commissioners of the Public Lands.

School District No. 1, situated entirely within the town of X. in the county of Y. has a loan from the state trust funds. The next installment of principal and interest due on this loan is five hundred dollars. The secretary of state has certified this five hundred dollars, installment to the clerk of Y. county who, in turn, has certified the same to the clerk of the town of X. This five hundred dollars installment has been spread upon the roll of the taxable property in school district No. 1. In the event that the treasurer of the town of X. should be unable to turn the said sum of five hundred dollars over to the treasurer of Y. county on or before the first Monday of March, as provided by Sec. 74.15, subsec. (1), you inquire:

"1). Is there any duty upon the part of the county treasurer of Y. county to remit to the state treasurer, as the installment due on the trust fund loan, the first $500.00 which he collects on the delinquent tax roll of the town of X., whether collected before tax sale or by sale of tax certificates to private individuals who would pay cash for the same?
"2). In the event that all of the real estate located in school district No. 1, subject to assessment to repay the installment due on the trust fund loan, is sold to the county at tax sale and ultimately acquired by the county on tax deed, is the county upon the resale of said property, obliged to remit to the state treasurer a portion of the proceeds of such resale to apply upon any unpaid balance of the said $500.00 installment?"

The questions will be discussed in order. Section 74.15, subsec. (1), provides in part, that

"* * * the town * * * treasurer shall pay over [to the county treasurer] the full amount of state tax on or before the first Monday of March of each year, though it may occasion a deficiency in the town * * * taxes."

Loans from the state trust funds are secured by an irrepealable tax levy. Sec. 25.05, subsec. (5).

In XXII Op. Atty. Gen. 239, in speaking of the trust funds, it was stated:

"The funds from which such loans are made are the various school funds contemplated by art. X of the Wisconsin constitution and objects of special care by the state.

"Sec. 25.04, Stats., providing:

" 'The annual interest and instalments of principal of all loans from the trust funds shall be payable into the state treasury with other state taxes,' would be sufficient, in conjunction with sec. 74.15, which requires the town treasurer to pay out of the taxes collected the full amount of the state tax to make clear the legislative intent that these loans must be paid first.

"This intent is made manifest in other sections of ch. 25, relating to the loan of school funds. Thus sec. 25.07 makes the loan 'a special charge to be paid next after the state tax out of any moneys collected as taxes within' any municipality which has obtained a loan from the state. Sec. 25.08 (which provides the manner of collecting the principal and interest of loans made to school districts other than joint as declared in sec. 25.09 (1) ) provides that the principal and interest of state loans: 'shall be levied, charged and inserted in the several tax rolls and collected and paid over with and in the same manner as the state tax until paid into the treasury; and in case of neglect or refusal to pay any sum or sums when due, the same shall be subject to all the provisions of law applicable to cases of default in payment of state taxes.'
"Throughout the statutes, in such chapters as deal with the assessment and collection of taxes, may be found sections which further strengthen the legislative purpose to require prior payment of state loans, e. g., secs. 70.60 and 70.63, regulating the apportionment of state and county taxes, provide that 'special charges' be collected with state taxes."

See also XXII Op. Atty. Gen. 290, which held that, in making settlement under Sec. 74.15, subsec. (2), the local treasurer should pay to the county treasurer the state property tax (when one is levied), then installments from loans on state trust funds and then state special charges.

Sections 74.26, subsec. (1) and 74.27 provide:

"74.26 (1) TO STATE TREASURER. The several county treasurers shall pay to the state treasurer, the amount of state taxes charged to their respective counties, on or before the second Monday of March in each year."

"74.27 When any county shall fail, neglect or refuse to pay to the state treasurer the whole or any part of the state tax lawfully apportioned to and levied upon such county at the time and in the manner required by law such county shall pay to the state treasurer, in addition to the amount so due and unpaid on such tax, interest at the rate of ten per centum per annum from the time such tax was due and payable, until the same, together with such interest thereon, shall be fully paid. The secretary of state shall annually, at the time he is by law directed to apportion the state tax, add to the amount charged to each county respectively all amounts which may be due the state and unpaid from such county on any former tax, together with interest thereon at the rate aforesaid up to the first day of January following such apportionment; and the amount so found shall be the amount of the state tax to be paid by such county for the year, and shall be certified, levied, collected and paid into the state treasury as provided by law; * * * ."

The direction to the county treasurer to pay to the state treasurer the amount of state taxes charged to their respective counties on or before the second Monday of March in each year is not conditioned upon the county treasurer's having received the money from the various municipalities of the county which have the trust fund loans. In XXII Op. Atty. Gen. 899 it was held that, under Sec. 74.27, the sec-
retary of state must include in the next apportionment the unpaid installment of principal and interest on trust fund loans and that he had no authority to waive interest on delinquent payments. It was stated at page 900:

"Secs. 25.08, subsec. (2), relating to payment of school fund loans, 46.10 (2), relating to special charges for the support of penal and charitable institutions, and 73.03 (6) and (14), relating to special charges made by the tax commission, all clearly indicate that these special charges are to be collected in the same manner as state taxes. These, therefore, would clearly come within the purview of Sec. 74.27. Sec. 26.14 (4), relating to special charges made by the conservation commission, is not as specific. However, this is included in the certification of state taxes and would, therefore, be subject to the same provisions as other state taxes are when delinquent. Sec. 70.60 * * *"


It was even held in XXV Op. Atty. Gen. 215, that where the cities, villages and towns extended the time for payment of taxes and consequently the county did not receive the tax money until July, that the county still had to pay interest on delinquent special charges as provided by Sec. 74.27.

From the foregoing it is our opinion that, under Sec. 74.26, subsec. (1), it is the duty of the county treasurer to pay to the state treasurer on or before the second Monday of March in each year all amounts due the state as installments of principal and interest on trust fund loans. If such payment is not made on or before the second Monday of March, the duty to make this payment continues, and requires the county treasurer to make such payment (after paying the state property tax, if any), out of any tax collections made by him whether such collections are made before tax sale or as the proceeds of the sale of tax certificates.

Your second question, in addition to being hypothetical, assumes a highly improbable situation. In any year, if the town treasurers and the county treasurer do their duty, there would be no delinquency in paying the principal and interest installment on a trust fund loan unless the total cash collected by the town treasurers and turned over to the county treasurer, plus the total tax collection of the county treasurer, were insufficient to pay the state property tax and
trust fund loan installments. If this most unlikely situation did exist, the secretary of state would, in the succeeding year and pursuant to Sec. 74.27, certify to the county treasurer the amount of the unpaid installments with penalty and interest, and the county treasurer would insert said sums in the next tax roll with any installment due for that year (XXII Op. Atty. Gen. 931) unless the state treasurer could collect the delinquent installment by offset pursuant to Sec. 74.27 which provides in part, as follows:

"* * * any money in the state treasury or which may come therein at any time prior to the payment of such delinquent tax by such county, on account of any appropriation made to such county by the legislature or otherwise, except money belonging to the school fund income, shall be retained by the state treasurer, and he shall apply the same, or such part thereof as may be necessary, to fully pay such delinquent tax, with interest thereon."

Only if this highly improbable situation existed for several years, until so much of the property in the whole county became exempt, that the state property tax and trust fund loan installments could not be collected, and the state treasurer was unable to collect by offset under Sec. 74.27, would your question become a practical one.

As previously indicated, under Sec. 74.27, there is a continuing duty upon the part of the county to pay the trust fund loan installments. The statutes and opinions cited herein indicate that it was the legislative intent to insure, so far as possible, the repayment of installments on trust fund loans after the state property tax has been paid. Sec. 75.36 provides that when the county takes a tax deed to a parcel of land, it does not need to pay any delinquent or outstanding taxes, the redemption value of outstanding tax certificates, or interest or charges until the land is sold by the county, and the section further provides:

"* * * If the sum realized on such sale * * * is insufficient to pay all of the said taxes, certificates, or interest or charges, the amount realized shall be applied thereto and there shall be no further liability upon the county for the same."
In view of the legislative intent to insure payment of trust fund installments, by giving them a priority, and the continuing duty of the county treasurer under Sec. 74.26 to pay such installments, it is our opinion that moneys realized by the county from the sale of lands located in school district No. 1, and acquired by the county through tax deed, should be applied to the payment of unpaid trust fund loan installments after the state property tax, if any, is paid. Whether the same holding would be made as to lands located in a municipality not having an unpaid trust fund loan need not be decided at this time.

JRW

Indigent, Insane, etc — Legal Settlement — Intoxicating Liquors — Posted Persons — Legal settlement for relief purposes acquired in the village of Ontario is not changed by Ch. 192, Laws of 1939 which transfers the entire village from Monroe County to Vernon County.

A person selling or giving away liquor to a prohibited person within the meaning of secs. 176.26 and 176.28, Stats., is liable if he has actual notice of the prohibition. It is not necessary that he be served with written notice.

August 16, 1939.

C. O. Heffernan,  
Assistant District Attorney,  
Sparta, Wisconsin.

You have quoted the following excerpt from ch. 192, Laws, 1939:

"The territory hereby detached from Monroe county and attached to Vernon county shall not be liable for any portion of the indebtedness of Monroe county, and said territory shall not be entitled to share in, participate or receive or be entitled to any part of the county property or funds of Monroe county."
You have then requested my opinion upon the question as to whether or not Monroe county is under obligation to care for the poor and indigent in the detached area at the present time.

Ch. 192, Laws, 1939, in substance, provides that certain described lands shall be detached from Monroe county and be attached to Vernon county "so that all the territory comprising the village limits of the village of Ontario shall be a part of the county of Vernon instead of being divided between the counties of Monroe and Vernon."

Thus the law in question does not attempt to change the boundaries of the village of Ontario,—it merely places that village entirely in Vernon county.

A legal settlement for relief purposes is acquired in a town, city or village, rather than in a county. Cf. sec. 49.02, subsecs. (1) and (4), Stats.; Dane County v. Sauk County, 38 Wis. 499; XXIV Op. Atty. Gen. 416. The ultimate liability of a county in relief matters is covered by sec. 49.04, Stats., and that section certainly does not contemplate that a county shall be liable for the relief of poor persons not standing in need thereof within the boundaries of the county or not settled within some municipality in the county.

It seems to us that, upon the basis of your statement, the liability of the village of Ontario to support its poor and indigent remains as it stood prior to the passage of the law in question. The poor and indigent of that village, however, are now settled in a village situated in Vernon county instead of in Monroe county and the responsibilities of the two counties are affected accordingly.

You have also requested our opinion upon another matter (we quote the language of your request):

"My second question deals with the offense of selling or giving intoxicating liquor to a person who has been posted. It is this: Can a person, other than a tavern keeper, be prosecuted under Section 176.28 of the Statutes if he has not received written notice served on him personally if it can be shown that he otherwise had notice? The attorney general's opinion in volume 24, page 182 indicates that he cannot, but it would seem to me that under this interpretation the law would be ineffective inasmuch as it would be an easy matter for the posted man to get some one who had not been served with a notice to furnish him with liquor."
We share your view that the opinion in XXIV Op. Atty. Gen. 182 is, to say the least, unfortunate. We have given the matter careful consideration and we simply cannot concur in the views expressed in that opinion. Our view corresponds with that of former Attorney-General Owen, as reported in V Op. Atty. Gen. 484, that is, if it can be shown that a defendant actually had knowledge that a person to whom liquor had been sold had been placed upon the so-called “black list”, it would satisfy the requirements of the statute. Cf. also II Op. Atty. Gen. 470, 506, 509; III Op. Atty. Gen. 487, 505; IV Op. Atty. Gen. 217, 476; V Op. Atty. Gen. 808.

It is rather apparent in view of the foregoing that in our judgment a tavern keeper, or any person other than a tavern keeper, may be successfully prosecuted pursuant to the provisions of sec. 176.28, Wis. Stats., if he knowingly sells or gives away intoxicating liquor to one who has been “posted” within the meaning of sec. 176.26, Wis. Stats. And it makes no difference that the person selling or giving away the liquor was not personally served with the required notice if he actually had knowledge of the notice through its being brought to his attention.

JWR

Public Officers — County Board Member — Relief Director — State Employee — A county board member may not be appointed as relief director where the selection is vested in a committee of the county board.

A county board member may hold a position in the state service where the duties of the two positions or offices are not incompatible.

August 16, 1939.

P. D. Flanner, Director,

Public Welfare Department.

You present the following statement of facts together with the following questions:
"Approximately 100% of the expense of operating the local Public Welfare Department in 'A' County, including the director's salary, is paid by the county treasurer with county checks from funds allotted 'A' County by the State Public Welfare Department. A committee of county board members has the power to select the director of relief. The state department, however, reserves the right of approving the selection.

"1. Can the committee of county board members employ a person as a relief director who has been elected to the county board for the current term? Would your answer be changed if the county board member should resign before being appointed?

"2. Would a state department be precluded from hiring a person, qualified under civil service for a state position, who is a member of a county board?"

First. A member of the county board would not be eligible for appointment under the circumstances outlined. Sec. 66.11, subsec. (2), Stats., seems to definitely dispose of the question. The section referred to reads as follows:

"No member of a town, village, or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, provided that the governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives."

Here the selection of a relief director is vested in a committee of the county board and not in the full board. We think, however, that where the selection is vested within a committee of the board, it is sufficiently within the selection of the board itself to fall within the provisions of the statute in question. Former Attorneys-General have so held in comparable situations: XXVI Op. Atty. Gen. 349 (Loomis); XXIV Op. Atty. Gen. 394 (Finnegan).

The authorities quite clearly hold that a person may not escape the prohibitions of statutes such as sec. 66.11, subsec. (2) by resigning his office or position. Cf. note in 5 A. L. R. 117, 120, where the annotator records his conclusion as to the state of the authorities as follows:
“In cases where the Constitution or a statute provides in specific terms that a person holding a certain office shall not be eligible, during the term for which he was elected or appointed to said office, to certain other offices, or any other office, the courts invariably hold that such ineligibility exists during the entire period for which the person was elected or appointed, and is not affected by resignation of the first office.”

Second. We can think of no rule of law, written or unwritten, which would disqualify a member of a county board from holding a position in the service of the state government. It might well be, of course, that the two positions would be incompatible in a given case, but there is, to our knowledge, no general disqualification.

JWR

Social Security Law — Charging back of Old-Age Assistance cost — Ch. 83, Laws, 1939, does not incorporate by implication any of the subsections of sec. 49.03, Stats. 1937, except those expressly referred to in said chapter.

Said chapter became effective May 14, 1939. The whole of any payments made thereafter (without apportionment for the month of May) may be charged back to the county of legal settlement in the manner provided by said chapter.

August 16, 1939.

GEORGE M. KEITH, Supervisor of Pensions,

Pension Department.

Ch. 83, Laws, 1939, became effective the day following publication which was May 13, 1939. The act in substance amends sec. 49.37, subsec. (1), Stats. 1937, by providing for intracounty charge-back on the basis of legal settlement rather than residence (residence being the basis for charge-back under sec. 49.37, subsec. (2), Stats. 1937) and (2) by adding a provision for inter-county charge-back on the basis of legal settlement. This provision for inter-county charge-back becomes sec. 49.37, subsec. (3), Stats. 1939 and reads as follows:
"If payments are made by a county to any person having a legal settlement in another county, the same shall be a charge against the county wherein such person has legal settlement. The clerk of the county making such payments shall certify quarterly to the clerk of such other county the net amount of the assistance so paid, less reimbursement from the state, and the latter clerk shall, upon receipt of such certificate, draw his warrant upon the county treasurer of his county in favor of the county making such payment for the amount claimed in such certificate. Should any dispute arise between the counties with respect to this subsection the county aggrieved may request a hearing by the industrial commission, in the manner prescribed in subsections (7), (8) and (8a) of section 49.03 of the 1937 Wisconsin Statutes. The state pension department shall, if necessary, enforce such decision through the adjustment of subsequent reimbursements to the counties. The county so charged may cause each city, village and town wherein such pensioners have legal settlement to reimburse the county for all amounts charged to the county for old-age assistance to persons residing in another county."

You have submitted five questions involving the interpretation and effect of this law as follows:

(1) Is the ten-day non-resident's notice which sec. 49.03, subsec. (3), Stats. 1937, provides for as a condition precedent to the legal right of a county rendering transient relief to charge back or collect from the county of legal settlement now a condition precedent to the county's right to an inter-county charge-back to the county of legal settlement pursuant to the provisions of sec. 49.37, subsec. (3), Stats. 1939?

Sec. 49.37, subsec. (3), Stats. 1939, creates a new right and provides the procedure to be followed. The only reference to sec. 49.03, Stats. 1937, is that with respect to the provisions for industrial commission hearing "in the manner prescribed in subsections (7), (8) and (8a) of sec. 49.03 of the 1937 Wisconsin Statutes." Had the legislature in creating the new right by sec. 49.37, subsec. (3), Stats. 1939, and providing the procedure to be followed, intended to incorporate all of the provisions of sec. 49.03, Stats. 1937, it would have been a simple matter for it to have said so. It did not say so but on the contrary provided a procedure to be followed and incorporates only so much of sec. 49.03,
Stats. 1937, as it deemed desirable. Under the circumstances, it is our opinion that the rule of statutory construction "expressio unius est exclusio alterius" applies and that the ten-day notice required by sec. 49.03, subsec. (3), Stats. 1937, with reference to charge-back for transient pauper relief has no application and is unnecessary to enable a county to charge back to the county of legal settlement old-age pension assistance rendered to a resident who has a legal settlement in some other county. Granted that old-age assistance is a form of poor relief, it is a distinct form quite different than that of relief to transient paupers; it is administered by a different agency and is treated throughout the statutes as an entirely separate and distinct form of relief. Merely because the legislature, by ch. 83, Laws, 1939, has provided for charge-back to the county of legal settlement and a similar provision exists with respect to relief to transient paupers, there would seem to be no reason for concluding that the legislature intended to change the old-age pension laws by the enactment of ch. 83, Laws, 1939, to any greater extent than the express provisions of that chapter.

The foregoing answers your question (2) which in substance inquires whether the chapter in question incorporates by implication any of the subsections of sec. 49.03 preceding subsecs. (7), (8) and (8a) expressly referred to in said chapter. The answer is, no.

It likewise answers your question (3) which in substance inquires whether the provisions of subsec. (9) of sec. 49.03 (the subsection with reference to removal to a county or municipality of legal settlement as a condition precedent to receipt of poor relief) are now applicable to old-age pension assistance. The answer is, no. This would seem especially true in view of the fact that any other interpretation would render our old age pension statutes at least of doubtful consistency with the minimum requirements of the federal social security law which provides that the federal board shall not approve any state plan which imposes as a condition of eligibility for old age assistance under the plan "Any residence requirement which excludes any resident of the state who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided therein continuously for one year immediately preceding the application."
The foregoing answers your question (4) which inquired whether there was any probability of the question of inconsistency if ch. 83, Laws, 1939, were construed to render sec. 49.03, subsec. (9), Stats. 1937, applicable to old-age pensions.

Your question (5) is as follows:

"Since the responsibility for bearing the county share of the cost of old age assistance was on May 13 shifted from the county of residence to the county of legal settlement question has arisen respecting the propriety of charging back to the county of residence of the entire amount paid at the end of May. Section 49.37 (3) as enacted by Chapter 83, provides that ‘If payments are made by a county to any person having a legal settlement in another county the same shall be a charge against the county wherein such person has legal settlement * * *’. How is the word ‘payments’ to be construed? As meaning the entire amount paid after the effective date of the law or as meaning a percentage of the payment for the month of May based on the ratio which the number of days after the effective date of the act bears to the total number of days in the month of May?"

In our opinion, the term "payments" should be construed to mean any sums actually paid after the effective date of the act. Old-age pensions are not like rents, wages, etc., which are being earned over a period in question and therefore apportionable. Under the circumstances there would seem to be no reason for interpolating something into the statute which is not there. Any sums paid after the effective date of the act and the whole thereof would seem to be "payments made" squarely within the language of the statute and therefore payments which may be charged back pursuant to the terms of the statute.

NSB
Public Officers — Malfeasance — County Board Member
— County Highway Employee — Sec. 348.28, Stats., prohibits member of county board from working as county highway employe.

August 17, 1939.

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

You have submitted the following question for my opinion:

"Can a member of the County Board, who is not a member of the Highway Committee, work upon State and Federal roads, doing seasonal work, such as assisting in oiling, gravelling, etc.?”

I think that a member of the county board cannot engage in working upon state and federal roads as an employe of the county, for compensation, without violating the provisions of sec. 348.28, Wis. Stats.

As an employe of the county board such employment would necessarily involve a contract in relation to a public service entered into with the member in his official capacity and in which he would have a pecuniary interest. Moreover, as a member of the county board he would be called upon to audit the claim for services and here, again, his position would be inconsistent.

We refer you to the following material upon which we have relied in expressing this opinion: XXI Op. Atty. Gen. 327; Henry v. Dolen, 186 Wis. 622; Rinder v. Madison, 163 Wis. 525; State v. Bennett, 213 Wis. 456.

JWR
Taxation — Assessments — Real estate is assessable under the provisions of sec. 70.10 Stats. 1937 on May 1st, and no change in ownership thereafter affects its taxability for that year.

August 18, 1939.

OLIVER O'BOYLE, Corporation Counsel,
Milwaukee, Wisconsin.
Attention: C. Stanley Perry, Assistant Corporation Counsel.

On April 28, 1938 certain real estate was purchased by a party in whose hands it would be exempt from taxation under the statutes. Possession was taken on that date but transfer of title was not effected until delivery on May 19, 1938 of a deed of that date, which was recorded on May 29, 1938. The city in which the property is located assessed it for 1938 general taxes. The purchaser has now petitioned the county board to cancel said taxes thereon for the reason that the property was exempt therefrom.

You request an opinion as to whether under the provisions of sec. 70.10 Stats., 1937, said property was exempt from the 1938 general taxes. In Petition of Wausau Inv. Co., (1916) 163 Wis. 283, 158 N. W. 81 it was held that under the statutes as they then existed the transfer of real property from a taxable class to an exempt class at any time prior to the first Monday in August rendered it exempt from taxation for that year. Subsequent to that case sec. 70.06 Stats., which was then sec. 1033 and later renumbered to be the present sec. 70.10 Stats., was amended by chap. 461, Laws, 1929. Specifically, your question is whether that amendment changed the rule announced by the Wausau Inv. Co. case.

Prior to the amendment in 1929 and at the time of the decision in that case the statute provided:

"The assessor of each assessment district shall begin on the first day of May in each year, or as soon thereafter as practicable, and proceed to make an assessment of all the real and personal property liable to taxation in such district. All personal property shall be assessed as of the first day of May in such year except as provided in section 1040. Real property may be assessed at any time between the first day of May and the time of the sitting of the board of review for such district."
In the *Wausau Inv. Co.* case, the court at page 289, said:

"* * * Personal property (with certain exceptions) must be assessed as of that date and no change of location or ownership thereafter affects the assessment thereof, but real property may be assessed at any time between that date and the sitting of the board of review. Sec. 1033 and sub. 8, sec. 1040. The board of review is required to sit on the last Monday of June and the assessor lays the roll before the board. Secs. 1060, 1061. This board has very complete power to hear complaints, take testimony, raise or lower assessments, correct errors, place omitted property on the roll, and in fact fully to complete the same. The statute fixes no date upon which real property is to be assessed, and in view of the very extensive powers of the board of review over the roll and the fact that it is in no sense a completed document until the board finishes its labors, we conclude that if real estate passes from the taxable class to the exempt class, or vice versa, at any time prior to the first Monday in August when the roll is completed, verified by the assessor, and filed with the town clerk, it would be the duty of the board to change the roll by striking out or adding such real estate, as the case may be. * * *"

By chap. 461, Laws, 1929, this statute was amended to read:

"The assessor of each assessment district shall begin as soon as possible after the April election, in assessment districts when an assessor is elected at such election, and in other assessment districts as soon as practicable after the first day of January of 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 by sec. 70.13."

By chap. 331, Laws 1933 there was added to the end of said Statute the following:

"All real property conveyed to any county by tax deed before the first Monday in August of any years shall not be included in such assessment for such year."
As thus amended by chap. 461, Laws, 1929 and chap. 331, Laws, 1933, these provisions became the present sec. 70.10 Stats. 1937 through renumbering by chap. 349, Laws, 1933.

At the time of the *Wausau Inv. Co.* case the statutes respecting the powers of the board of review over assessments of real and personal property, and the time and method of exercising the same, were the same as now, with only slight immaterial differences. Assessments of personal property are now, and were then, reviewable by the board in the same manner and at the same time as assessments of real estate, and the powers of the board over both are the same and exercised at the same time and in like manner. However, there was a difference between such assessments in that the statute expressly said that personal property was to be assessed as of May 1st but was silent as to any definite date that real estate should be assessed.

Accordingly the court said in the *Wausau Inv. Co.* case that because there was no definite date set when real estate was to be assessed the matter of its assessment was open so long as the assessment thereof was subject to change by the board of review and thus the closing date for assessment thereof was the date when the statutes required that the assessment thereof be concluded. The court, however, expressly said that a different rule was operative as to personal property and that because of the express provision of the statute fixing a definite date when personal property was to be assessed it must be assessed on the date so specified. Thus, even though assessments of personal property were subject to the same review by the board, and for the same length of time and in the same manner as assessments of real property, that was not operative as determining the date when personal property was to be assessed but the express provision of the statute upon the subject was controlling.

By chap. 461, Laws, 1929 the statute was amended to provide that real property as well as personal property should be assessed as of May first. This amendment was effected by adding "real" to the language providing that personal property should be assessed as of May 1st in each year. By so doing real property was placed in the same category as personal property in respect to the date as of which it was to be
assessed. If such provision as it previously existed when applicable only to personal property was fully determinative as to personal property, then when real property was also brought within its application by express amendment, thereafter it must be given the same operative effect as to real estate. What other purpose could the legislature have had in making this change? Accordingly it is our opinion that by virtue of the amendment effected by Chap. 461 Laws of 1929 the decision of the Wausau Inv. Co. case is no longer the law in this state. See XXV Op. Atty. Gen. 145, 148.

Our conclusion is given support by the further amendment made to this same statute by chap. 331, Laws 1933, as previously set out herein. If the statutes were to be interpreted after the amendment of chap. 461, Laws, 1929 the same as in the Wausau Inv. Co. case, then this last amendment would be unnecessary. Thus, the amendment by chap. 331, Laws, 1933 must be taken as a legislative interpretation that without such provision the acquiring of real estate by a county by tax deed after May first would not render such real estate exempt from taxation in the year so acquired.

It is therefore our opinion that under the provisions of sec. 70.10 Stats. 1937 real estate is to be assessed as of May 1st in each year and that any transfer thereafter to an exempt class does not render it exempt from taxation for that year.

HHP
Mortgages, Deeds, etc. — Deed of Conveyance — Validity of deed — Deed of conveyance signed by grantors and delivered with the name of grantors and the consideration omitted at the time of delivery, the omissions of which are subsequently inserted by the grantee, is a valid instrument of conveyance if the instrument so completed represents the actual agreement of the parties.

August 18, 1939.

HIGHWAY COMMISSION.

In your letter you state:

“Rock County, and indirectly the State Highway Commission, apparently have become involved in legal entanglements in connection with the securing of certain right of way on U. S. Highway No. 51 between Edgerton and Janesville.

“The immediate question hinges about the validity of a certain conveyance of lands from one A and his wife, grantors, to Rock County as grantee. The alleged conveyance was properly executed by A and his wife, having been signed by both, witnessed, and properly notarized. However, in the body of the deed the names of the grantors were omitted and the consideration also was omitted. There was a delivery of the uncompleted deed to the grantee with the omissions indicated above. There is disputed opinion as to the amount of the consideration. Upon receipt of the deed by the Rock County Highway Committee, there was inserted at the direction of the committee a consideration of one dollar, and the name of the grantors, A and his wife, were also typed in.

“Later the Rock County Highway Committee mailed A a check for one dollar, the consideration named in the deed and inserted by direction of the Rock County Highway Committee. A returned the check, stating that it did not represent the actual consideration.

“The question upon which the State Highway Commission would like an opinion from the Attorney General’s Office is whether or not this instrument constituted a valid instrument of conveyance.”

Assuming that the deed as completed represents the actual agreement of the parties, it is our opinion that the deed is a valid instrument of conveyance. There is a split of authority, see L. R. A. 1915D 196, upon the question of whether
failure to insert the name of the grantors in the body of the instrument at the time of delivery invalidates the instrument. The great weight of authority seems to be to the effect that such omission would invalidate the instrument. The Wisconsin rule, however, seems to be otherwise and to the effect that such omission does not invalidate the instrument. *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166.

There is a quite general legal superstition that a deed of conveyance must recite a or the consideration. This superstition is a result of early common law principles of conveyancing that are of no validity at the present time because of statutory changes. The modern rule under statutes such as those in Wisconsin seems to be that a recital of consideration is not essential to the validity of a deed. 18 C. J. 177, 16 Amer. Jur. 474, Thompson on Real Property, Vol. 4, par. 3013. Sec. 235.01, Stats., enumerates the formal requirements for a valid conveyance of real estate. Consideration is not one of the requirements. If those requirements are met, it would seem that the instrument is a valid instrument of conveyance. The foregoing would seem especially true in view of the fact that these instruments are ordinarily instruments under seal and a sealed instrument conclusively imports consideration. *Singer v. Gen. Acc. F. & L. Assur. Corp.*, 219 Wis. 508 (1935) and cases cited therein. While our court has never squarely passed upon the question, the case above cited and the cases cited in the opinion would indicate that at least with respect to sealed instruments, a failure to recite a or the consideration in the deed would not render the deed invalid.

We express no opinion as to the validity of the instrument if the instrument as completed does not in fact represent the agreement of the parties. This opinion does not cover the validity of the instrument in the light of disputed questions of fact, as such disputed questions of fact are not stated in the submission nor was any opinion requested with respect to the validity of the instrument in the light of any stated disputed factual situation.

NSB
RK
Criminal Law — Lottery — Gambling — Scheme of advertising called "Money Words" is a lottery.

August 25, 1939.

LEWIS C. MAGNUSEN,
District Attorney,
Oshkosh, Wisconsin.

In your letter you state that there is now operating in Winnebago County, in certain filling stations, a scheme or device called "Money Words." You enclose a statement as to the operation of the scheme, together with a copy of the coupons referred to in the statement. The statement, as we understand it, was prepared by the attorneys representing the company engaged in selling the scheme. From this statement it appears that

"Money Words, Inc., is a corporation engaged in the advertising business, and at the present time in the promotion of an advertising plan which is sold to gasoline and oil jobbers and their retail station operators on the following basis:

1. Each week it delivers to its contracting jobbers a number of coupons, forms of which are attached. The jobber in turn distributes these to the retailers who distribute the coupons to the public.

2. The coupons contain a complete explanation of the operation of the plan. At the top of the coupon is an advertising message, certain of the letters of which are printed in red. The contestant deciphers the red letters, making of them various combinations which, with the addition of another letter, called the 'key letter' will make combinations forming the words o-n-e, t-w-o, etc. to t-e-n.

3. On Friday morning of each week, there is posted in every participating service station the key letter for that week. The contestant may come in to the station or call by telephone to find out what this key letter is. If it 'fits' with the letters he has deciphered to form any of the words from one to ten, he is to receive that amount of dollars from the station operator, who will be repaid by the jobber. Thus, if a coupon should contain the letters 'o' and 'n' and the key letter is 'e', the coupon holder is to receive one dollar.

4. The coupon holder must mark his combination of letters on the coupon in the lower section, insert the key letter, sign the voucher at the bottom of the coupon. He has
three days after posting of the key letter within which to present it to the station operator for payment of his contest award.

5. There is no 'drawing' at which a contestant must be present. There is no particular hour at which he must appear at the filling station. He may come in at any time within the three day period. And he need not return it to the station from which he received the coupon. He may present it at any station served by the jobber who has contracted for the advertising service within his territory.

6. The plan calls for the direct and immediate payment of the amount called for by the combination of letters of from 'one' to 'ten' to the person presenting the coupon. Until that time there is no record kept of coupon holders, no registration is required, and the only person controlling the right to collect is the holder of the coupon, who must prepare his analysis, present his coupon, and then collect. At the time the coupons go out, the key letter has, of course, been decided, but is known only to the operators of the plan, Money Words, Inc. The jobber and the retailer do not know of it until the day of posting.

7. The coupons are distributed to anyone calling for them at the filling station, and are delivered in the general neighborhood of the stations participating in the plan, as provided in the following instructions to station operators:

"'Make sure that the handbills are distributed throughout your neighborhood.

"'You can gauge your normal station traffic. Take whatever extra blanks you may have and hand them out to the people in your vicinity. Full distribution will increase the advertising value of the plan and make certain that winning blanks are out.'"

The coupons are delivered whether a sale is made or not.

8. The purpose of the plan is to induce the contestants to read, word for word, the advertising message appearing at the top of the coupon, in which appear the red letters which may form a winning combination. To decipher the red letters, the contestant must read the entire advertising message. The advertising messages call attention to and promote the sale of specific items of merchandise, as well as the various services offered by the participating jobber and his station retailers, and announcements of business policies. A person may have an advertising message on a coupon which, if properly analyzed, will combine with the key letter to produce a winning word, but unless he reads the advertising message, makes his analysis and diagrams the same properly, he is not entitled to the money that the coupon would otherwise entitle him to.
9. The work of analysis involved is always more or less extensive and complicated, and considerable skill is required to decipher the winning combinations. On the samples submitted, for instance, there are sixteen red letters scattered through the message. This calls for reading the message through several times, which means that through this plan the advertising of the dealer and jobber is spread through the general community.

10. The contract between Money Words, Inc., and the jobber calls for the distribution of a certain amount of money each week in the following clause:

"We agree to insert all winning blanks in the units delivered to dealers, and to cash same upon presentation to us by dealers. If we fail to do so, you are entitled to cancel our franchise forthwith on written notice. Not later than 10 days after the winning letter has been posted, we will deliver to you all winning coupons of that week which have been cashed, whereupon you are to increase the amount of winning coupons for the third week following by the amount of the coupons not cashed.'

The purpose of this portion of the agreement is to make certain the eventual distribution to contestants of the full amount announced for distribution and set aside therefor each week. Thus, if in the week of July 3, only a portion of the money announced for distribution had been called for, the undistributed portion will be added to the awards for a later week, and be distributed as the contest continues.

11. The plan is to be advertised by station posters, attendants' badges, and other advertising media which the jobber or retailer may decide to employ.

12. There is absolutely no requirement of purchase or presence at a specific time involved in this contest. Its purpose is to insure the thorough reading of advertisements promoting the sale of the station operator's and jobber's sales and services."

While it appears from the statement that the holder of a coupon may call the station and determine the key number, the plan contemplates, and it is a rather vital point in the sales literature that is put out, that the great majority of customers or hoped-for customers will not determine the key number in such manner, but rather by a call at the station. When the plan is initiated it is quite possible that coupons will be delivered in the community at homes and elsewhere other than at the stations and in as large a number as possible to assure stimulating interest in the trade area in the "Money Words" plan of operation. After the initial distribution, the adver-
tising literature points out that the scheme attracts patrons to the station Monday of each week when any coupons are available for distribution. The scheme is adapted to and designed to stimulate calls at the station both with respect to determination of the key letter and receipt of weekly coupons. Can it be said that such increased calls designed at increase in patronage have no relation at all to the prize and chance feature of the advertising? We think not. Under the court's holding in *State ex rel. Cowie v. La Crosse Theatres Company*, decided June 21, 1939, "bank night" and all similar schemes of advertising which involve (1) prize, (2) chance, and (3) increased patronage, business or profits as a result of the scheme (the consideration) appear to be lotteries. All "bank night" schemes and modifications thereof, such as the instant one, involve an effort to make it appear that the prize and chance are wholly divorced from patronage. All such schemes involve the *may* possibility whereby *some* may participate without becoming patrons and without making a purchase of any kind. The vitality, merit and worth of all such schemes as business stimulators depend upon the fact that the great majority of participants will not be in the *may* or non-paying class. Under the hold-rule of the *La Crosse Theatres Company Case*, supra. The patronage stimulated as a result of the scheme furnishes consideration for the non-paying participant.

It is our opinion that the scheme is a lottery within the rule of the *La Crosse Theaters Company Case*, supra. We have recently held that "treasure chest" (a modified form of "bank night") is a lottery within the rule of that case. See, also, XXVII Op. Atty. Gen. 190, 225, 611 and 764.

NSB
Constitutional Law — Banks and Banking — Reorganization of Banking Department — Bill No. 919,A., introduced in the 1939 legislature and relating to reorganization of the banking department requires a two-thirds vote under the provisions of Article XI, section 4 of the Wisconsin Constitution.

August 25, 1939.

The Assembly.

You have requested my opinion as to the vote required under the Wisconsin constitution to legally enact bill No. 919,A., providing for the organization of the banking department and making an appropriation.

You refer to the following constitutional provision:

Article XI, section 4: “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.”

The Wisconsin supreme court has held that the provision in question extends as well to amending existing banking laws as it extends to the creation of a banking law in the first instance. Thus, a material change of a general banking law requires a two-thirds vote. Cf. In re Koetting, 90 Wis. 166.

It has been likewise held that the administration of general banking laws is an integral part of such laws and that comprehensive administrative provisions require the two-thirds vote provided for by Article XI, section 4. Cf. State ex rel. Bergh v. Sparling, 129 Wis. 164.

Thus, in the case just cited it was held that the original law creating the banking department and placing it under the supervision of the banking commission required a two-thirds vote.

In view of the foregoing it seems apparent that there must be a two-thirds vote of all the members elected to each house of the legislature in order to validly enact into law bill No. 919,A. The bill abolishes the present three-man banking commission and sets up a single commissioner. It
abolishes the present banking board of review which has important appellate functions involving a review of decisions of the banking commission and vests such authority in the single commissioner. Thus, under the old law certain decisions of the banking commission could be appealed to the banking board of review and from that board to the courts. The proposed law simply eliminates one step in the proceeding and provides for direct appeal from the commissioner to the courts. Certainly no one can deny that this change alone represents a substantial change in the administration of the banking laws of this state.

In addition to this, the bill sets up an advisory board which is something altogether new in the administration of the banking laws and vests in this board important powers and duties different from those exercised by any state banking official under existing law. In fact, at least some of these powers involve a change in the substantive law relating to the regulation of state banks.

JEM
Oil Inspection — Mixing of Products — Inspection Fees — Signs — Heating Oils — When a Wisconsin wholesaler purchases from out of state, carload quantities of naphtha and high-grade gasoline for same delivery date with intention of mixing the two products to form a motor fuel, the mixed product rather than the separate products should be inspected. The product must be inspected for gravity test only. It is not necessary to subject the product to a distillation test before sale. Fees for such testing, when computed upon a gallonage basis, should be based upon the total gallonage inspected even though it includes gallonage previously inspected.

Ch. 168 does not require posting of a sign indicating the distillation test of motor fuel. It requires a sign indicating the gravity test.

Heating oils are required to be inspected under Ch. 168.

August 26, 1939.

JOHN M. SMITH, State Treasurer.

You state that the X Company, a Wisconsin wholesaler of motor fuel, purchased carload quantities of naphtha and high grade gasoline which were shipped into this state. Upon arrival here these products were mixed with others to form a motor fuel which was offered for sale. Your questions regarding this operation will be considered separately.

You ask whether the mixing of two tax-paid petroleum products forms a new product which must be inspected for gravity and distillation before being offered for sale to retailers.

Sec. 168.05, Stats., provides in part:

“(1) All mineral or petroleum oil, or any oil or fluid substance which is the product of petroleum, or into which any product of petroleum enters or is found as a constituent element, whether manufactured within this state or not, shall be inspected as provided in sections 168.03 to 168.14, inclusive, before being offered for sale or sold for consumption or used for illuminating or heating purposes within this state. For the purposes of sections 168.03 to 168.14, inclusive, all gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, used for illuminating,
heating, or power purposes, shall be deemed to be subject to the same inspection and control as provided for in sections 168.03 to 168.14, inclusive, for illuminating oils, except that the inspectors are not required to test it other than to ascertain its gravity, and it shall be unlawful for any person, dealer, or vendor to sell or offer for sale any such petroleum products for any of such purposes, that has not been so inspected and approved. It shall be the duty of the supervisor or his deputies to inspect all such petroleum products under whatever name called, whether manufactured in this state or not, and stamp the gravity test over his official signature, which shall also be stamped on the barrel, cask, or package inspected, before being sold or offered for sale within this state. Provided, however, that any person, corporation or vendor, selling or delivering gasoline, benzine, naphtha, and other like products of petroleum for illuminating, heating or power purposes in bulk by tank wagon shall, in lieu of the stamp or brand herein provided for, print or stencil on each tank wagon sale-ticket covering deliveries the following:

"(3) Any person who shall personally, or by clerk or agent, sell or offer for sale or for use, or who shall in any manner dispose of or attempt to dispose of any oil, gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, for illuminating, heating or power purposes, which shall not have been examined or tested under the provisions of sections 168.03 to 168.14, inclusive, or which having been so tested shall have been marked as rejected, or who shall knowingly use or furnish for use for illuminating, heating or power purposes any oil, gasoline, benzine, naphtha, or other like products of petroleum, which shall not have been properly examined or tested, and stamped, sealed, or marked as provided in sections 168.03 to 168.14, inclusive, shall be liable to a fine of not less than five dollars nor more than five hundred dollars, and any person so offending against the provisions of sections 168.03 to 168.14, inclusive, shall be responsible in damages to the party injured, in the event of injury arising or growing out of the use of any oil so offered or provided for sale or use."

Since the provisions of sec. 168.05, subsec. (1) require that inspectors subject gasoline and naphtha to a gravity test only, it is evident that these products need not be tested for distillation before being offered for sale. Although sec. 168.095 fixes the standards which motor fuel must meet when tested for distillation, such a test is not required prior to the sale of such motor fuel.
The inspections and tests which are imposed upon petroleum products serve to indicate the use to which a particular product is suited as well as to notify purchasers of its explosive qualities. In *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 123 N. W. 785, it was held that Ch. 168 was constitutional as a valid exercise of the police power of the state, both for the safety of the public and for the prevention of fraud. Since the blending of two petroleum products of different qualities will necessarily form a mixture which will bear a new gravity and since such mixture will be sold to the public as a motor fuel, it follows that the ultimate product must be tested before being so offered for sale in order to satisfy the purpose of Ch. 168. See V Op. Atty. Gen. 114.

You next ask whether Ch. 168 requires that gasoline and naphtha which is shipped into this state by a wholesaler for blending purposes be inspected both before and after that operation, thus imposing two inspection fees.

Sec. 168.10, subsec. (1) provides:

"Each deputy inspector may inspect and test illuminating or heating oil and gasoline, benzine, or naphtha, and such other like products of petroleum, in a tank or railroad tank car, so called when standing upon a railroad track, and such products shall not be transferred into warehouses or storage tanks or otherwise unloaded until so inspected; provided, if any such products are not inspected within twenty-four hours after arriving at their destination they may be unloaded, and the deputy inspector shall make his inspection after they are so unloaded, and when such products have been inspected, no other inspection shall be necessary, but the deputy shall, when such products are put in stationary tanks or barrels, mark, stamp, seal, or brand them without extra charge."

Sec. 168.16 fixes the fees for such inspection. That section provides in part:

"Every deputy inspector of illuminating oils shall demand and receive from the owner or other person for whom or at whose request he shall examine or test any oil, gasoline, benzine, naphtha or such other like products of petroleum or sample thereof, as provided by law, an inspection fee of four cents for every single cask, barrel, package or sample so inspected. * * *"

"
It is contended that the provisions of sec. 168.10, subsec. (1) require an inspection of petroleum products at the time they are received by the wholesaler from the refinery regardless of the purpose for which they are intended. A careful consideration of the purpose of the inspection, however, indicates that such a strict construction is neither reasonable nor necessary. The inspection is imposed for the protection of the purchasing public. It is not for the protection of the wholesaler in dealing with the refinery. *State v. Bartles Oil Co.*, 132 Minn. 138, 155 N. W. 1035, 1036. When gasoline and naphtha are to be blended by a wholesaler before being offered for sale as a motor fuel, it is apparent that an inspection of such products before that process could serve no useful purpose. A statute should not be construed so as to work an absurd result. *Carchidi v. State*, 187 Wis. 438, 443, 204 N. W. 473. A statute should be construed to give effect to its leading idea and the whole brought into harmony therewith if reasonably practicable. *McCarthy v. Steinkellner*, 223 Wis. 605, 615, 270 N. W. 551. Since the mixture resulting from the blending of petroleum products of different qualities must be inspected before being sold or offered for sale, such inspection affords the protection to the purchasing public which Ch. 168 was intended to provide. You are therefore advised that when such products are received by a wholesaler for blending purposes, they need not be inspected before that operation, provided the ultimate product resulting from such blending is inspected before being sold or offered for sale.

You next inquire as to the proper gallonage basis upon which to compute the fees for inspection when gasoline and naphtha are pumped into a bulk tank containing a quantity of motor fuel which has been previously inspected.

If a wholesaler chooses to change the nature of a product which has been inspected, it would seem that he should bear the cost of the inspection which such mixing necessitated. See *Kentucky Independent Oil Co. v. Thiel*, 181 S. W. 982, 168 Ky. 65. The gravity of the resulting mixture will be determined by the combining of all of the products contained in the tank. Hence it appears that the inspection fee should be computed upon the basis of the total gallonage contained in the bulk tank after such mixing even though one of the products which constitutes such total was once inspected.
You ask whether Ch. 168 requires that a sign indicating both gravity and distillation of a motor fuel be posted at each pump where such product is sold or offered for sale.

Sec. 168.05, subsec. (5) provides in part:

"Any person * * * who shall offer for sale, or shall sell any such oil, or gasoline, benzine, naphtha and other like products of petroleum, representing it to be in any respect other and different in quality or kind than as represented to the person so purchasing the same, or without providing and exhibiting in a conspicuous place where such oil, or gasoline, benzine, naphtha and other like products of petroleum is sold, a sign or placard, announcing and plainly proclaiming to all intending purchasers the tests, flash, burning, and gravity, according to the last certificate issued by the deputy inspector making the inspection of the product as to explosive qualities, and the gravity test of gasoline provided for in sections 168.03 to 168.14, inclusive, shall be liable to a fine of not less than five dollars nor more than five hundred dollars, or to imprisonment in the county jail for not more than six months, or to both such fine and imprisonment; * * *"

As noted above, sec. 168.05, subsec. (1) requires that deputy inspectors test gasoline and naphtha for gravity only. Since Ch. 168 requires no other test to be made of gasoline before being offered for sale, it is evident that a sign bearing only the gravity test of gasoline is sufficient to satisfy the requirements of sec. 168.05, subsec. (5).

This section was intended to prevent misrepresentation in the sale of petroleum products by either displaying a sign bearing false tests or by posting a proper sign in such a manner as to be misleading. The language of the statute cannot be so strictly construed as to require that a sign or placard be posted at each pump where the product is sold since it imposes only the broad requirement that such signs be exhibited "in a conspicuous place" where such product is offered for sale. Compliance with the requirements of this section depends to a large extent upon the location and arrangement of the pumps and bulk tanks at the place of sale. Since this is a question of fact, no rule can be laid down which will govern in all situations.
You also request the opinion of this department as to whether the provisions of Ch. 168 require that heating oil be inspected. You state that inspections of such oil have not been made due to a possible conflict between sections 168.06 and 168.13.

Sec. 168.06 provides in part:

“No person shall knowingly sell or offer for sale, or knowingly use any coal or kerosene oil or any product of petroleum for illuminating or heating purposes, which by reason of being adulterated or for any other reason will emit a combustible vapor at a temperature less than one hundred and five degrees above the zero point of Fahrenheit’s thermometer, open test, where tested as provided in section 168.09, or will burn freely at a temperature less than one hundred and twenty-five degrees above the zero point of such thermometer, open test, where tested as therein provided.

* * * Any person violating any of the provisions of this section shall be fined not less than one hundred dollars nor more than one thousand dollars, and be liable for all damages resulting therefrom. Any oil which shall fail to stand the test above described shall be deemed unfit for illuminating or heating purposes, and the barrel, cask, tank, or other package containing the same shall be marked ‘rejected’ as hereinafter provided.”

Sec. 168.13 provides:

“Nothing contained in this chapter shall be construed to prevent manufacturers, refiners or dealers in this state from keeping in their warehouses or tanks for transhipment to other states illuminating oil of a grade below the test prescribed; nor shall this chapter be construed to apply to crude petroleum, gas oil or fuel oil; but the terms gas oil and fuel oil shall not be construed to include kerosene, gasoline, benzine, naphtha, power distillate, motor spirits, or any other like products of petroleum by whatever name called. It is the true intent and meaning of this chapter that the terms oils, illuminating oils, oils used for illuminating and heating purposes and all similar words, terms and expressions shall be held to mean any mineral or petroleum oil or any fluid or substance which is the product of such oil or of petroleum, or in which oil or fluid or other substance is so obtained, mineral or petroleum shall be a constituent part of whatsoever name or title such oil, fluid or other substance may be known or called.”
A study of the legislative history of Ch. 168 reveals that this act, as created by ch. 269, Laws, 1880, applied only to illuminating oils. As uses for new petroleum products were found, however, the original act was amended to include such products within its scope. Ch. 114, Laws, 1897, amended the law to include any mineral or petroleum product sold for consumption or used "for illuminating or combustive purposes within this state." Sec. 1421e, Stats. of 1898, further amended the law so as to require the inspection of all mineral or petroleum products sold for consumption or used "for illuminating or heating purposes within this state." These are the words which appear in secs. 168.05, subsec. (1) and 168.06 at the present time.

In view of the primary purpose of Ch. 168, it is clear that neither the language of sec. 168.13 nor any reasonable construction thereof can serve to exclude heating oils from the scope of that chapter. You are therefore advised that the provisions of Ch. 168 require the inspection of oils used for heating purposes before such oils may be sold or offered for sale within this state.

Insurance — Payment of cash Premiums — Sec. 201.08, subsec. (1), par. (a) does not require that the applicants pay the required amount of premiums in cash without borrowing.

August 29, 1939.

H. J. Mortensen, Commissioner of Insurance,
Department of Insurance.

In your letter you state:

"A domestic mutual insurance company in process of organization reports that it has over four hundred bona fide applications for insurance on over four hundred separate risks located in this state from over four hundred persons who are owners of said risks and on which the cash premiums amounting to more than $20,000 has been actually paid
to the insurance company, in cash, by said applicants. Upon this representation the company asked that it be granted a license to begin business.

"Upon examination of the company it was found, and the organizers admit, that a part of the cash premiums of a large number of the applicants were obtained from loans made to said applicants by a premium finance company. This brings up the following questions—

1. Have the cash premiums obtained from loans made to such applicants by the premium finance company and paid into the insurance company been actually paid, in cash, by the applicants within the meaning of section 201.03 (1) (a) of the Wisconsin Statutes?

2. If your answer to question 1 is in the negative would your answer we different if the applicants obtained their premium money by borrowing from a bank, an individual or any other source?

I am asked to submit the question in another form, to wit—

"Can a third party, holding promises to pay, advance all or part of these cash premiums; or is it the intent or a requirement of the law section 201.03 (1) (a) that in the organization of a mutual insurance company the four hundred charter members should show financial responsibility by they themselves having actually parted with the cash for the full premium?"

Sec. 201.03, subsec. (1), par. (a) in so far as applicable provides as follows:

"* * * No such company hereafter organized shall issue any policies of insurance unless and until:

(a) It shall have not less than four hundred bona fide applications for insurance on property or risks located in this state from not less than four hundred persons and upon not less than four hundred separate risks in this state on which the cash premiums plus cash contributions shall amount to at least twenty thousand dollars, which shall have been actually paid in, in cash, by the applicants."

Unless a statute is ambiguous, there is no room for construction. We can see no ambiguity in the statute itself or as applied to the facts under consideration. The applicants for insurance that have borrowed these premiums and are thus paying the money so borrowed in cash—are paying out their own money in cash and answer all of the calls of the
statute, or to answer the question as rephrased by you, they themselves have "actually parted with the cash for the full premium." The question is whether we are permitted to read something into the statute which is not there, namely, a requirement that they part with cash on hand without borrowing. The statute imposes no such terms and it would not seem permissible for us to undertake by construction the legislative function of imposing such terms. Granted that it may be desirable that the applicants for insurance furnish the cash premiums from their own cash reserves without borrowing (some indication of the members' ability to meet assessments if and when imposed) such is a matter of policy for the legislature to determine. The legislature has prescribed the conditions. Payment of the premiums in cash by the applicants is all that is required. To add a further requirement that such payments must be paid "without borrowing" would not appear to be a matter of construction but one of usurpation of a legislative function.

We are of the opinion that the company in question has met the calls of the statute.

NCB

Criminal Law — Sale of Merchandise to Employees — Words and Phrases — Fuel — Gasoline and lubricating oil used in the operation of motor vehicles is not "fuel" within the meaning of sec. 348.54 of the 1939 Statutes.

August 30, 1939.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You state that a certain Milwaukee corporation has for several years dispensed gasoline and oil to its employees under an arrangement whereby payment therefor is deducted from the employees' paychecks. This corporation has inquired whether the provisions of ch. 129, Laws, 1939, pro-
hibit the continuance of this practice. Hence you ask whether the term “fuel,” as it appears in that act, may be so construed as to include gasoline and oil used in the operation of motor vehicles.

Ch. 129, Laws, 1939, which became effective on July 1, 1939, created sec. 348.54 of the statutes. That section provides in part:

“(1) No person, firm or corporation engaged in any enterprise in this state shall by any method or procedure directly or indirectly by itself or through a subsidiary agency owned or controlled in whole or in part by such person, firm or corporation, sell or procure for sale or have in its possession or under its control for sale to its employees or any persons any article, material, product or merchandise of whatsoever nature not of his or its own production or not handled in his or its regular course of trade, excepting meals, candy bars, cigarettes, tobacco and excepting such specialized appliances and paraphernalia as may be required in said enterprise for the employees’ safety or health, and excepting fuel when such fuel is paid for by deduction from the employees’ paychecks. The provisions of this subsection shall not apply to lumber producers and dealers nor to any co-operative association organized under chapter 185.”

You do not indicate whether the corporation in question produces or deals in gasoline or oil. Since it appears, however, that the practice under consideration is not prohibited by sec. 348.54 if the commodity so purchased is produced or handled in the regular course of trade of the company through which such purchase is effected, we will assume, for purposes of this opinion, that the corporation does not produce or handle either gasoline or oil.

In Aetna Casualty & Surety Co. v. Kimball, 206 Ia. 1251, 222 N. W. 31, 34, the court held that the appellant’s claim for furnishing kerosene for lighting purposes and also oils and greases for use in motor vehicles should be denied since such products did not come within the meaning of the word “fuel” as that term appeared in a statute relating to the furnishing of materials for public improvements. In that case the court said:

“Nor does the word ‘fuel,’ as embraced within said statute, cover those goods, wares, and merchandise furnished
by appellant. Webster's New International Dictionary affords this explanation:

'Any matter used to produce heat by burning, as wood, coal, peat, petroleum; gas; that which feeds fire; combustible matter for fires.'

"27 Corpus Juris, page 913, consistently says:

'Fuel. Any matter used to produce heat by burning, as coal, gas, peat, petroleum, or wood.'

"Such definitions and meanings exclude, rather than include, oils and greases for lubricants, the barrels containing the same, and kerosene consumed for lighting purposes only."

In view of the foregoing, it is my opinion that the term "fuel," as used in sec. 348.54 of the 1939 statutes, may not be so broadly construed as to include gasoline and oil intended for use in motor vehicles.

JWR

NH
Public Officers — Attorney-general — District Attorney — District Attorney pro tempore — Courts — Assistants in Criminal and Civil Cases — Power of court to appoint a special prosecutor or district attorney where the district attorney is disqualified under sec. 59.44, subsec. (1), Stats., is not limited to appointing for trial of the case. Trial is not limited to preparation for and trial of the case in the trial court but extends to appointing with respect to appeal or review in the supreme court.

Disqualifications of the district attorney under said section exist in supreme court as well as in trial court.

Limitations with respect to maximum amount of fees for preparation and trial in the trial court under sec. 59.44, subsec. (2), Stats., are not applicable on the appeal.

September 15, 1939.

LEWIS C. MAGNUSEN,
District Attorney,
Oshkosh, Wisconsin.

In your letter you state:

"Under the authority of Section 59.44 of the Wisconsin Statutes for 1937 wherein it is stated (when there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, etc., the court, by an order entered in the minutes, stating the cause therefor, may appoint some suitable person to perform, for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting).

"There was duly appointed by the Municipal Court counsel to prosecute a violation of Section 351.30 in this Court.

"The defendant in this case was found guilty, and on conviction was sentenced and committed to the State Prison at Waupun.

"Counsel for defense has served notice of appeal, thereby presenting at this time the question of whether the court, under the authority extended in this section or otherwise, has the power and authority to appoint this same counsel to act for the state on appeal."
"The disqualification of the district attorney on the trial of this case arose out of the fact that he had acted as counsel for the party accused in relation to the matter of which the accused was charged and for which he was tried.

"If it be determined that the court has such power, upon what basis is the remuneration of such special counsel based?

"Thirdly, on the premise that the original trial has been concluded, can it be held that the disqualification of the district attorney continues to exist?"

Sec. 59.44, in so far as applicable, reads as follows:

"(1) When there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is near of kin to the party to be tried on a criminal charge, or is unable to attend to his duties, the circuit court, by an order entered in the minutes stating the cause therefor, may appoint some suitable person to perform, for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting.

"(2) The court may, in the same manner, and in its discretion, appoint counsel to assist the district attorney, in the prosecution of persons charged with crime punishable by imprisonment in the state prison, and in case of prosecutions before a grand jury, and upon indictments found by grand juries, and in bastardy cases. Such counsel shall be paid such sums as the court, by order entered in the minutes, certifies to be a reasonable compensation therefor, which sum shall in no case exceed twenty-five dollars per day for each day actually occupied in such prosecution, and not to exceed fifteen dollars per day for not more than five days actually and necessarily occupied in preparing for trial in any one case, the same to be paid in the manner provided by law for the payment of counsel for indigent criminals."

It is the legislative policy that a district attorney, who, because of interest in the case for the reasons assigned in the statute, is disqualified from prosecuting. The same reason that exists for disqualification with respect to prosecution in the trial courts exists with respect to representing the state upon appeal or writ of error to the supreme court. No sound reason is perceived why the district attorney is not
equally disqualified from representing the state in the case upon review by the supreme court. We have no difficulty in concluding that the district attorney's disqualification exists just as much on appeal to or review by the supreme court as in the trial court.

The only reason that occurs to us that would militate against the above conclusion is that sec. 14.53, subsec (1) makes it the duty of the attorney-general to appear for and represent the state in criminal actions on appeal or review in the supreme court. On the other hand, the statutes do not contemplate that the attorney-general must handle criminal cases in the supreme court without aid from the prosecuting officers. Sec. 59.47, subsec. (7) makes it the duty of the district attorney, upon the request and under the supervision and direction of the attorney-general, to brief and argue all criminal cases in the supreme court. Do the three statutes, secs. 59.44, subsec. (1), 14.53, subsec. (1) and 59.47, subsec. (7), when read together, contemplate that the state's case will be adequately and must be presented by the attorney-general plus such assistance as he can obtain from a district attorney disqualified as a matter of legislative policy from handling the case in the trial court? We do not think that the statutes contemplate any such result. The attorney-general is entitled to the same unbiased assistance in presenting the case to which the trial court is entitled. Such being true, it would follow that the trial court has authority to appoint a special prosecutor or special district attorney to handle the case on appeal.

It will be noted that sec. 59.44, subsec. (1) concludes "and the person so appointed shall have all the powers of the district attorney while so acting." There can be no question but that the district attorney would have the power, in fact it would be his duty, to assist the attorney-general both in briefing and arguing the case in the supreme court when requested to do so by the attorney-general. It is not our practice to make individual requests to district attorneys with respect to criminal cases on appeal. District attorneys understand that the office expects them to assume the burden of briefing and arguing such cases with the aid of such supervision and direction as we are able to give. We will expect the same thing from the special prosecutor in this in-
stance and this letter may be treated as a request from this office that the special prosecutor be continued as such to represent the state on appeal, his services to be paid by the county.

We cannot see where the circuit court's power to appoint or continue the special prosecutor in the instant case or in an appointment under sec. 59.44, subsec. (1) is any more limited than the power to appoint under sec. 59.44, subsec. (2). Trial courts have apparently adopted no restricted interpretation with respect to their power to appoint or continue special prosecutors to represent the state on appeal or review in the Supreme Court where the appointment has been made under sec. 59.44, subsec. (2). See, State ex rel. Kropf v. Gilbert, 213 Wis. 196, Hobbins v. State, 214 Wis. 496, Boyd v. State, 217 Wis. 149.

As to rate of compensation for services with respect to the appeal, the maximum sum for services in trial and preparation of trial set forth in sec. 59.44, subsec. (2) does not apply. John v. Municipal Court of Milwaukee County, 220 Wis. 334. The matter is within the sound discretion of the appointing court. It would be well for the appointing court to specify in the order of appointment the rate of compensation. It would likewise be prudent to have an express order of appointment. See Williams v. Dodge County, 95 Wis. 604.

School Districts — Tuition — Child may have his residence for school purposes different from that of his parent or parents if he is actually residing in the district "for other, as a main purpose, than to participate in the advantages which the school affords."

September 15, 1939.

JOHN CALLAHAN,
Department of Public Instruction.

In your letter you state:

"I have been requested to secure an Attorney General's opinion on the following case:
“Case. Mr. A. has a child who from all reports from doctors cannot live in the country where his parents now live. Mr. A. lives in the town of Ellington. The child has asthma and is affected by the dust from horses. Therefore this child is now and has for the last two years been living with his grandmother in the city of Appleton. He will have to continue to live in the city of Appleton. The child is six years old and must attend school in the city of Appleton. The city of Appleton says the parents must pay tuition.

“Question. Has the child the right to attend the Appleton schools free of tuition?


It appears further through conference with members of your staff that this request came from the district and that the district is willing to accept the above statement of facts as true. You did not deem this a proper matter to submit to this office for opinion and you have submitted the request to us with considerable reluctance.

Your position in the matter was fully warranted. The request for submission to our office was not a proper one for your department to honor. The cases cited state the law very clearly on the subject and there is nothing new in the problem presented. It is firmly established that a child may have a residence for school purposes different from that of his parent or parents. The question in each case is whether the child is actually residing in the district “for other, as a main purpose, than to participate in the advantages which the school affords.” Generally this question is one of fact to be determined under all the facts and circumstances of the case. There are apparently no disputed questions of fact in the particular case as the district seems quite willing to concede the facts which establish very clearly that the child is entitled to the facilities of the school tuition-free.

In support of your position that the request was not a proper one for your department to honor, it may be observed that we are under no duty to act as either private or official counsel for the various school boards throughout the state. We would be under no duty to honor this request from the board if it were submitted to us directly. If the various state departmental agencies are to be used as a mere medium for
transmission of requests to this department, it is apparent that we will find ourselves acting in the capacity of official advisor for every citizen or municipal board that desires to obtain some free legal advice from us—advice which it is not our duty to give and which it is improper for us to give.

There is an ever present tendency for departmental heads to act in just such a capacity as a medium of transmittal. Our office cannot function properly in relation to our official duties if we undertake to advise with respect to every legal problem that arises throughout the state and in every conceivable field. We have adopted a definite policy of confining our opinions within the sphere of our official duty and have refused to honor and shall continue to refuse to honor requests similar in nature to the instant one. It is only when a departmental head feels that he needs the guidance and interpretation of this office with respect to some problem which concerns him in his official capacity that this office is under any duty to respond to requests for opinions.

In the future, please refuse to honor any requests of a like nature.

NSB

Public Officers — Public Service Commission — Ch. 413, Laws, 1939 repealed ch. 9, Laws, Special Session 1937. In addition, it restored sec. 195.01, subsec. (8), Stats., 1937, to the same status that it occupied prior to the passage of ch. 9.

September 15, 1939.

Public Service Commission,

You submit the following questions with reference to ch. 413, Laws, 1939:

“1. Does this act abolish the position of director in the Public Service Commission of Wisconsin?
“2. If the position of director is abolished, does the act recreate the position of secretary?
“3. If the position of secretary is restored, what, if any, are the rights of William M. Dinneen, former secretary?
4. If the position of secretary is not recreated by the act, does the commission have the right to establish, pursuant to the civil service law, a position whose occupant would be the chief administrative officer of the commission and to whom would be assigned duties which the commission properly may assign similar to those performed by the secretary and director?

It is our opinion that the act abolishes the position of director of the public service commission of Wisconsin and that it recreates the position of secretary of that commission as it existed prior to the enactment of ch. 9, Laws, Special Session 1937. The restoration of the position of secretary does not, however, operate to restore the former secretary, William M. Dinneen, to that position.

The position of secretary of the public service commission was provided for by sec. 195.01, subsec. (8), Stats. 1937. Ch. 9, sec. 6, Laws, Special Session 1937, abolished the office of secretary of the public service commission and created the office of director of that commission. The act did not, however, assume to amend or repeal sec. 195.01. There can be no doubt, though, that the enactment operated, to all intents and purposes, to repeal sec. 195.01, subsec. (8).

Ch. 9, in addition to the change referred to, made comprehensive changes in the organization of the state government. It would serve no useful purpose here to go into these changes in detail other than to say that new departments were created, other departments reorganized, provision was made for further executive reorganization and statutory changes necessary to effectuate these purposes were made.

Ch. 413, Laws, 1939, is entitled as follows:

"AN ACT

To repeal chapter A 58 and subsection (7) of section 17.07, created by chapter 9, laws of special session 1937; to repeal and recreate subsection (1) of section 15.001, paragraphs (a) and (b) of subsection (1) of section 20.60 and section 93.02, all created by said chapter 9; and to amend subsection (1) of section 14.71 and subsection (6) of section 195.01 of the statutes, as amended by said chapter 9, laws of special session 1937, relating to the reorganization of certain state departments, and making an appropriation."
The first three sections of the law deal with statutory changes brought about by ch. 9. Any statutory provisions created by ch. 9 are repealed outright. Statutory changes brought about by ch. 9 are repealed and the statutes affected restored to their former status.

Section 4 of ch. 413, Laws, 1939, reads in part as follows:

"It is the intent of this act to repeal chapter 9, laws of special session 1937, to nullify all transfers of duties, powers and functions and other reorganizational changes thereunder, and to restore all boards, commissions, departments, agencies and instrumentalities of the state government affected by said chapter 9 to the same organization and status and with the same powers, duties and functions as existed prior to the enactment of said chapter 9; but this act shall not be deemed to affect the changes enacted by the 1939 session. * * *""

Except as it may be contained within this provision, there is no repeal of ch. 9. It is our opinion, however, that the language in question operates to repeal ch. 9. It certainly would have been preferable, from the standpoint of draftsmanship, to say in so many words that ch. 9 was repealed. On the other hand, if it is possible to determine from a legislative enactment the legislative intent, and if it is possible to effectuate that intent, it must be given effect.

Thus considered, it at once becomes apparent that it is the legislative intent to repeal ch. 9. It is likewise apparent that the legislature has so acted as to make it possible to effectuate that intent. If the legislature were to enact a law stating that "It is the intention of the legislature to repeal ch. 9" we think it would be just as effective as though it were to say, "Ch. 9 is hereby repealed." There is no particular magic in words and there is no particular form required for legislative enactments. In any case, as indicated, the basic questions are, what is the legislative intent, and is the enactment so formed as to make it possible to effectuate that intent?

If, as we have indicated, ch. 413 repeals sec. 6 of ch. 9, it is just as apparent that it restores sec. 195.01, subsec. (8) to its former status. We have called attention to the fact that sec. 195.01, subsec. (8) has never been expressly repealed.
The declaration of legislative intent in sec. 4 of ch. 413, to restore all boards, commissions, departments, agencies and instrumentalities to the same organization and status as existed prior to the enactment of ch. 9, is sufficient to restore sec. 195.01, subsec. (8) to the same status it occupied prior to the passage of ch. 9.

It is, of course, apparent that the restoration of the office of secretary of the public service commission does not operate to restore the former secretary to that position. Upon the abolition of the office of secretary, the former secretary became separated from the state service. The mere fact that the position of secretary is recreated after the lapse of a year or so, does not operate to reappoint the former secretary to that position.

As suggested above, we are fully aware of the fact that ch. 413 leaves much to be desired in the way of draftsman-ship. It is perfectly clear, however, from reading the law that it was the intent of the legislature to repeal statutes created by ch. 9, to restore statutes affected by ch. 9 to their former status, to repeal ch. 9 and to restore state agencies affected by ch. 9 to their former status. And, as we have indicated, once the legislative intent is determined, it must be given full expression if it is possible to do so. We have consulted several authorities in connection with this analysis and call your attention particularly to Callaghan's Wisconsin Digest, Statutes, para. 96.

JWR
Public Officers — Secretary of State — De facto State Officer — Appropriations and Expenditures — The secretary of state is fully protected in auditing payment of salary to a de facto state officer.

September 15, 1939.

Fred R. Zimmerman,
Secretary of State.

We have received the following request from you:

"Chapter 410, laws of 1939, recently became effective and I understand an appointment of the Commissioner has been made by the Governor and submitted to the Senate.

"The act creating the department contains the somewhat unusual provision found in subsection 8 of section 110.01: 'The commissioner and directors shall be appointed on the basis of recognized interest, training and experience and possess a knowledge and understanding of the powers, duties and functions of their respective offices.'

"With the appointment, confirmation, and qualification of the Commissioner, there may come before this department, in view of the language in subsection 8 of section 110.01, the question of the qualifications of the Commissioner and my right to certify the pay roll, under the circumstances.

"While it is not my function to pass on the qualifications of the Commissioner, I am concerned with the possibility that someone may question his qualifications after the pay rolls have been certified to me. If such a contest were raised as to the qualifications of the Commissioner, the question would also be raised as to the legality of the pay roll payments that had been previously made.

"For this reason, I desire to ask the following questions: (a) Is the Governor the ultimate judge of the qualification of the Commissioner, and does that question become settled upon the appointment of the Commissioner by the Governor and confirmation by the Senate, or may that question be inquired into at a later date? (b) If the latter is the case, when and by whom may such question be raised? (c) Is the Secretary of State fully protected in paying the salary of the Commissioner if an attack on his qualification is made?"

It is our opinion that following the appointment and confirmation of the commissioner and his entry into the duties of his office you would be fully protected in auditing the payment of salary to him. There cannot be the slightest doubt
but that when he has been so appointed and when he has assumed to discharge the duties of his office he would be at least a *de facto* officer. It is well settled in this state that disbursing officers are fully protected in paying salaries to *de facto* officers. In fact, it is probable that they are required to pay such salaries.

In arriving at our conclusion we have considered the following authorities: *State ex rel. Elliott v. Kelly*, 154 Wis. 482; *State ex rel. Kleinsteuber v. Kotecki*, 155 Wis. 66; *In re Burke*, 76 Wis. 357; Callaghan's Wisconsin Digest, Officers, sec. 44 et seq.

JWR

*Criminal Law — Lottery* — Plan whereby a mechanical device, electrically operated, is attached to a ticket dispenser in a box office of the theatre, the bell of which mechanical device rings and a light flashes automatically every minute or a few minutes depending upon how many tickets are sold and how rapidly they are sold, the machine being geared to ring and the light to flash each time after sale of a certain specified number of tickets, and which entitles a ticket purchaser to refund of his money for tickets purchased up to five in number if he happens to make the purchase at the time the bell rings and the light flashes, is a lottery.

September 15, 1939.

**HERBERT J. STEFFES,**

*District Attorney,*

Milwaukee, Wisconsin.

In your letter you state:

"The City of Milwaukee Police Department recently called to my attention a system installed at a certain Milwaukee theatre in the operation of which a certain number of free theatre tickets are given away every day. Pending my decision as to whether the same is in violation of our lottery statutes, both the promoter and theatre have discontinued its use."
"Consequently, I am requesting your official opinion as to whether or not the following plan is in violation of Sec. 348.01 of the 1937 Wisconsin Statutes and the related sections 348.02 and 348.03:

"Plan consists of the use of an A-P machine which is attached to the ticket dispenser in the box office of the theatre and works in unity with the ticket dispenser. The A-P machine is electrically operated and approximately once each minute a bell in the machine rings and a light flashes, which is a signal for the operator to give the person at the ticket window a free pass or passes, and the money tendered by the patron for the admission ticket or tickets is thereupon refunded. The number of free passes distributed to an individual, not to exceed five at one time, depend upon the number of admissions he intends to purchase when presenting himself at the box window. If he asks for three tickets and upon the purchase of the same the A-P machine bell rings and light flashes, he is then entitled to the equivalent number of passes, in other words three, and so on up to five.

I am enclosing some printed material furnished by the promoter, explaining the system in detail. As you can readily see from the enclosed literature, the so-called A-P Attendance Plan is frankly intended to be a business stimulator. I have arrived at the conclusion that under a strict interpretation of the recent Bank Night decision of our Supreme Court, State ex rel. Cowie v. La Crosse Theatres Co., handed down June 21, 1939, and reported in the July 26, 1939, North Western Reporter advance sheet commencing at page 707, such A-P Attendance Plan is a violation of our lottery sections. However, I also appreciate that, in my opinion, there is no statutory bar to a theatre giving away to persons of its own choosing free passes to its theatre, and I can see some logic in the argument that the A-P Attendance Plan simply involves the use of a mechanical device to indicate to the theatre when such free passes shall be distributed. It is also argued by the promoters that no consideration passes, that no extra inducement is offered but simply free admission to the theatre and that if people don't want to attend the theatre they would not go there on the mere chance of being admitted free, but nothing over and above the theatre performance is offered.

"However, the language and scope of the State Ex rel. Cowie decision are so broad and sweeping, particularly with respect to what constitutes consideration, that I feel impelled to request your opinion covering this question especially in view of the fact that the promoter in the literature frankly advances as a sales point to the theatres for the adoption of his plan the argument that it will increase theatre attendance, and under the State ex rel. Cowie decision this may be sufficient consideration."
A lottery involves three elements—prize, chance and consideration. *State v. La Crosse Theatres Co.*, Wis., 286 N. W. 707. You appear to have some difficulty with the element of consideration. So far as that element is concerned, the scheme does not present the difficulty presented in the *La Crosse Theatres Co.* case. Participants in the scheme are limited to those who purchase tickets. Where the other elements of a lottery are present, the element of consideration presents no problem where the participants are limited to those who purchase tickets. That has been the uniform holding of all courts. See the *La Crosse Theatres Co.* case where the court says:

"** It is stated in an article in 7 U. of Kansas City Law Rev. 133, that 'where the participants (in the drawing for the prize) are limited to those purchasing tickets to the theatre the courts have consistently held that such a (bank night) scheme constitutes a lottery.' As far as our examination has gone, this is a correct statement. ** " (710)

It is only where the scheme enables non-purchasers of tickets to participate with purchasers that any problem with respect to the element of consideration is present. Where non-purchasers can participate, the argument goes to the effect that purchasers furnish no consideration as the non-purchaser has a chance equal with the purchaser; there therefore can be no object in purchasing a ticket other than that of a purchase to see the performance or show; therefore the sole consideration in the purchase of the ticket is that of seeing the performance or show and that under such circumstances no part of the purchase price can be paid in consideration for the opportunity to participate in the drawing. Some courts accepted this line of argument. Others refused to accept it. Our court in the *La Crosse Theatres Case* joined the ranks of those courts that refused to accept such line of argument. The court looked at the scheme as a whole for what it was intended to accomplish and did accomplish, namely, the increase in attendance and therefore increase in profits as furnishing the element of consideration. It is obvious that the instant scheme aims at the same objective and has no value except as it aims at that objective. It is advertised and sold as a scheme which will accom-
plish that objective. It will fall into the discard unless it accomplishes the objective. So far as the element of consideration goes in the scheme under consideration, it is much less difficult of analysis than that of the same element involved in the La Crosse Theatres Co., case. Consideration is present. All of the authorities are agreed upon that point.

The only remaining questions can be with respect to whether the scheme presents the elements of chance and prize. As to the element of chance, it will be noted that all of the cases in defining the elements of a lottery use the term "chance" as one of the elements. They do not use the term "a drawing" or similar term. A drawing is merely a modus operandi of determining who wins by the element of chance. It is quite immaterial what method of determination is used so long as the element of chance is present. The "exact method adopted for the application of chance to the distribution of prizes is also immaterial." 38 C. J. 290. There can be no question but that the prizes offered (if prizes they be) are determined by chance. The promoters of the plan argue that the plan simply involves the use of a mechanical device to indicate to the theatre when free passes will be distributed. The same argument can be used with equal validity with respect to any drawing or the mechanics of any scheme. The drawing or other device used merely indicates to the management to whom it will give the prize. No one can dispute but that the theatre has the right to give its tickets to anyone it wants to. No one could dispute but that the La Crosse Theatres Company could donate a prize or cash to anyone that it wanted to. But in either case that which is given cannot be given by resort to the element of chance when consideration is paid therefor.

As to the remaining element of prize—the La Crosse Theatres case presented a method of operation involving an obvious major prize and other minor prizes. The present scheme involves a large number of free tickets and with no major prize or any prizes other than the free tickets. Are the tickets prizes? All that is needed to constitute a prize within a lottery analysis is that something of value be given away under circumstances where the other two elements of a lottery are present. 38 C. J. 292. We doubt that theatre owners are willing to concede that tickets to their shows are
of no value or that opportunities to see their shows free is not giving something of value. We know of no cases that would in any wise support any argument that something of value or that a prize or prizes are not involved in this scheme. We think it apparent that the element of prize is present.

We conclude that all three elements are present and that the scheme constitutes a lottery.

NSB

Oil Inspection — Words and Phrases — Fuel Oils — Problem of whether furnace fuel oils are subject to the terms of Ch. 168, Stats., re-examined in the light of prior practices, departmental rulings and legislative acquiescence in conflicting interpretations. The opinion holds that within the limits of expert proof on the subject, fuel oils which can reasonably be said and established to be a like product of petroleum to kerosene, gasoline, benzine, naphtha, power distillate or motor spirit are subject to the terms of the chapter and that sec. 109.04 gives the state supervisor the power and authority, in fact it is his duty to establish some rule which he feels will stand the test as a matter of expert proof whereby fuel oils used for heating purposes and which can reasonably be established as being a like product to the petroleum products immediately above named are subject to the terms of the act.

September 15, 1939.

John M. Smith,
State Treasurer.

On August 26th of this year we rendered to you an opinion covering six separate questions submitted with respect to ch. 168, Stats., dealing with inspection of petroleum products.* The last question submitted was whether ch. 168 required the inspection of heating oil or oils used for heating purposes. The apparent conflict between secs. 168.05, subsec. (1), 168.06 and other sections of the statutes requiring petroleum products used for “heating purposes” within this

*Page 535 of this volume.
state to be inspected and the provisions of sec. 168.13 Stats. exempting fuel oils from the terms thereof was pointed out. No reference was made to the history of prior administrative flip-flops on the question or to prior interpretations from this department, flip-flops or otherwise,—a most unsatisfactory method of submitting a question the historical background of which is so replete with somersaulting, skilled or otherwise, and with complete legislative acquiescence and slumbering throughout the entire performance.

We examined the question without the benefit of this background and concluded as follows:

"A study of the legislative history of Ch. 168 reveals that this act, as created by Ch. 269, Laws of 1880, applied only to illuminating oils. As uses for new petroleum products were found, however, the original act was amended to include such products within its scope. Ch. 114, Laws of 1897, amended the law to include any mineral or petroleum product sold for consumption or used 'for illuminating or combustive purposes within this state.' Sec. 1421e, Stats. of 1898, further amended the law so as to require the inspection of all mineral or petroleum products sold for consumption or used 'for illuminating or heating purposes within this state.' These are the words which appear in secs. 168.05, subsec. (1) and 168.06 at the present time.

"In view of the primary purpose of Ch. 168, it is clear that neither the language of sec. 168.13 nor any reasonable construction thereof can serve to exclude heating oils from the scope of that chapter. You are therefore advised that the provisions of Ch. 168 require the inspection of oils used for heating purposes before such oils may be sold or offered for sale within this state."

Since the ruling on this question considerable dissatisfaction on this question has been expressed to your department with respect to the soundness of the conclusion and hence we have been requested to re-examine the prior opinion upon this particular question.

The argument against the conclusion reached is largely one of statutory interpretation based upon the rule of "noscitor a sociis" and its illegitimate offspring "ejustem generis." It is argued that sec. 168.05 subjects to the provisions of the chapter "all gasoline, benzine, naphtha, or other like products of petroleum * * * used for illuminat-
ing, heating or power purposes”, that regard must be had for the specific named products and that the general provisions “or other like products of petroleum” adds little scope to the operation of the chapter in that such general provision is limited and relates back to the specific named products.

With respect to such argument, it is our opinion that the principles of statutory construction upon which the argument is based have no application to a statutory provision which by its express terms provides that names are of no significance. In this connection it should be noted that sec. 168.05, subsec. (1) Stats., in so far as applicable, reads:

“* * * For the purposes of sections 168.03 to 168.14, inclusive, all gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, used for illuminating, heating, or power purposes, shall be deemed to be subject to the same inspection and control as provided for in sections 168.03 to 168.14, inclusive, for illuminating oils, except that the inspectors are not required to test it other than to ascertain its gravity, and it shall be unlawful for any person, dealer or vendor to sell or offer for sale any such petroleum products for any of such purposes, that has not been so inspected and approved. * * *”

The problem presented in each case is not one of names or similar names to the specific named products, but is one of fact as to whether the particular product in question is a like product of petroleum to the named products. In this connection it may be noted that the section in question does not subject kerosene by express naming to the provisions of the chapter,—yet kerosene has been one of the most important petroleum products subjected to the terms of the act by consistent administrative interpretation, acquiesced in by all concerned (so far as is known) since the enactment of the act. Further, at this point in the discussion, it may also be noted that there is considerable variation between the average kerosene product inspected with respect to gravity, flash or distillation tests and the average similar test of the named products. It is our understanding that there is an overlapping, depending upon grade with respect to all of the named products and kerosene, but that the average of kerosene would constitute quite a variation with respect to all
tests when compared to the average of the named products. Thus, if there is consistent administrative interpretation and application of the Act, the mere fact that the average gravity test of a particular petroleum product under consideration is a degree less in gravity than the lowest known gravity of a named product would not necessarily and conclusively establish that the particular product under consideration is not an "other like product of petroleum" within the language of the statute.

Further argument is advanced that even though sec. 168.05 Stats. and other sections of the statutes by their express terms include petroleum products similar to the named products used for heating purposes, sec. 168.13 was amended by ch. 399, Laws, 1913 by adding to the exclusion provision, the underscored quoted language:

"* * * nor shall this chapter be construed to apply to crude petroleum, gas oil or fuel oil; but the terms gas oil and fuel oil shall not be construed to include kerosene, gasoline, benzine, naphtha, power distillate, motor spirits or any other like products of petroleum by whatever name called. * * *

It is argued that the chapter was extended to cover products similar to the named products used for heating purposes in 1898; that the legislature could not have had in mind at that time the use now made of oil for heating purposes; that sec. 168.13 Stats. by the 1913 amendment by its express terms excludes fuel oil; that heating oil is a fuel oil and that in so far as there is any inconsistency between the 1898 products subjected to the terms of the act and the 1913 amendment excluding fuel oils from the terms of the act, the 1913 amendment must control and that fuel oils used for heating purposes are not subject to the act.

In support of this argument our attention is directed to an opinion of this department rendered in 1926, XV Op. Atty. Gen. 10, which it is claimed supports the position taken. It may be admitted that the opinion does support the position taken. The vice of the opinion is that it decides the problem as a matter of law whereas the real problem is one of fact. The opinion is grounded upon an application of rules of statutory construction which, as heretofore noted,
have no application and assumes as a fact that oils used for heating in furnaces are not "other like products of petroleum" within the exception to the exclusion clause. It will be noted that the exclusion clause reads:

"* * * nor shall this chapter be construed to apply to crude petroleum, gas oil or fuel oil; but the terms gas oil and fuel oil shall not be construed to include kerosene, gasoline, benzine, naphtha, power distillate, motor spirits or any other like products of petroleum by whatever name called. * * *

Having in mind that the sole purpose of this chapter was that of protecting the public and its property from physical harm and preventing it from being victimized by fraudulent practices (Wadhams Oil Co. v. Tracy, 141 Wis. 150) it would seem a perversion of legislative intent to glorify the term "fuel oil" in the exclusion provision of sec. 168.13 at the expense of that portion of the exclusion provision which specifically provides that "the terms gas oil and fuel oil shall not be construed to include kerosene, gasoline, benzine, naphtha, power distillate, motor spirits or any other like products of petroleum by whatever name called."

The foregoing above-quoted provision is just as important as the provision excluding fuel oils from the terms of the act. A petroleum product may well be a fuel oil, but nevertheless if it is an "other like product of petroleum by whatever name called" to the named products it is still subject to the terms of the chapter. That problem is one of fact and largely a matter of expert proof. Any opinion which assumes the fact to be proved either one way or the other is not sound in analysis.

But it is urged that the opinion in question has been acquiesced in by the legislature since 1926 that we are no longer free to approach the matter as one of original interpretation; that due weight must be given to the legislative acquiescence in the opinion exempting heating oils from the terms of the act and that for us to reverse the 1926 ruling at this time is the equivalent of assumption of a legislative function.

There would be much force in the argument if it were not for an opinion rendered by this department in 1935, XXIV
Op. Atty. Gen. 667, in which we reached just the opposite conclusion, which opinion in turn has been followed by the departments administering the law and likewise acquiesced in by two legislatures to date. As a matter of administration, the 1935 opinion superseded to a large extent the 1926 opinion,—if it did not completely overrule the same. The 1935 opinion impresses us as much sounder analysis than the 1926 opinion, even though it is subject to the same vice found in the 1926 opinion, namely, the assumed fact that the product under consideration in this instance was a "like product" to kerosene.

It is perhaps worth noting that the 1913 amendment to sec. 168.13 Stats. for the first time included kerosene as a named product. As kerosene itself theretofore was subjected to the terms of the Act, not by express name but as a similar product to the named products, the naming of "kerosene" in the 1913 amendment to sec. 168.13 Stats. is of significance. It increased the range within which a particular product may be found to be a product similar to the named products.

Legislative acquiescence in the 1926 opinion is of no significance at all with respect to the problem under consideration in view of the history of legislative acquiescence in the various conflicting administrative interpretations and rulings of this department. It appears from the 1926 opinion that the department, from the time that use of oils for heating purposes came into being and developed, inspected gas oils where they were above a certain gravity test. Such inspection was uniformly applied until 1926 when the ruling of this department changed the picture. The legislature acquiesced in the inspection up until 1926, it acquiesced in the non-inspection thereafter until 1935 and it has acquiesced in the inspection since then. This sort of acquiescence is not of any particular value in the problem of interpretation now before us. Further, in view of the conflicting opinions of this department, we feel free to approach the problem as one of initial interpretation and feel free to render an opinion in accordance with our interpretation of legislative intent as gleaned from the manifest and underlying purpose of the Act, namely, the protection of the public from physical harm and damage to property and the preventing
of the public from being victimized by fraudulent practices.
Sec. 109.04 Stats. provides as follows:

"The state supervisor of inspectors shall have power and
erm authority to make and enforce such necessary rules and reg-
tulations, not inconsistent with law, as he may deem neces-
sary for the discharge of all the powers and duties of the
state inspection bureau. He shall also have authority to pre-
scribe forms for all applications, notices and reports re-
quired by law to be made to the bureau or which are neces-

We conclude that within the limits of expert proof on the
subject, fuel oils which can reasonably be said and estab-
lished to be a like product of petroleum to kerosene, gasoline,
benzine, naphtha, power distillate or motor spirit are sub-
ject to the terms of the chapter and that sec. 109.04 gives the
state supervisor the power and authority, in fact it is his
duty to establish some rule which he feels will stand the test
as a matter of expert proof whereby fuel oils used for heat-
ing purposes and which can reasonably be established as be-
ing a like product to the petroleum products immediately
above named are subjected to the terms of the Act.

NSB

Public Health — Slaughterhouses — Words and Phrases
— Place where chickens are killed in large numbers and pre-
pared for freezing is a slaughterhouse or place where the
business of slaughtering is conducted within the meaning of
those terms in sec. 146.11, Statutes, and subject to regulation
by the state board of health.

September 16, 1939.

CARL N. NEUPERT, Assistant State Health Officer,

State Board of Health.

In your letter you state:

"Section 146.11 (1) of the Statutes provides that, 'No
person shall erect or maintain any Slaughterhouse, or con-
duct the business of slaughtering * * * unless under
federal inspection, within one-eighth mile of a public highway, dwelling, or business building.* * * *

"Section 146.11 (2) provides that, 'Slaughterhouses * * * shall be inspected and supervised, as to location, construction and operation, by the state board of health * * * *

* * * * * 

"This Department is frequently called upon to investigate complaints of odors, etc., incident to the killing of chickens within the city limits of cities of various sizes. In one city one such an establishment kills or butchers and prepares for freezing, about 1500 chickens at least once a week. The question involved is: Does this constitute slaughtering, and is the operator, therefore, conducting the business of slaughtering?"

The problem is one which has given us considerable difficulty. It is not free from doubt. The term "conduct a business of slaughtering" is used but once in the section under consideration and that in subsection (1) thereof. That use may or may not add anything to the term "slaughterhouse" as elsewhere used in the statute. The term "slaughterhouse" is defined by Webster as "a building where beasts are butchered for the market." If the foregoing dictionary definition is taken as the accepted sense in which the term "slaughterhouse" is used in the section under consideration, it is apparent that the place in question is not a slaughterhouse as chickens cannot qualify as beasts. On the other hand, a slaughterhouse is defined in the new English Dictionary as "a house or place where animals are killed for food." If this definition is accepted, there would appear to be no reason why the place in question would not be comprehended in the term "slaughterhouse". The cases are legion where the term "animal" has been construed to include fowls. See the term "animal" in "Words and Phrases". But few cases have ever discussed the subject and in those cases that have discussed the subject, it seems to be assumed that the term "slaughterhouse" is sufficiently comprehensive to include a place where animals are slaughtered. The discussions of the subject in the cases are loose discussions where the exact point was not under consideration, namely as to whether a slaughterhouse, technically so-called, comprehends only those places where beasts are slaughtered as distinct from a place where animals are slaughtered. See Thibaut v. Hebert, 45 La. Ann.
838, 12 S. 931; Williams v. Schehl, 84 W. Va. 499, 100 S. E. 280; Ford v. State, 112 Ind. 373, 14 N. E. 241. Certainly there is no difficulty with the concept that chickens are a fit subject matter for slaughter. The killing of chickens in large numbers at a central plant for commercial purposes was referred to in Higgins v. Decorah Produce Co. (1932) (Iowa) 242 N. W. 109 as a slaughtering of said animals. It seems to us that the term “slaughterhouse” may well comprehend any house or place where the business of slaughtering is carried on. If chickens are a fit subject matter for slaughter, and there would seem to be no question but that they are, then it would follow that any place where chickens are slaughtered is a slaughterhouse, subject to the limitations that here in any question of “slaughterhouse” or “no slaughterhouse” as to whether the killing is in sufficient quantity to constitute the place a slaughterhouse.

The problem comes to one of determining in what sense the legislature used the term slaughterhouse in section 146.11, Statutes,—whether in the restricted sense as defined by Webster which would limit the term to a place where beasts are killed or in the larger sense, which seems to be equally acceptable in ordinary parlance or understanding, of a place where animals are killed. In arriving at such determination, it must be borne in mind that the statute is a health measure and that the term should receive such interpretation as will accomplish that which the legislature sought to accomplish,—protect health. In your submission you enclose rules which the board adopted in 1914 with respect to sanitary measures which all slaughterhouses must meet. It is apparent that from the standpoint of public health these rules are just as much needed as applied to the business in question as applied to a slaughterhouse in a restricted Websterian, technical sense. If the legislative purpose is to be accomplished, it would seem apparent that the term “slaughterhouse” as used in section 146.11, Statutes, must be used in the sense of a place where animals are killed for food and that the term should not be limited in scope to one of a place where beasts only are killed.

NSB
School Districts — Temporary Borrowing — Municipal Corporations — Municipal Borrowing — So long as temporary borrowing by a school district for current and ordinary expenses under sec. 67.12, subsec. (8), Stats., is such that it can be paid out of current revenues collected or in process of collection within the rule of cases cited, such district may borrow without regard to the constitutional debt limit.

September 21, 1939.

JOHN CALLAHAN,
Department of Public Instruction.

Sec. 67.12, subsec. (8), Stats., provides as follows:

"The school board of any school district operating under the district system may on their own motion, made and properly recorded at a lawful board meeting, borrow money in such sums as are needed to meet the immediate expenses of maintaining the schools in such district. No such loan or loans except loans made by town boards to school districts shall be made to extend beyond the first day of May following nor to an amount exceeding one-half the estimated receipts as certified by the state superintendent of schools and the local school clerk. All such loans shall be secured by lawfully authorized and drawn school orders, each order when paid to be receipted and returned to the treasurer of the board."

You inquire whether borrowing under this section is authorized if the school district has exceeded its constitutional debt limitation under Art. XI, sec. 3 which provides in part as follows:

"* * * 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. * * *"

You are advised that a school district may borrow under sec. 67.12, subsec. (8) for current and ordinary expenses
without regard to the constitutional limitation above set forth provided that it can fairly be said that such borrowing can be repaid within the limits of monies and assets actually in the treasury or from current revenues collected or in process of collection. The theory then is that the municipality or school district 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. *Earles v. Wells, et al*, 94 Wis. 285.

But the foregoing marks the limits of such borrowing. In the same case the court said:

"* * * But the moment an indebtedness is voluntarily 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." (p. 299)

This language was quoted with approval in *Crogster v. Bayfield Co., et al.*, 99 Wis. 1 and *Rice v. City of Milwaukee, et al*, 100 Wis. 516. In the last cited case the court says:

"* * * There is no disposition to enlarge the rule as there laid down." (p. 519)

Nor can we find any case where the court has ever indicated that there is any disposition to enlarge the rule. But within the limits of the rule, a school district may borrow for temporary purposes under sec. 67.12, subsec. (8) without regard to the constitutional limitation of Art. XI, sec. 3 above quoted.

NSB
Public Officers — Motor Vehicle Department — Civil Service — Status of Employes — Organization of State Departments — Organization powers of commissioner of motor vehicle department established by Ch. 410 considered and analyzed.

September 22, 1939.

Col. George W. Rickeman, Commissioner,
Motor Vehicle Department.

Ch. 410, Laws of 1939, creating the motor vehicle department, in so far as applicable to the queries that you have propounded, provides as follows:

"110.04. Transfer of powers, duties and functions. The powers, duties and functions of the respective departments transferred to the motor vehicle department by section 110.03 shall be transferred to and vested in such department within ninety days after the effective date of this chapter, as the commissioner may determine.

"110.05. Transfer of records, equipment and personnel. All records, books, papers, documents and equipment, and so much of the personnel now employed in the departments hereby transferred, as the commissioner may deem necessary to the efficient execution of the functions so transferred, shall automatically be transferred to and become the property and employes of the motor vehicle department as each such transfer is consummated."

"Section 3a. All records, equipment and personnel of the various departments and bureaus affected and transferred by this act shall automatically be transferred to the motor vehicle department and the rights and status of the personnel so transferred shall remain unchanged. Each employe transferred from the public service commission shall have the same classification, status and salary after transfer as before transfer. Each employe transferred from the department of state and the department of the state treasurer shall be given such classification, status and salary as shall be determined by the bureau of personnel, except that employes from the two departments in the same or closely related fields shall receive the same salaries. The personnel, records and equipment, as used and employed at the time of the effective date of this act in connection with the administration of sections 109.06 and 109.07 and paragraph (k) of subsection (4) of section 85.01 (repealed by this act) are transferred to the motor vehicle department and the rights
and status of the personnel so transferred shall remain unchanged.

"Section 4. When the commissioner of the motor vehicle department has so effected his organization so that he is ready to take over the functions, powers and duties of any of the state agencies, specifying the same, pursuant to this act, he shall so notify the governor." (Then follow the provisions whereby the governor notifies the secretary of state and state treasurer to the end that appropriations will be available to the new department).

You have requested our opinion as to just what the chapter contemplates by way of organization of the new department before you conclude that an agency or all of them should be transferred, and particularly whether the chapter contemplates that you perfect beyond subsequent change the three new divisions provided for by the chapter before notifying the governor that the new department is ready for the transfer of a particular agency and whether your powers with respect to organization of the new department are any greater before transfer than after transfer.

It may be stated at the outset that the chapter contemplates that all of the various agencies shall be transferred within a period of ninety days after the effective date of the act. Sec. 110.04 specifically so provides. It is within your discretion as to when the transfer shall be effective within said ninety day period as to any particular agency, the functions of which the chapter transfers to your new department.

The chapter further contemplates that you will have proceeded in the organization of the new department and the various divisions to the extent that the department and the various divisions thereof can function as such before request of transfer of a particular agency to the new department. But with respect to perfection of the organization of the department and the various divisions thereof, your power with respect to change of function or decrease or increase in personnel is no greater before transfer than after transfer.

It seems clear that you cannot discharge an employe until transferred—that you cannot discharge until the employe becomes an employe of the department. We do not think
that you can, by the simple expediency of refusing to accept certain employees of the various agencies before transfer, in
effect affect a discharge of such employe or employes without regard to civil service status. The wording of sec. 110.05 would lend some color to the proposition that you can do so. However, in so far as there is any inconsistency between sec. 110.05 and sec. (3a) of the act, the latter section is entitled to controlling weight. Sec. (3a) was added by amendment to the original bill and it seems to be the clear intent of that section that all employes of the various agencies transferred shall be and are automatically transferred to the new department and that the rights and status of the personnel so transferred shall remain unchanged.

The foregoing construction is consistent with the long established legislative policy of this state, namely, that of a civil service status of state employes. It would take rather clear and explicit language in a reorganization bill to justify the conclusion that the reorganization is to be perfected without regard to the civil service status of the employes effected. State ex. rel. Nelson v. Henry, 216 Wis. 80, 256 N. W. 714. We find no clear and explicit language in this chapter that would justify our concluding that the organization of your department may be effected without regard to civil service status of the employes of the agencies effected. Neither the language of sec. 110.05 nor that of sec. (3a) of the act lead irresistibly to any such conclusion. On the contrary, it seems that the language of sec. (3a) is such as to lead rather irresistibly to the opposite conclusion. This is especially true if the term "effected and transferred by this act" is limited to the preceding antecedents "departments and bureaus." If it will accomplish the legislative intent by so limiting the term, the term should be so limited. As sec. (3a) is concerned primarily with the preservation of civil service status of employes, it would seem quite apparent that the term should be so limited in order to accomplish the legislative intent.

We conclude that in the organization of your new department (except as to employes with respect to which the act specifically provides to the contrary, such as secretary to the commissioner, etc.), present personnel of the various agencies will have to be discharged subject to civil service rules and regulation.
A departmental head may always reduce personnel in the interest of economy and efficiency of the state service. Civil service status of an employe does not require a departmental head to retain the services of an employe or of employes when their services are no longer required. Such type of lopping-off must be exercised in good faith and not for the purpose of evading the civil service laws and the rules and regulations with respect thereto. Nor does civil service give the inefficient employe a strangle hold upon his job or position. A departmental head may always discharge for cause.

Transfer of employes of a particular agency will not freeze your new department or put it in a straight jacket so that you no longer possess power to further perfect the organization of the new department and the various divisions thereof. Further, you are not limited to perfecting your department to a ninety day period. You must have your department so perfected that you are able to take over the functions of the various agencies transferred within said ninety day period, but a departmental head may always work toward perfection of his department and you have just as much power with respect thereto after the ninety days has expired as you have prior thereto.

NSB
Trade Regulation — Trade-marks — Advertising — The fact that the name of a plan, scheme or system of advertising is to be used in connection with the sale of some tangible personal property does not make the name eligible for registration where it appears that such sales are a mere incident of sale of the plan or system and that such personal property is not to be offered for sale except in connection with and as an incident of the sale of the system.

September 25, 1939.

FRED R. ZIMMERMAN,
Secretary of State.

You have submitted to us a form of application for registration of a trade-mark “Lucky Amateur Hour”, the application of which states that the so-called trade-mark is to be “typewritten, printed, etc. * * *”

“The class of merchandise to which the same is intended to be appropriated is prints & publication & receptacles and a particular description of the goods is publication explaining purposes and use of a form of advertising known as the ‘Lucky Amateur Hour’, and registration books of various sizes and types designed by the owner for registration of amateur performers; for electrically operated drums of varying designs, sizes and types to receive and mix tickets, all to be offered for sale to firms using the form of advertising.”

You have also submitted an application for registration of form of advertising “Lucky Amateur Hour”, the application for which states:

“Operation:*  
*The theater or place of public entertainment gives to the person entering their place a numbered ticket, one-half of which is deposited in a drum; a different colored but similar ticket is given to those persons registering outside. From the tickets deposited two numbers are drawn and those selected are given an opportunity to compete for a prize, first and second prizes being offered. Judging is to be done by three judges selected by drawing tickets.
"The class of merchandise to which the same is intended to be appropriated is entertainment and a particular description of the goods is moving picture theaters and public entertainments of all kinds."

It appears from pamphlets submitted with the application that what the applicant proposes to do is to license theaters to use this name if such theaters purchase the applicant's system of advertising. The system is in substance a scheme of advertising as follows:

"The Theatre licensed to use the system advertises, for an appropriate period of time beforehand, that on a certain 'hour' or 'hours' of a certain day (such as Wednesday afternoon at 4:30, or Wednesday evening at 9:00 o'clock) will thereafter be designated as the 'Lucky Amateur Hour', and that all persons in the seats of the theatre and those who have registered outside and appear within two minutes of the time their name is called, will be given the opportunity to perform on the stage of the theatre for a period of two minutes or less, as they require, the performance to be in competition with another person similarly selected. The substance of the act is to be of the actor's own selection, to be original or otherwise, and the merits of the performance to be judged by three persons selected in the same manner as are the actors."

"Two sets of tickets will be provided to the theatre, each set to be of a different color and to contain as many tickets (numbered from 1 to ...) as there are seats in the theatre. The tickets will have the name of the theatre printed thereon, and on each end thereof have the number of the ticket. Across the back of the ticket will be the name 'Lucky Amateur Hour', and underneath the word 'inside' or 'outside' as appropriate, and a serial number assigned to the theatre.

"Those purchasing regular theatre tickets to see the performance each receive one of the 'inside' tickets, and as the patron enters the foyer of the theatre, he tears this ticket in half and drops one-half in the drum, and then enters the theatre, retaining the other half of the ticket. Those registering in the foyer of the theatre, in the register book provided, receive one of the tickets marked 'outside' and deposits one-half of same in the drum."

"When the 'hour' approaches, the drum will be removed from the foyer, and set upon the stage, and two tickets are drawn therefrom by separate individuals from the audience.
"The number of each ticket drawn will be read aloud as it is drawn. Persons holding the other half of the ticket will be given two minutes to appear, two to get ready, and two to perform. If the holder of any number drawn fails to appear within the time limited, another is promptly drawn until two amateurs are selected.

"The performances will be judged on the basis of merit, suitability to the personality, or ability of the performer, etc. The decision of two of the judges shall be final."

Two prizes are offered, the first prize to be approximately three times as large as the second prize. If a judge is selected from an "outside" ticket in consideration of acting as such judge he is permitted to remain and see the following performance.

In connection with these applications you inquire:

"Do these applications fall under the ban of your former opinion regarding 'Bank-Nite' as confirmed by State ex rel. Cowie vs. La Crosse Theater Company (286 N. W. 707)?  "If not, does the 'method of doing business' which the applicant proposes to license to the use of theaters fall within the scope of the opinion of your department of June 12, 1908 and subsequent rulings under which such forms of doing business have been held to be ineligible for registration?"

We do not find it necessary to answer your first question as we are of the opinion that neither application is entitled to registration under Ch. 132, Statutes. Sec. 182.01, subsec. (1), in so far as applicable, provides as follows:

"Any person, firm, copartnership, corporation, association, or union of workingmen, which has heretofore adopted or used or shall hereafter adopt or use any label, trademark, trade name, term, design, pattern, model, device, shop mark, drawing, specification, designation, or form of advertisement, for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor or manufacture as having been made, manufactured, produced, prepared, packed, or put on sale by such person, firm, copartnership, corporation, association, or union of workingmen, or by a member or members thereof, * * * ."

It will be noted that our registration statutes are not all comprehensive in terminology and that anything and every-
thing is not entitled to registration thereunder. The application for form of advertising shows very clearly that what is sought to be registered is a name to be used in connection with a system or plan of operation, whereas the section above quoted permits registration of a trade-mark, trade name, form of advertising, etc. only “for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor or manufacture as having been made, manufactured, produced, prepared, packed, or put on sale by such person, firm,” etc. Such language is not sufficiently broad to comprehend registration of “Lucky Amateur Hour” either as a trade-mark or form of advertising for use in connection with the sale of a plan, scheme or system of advertising or operation. This department so ruled in 1908 in the opinion to which you refer us. (1908 Op. Atty. Gen. 997) That opinion appears to have been adhered to administratively throughout the intervening years. While the statute has been somewhat changed since the opinion was written, there has been no change that requires a different ruling or holding on this particular point.

It does appear from the application of registration of trade-mark that the name “Lucky Amateur Hour” is to be used to some extent in the sale of electrically operated drums, registration books, tickets, etc. It does not appear whether such equipment must be purchased along with purchase of the system and as a part of it or whether the purchase of such equipment is optional on the part of a purchaser of the scheme or system. Whether the purchase of such equipment is compulsory or optional cannot be determinative of any question herein involved. It clearly appears that such equipment is not for sale except in connection with and as an incident of the sale of the plan, scheme or system. Sale of these articles under such circumstances does not bring them within the scope of the purposes for which trade-marks may be registered in this state under the language of the above quoted statute.

You are advised that neither application is eligible for registration under Ch. 132, Statutes.

NSB
Trade Regulation — Revocation of Watchmaker's Certificate — A watchmaker whose certificate of registration has been revoked under sec. 125.08, subsec. (1), for non-payment of the annual renewal fee, may have such license restored only as provided in sec. 125.08, subsec. (3), Stats.

B. W. Heald, Secretary,

Board of Examiners in Watchmaking.

You state that the certificate of registration of a certain watchmaker has been revoked because he neglected to pay the annual renewal fee provided in sec. 125.06, subsec. (4), Stats., and that he has requested that the hearing on his revocation be re-opened, and that he be permitted to pay the renewal fee at this time.

We are asked whether the board has the power to re-open a hearing duly held and concluded and to change the order made thereon, and whether the power to register such an individual is strictly limited to the procedure provided in sec. 125.08, subsec. (3), Stats.

Sec. 125.08, subsec. (1), Stats., reads:

"(1) The board may revoke a certificate of registration upon the failure of the holder thereof to pay the annual renewal fee, upon giving said holder thirty days' notice in writing of such proposed revocation."

Sec. 125.08, subsec. (3), provides:

"(3) One whose certificate has been revoked, may, upon the expiration of one year after such revocation, apply to the board for registration and upon satisfactory proof that the cause of revocation no longer exists, the board may, in its discretion, issue to said person a certificate of registration upon payment of the fees herein provided."

Subsec. (3), above quoted, is the only one making provision for the issuance of another certificate after the first one has been revoked. It may perhaps seem somewhat harsh to make an individual wait a whole year to obtain a certificate when the reason for revocation is merely the non-pay-
ment of the fees which he is presently willing to pay. However, under sec. 125.08, subsec. (1), above quoted, he must be given notice of the proposed revocation, and the provisions of subsec. (3) are sufficiently clear so that he should understand the consequences of neglecting to pay his fee within the time specified.

While the statute contemplates action by the board in revoking a certificate for nonpayment of fees, it does not provide for any hearing on the matter, and, consequently, there is no basis for asking that such a hearing be re-opened. It may well be that the board has some discretion in the first instance as to whether or not the license is to be revoked because of non-payment of the renewal fee within a particular time, since the use of the words "may revoke" indicate that the statute is directory rather than mandatory. However, having once acted to revoke the license, and the statute providing the manner in which the same is to be restored, it would appear that the board must confine itself to the procedure thus provided, since it is well established that administrative boards have only such powers as the statutes give them, and that when a particular statutory procedure has been set up, other methods of procedure are impliedly excluded.

WHR
Public Health — Embalmers and Funeral Directors — No embalmer need be employed in a branch funeral establishment where no embalming is practiced, but a duly licensed embalmer who devotes his full time to embalming must be employed in an establishment where embalming is performed, although it is not necessary for him to be employed full time in any one establishment.

One licensed embalmer or one licensed funeral director may supervise only one apprentice embalmer or apprentice funeral director.

September 25, 1939.

Board of Health.

Attention—Dr. Carl N. Neupert, Assistant State Health Officer.

You call our attention to the fact that sec. 156.04, subsec. (3), Stats., as amended by ch. 93, Laws, 1939, provides:

"* * * that any embalmer licensed under the provisions of chapter 156 of the 1937 statutes and whose license is in effect at the time of the effective date of this amendment of 1939, shall be eligible to take the examination for a funeral director's license."

Our attention is also called to Rule 5 of the rules and regulations governing qualifications and examination of funeral directors and embalmers which was adopted by the Wisconsin state board of health and has been in force for several years. This rule reads as follows:

"An applicant for a funeral director's license must present proof that he is the owner, either individually or as a member of a firm, or a full time employee of such owner or firm operating the business of funeral directing at a fixed place or establishment as defined in Rule 7."

You inquire whether Rule 5 qualifies the law as amended and requires embalmers who are eligible to take the funeral director's examination to furnish proof that they are the owners, individually or as members of a firm or as full time employees before application for writing the examination can be accepted.
This question is answered in XXIII Op. Atty. Gen. 92, where it was stated that the state board of health may not require that a funeral director own the property and equipment used in the conduct of that business. The reasoning of that opinion would also apply as far as full time employment is concerned.

Secondly, you inquire whether a full time embalmer must be employed in a branch establishment where no embalming is done.

Sec. 156.01, subsec. (5), as amended, reads in part:

"* * * A full time duly licensed embalmer must be employed in all funeral establishments where embalming is practiced."

Obviously, this language does not apply to an establishment where no embalming is practiced.

In this connection you further inquire whether the above statute applies to a funeral director who does not have an embalmer's license, where employment of a full time embalmer would be prohibitive because of the fact that only about one funeral is conducted every two weeks.

The construction which we place on this statute is that any embalmer employed must be a full time embalmer but that it is not necessary for him to be employed full time in any one establishment. The words "full time" modify or qualify the word "embalmer" only. The legislature did not say that the embalmer "must be employed full time in all funeral establishments where embalming is practiced. In holding that the words "full time" modify the word "embalmer" only, we are using, according to the phraseology used, its common and approved usage. It is an elementary rule of grammatical construction that:

"Every modifier should be so placed that the reader connects it immediately with the member it modifies, and not with some other member." Woolley Handbook of Composition, p. 32.

This construction appears to be in conformity with the apparent purpose of the statute which is to eliminate the unskilled part-time embalmer. The legislature must have felt
that the public interests would be better served by professional embalmers devoting their full time to the profession. Any other construction of this statute would be absurd, since no useful public purposes could be served by requiring the full time services of an embalmer in an establishment where only one or two funerals a month are conducted, and, in fact, it would virtually result in the elimination of funeral establishments in the less populous cities and villages, regardless of the fact that full time embalmers might be called in when needed.

Thirdly, you have asked under what circumstances branch establishments may be operated.

We must decline to answer this question because of its indefiniteness. It is rather difficult for us to pre-suppose all possible factual situations which might arise along this line and then proceed to make rulings upon our own hypothetical problems. However, we shall be very glad to assist you whenever a specific question arises out of any actual fact situation in this connection.

Lastly you submit for our consideration the following situation:

"In the continued absence out of state of the owner of a funeral establishment, an apprentice has charge of the establishment and calls in a licensed funeral director from a neighboring city whenever notification comes to the establishment of a death requiring the services of this establishment. This funeral director is also a licensed embalmer and supervises the apprentice in all operations following the receipt of the initial call. He is subject to call of the funeral establishment in the neighboring city with which he has been associated for a number of years but has his funeral director's license displayed in the establishment under question. His home is in the neighboring city. At this neighboring location, the apprenticeship of an apprentice embalmer is being served under his supervision. Under the circumstances, can the apprentice funeral director and embalmer at this establishment from which the owner is absent be credited with meeting the requirements and serving a registered apprenticeship under this same individual who is supervising another apprentice in the neighboring city?"

It is our opinion that the apprentice mentioned above is not meeting the requirements of the statute. Although it is
not expressly stated that a licensed embalmer or a licensed funeral director may supervise only one apprentice, the statutes indicate that this was intended.

Par. (c) of subsec. (2) of sec. 156.095, as amended, provides that only one funeral director apprenticeship may be recognized at any one establishment in any one year. Par. (d) makes an exception where there are more than 150 funerals per year, provided that there are at least two licensed funeral directors at the establishment.

Pars. (c) and (d) of subsec. (3) make similar provisions in the case of apprentice embalmers.

The fact that two funeral directors or two embalmers are necessary where there are two apprentices in the same establishment suggests that the intent of the statute was to prevent more than one apprentice from working under one embalmer or one funeral director and that this principle should be applied whether in the same or different establishments.

WHR

Indigent, Insane, etc. — Legal Settlement — Poor Relief — Minors — A minor enjoying a derivative settlement in the city of Waupaca does not lose that settlement by marriage to a person not settled in Wisconsin, nor by acquiring a legal settlement in another state.

September 25, 1939.

Paul E. Roman,
District Attorney,
Waupaca, Wisconsin.

You have submitted the following statement of facts and have requested that we give you an opinion thereon:

"In the matter of the case of A., an indigent, it is agreed that she had a derivative settlement in the city of Waupaca. And on or about April 4th, 1937, when she was sixteen years of age, she was married to a man who had no settlement in the State of Wisconsin. It purports to be the fact that she
and her husband left the city of Waupaca and State of Wisconsin and lived in Spartansburg, South Carolina, from April, 1937, to May, 1938. Indigent and her husband then moved from Spartansburg, S. C. to Asheville, North Carolina and lived there from June, 1938, to September 4th, 1938. On or about September 4th, 1938, applicant came back to Waupaca without her husband and arrived there September 8th, 1938, and has continued to reside in Waupaca from September 8th, 1938, to May 20, 1939, the whereabouts of the husband being unknown, at which time she made an application for relief and was given relief by the city of Waupaca. The question is has applicant a legal settlement in the city of Waupaca or is she a County charge.”

We understand that the derivative settlement referred to in the city of Waupaca existed by reason of the fact that the girl's parents resided in that city.

We start with the fact that A., prior to April 4, 1937, had a derivative settlement in Waupaca by reason of the fact that she was a minor and that her parents were settled there.

The fact that she married did not deprive her of her derivative settlement. A wife takes the derivative settlement of her husband only when the husband has a settlement in the state. See sec. 49.02, subsec. (1), Stats.

Under the provisions of sec. 49.02, subsec. (7), Stats., “Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; * * *.” It is evident from the statement of facts submitted that A did not acquire a new settlement in this state. Consequently she did not lose her settlement by acquiring a new one. Neither did she lose her settlement by voluntary and uninterrupted absence. Voluntary and uninterrupted absence does not apply to derivative settlement. By the very nature of derivative settlement, as applied to minors, it is based upon the relationship of the minor to one or both of his parents. Cf. sec. 49.02, subsec. (2), Stats. The physical fact of residence has nothing to do with the case. See Town of Grand Chute v. Milwaukee Co., 282 N. W. 127; XXII Op. Atty. Gen. 225. The derivative settlement provisions give a minor
a settlement at the place where his father or mother are settled, as the case may be, even though the minor may never have resided at all in that place. Consequently, the fact that he may have resided there and departed, is of no consequence whatsoever.

In view of the foregoing, it is our opinion that A has not lost her derivative settlement in the city of Waupaca and that she is legally settled there at the present time. This conclusion agrees with the conclusion at which you arrived and which was submitted in a memorandum which we have found to be very helpful.

JWR

Indigent, Insane, etc. — Poor Relief — Legal Settlement — School Districts — Tuition — Where a family, in which there are persons of school age, receives poor relief, the school district at which the members of school age attend school is entitled to the pro rata reimbursement referred to in sec. 40.21, subsec. (2), Stats. If the county system of relief prevails, the reimbursement must be made by the county.

William H. Rogers,
District Attorney,
Jefferson, Wisconsin.

You have submitted the following statement of facts, together with the following questions:

"Jefferson County is on the county system of poor relief. A family having a legal settlement in the Town of 'A' in Jefferson County and on poor relief moves into the Town of 'B' in Jefferson County continuing to receive relief. The children of this family establish a residence under Section 40.21 of the Wisconsin Statutes for school purposes. Town 'B' submits a bill for the pro rata cost of maintaining that school to the county.

* * *
"First, does the statement 'maintain as a public charge' as used in that section [sec. 40.21, (2), Stats.] mean the children of any family on poor relief, or does it apply only to those cases in which the child itself is receiving direct aid, as in aid to dependent children?

"* * *"

"Is the mere removal of an indigent family from one township to another within the county sufficient to enforce upon the county the obligation to make the payments mentioned in Sec. 40.21 as to the members of that family of school age?"

Sec. 40.21, subsec. (2), Stats., reads as follows:

"(2) Indigent Pupils, Tuition. 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."

It is our opinion that the subsection in question comprehends relief furnished to a family of which a child is a member and in which the child participates. It is not limited to any form of public support extended directly to a child, if there be any such form of support. The subsection specifically refers to local and county systems of "poor relief". It refers as well to the provisions of sec. 49.02, Stats., relating to the place of legal settlement as it may apply to liability of local units for furnishing poor relief. The only poor relief with which we are familiar is that provided for by Ch. 49, Stats., and such relief in no wise embraces aid to dependent children, the blind, the aged, or other forms of public assistance. It is, of course, quite clear that a minor of school age, who is at the same time a member of a fam-
ily receiving poor relief, and who participates in the receipt of that relief, is a public charge.

It is also clear to us that, in case a family moves from one school district to another in the same county, the county is liable for the pro rata payment referred to in sec. 40.21, subsec. (2), Stats., for the schooling of the family's children, irrespective of any question of nonresident tuition. A reading of the statute can permit of no other conclusion. Cf. also: XXIV Op. Atty. Gen. 49.

The fact of removal from one school district to another does not, in our opinion, have any significance. If the county is on the county system of relief, it is liable in any event. That is, under the county system of poor relief the county is liable for the pro rata payment provided for in any case where a child of a family obtaining poor relief attends school in the county. Whether the family remains in one district or whether it moves around from one district to another; is of no particular importance.

We call your attention to chs. 146 and 338, Laws, 1939, amending sec. 40.21, subsec. (2), Stats. These amendments do not affect the answers the questions submitted.

JWR

Counts — County Board Resolutions — Bridges and Highways — County Trunk Highway System — One county board cannot by providing a method as to how a resolution may be amended or repealed require a succeeding or future county board to conform to the method provided.

A county board may add all town roads within the county to the county trunk highway system.

September 30, 1939.

WALTER T. NORLIN,
District Attorney,
Washburn, Wisconsin.

You have submitted three questions to us.

Your first question involves the following situation: Your county board on December 1, 1920 adopted a resolution re-
lating to the addition of mileage to the county trunk system. In substance, the resolution restricted the mileage that might be added. It provides also that no proposal to add mileage should in the future be voted on at the meeting at which the proposal was presented but should be referred to a committee for investigation and report at some future meeting of the board. There were, in addition, certain other provisions, all calculated to operate as a regulation of the procedure by which future additions to the county trunk highway system might be made.

In line with its tenor the resolution further provided that "in order to amend, change or repeal this resolution, notice of proposed amendment, change or repeal, must be read at a regular meeting of this Board and voted upon at the next regular meeting."

You inquire as to whether or not the resolution may be repealed without conforming to the requirement that the repealing resolution be read at a regular meeting of the board and voted upon at the next meeting.

It is our opinion that the county board enjoyed no such power as that which it assumed to exercise by virtue of the language quoted. It would serve no useful purpose to discuss the question in detail except to say that one legislative body cannot bind another in any such manner. The Wisconsin decisions are quite clear as to this point. Kellogg v. The City of Oshkosh, et al., 14 Wis. 623; Brightman v. Kirner, 22 Wis. 54; Baines v. City of Janesville and another, 100 Wis. 369.

You then say that your county board proposes to add all town roads to the county trunk highway system, and ask our opinion as to whether or not the board may do so under the provisions of sec. 83.01, subsec. (6), Stats.

That subsection provides that the present system of county trunk highways may be altered or increased by the county board with the consent of the state highway commission. If, as seems to be clear, the county board may add some town roads to the county trunk system, we know of no reason why it may not add all town roads to the county trunk system. Certainly there is no express limitation as to the mileage or as to the number of roads that may be added
provided the increase or alteration is made with the consent of the commission, and we know of no implied limitation.

You then ask as to whether or not sec. 83.01, subsec. (6), Stats., applies to the streets in incorporated cities and villages.

In connection with this question we refer you to ch. 355, Laws, 1939. We think that a reading of this statute, as amended, will answer your inquiry.

JWR
Opinions of the Attorney General

Public Officers — Deputy County Clerk — Minors — A minor cannot hold the office of deputy county clerk, created by sec. 59.16, Stats.

James P. Cullen,
District Attorney,
Prairie du Chien, Wisconsin.

You have inquired as to whether a minor may be legally appointed to the office of deputy county clerk under the provisions of sec. 59.16, Wis. Stats.

At a very early period in the history of this state it was held to be "* * * a fundamental principle of our government that a person not an elector of the state is ineligible to hold a public office therein, * * *." State ex rel. Schuet v. Murray, 28 Wis. 96; State of Wisconsin etc. v. Trumpf, 50 Wis. 103; State ex rel. Off v. Smith, 14 Wis. 497.

The rule has been followed, and there has been, to our knowledge, no departure from the rule so laid down. See: Sieb v. City of Racine, et al., 176 Wis. 617; State ex rel. Wis. Dev. Authority et al. v. Dammann, 228 Wis. 147, 163, (mandate vacated on other grounds on rehearing).

The rule is apparently based upon the proposition that it is inherent in the constitutional framework of the state government that only those persons who participate in its management through exercising the privilege to vote are entitled to act as agents or officers of the electorate. It cannot be presumed that the sovereign electors would have delegated any portion of the sovereignty of the people to one who was otherwise unable, through constitutional limitation, to exercise any voice in the management of the government.

There is not, to our way of thinking, any indication in the cases cited, either express or implied, that the rule is limited in application to constitutional officers or, for that matter, even to elective officers. The reasoning of the decisions extends as well to appointive officers. And the cases of Sieb v. City of Racine, and State ex rel. Wis. Dev. Authority v. Dammann, supra, both assume that the rule extends to appointive officers.

October 2, 1939.
The only question that remains to be determined, therefore, concerns the status of a deputy county clerk.

A deputy county clerk is an officer. His position is created by statute. Cf. sec. 59.16, Stats. He is required to take an oath of office. Sec. 59.13, Stats. In the absence or the disability of the clerk he is clothed with all the statutory power of that officer and is required to perform his duties. See sec. 59.16, Stats. He is, in the absence of the clerk, pro hac vice, the incumbent of the office and may perform all acts incident thereto in his own name as deputy. He does not act in the name of his principal in such a case, nor does he derive his power and his authority from the power and authority vested in the clerk. To the contrary, he derives his office and his power from the laws of the state. He occupies a far different status than did the deputy under the common law concept. Cf. Gilkey v. Cook, 60 Wis. 133 and cases cited therein.

If a minor would not under the law of this state be eligible to hold the office of county clerk, it is apparent that he is not eligible to hold the office of deputy county clerk in view of what has been said. It would be a rather strange thing if a person, who was ineligible to hold the office of clerk, could be appointed deputy and as an incumbent of that office perform all the duties of the county clerk and be invested with all the obligations of the office of county clerk in the absence or disability of the clerk. Certainly, within the reasoning of the cases which disbar a minor from holding the office of county clerk he should likewise be disbarred from holding the office of deputy county clerk.

We are aware of the fact that there are some opinions of the attorney general in conflict with the views herein set forth. Among such opinions are IX Op. Atty. Gen. 444, XV Op. Atty. Gen. 413, and XX Op. Atty. Gen. 43. We disapprove of such opinions to the extent that they are in conflict with the views which we have expressed.

JWR
Civil Service — Classified Service — Cumulative Sick Leave — Public Officers — Director of Public Service Commission — The office of director of the public service commission, created by section 6, ch. 9, Laws Special Session, 1937, fell within the exempt division of the classified service by virtue of the provisions of secs. 16.08 and 16.09, Stats.

A change in the classification of one who is a member of the classified service does not deprive his appointing officer of the right to grant him a vacation.

October 2, 1939.

Public Service Commission.

You have requested our opinion as to the rights of Calmer Browy, acting secretary of the commission, to vacation and sick leave as determined by his status as director of the commission from February 3, 1938 to September 8, 1939.

Prior to Mr. Browy’s appointment as director of the commission, he was an employe of the commission, occupying a position in the competitive division of the classified service. Cf. sec. 16.09, subsec. (3), Stats. During his incumbency of the office of director he has been granted a leave of absence from the former position.

In order to determine the extent of the rights concerning which you have inquired and their application to Mr. Browy’s case, it is necessary to determine the character of his status during the time when he acted as director of the commission. He was appointed as director pursuant to the provisions of section 6, ch. 9, Laws, Special Session 1937. That section provides that the director shall be appointed without regard to the provisions of ch. 16, Stats. We construe this reference to ch. 16, however, to mean that the director was to be appointed without reference to those provisions of ch. 16 which require a competitive examination for positions and offices in the competitive division of the classified service. Under sec. 16.08, Stats., the civil service is divided into the unclassified service and the classified service. Subsec. (2) of sec. 16.08 enumerates those positions or offices which shall constitute the unclassified service. By virtue of subsec. (3) of sec. 16.08, Stats., all positions or offices not within the unclassified service are placed within the classi-
fied service. It is apparent that the position of director of the public service commission is not within the list of offices in the unclassified service, and, as a necessary consequence, it is in the classified service.

Sec. 16.09, Stats., comprises a classification of the classified service and divides the offices and positions therein into the exempt division and the competitive division. The exempt division includes certain offices and positions but it does not specifically include the position of director of the public service commission. On the other hand, it is quite apparent that sec. 16.09, subsec. (2), Stats., does not assume to be exclusive. In other words, by including certain positions in the exempt division, it does not necessarily exclude other positions not therein mentioned.

It is rather apparent, therefore, in view of what has been said that the office of director of the public service commission falls within the exempt division of the classified service. It certainly is in the classified service and it clearly cannot be in the competitive division in view of the provisions of section 6, ch. 9, Laws, Special Session 1937.

Under sec. 16.02, Stats., "appointing officer" may mean a commission, board or body. "Subordinate" means "any person holding a subordinate position subject to appointment, removal, promotion or reduction by any appointing officer."

Sec. 16.275, Stats., relates to vacation and sick leave. It provides as follows:

"(1) Appointing officers may in their discretion grant to each subordinate employed subject to the provisions of this chapter a noncumulative leave of absence without loss of pay, at the rate of three weeks for a full year's service.

"(2) Leave of absence with pay owing to sickness and leave of absence without pay, other than vacation, shall be regulated by rules of the bureau, except that unused sick leave shall accumulate from year to year not to exceed sixty days."

Thus, it is perfectly clear that the members of the public service commission, as appointing officers, could have granted a vacation to Mr. Browy at any time during his incumbency of the office of director, since he was obviously a subordinate within the meaning of sec. 16.275, Stats., and
the members of the commission were obviously appointing officers. This is but another circumstance showing that ch. 16, Stats., contemplated the granting of vacations to those occupying a status such as that of director of the public service commission. The only question that remains to be determined is as to whether or not, by reason of the fact that the office of director was abolished by ch. 410, Laws, 1939, the members of the public service commission may consider his service as director in granting him a vacation from his present position as acting secretary. The position of secretary of the public service commission was recreated by ch. 410, Laws, 1939, and now exists in the manner provided for in sec. 195.01, Wis. Stats. 1937.

Mr. Browy has been appointed as acting secretary although his civil service classification at the present time is that of junior investigator in the public service commission. If his right to a vacation must be determined upon the basis of a year's service in his present capacity, then he, of course, is not entitled to one. If, on the other hand, vacation allowance earned in his capacity or classification of director can be applied or considered, it is apparent that the commission may grant him a vacation.

We have no difficulty in arriving at the conclusion that a vacation allowance earned in one classification may be taken into consideration in granting a vacation to an employee whose classification has been changed. Thus, for example, if a person were to be promoted from law fellow to law clerk in this office, it is quite clear that the appointing officer in granting the employee a vacation could consider his service in both capacities. This, it seems to us, is precisely the situation in Mr. Browy's case. There has been no time during the past year when he was not a member of the classified service. It is true that his classification has been changed but, as we have indicated, this is not a material consideration.

In view of the foregoing we are of the opinion that the commission may grant Mr. Browy a vacation and that he is entitled to cumulative sick leave as provided for by law.

JWR
Tuberculosis Sanatoriums — Appropriations and Expenditures — Improvements of Sanatoria Facilities — Expenditures made by county for improvements of sanatoria facilities even though made prior to enactment of ch. 65, Laws, 1939 are not to be amortized under sec. 50.07, subsec. (2), par. (d), Statutes of 1937, when the source of the funds expended for such improvements is that of a bequest.

October 3, 1939.

DR. C. A. HARPER, State Health Officer.

In your letter of September 12 you state that a certain county has undertaken the construction of additions to its tuberculosis sanatorium and that such additions are being financed in part by a P.W.A. grant and in part by a bequest made for that purpose by a citizen of the county. The bequest consisted of $47,539 cash and $30,000 in securities. Deeming it inadvisable to liquidate the securities in view of the condition of the market, the county board empowered the finance committee to purchase these securities from the sanatorium trustees at $30,000 and the county is carrying them as an investment. The proceeds of the securities and the cash bequest were mingled in a common fund from which disbursements from the construction of the additions are being made. Up to May 12, 1939 when chap. 65, Laws, 1939 became effective the actual expenditures amounted to $38,000.

You ask what sum if any may be included in determining per capita cost under sec. 50.07, subsec. (2) par. (d) Wis. Stats. 1937.

In an opinion dated July 1, 1939,* this department advised the state board of control that rights acquired by counties under sec. 50.07, subsec. (2), par. (d) Wis. Stats. 1937 were not defeated by the enactment of chap. 65, Laws, 1939. The extent of such rights must, of course, still be determined by the provisions of the 1937 law which provides in part:

Sec. 50.07 (2) (d) 3. “For the purpose of this paragraph, expenditures for the addition to any existing sanatorium shall be determined on the actual expenditures of the county

*Page 411 of this volume.
for such purpose, less the amount, if any, of any grant of money or the value of any services, received from any source other than county funds. * * * *’’

The above quoted portion of the statute clearly excludes from the operation of paragraph (d) all sums derived from any source other than county funds. The legislature could not have used plainer, less ambiguous terms.

In the case in question all the money used for the construction of the additions was derived from sources other than county funds.

While part of the funds constitute the purchase price paid by the county for the securities, that part represents the proceeds of the sale of the securities which were a part of the bequest. Certainly the source of the money raised by the sale, as that word is used in the statute, is the donor’s estate, and whether the county or some other party was the purchaser is immaterial. Although the county paid a greater price for the securities than could be realized on the open market, it did so not by way of a contribution toward the cost of construction but because the board anticipated a more favorable market in the future and preferred to advance to the sanatorium fund the anticipated increase in the market price rather than delay the construction.

You are advised that no part of the expenditures for the additions under construction can be credited to the county and amortized under sec. 50.07, subsec. (2), par. (d).
Criminal Law — Improper Use of State or U. S. Flag — Use of emblem containing picture of an American flag in background does not constitute violation of sec. 348.479, where such emblem is used in connection with patriotic celebration of a day known as Citizenship Day to honor young people who have reached their twenty-first birthday and who are entitled to vote at the next election.

Patrick A. Dewane,
District Attorney,
Manitowoc, Wisconsin.

You state that the citizens of your county have decided to celebrate a day known as "Citizenship Day" for the purpose of honoring the young men and young women of the county who have reached their twenty-first birthday during the current year, and who are, therefore, entitled to vote in the next election. In connection with this celebration, use has been made of a certain emblem which the permanent organization for celebrating Citizenship Day would like to continue in the future. We are asked whether this emblem which pictures the flag of the United States in the background, violates sec. 348.479, Stats.

Sec. 348.479 provides:

"Improper use of State or United States flag or other symbol of authority. No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or

"(3) Expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or
carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign, or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance."

It is our opinion that the use of such an emblem in connection with the patriotic celebration mentioned violates neither the letter nor the spirit of the above statute.

It is to be noted that subs. (1) and (2) relate to the placing and exposing to public view of a flag upon which words, figures, marks, pictures, designs, drawings or advertisements have been placed. An emblem containing the picture of a flag in the background would obviously not fall within the language of either of these two subsections.

Subsec. (3) relates only to the use of reproductions of the flag, standard, color, ensign or shield of the United States or of this state upon articles of merchandise or receptacles or things for holding or carrying merchandise. This, of course, does not apply in the present instance. It is plain to see that the statute in question was designed to prevent the use of flags and the other items mentioned for commercial or private purposes. Whereas, in the present instance, the emblem is used in connection with what Chief Justice Rosenberry has referred to as the performance of "a patriotic duty of much significance in setting aside one day to induct into the corporate body of citizens those who will vote for the first time at the next election."

WHR
Banks and Banking — National Banks — Bank License — Corporations — Securities Law — The provisions of chapter 153, Laws, 1939, requiring banks and trust companies to secure a “bank license” in order to engage in certain specified securities transactions do not apply to national banks.

October 9, 1939.

G. Kenneth Crowell, Deputy Director,
Department of Securities.

You have requested our opinion as to whether or not under the provisions of chap. 153, Laws, 1939, national banks must secure a “bank license” as provided for therein in order to conduct certain securities transactions referred to in said chapter.

Chap. 153, Laws, 1939, among other things, amends subsec. (2) of 189.02, Wisconsin statutes, which subsection is a part of the securities law and defines the term “dealer”. The amendment provides that the term “dealer” does not include “any bank or trust company exercising banking powers which merely executes orders for purchase or sale of securities as agent of the purchaser or seller, has no direct interest in the sale or distribution of the security ordered or sold, receives no commission, profit or other compensation from any source other than the purchaser or seller, and delivers to the purchaser or seller written confirmation of the order which clearly itemizes his commission, profit, or other compensation.” It is also provided in chap. 153 that “all banks or trust companies exercising banking powers and qualifying under subsection (2) of section 189.02 shall procure a license therefor as provided in this chapter” and it is further provided that the commission shall collect “for each application for a license for a bank or trust company exercising banking powers and qualifying under subsection (2) of section 189.02, ten dollars.” Chapter 153, Laws, 1939, also adds a new section to the statutes reading:

“189.145. Application for Bank License. (1) Any bank or trust company exercising banking powers and qualifying under subsection (2) of section 189.02 shall first obtain a
license therefor. The application for such license shall be filed in the office of the commission and shall contain a statement, verified by an officer of such bank or trust company, setting forth the facts relating to qualification under subsection (2) of section 189.02.

"(2) The commission shall examine the application and may make a detailed investigation into the business affairs of the applicant. Such bank or trust company shall not be required to report to the commission the sales and purchases of securities, but must keep a permanent record thereof, available for inspection by the commission."

It is to be noted that in the three portions of chapter 153 last quoted, reference is made to banks or trust companies "qualifying under subsection (2) of section 189.02". It is somewhat difficult to ascertain the meaning of this language since subsection (2) of section 189.02 merely states that banks or trust companies functioning in a certain manner in connection with the execution of orders for the purchase or sale of securities are not to be considered "dealers" as otherwise defined in the securities law. There is no mention made in this subsection as to banks or trust companies in any way "qualifying" to attain any particular status. For the purpose of this opinion, however, we will assume that the legislature intended that the new provisions of the statute relative to the securing of a bank license were intended to apply to banks or trust companies which merely execute orders for purchase or sale of securities as agent of the purchaser or seller and otherwise act as described in the amendment to subsection (2) of section 189.02. The question is, then, whether these new provisions relating to the securing of a license by banks or trust companies in order that they may so function may be applied to national banks so acting within the state. This involves a consideration of questions as to the sphere which state laws may properly occupy when applied to instrumentalities of the United States government, such as national banks.

Generally speaking national banks are subject in their operation to state laws, unless such laws tend to impair their utility as an instrumentality of the federal government or conflict with the national government. 2 Zollman, Banks and Banking, Para. 621, First National Bank v. Missouri, 263 U. S. 640. However, this general principle is modified
by the rule that where congress has legislated upon a particular subject within its jurisdiction and has thus occupied the field, the state legislature may not validly enact contrary laws or laws which are intended to be supplementary or auxiliary to the laws on the subject already enacted by the federal congress. Prigg v. Pennsylvania, 16 Peters 539. Also Farmers and Mechanics National Bank v. Dear- ing, 91 U. S. 29.

In conferring corporate powers upon national banks, congress has expressly legislated upon the subject of dealing in securities by such banks. In enumerating the powers of national banks, it is provided “the business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock.” Title 12 U. S. C. Sec. 24. Comparison of this language with the language added to section 189.02, subsec. (2) by chapter 158, Laws, 1989 indicates clearly that in a number of particulars, the state and the federal law in this respect overlap. This being the case, the state law must fall upon the authority of the cases cited and upon generally accepted principles of constitutional law as applied to national banks in numerous other decisions.

A point of actual conflict with the federal statutes relating to national banks is found in subsection (2) of the new section 189.145 created by chapter 158, Laws, 1939. By that subsection it is provided that upon the bank making application for a banking license “the commission shall examine the application and may make a detailed investigation into the business affairs of the applicant.” The federal statutes relating to national banks contain the following provision:

“No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.” Title 12 U. S. C. A. Sec. 484.

These provisions were construed in Guthrie v. Harkness, 199 U. S. 148. It was there held that no state law or enactment
should undertake to exercise the right of visitation over a national corporation and that except in so far as such a corporation is liable to control in the courts of justice, the congress intended that this act was to be the full measure of visitorial power. Obviously a statute permitting a detailed investigation into the business affairs of a national bank by state authorities to ascertain whether such bank would upon application be entitled to a "banking license" would be plainly contradictory to the express terms of the national banking laws. Nor would this provision as found in the new section 189.145 created by chapter 153, Laws, 1939, appear to be severable from the remaining portions of the law so that if the remaining provisions were valid these provisions would stand. This provision would seem to constitute an integral part of the entire scheme and procedure set up for issuing "banking licenses" to banks and trust companies desiring to deal in securities in the manner specified.

Upon the foregoing considerations, it is our opinion that the provisions of chapter 153, Laws, 1939 requiring banks and trust companies to procure a license in order to deal in securities in the manner described in subsection (2) of section 189.02 as amended do not apply to national banks.

RHL

Indians — Prosecution for Desertion or Abandonment — Criminal Law — Prosecution of Indians — A tribal Indian who is a ward of the government and who contracts marriage pursuant to Wisconsin law may not be criminally prosecuted in state courts for subsequent non-support or abandonment of his family.

October 10, 1939.

EDMUND H. DRAGER,

District Attorney,

Eagle River, Wisconsin.

On the Lac du Flambeau Indian Reservation, there are numerous Indians who contract marriage pursuant to the state law by having a legal civil marriage ceremony per-
formed. From time to time requests have been made of you for prosecution of some of these Indians for non-support and abandonment. You inquire whether Indians who are wards of the government and who have contracted marriage pursuant to Wisconsin law may be criminally prosecuted for desertion or abandonment committed on an Indian reservation.

In the early Wisconsin case of State v. Doxtater, 47 Wis. 278, the court stated at page 297:

"We have no doubt that the criminal laws of the state apply to the Indians on their reservations within this state."

The holding of that case was followed in State v. Harris, 47 Wis. 298; Stacey v. LaBelle, 99 Wis. 520; and Deragon v. Sero, 137 Wis. 276. However, in United States v. Kagama, 118 U. S. 375 and In re Blackbird, 109 Fed. 139, the federal courts held that tribal Indians are wards of the United States, and are not amenable to the criminal laws of the state wherein they reside for crimes committed on the reservation. The Kagama case, supra, upheld the power of congress to enact, and the constitutionality of, section 328 of the United States Criminal Code which gave to federal courts exclusive jurisdiction of eight major crimes committed by Indians within the limits of an Indian Reservation. In United States v. Pelican, 232 U. S. 442, the court held that the United States retains jurisdiction over Indian lands and the Indians living thereon even though the lands have been allotted to the Indians in severalty but not fully patented to them. Since the Kagama case, supra, both the federal cases and those in state courts have almost uniformly held that as to the eight major crimes mentioned in section 328 of the United States Criminal Code, the jurisdiction of the federal courts is exclusive.

For some time, however, a question existed concerning the jurisdiction of the state courts over crimes committed by tribal Indians while on a reservation when those crimes were other than the eight major crimes listed in section 328 of the United States Criminal Code. The case of State v. Rufus, 205 Wis. 317 deals exhaustively with the question of state jurisdiction over crimes committed by tribal Indians
on an Indian reservation. In that case both the state and federal decisions are discussed and the conclusion is reached that the state courts have no jurisdiction whatever to punish tribal Indians for crimes committed on a reservation and that all such offenses except those specifically made punishable by federal statute must be punished, if at all, through action of the tribe. See \textit{U. S. v. Quiver}, 241 U. S. 602.

In XXV Op. Atty. Gen. 404, it was in substance held that a tribal Indian who is a ward of the government and married according to Indian custom may not be prosecuted criminally in state courts because he fails to support or abandons his wife or children.

It is our opinion that the fact that an Indian may have contracted marriage pursuant to Wisconsin law does not in any way operate to give the state court jurisdiction to prosecute him criminally, if, subsequently he abandons or fails to support his wife or family. The fact that he had contracted marriage pursuant to state law might make it easier to prove non-support or abandonment. This, however, would not in any way affect the question of state jurisdiction. No act which the Indian could perform, as for example subjecting himself to the civil marriage laws of this state, would suffice to free him from the exclusive jurisdiction of the United States. \textit{"* * * That is a legal consequence which can be attached only by express declaration of congress. * * *."} \textit{Ex parte Pero}, 99 Fed. (2d) 28 at 34.

JRW

\textit{Courts — Legal Holidays} — Under sec. 256.17, Stats., both the governor and the president may designate a day of thanksgiving and both days designated are legal holidays.

\textbf{Fred R. Zimmermann,}

\textit{Secretary of State.}

You have called our attention to the following situation. The governor of the state of Wisconsin has proclaimed the
30th day of November of this year as a day of public thanksgiving. The president of the United States has indicated that he will shortly proclaim the 23rd day of November of this year as a day of public thanksgiving. You inquire, in view of these facts, as to whether both of the days mentioned are to be observed as legal holidays in the state of Wisconsin, and, if not, as to which of the two should be observed as such.

Sec. 256.17, Wis. Stats., 1937, so far as material here, provides as follows:

"* * * the day appointed by the governor as Labor Day and by the governor or the president of the United States as a day of public thanksgiving in each year, * * * are legal holidays. * * *"

Two possible interpretations of the language of this section have been suggested to us. First, it has been suggested that the language contemplates but one day of public thanksgiving in each year, to be designated by the governor of Wisconsin or by the president of the United States. Second, it is said that the language contemplates that both the President and the Governor may designate a day of public thanksgiving in each year, and that the day so designated by each is a legal holiday. Under this interpretation there might, of course, be two holidays in the event that the day designated by the president fell upon a different day of the month than the day designated by the governor.

We are of the opinion that the latter construction is correct and that when and if the president of the United States proclaims the 23rd of November as a day of public thanksgiving, there will be two legal thanksgiving holidays in the state of Wisconsin for this year, namely, the 23rd of November and the 30th of November.

If one holds to the view that the statute contemplates but one legal thanksgiving holiday to be designated by the governor or the president, a question immediately arises in a case where the governor designates one day and the president designates another. Several theories have been propounded for resolving this question. It is suggested, for example, that in matters pertaining to the internal affairs of the state, the governor’s selection should be held to have
precedence over that of the president. We regard any such position as wholly unsound, principally for the reason that the statute itself, by no stretch of the imagination, implies any such a precedence. The contention likewise is made that the president or the governor may name a legal holiday in each year accordingly as he acts first; that is, that the governor, for example, may proclaim a day and if the president has not acted at the time of such a proclamation, he loses his power to proclaim a day. Here, again, the difficulty with the argument is that it rests upon pure speculation and conjecture.

As a matter of fact, if we begin with the assumption that there is to be but one legal holiday and endeavor to arrive at a conclusion as to whether the president or the governor has the power to name that day, we can think of no process of reasoning which determines the question beyond the realm of bald conjecture.

Moreover, we think a consideration of the history of the statute establishes the validity of our conclusion. As originally enacted, the provisions relating to Thanksgiving read as follows:

"Section 1. The twenty-fifth day of December, the first day of January, and any day appointed by the governor of this state or the president of the United States, as a day of public thanksgiving, are hereby declared to be holidays."
Ch. 248, Laws, 1862.

It thus appears that as originally enacted, there could be little doubt but that both the president and the governor could designate a day of public thanksgiving which would be a legal holiday. Thus, any day designated by the governor or any day designated by the president was to be a legal holiday.

Through subsequent additions and revisions, the word "any" has been dropped and the word "the" has been inserted, and other small changes have been made in the language of the law as originally enacted; but in all cases such changes have come into the statute by way of revision, or in connection with the addition of other holidays. Thus, "any" was changed to "the" as the section in question was published in the Statutes of 1878. Cf. Sec. 2578 R. S. 1878.
It is, of course, a well established rule of statutory construction that revisers' bills are presumed not to effect a substantive change in statutes unless such an intention manifests itself from the plain words of the change. Cf. Oconto County v. Town of Townsend, 210 Wis. 85.

We have not discussed the federal statutes relating to Thanksgiving, as they are of no importance in resolving the problem presented.

JWR

Appropriations and Expenditures — Workmen's Compensation — Claims — An appropriation is not exhausted in the meaning of sec. 20.07, subsec. (3) so long as any monies appropriated thereby remain unexpended, notwithstanding that the department to which the appropriation is made may have budgeted it to the last dollar.

Under sec. 20.07, subsec. (3) the first two hundred dollars of workmen's compensation (and any penalties) awarded an injured state employe whose salary is payable out of federal funds appropriated by sec. 20.573, must be charged to that appropriation by state treasurer so long as any monies, whether derived from state or federal sources, remain unexpended in said appropriation.

Under sec. 20.573, subsec. (2) the first two hundred dollars must be charged ultimately to the federal grant by the treasurer of the unemployment reserve fund, although pending the receipt of federal funds to cover the item he may charge it to state monies in the appropriation which have been constituted a revolving fund for such purpose.

October 20, 1939.

VOYTA WRABETZ, Chairman,
Industrial Commission.

You request an opinion as to the application of sec. 20.07, subsec. (3), Stats., to the payment of workmen's compensa-
tion to injured state employees whose salaries are financed from federal grants under Title III of the Social Security Act and paid under sec. 20.573, Stats.

Sec. 20.07, subsec. (3), Stats., appropriates a sum sufficient to pay compensation claims of state employees and provides in part as follows:

"* * * Primary compensation and medical benefits of two hundred dollars or less, as well as all increased compensation payable under the provisions of sections 102.57 and 102.60, shall be paid from the appropriation covering the salary or maintenance of the person injured, provided such appropriation has not been exhausted; otherwise compensation shall be paid from the general fund."

You inquire under what circumstances the appropriation made by sec. 20.573 may be "exhausted" in the meaning of sec. 20.07, subsec. (3), and also what procedure should be followed in the payment of compensation awards.

The federal social security board is directed under Title III (sec. 302) of the social security act to grant each state agency (e.g., the Industrial Commission of Wisconsin) administering an approved state unemployment compensation law (e.g., ch. 108 of the Wisconsin statutes) sufficient federal money to cover the "necessary cost of proper administration" of such state law. Of course, salaries and other personnel costs are a part of the necessary cost of proper administration, and each federal grant contains sums estimated to be sufficient to cover salaries and other personnel expenditures.

Sec. 20.573 provides a continuing appropriation to the industrial commission of monies received from the federal government pursuant to Title III and from certain other sources, to meet such expenses as may be incurred in the administration of ch. 108. As this continuing appropriation relates to all administrative expenditures that the commission may incur, it is clear that it is the one "covering the salary of maintenance of the person injured" within the contemplation of sec. 20.07, subsec. (3).

This office has ruled that the approval of department heads is not required for payment of vouchers based on awards of the commission, even though payable from funds
otherwise belonging to their departments, the audit of the secretary of state alone being required. XXII Op. Atty. Gen. 1044. It is equally clear that so long as any money remains unexpended in a particular appropriation from which the administrative expenses of a state department are to be paid, the appropriation is not “exhausted” even though the department may have budgeted it to the last dollar for purposes other than the payment of compensation awards.

Thus, the significance of the provision as to the “exhaustion” of an appropriation, contained in sec. 20.07, subsec. (3), is to be found not in the plans of a state department to use funds for purposes other than the payment of compensation, but, rather, in the purpose of protecting an employe who would otherwise be unable to collect his award in full in case, for example, his employing department and its appropriation were abolished following his injury and before entry of his award. The employe is protected in such a case by allowing the payment of the first two hundred dollars of the award (and any penalties) from the general fund. But it was never supposed that the employing department could shift the responsibility to the general fund on the plea that it could not spare the money because it was needed for other purposes.

It follows that, though federal funds are allocated quarterly to the state on budget estimates prepared by the unemployment compensation department of the industrial commission, this arrangement in no manner affects the secretary of state, who is required by law to issue warrants upon proper vouchers, so long as any money remains in the appropriation for administrative expenses provided by sec. 20.573. In auditing the voucher for the payment of a compensation award, the secretary of state cannot consider the budget estimates of the state agency or the contemplation of the social security board with reference thereto.

It is likewise clear that the state treasurer, when presented with a warrant issued by the secretary of state covering a workmen’s compensation claim, must pay the warrant from the administration fund appropriated by sec. 20.573 without regard to the source of the monies which, as a continuing appropriation, constitute such administration fund. This is plainly provided by sec. 20.573, subsec. (2), Stats. 1939, which reads in part as follows:
"All vouchers covering expenditures under chapter 108, if duly drawn and approved in accordance with the provisions of the Wisconsin statutes applicable to the disbursement of state funds, shall be paid from the administration fund by the state treasurer, without regard to the sources from which this fund is derived."

But although the secretary of state and the state treasurer are required to audit and pay a workmen's compensation award of the type here in question without regard to the contemplated uses of the monies contained in the administration fund as set up in sec. 20.573, or without regard to the source of the monies contained in said administration fund, the treasurer of the unemployment reserve fund must charge such payment against the proper monies contained in the fund.

Sec. 20.573, subsec. (2), Stats. 1939, continues as follows:

"* * * The treasurer of the unemployment reserve fund, however, shall maintain a separate record of all moneys received for the administration fund as interest on delinquent payments under chapter 108, and of all moneys (other than the contributions paid by certain 'exempted' employers for January 1936) received for the administration fund as contributions for months ending prior to February 1936, namely the month in which federal grants were first authorized for the administration of chapter 108, and of all expenditures made from said moneys. He shall charge against said moneys such expenditures and transfers heretofore made by the industrial commission as the commission may by resolution decide were not properly and validly chargeable against federal grants (or other funds) received for the administration fund in or after February 1936. Said moneys shall not be expended or available for expenditure in any manner which would permit their substitution for (or a corresponding reduction in) federal funds which would in the absence of said moneys be available to finance expenditures for the administration of chapter 108. But nothing in this section shall prevent said moneys from being used as a revolving fund, to cover expenditures (necessary and proper under chapter 108) for which federal funds have been duly requested but not yet received, subject to the charging of such expenditures against such funds when received. The industrial commission may also, by resolution duly entered in its minutes, authorize to be charged against said moneys any expenditures which it
deems proper and desirable under chapter 108, provided the commission in such resolution finds that no other funds are available or can properly be used to finance such expenditures."

The social security board has ruled that, subject to certain other requirements not material here, the payment of a workmen's compensation award to a state employe whose salary is financed out of federal grants is a proper administrative expense to be met by the federal government if "the proposed payments may lawfully be paid under state statutes from the administration fund."

Since the payment of the first two hundred dollars (and penalties) of a workmen's compensation award to an employe of the unemployment compensation department is to be a proper administrative expense of the federal government under the above rule, it is clear that sec. 20.573, subsec. (2) does not permit the treasurer of the unemployment reserve fund to make the ultimate charge against the monies derived from administrative contributions from employers and interest and penalties (as specified in the quoted section). Ultimately the charge must be made against federal funds. However, the administrative contributions and the interest and penalty monies contained in the fund may be used as a revolving fund to pay a workmen's compensation award in the absence of federal funds that have been requested for the purpose. Then, upon receipt of federal funds covering the expenditure, the amount must be charged back against such federal funds.

WAP
Copyrights — Phonograph Records — Broadcasting —

Phonograph record manufacturer may not require non-commercial broadcasting station to announce trade names of records used, or otherwise interfere with the use of such records for noncommercial and educational purposes.

October 24, 1939.

FREDERICK FULLER, Music Director WHA,

University of Wisconsin.

You have inquired whether the opinion of the attorney-general, dated February 24, 1938, XXVII Op. Atty. Gen. 111, is altered by the case of RCA Manufacturing Co. Inc., v. Whiteman, et al., 28 Fed. Sup. 787, decided July 24, 1939, and we are asked further whether the manufacturer of phonograph records may legally require a noncommercial broadcasting station to announce the tradename of phonograph records used on its programs.

In the attorney-general’s opinion referred to it was ruled that a phonograph record manufacturer had no interest in such records which would enable it by the device of a restricted use notice to control such use in the hands of non-commercial broadcasting stations and that neither the recording artist nor a copyright owner could legally prevent the non-commercial broadcast of such records.

The Whiteman decision referred to was made in the case of a commercial broadcasting station and the ruling in that case cannot be regarded as controlling in the case of a non-commercial broadcasting station, such as we had in mind in the discussion contained in XXVII Op. Atty. Gen. 111.

The RCA Mnfg. Co. in the Whiteman case alleged in its bill of complaint that the use of its records by others “for profit” constituted a wrongful exploitation of its property rights. The basis for the order enjoining the broadcasting station in the Whiteman case was that its activities constituted unfair competition with the record manufacturer,
since both were competitors in the business of public entertainment. Considerable reliance was placed in this case upon the opinion of Justice Pitney, in the case of International News Service v. Associated Press, 248 U. S. 215, 234, 39 S. Ct. 68, 71, 63 L. ed. 211, 2 A. L. R. 293, and among other things, the following quotation was taken from that case:

"But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition, because contrary to good conscience."

It is obvious that this reasoning does not apply to a non-commercial station, such as a state-owned station operated for educational purposes.

The Whiteman case extends the protection previously accorded the recording artists to the record manufacturer, who by contract had acquired the rights of the recording artist, but it does not change in any way the principle laid down in Waring v. WDAS Broadcasting Station, 194 Atl. 631, cited in our previous opinion to the effect that the validity of the restriction on the use of the performance depends upon whether it serves a useful commercial purpose.

With respect to your second question it is our opinion that a record manufacturer cannot legally require a non-commercial station to announce the tradename of records used on its programs.

As was stated in XXVII Op. Atty. Gen. 111, a manufacturer of an article ordinarily cannot impose restrictions on its use in the hands of a purchaser. The cases which hold that a record manufacturer or a performing artist may do so in the matter of broadcasting records for a commercial radio station are exceptions to that general rule. Since non-commercial stations are not included in such exception, there may not properly be any such restriction as to them. Thus they cannot be forced to announce the name of the record manufacturer.
Moreover, such an announcement would constitute a form of advertising to some extent at least, which, of course, is not practiced at a nonprofit station, and it would thus involve the noncommercial station in commercial activity which it seeks to avoid.

You have also inquired as to the noncommercial use of phonograph records by the University of Wisconsin for class demonstrations, out of door concerts, dinner music for students at the Memorial Union, use of such records for churches, and the like. This question requires no additional observations, since it is obvious in view of our previous discussions, that if a record may be broadcast for noncommercial purposes, it could likewise be played directly for the same purpose without the intervention of the broadcasting medium.

WHR

Criminal Law — Prohibition of Sale to Employes — Counties — Chapter 357, Laws, 1939, as amended by ch. 500 does not prohibit counties from disposing of salvage materials to employes, nor does it prohibit the use of county road equipment for private individuals or other municipalities, nor the performance for others of work in the county machine shop. County may not sell gas, oil or gravel to its employes.

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

You have called our attention to ch. 357, Laws, 1939, and have inquired as to its effect upon the sale by the county of salvage from bridges, junk iron, junk batteries and old pieces of equipment beyond repair. Also you inquire as to the sale of gas and oil to the highway commissioner, the traffic officer and patrol superintendent, and as to the use of county equipment on private road work and for munici-
palities. Lastly we are asked as to the effect of the law on performance of work in the county machine shop when such work cannot be done at any other place in the county, and whether gravel may be sold by the county to municipalities or individuals.

Ch. 357, Laws, 1939, prohibits the sale of products or merchandise by the state or its political subdivisions or agencies "to any employes of the state or any political subdivision thereof or any other person." After your request for an opinion reached this office the provisions of ch. 357, Laws, 1939, were amended by ch. 500, Laws, 1939, so as to omit the words "or any other person." This amendment solves some of the problems which might otherwise have arisen. The material portion of ch. 357, as amended by ch. 500, now reads:

"No department or agency of the state or any political subdivision thereof, or member or officer of any village, town or county board or common council of any city, or any purchasing agent or purchasing agency of the state or any political subdivision thereof, shall sell or procure for sale or have in its possession or under its control for sale to any employes of the state or any political subdivision thereof, any article, material, product or merchandise of whatsoever nature, excepting meals, public services and such specialized appliances as may be required for the safety or health of the employes."

Ch. 357 was also amended in other particulars, not material here, by ch. 487, Laws, 1939.

It appears that ch. 357 as amended by ch. 500 is designed to prohibit the state or its subdivisions or agencies from acquiring products and merchandise for resale to employes in competition with or to the detriment of private enterprise. This purpose appears even more clearly when ch. 500 is read in connection with ch. 129, Laws, 1939, which imposes similar restrictions on private employers.

With this apparent purpose in mind, it would seem that the sale of junk or salvage materials would not fall within the purpose or prohibition of the statute. There is nothing in the statute to indicate any intent to prevent governmental agencies from disposing of articles which have lost their usefulness upon the most advantageous terms possible.
On the other hand, the sale of gasoline and oil to county employes would fall directly within the prohibition of ch. 500.

This statute does not prohibit the use of county equipment on road construction work for private individuals or for other municipalities, nor does it prohibit the performance for others of work in the county machine shop. The statute prohibits the sale by governmental agencies to employes of "any article, material, product or merchandise of whatsoever nature * * *" but it does not prohibit the county from performing services such as those enumerated above, nor does it prohibit the loaning of the use of its equipment.

It appears that the sale of gravel by the county to its employes would fall within the literal language of the prohibition in the statute, since gravel constitutes a "material" or a "product" within the meaning of the statute. However, since the words "or any other person" do not appear in the statute as amended, the county would not be prohibited from selling gravel to individuals other than its own employes or to other municipalities.

In closing we might state that while ch. 357 purports to create section 348.54 of the statutes and ch. 500 purports to amend subsec. (1) of sec. 348.54, we have refrained from referring to the statute by that section number, in order to avoid possible future confusion, for it seems that through inadvertence several other chapters passed at this session of the legislature also purport to create section 348.54. (See Chaps. 129 and 174, Laws 1939.) We are informed by the revisor of statutes that ch. 357 will probably be printed as sec. 348.56, rather than as sec. 348.54.

WHR
Intoxicating Liquors — License to Country Clubs —
Power of state treasurer to issue liquor licenses to country clubs under sec. 176.05, subsec. (4a), 1939 Stats., is not limited by the operation of sec. 176.05, subsec. (21) as created by ch. 397, Laws, 1939. Six-month licenses issued under sec. 176.05, subsec. (6) stand on the same footing as annual licenses so far as sec. 176.05, subsec. (21) is concerned.

October 27, 1939.

John M. Smith,
State Treasurer.
Attention—John W. Roach, Chief, Beverage Tax Division.

You have directed to us several inquiries regarding the effect of section 176.05, subsec. (21), created by ch. 397, Laws, 1939, which reads, in part, as follows:

"Retail 'Class B' Liquor Licenses Limited in Number:
(a) No governing body of any town, village or city shall issue more than one retail 'Class B' liquor license for each five hundred inhabitants or fraction thereof, except that if a greater number of such licenses have been granted, issued, or in force, in such town, village or city, at the time of the taking effect of this subsection, than would be permissible under said limitation, such town board, village board or common council may grant and issue such licenses equal in number to those granted, issued, and in force on the taking effect of this subsection, but no such town or village board, or common council shall grant and issue any additional retail 'Class B' license above the number in force upon the taking effect of this subsection until the number of such licenses shall correspond to the limitation provided herein.
*  *  *
You first inquire whether under sec. 176.05, subsec. (4a) the state treasurer may issue a "Class B" liquor license to a country club located in a municipality whose quota of "Class B" licenses under sec. 176.05, subsec. (21), par. (a) has already been filled.
Sec. 176.05, subsec. (4a) as amended by ch. 376, Laws, 1939, provides as follows:

"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, and including yachting clubs, shall be issued by the state treasurer without regard to the provisions of section 176.38 and paragraph (b) of subsection (10) of this section 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 country clubs by the state treasurer.

We are of the opinion that sec. 176.05, subsec. (21), par. (a) does not apply to the issuance of state licenses to country clubs by the state treasurer pursuant to sec. 176.05, subsec. (4a) and therefore does not prevent the issuance of such a license, although the quota of “Class B” liquor licenses for the particular municipality already may have been filled by the municipal licensing authority.

Sec. 176.05, subsec. (21), par. (a) merely provides that “no governing body of any town, village or city shall issue more than one retail ‘Class B’ liquor license for each five hundred inhabitants or fraction thereof. * * *.” The state treasurer’s authority to license country clubs is derived entirely from sec. 176.05, subsec. (4a), which constitutes the state treasurer a licensing agency entirely separate from and independent of the “governing body of any town, village or city.” Therefore a limitation whose terms apply only to such “governing body of any town, village or city” cannot be held to apply to the state treasurer, even by implication.

We might add at this point that the state treasurer may now also grant such license even where the municipality has voted dry, since sec. 176.05, subsec. (4a) as amended by ch. 376, Laws, 1939, expressly provides that country club licenses may be issued without regard to sec. 176.38, the local option provision, thus nullifying the effect of XXVII Op. Atty. Gen. 292.

In response to your further inquiry we also wish to state that the state treasurer may issue a “Class B” liquor license
to a country club, pursuant to sec. 176.08, subsec. (4a) even though the municipality may have refused to grant a "Class B" beer license to the country club.

While sec. 176.05, subsec. (10), par. (b) prohibits the granting of a "Class B" liquor license to any person who does not also have a "Class B" beer license, under sec. 66.05, subsec. (10), it is now expressly provided by sec. 176.05, subsec. (4a), as amended by ch. 376, Laws, 1939, that country club liquor licenses "shall be issued by the state treasurer without regard to the provisions of * * * paragraph (b) of subsec. (10) of this section * * *." From this provision it is entirely clear that the state treasurer is authorized to issue a "Class B" liquor license to a country club which has been denied a "Class B" beer license by the municipality in which it is located.

Several inquiries regarding the effect of sec. 176.05, subsec. (21) on the granting of the semi-annual or six-month licenses provided for by subsec. (6) of sec. 176.05, are submitted to us for consideration.

In one instance a municipality with a population of five hundred had three "Class B" liquor licenses in force on the effective date of sec. 176.05, subsec. (21), two of which are six-month "Class B" licenses for the period of May 1 to November 1.

You inquire first whether two new six-month licenses may be granted as of November 1st, when the two six-month licenses expire, to persons other than those who held the six-month licenses.

While sec. 176.05, subsec. (21) fixes the maximum number of "Class B" liquor licenses at one for each five hundred inhabitants, it also provides that in municipalities in which a greater number of such licenses has been granted and is in force on the effective date of this subsection (August 27, 1939, the day following the date of publication) the governing body of such municipality "may grant and issue such licenses equal in number to those granted, issued, and in force on the taking effect of this subsection * * *"

Pursuant to this provision, the municipality referred to, while having only five hundred inhabitants, would be authorized to issue a maximum of three "Class B" liquor licenses—the number in force on the effective date of the subsection.
Since the six-month license is the same as the regular "Class B" liquor license in all respects except the length of its duration, it would seem that upon the expiration of the two six-month licenses referred to in the example, the municipal licensing authority may properly grant two new licenses, either six-month or regular "Class B" liquor licenses, to new applicants, if it desires to have in force its maximum number of licenses. Of course, it is clear that such a municipality may not at any one time have more than three licenses in force, so that if the municipality does grant two new licenses on November 1 to replace the expired six-month license, it may not while those licenses are in force, issue renewal six-month licenses to the previous holders thereof.

You also inquire whether, if no new licenses are granted between November 1 and the following May 1, the two previous holders of six-month licenses may each then be granted "renewals" of their six-month licenses, or whether the lapse of time between November 1 and May 1 would automatically reduce and limit to one "Class B" liquor license the maximum number which may be granted by the municipality of five hundred inhabitants referred to above.

We are of the opinion that the municipality may "renew" both of the six-month licenses since such "renewal" would merely constitute the granting of "such licenses equal in number to those in force on the taking effect of this subsection * * *" as authorized by sec. 176.05, subsec. (21).

WHR
OS
Opinions of the Attorney General

Appropriations and Expenditures — Bridges and Highways — Public Officers — Highway Commission — Highway commission is without power to spend moneys appropriated under sec. 20.49, subsec. (9), Stats., for roadside park purposes, etc., except in so far as said appropriated moneys are used in matching or supplementing federal moneys allotted and to be expended for such purposes.

October 28, 1939.

State Highway Commission.

In your letter you state:

"There has been a growing demand in this state for the improvement of roadside park facilities, and it has been proposed that the State Highway Commission undertake the improvement of such facilities along state trunk highways, provided the funds available to the Commission may be legally expended for such purpose. We call your attention to the following provisions of the Statutes which seem to be relevant to this question.

"Section 80.01 (3) ♦ ♦ ♦ All lands hereafter acquired for highway purposes may be used for any purpose that the public authorities in control of such highway shall deem to conduce to the benefit of the public use and enjoyment thereof ♦ ♦ ♦"

"Section 20.49 (9) (Appropriations to State Highway Commission) ♦ ♦ ♦ For the improvement of the State Trunk Highway System ♦ ♦ ♦ This amount shall be allotted in the manner provided by Subsection (9) of Section 84.03 ♦ ♦ ♦"

"Section 84.03 (9) "The appropriation made by Subsection (9) of Section 20.49 shall be used by the Commission for ♦ ♦ ♦ the improvement of the state trunk highway system ♦ ♦ ♦ Such appropriation shall ♦ ♦ ♦ be expended by the Commission on such projects, of such nature within the provisions of this subsection and executed in such manner as the Commission shall from time to time determine will best meet the needs of travel and tend to promote the general welfare in the most effective manner ♦ ♦ ♦"

"Will you please give us your opinion in reply to the following questions:

"1. May the appropriation made by Section 20.49 (9) be used by the State Highway Commission to construct ap-
proaches leading from the traveled way to areas to be used as public roadside parks, located on the highway right of way of State Trunk Highways?

"2. May such appropriation be used by the State Highway Commission to improve areas located on the highway right of way of State Trunk Highways for use as public roadside parks, including the construction of parking areas, tables, shelters, and other appurtenances?

"3. May such appropriation be used by the State Highway Commission to acquire additional land adjacent to the highway right of way of State Trunk Highways for the development of such public roadside parks?

"4. May such appropriation be used by the State Highway Commission for the development of public roadside parks on land adjacent to the highway right of way of State Trunk Highways which has not been specifically dedicated to public highway purposes, but which has been specifically dedicated to a county, town, school district or other governmental subdivision of the state, for public park purposes?

"5. May the appropriation made by Section 20.49 (6) be used for any of the purposes outlined above?"

In the last analysis the question resolves itself into one of, for what purposes the appropriated moneys to which you refer, namely, those moneys appropriated by sec. 20.49, subsec. (9), Stats., may be expended. We have given careful consideration to sec. 84.03, subsec. (9), Stats., and the other applicable provisions referred to in said section, and feel obliged to rather reluctantly reach the conclusion that the highway commission is without authority to expend the appropriated moneys in question for any of the purposes set forth in your letter except insofar as said appropriated moneys are used in matching or supplementing federal moneys allotted and to be expended for such purposes. You are, accordingly, advised that you may expend money appropriated under sec. 20.49, subsec. (9), Stats., for the purposes set forth in your letter only to the extent that you are matching or supplementing federal funds available for these particular purposes.

In this connection we cite you to Title 23, para. 10b, U. S. C. A., which reads as follows:

"10b. Construction of roadside and landscape developments. Hereafter the construction of highways by the States with the aid of Federal funds may include such roadside
and landscape development, including such sanitary and other facilities as may be deemed reasonably necessary to provide for the suitable accommodation of the public, all within the highway right-of-way and adjacent publicly owned or controlled recreational areas of limited size and with provision for convenient and safe access thereto by pedestrian and vehicular traffic, as may be approved by the Secretary of Agriculture. June 8, 1938, c. 328, sec. 1 (c), 52 Stat. 633.”

NSB

Public Officers — District Attorney — Divorce Counsel — Offices of district attorney and divorce counsel are compatible.

DONALD E. BONK,
District Attorney,
Chilton, Wisconsin.

You state that the divorce counsel in your county died a short time ago and that now the circuit judge wishes to appoint you to this position. The question arises as to whether you, as district attorney, may hold this additional office.

Two offices are incompatible if there is a conflict of interests or duties, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. State ex rel. Hilton v. Sword, 157 Minn., 262, 196 N. W. 467, State v. Wait, 92 Neb., 313, 138 N. W. 159, 46 C. J. 942. Do the offices of divorce counsel and district attorney fall within the above rule?

Sec. 247.13, Stats., provides for the appointment of divorce counsel by the circuit judge, except that in a county having a population of two hundred fifty thousand or more (in Milwaukee county), the district attorney or assistant district attorney is divorce counsel.

The legislature has said in effect that there is no inherent incompatibility between the office of district attorney and divorce counsel when it made provision for the holding
of the latter office by the district attorney or assistant dis-

trict attorney in Milwaukee county. It is not reasonable to
conclude that because these offices are compatible in one
county, they are, therefore, incompatible in all other coun-
ties, merely because the legislature has set up a different
method of selecting the divorce counsel in other counties.
The duties of the two offices are the same whether the
county happens to be Milwaukee or Calumet.

For each case in which the divorce counsel appears, other
than in Milwaukee county, sec. 247.17 provides for a ten dol-
lar fee with additional compensation if the case takes more
than one day. This fee is payable regardless of the recom-
mendation which the divorce counsel makes to the court as
to whether or not a divorce should be granted, and regard-
less of whether or not the divorce counsel discovers facts
which suggest that there should be a criminal prosecution
of one or both of the parties or of some third person. Hence
there is no temptation to take any particular position on the
granting of the divorce so as to earn the ten dollars fee, or
to neglect the bringing of a criminal prosecution in an effort
to earn the fee. As a matter of fact, we understand that it is
not an uncommon practice in Milwaukee county for the trial
judge, after hearing the proofs in the divorce case and the
recommendation of the district attorney or assistant district
attorney, to recommend to the district attorney or his as-

sistant appearing as divorce counsel, that a criminal action
be commenced.

Where the district attorney has been appointed a divorce
counsel, we see no objection to his receiving the statutory
fees and compensation for his work as divorce counsel, in
addition to his regular salary as district attorney, since his
duties as district attorney do not require him to act as di-

vorce counsel. See XIV Op. Atty. Gen. 31, where we ruled
that the county board has no power to instruct the district
attorney to perform the duties of divorce counsel. The dis-

trict attorney is entitled to no additional compensation for
performing any work which properly falls within the scope
of his duties as district attorney, since a public officer takes
his office cum onere, and is only entitled to such fees as are
allowed by law. Henry v. Dolen, 186 Wis. 622, 624, and the
salary of the district attorney cannot be increased during
his term. XI Op. Atty. Gen. 388. This, however, has no application to salary or fees received not as district attorney, but as divorce counsel whose work, except in Milwaukee county, may not be required of the district attorney.

WHR
FAR

Counties — Zoning Ordinance — Words and Phrases — Structure — Where county zoning ordinance permits signs of only a certain type in a district, the published record of nonconforming uses should contain a description of the land upon which nonconforming signs are located, unless the county under sec. 59.97, subsec. (7), par. (d) enforces issuance of building permits or other devices.

County zoning ordinance can become effective in town only if town board approves such ordinance prior to its adoption by county board.

Sec. 59.97, subsec. (1) authorizes county to regulate both structures and buildings. It may regulate structures by including them within an ordinance definition of buildings.

October 30, 1939.

HERBERT W. JOHNSON,
District Attorney,
Sturgeon Bay, Wisconsin.

The county board of Door county is considering the adoption of a zoning ordinance pursuant to the provisions of sec. 59.97, Wisconsin statutes, which provides, in part, as follows:

“(1) The county board of any county may by ordinance regulate, restrict and determine the * * * size of buildings and other structures, * * *; provided, however, that the said county board shall before it adopts such ordinance or ordinances, submit the same to the town board or town boards of the town or towns in which may be situated any lands affected by such ordinance, and thereupon
obtain the approval of said town board or town boards, so far as the same affects the lands in such town or towns, and in like manner any and all ordinances, which may amend any ordinance, which have been adopted as herein provided shall be submitted to said town boards of the towns in which said lands are located and their approval obtained as to each change before the same shall be adopted by the county board. Such ordinance or amendments thereto may be adopted as to such town or towns which shall have given their approval thereto.

"(7) (a) Immediately after the publication of a county zoning ordinance, it shall be the duty of the board of supervisors of such county to cause to be made a record of the present use of all buildings and premises used for purposes not in conformity with the regulations of the district in which such buildings and premises are situated, such record to contain the names and addresses of the owner or owners of such nonconforming use, and of any occupant other than the owner, the legal description or descriptions of land and the nature and extent of land use. Such record shall be published for three successive weeks in a newspaper having general circulation in the county. *

"(7) (d) The provisions of this subsection shall not apply to those counties issuing building permits as a means of enforcing the zoning ordinance or of checking nonconforming uses or to counties which have instituted other devices for this purpose."

For the purpose of promoting public health, safety and general welfare, the proposed ordinance divides the county, excepting villages and cities, into seven districts. In the two districts known, respectively, as "Forestry, Recreation District 'A'", and "Agricultural District", only the following signs may be erected:

"One sign not over six (6) square feet in area pertaining to the sale, lease, hire or location of each premise in the district."

You inquire whether every sign now in these respective districts, and not complying with the above sign restriction, constitutes such a nonconforming use that such use must be published along with the publication of the record of names and addresses of owners of nonconforming uses, under sec. 59.97, subsec. (7) par. (a), Wis. Stats.
If the county board has authority to regulate the size of signs and attempts to exercise that authority, then every sign which does not comply with a reasonable regulation constitutes a nonconforming use of the premises upon which said sign is located. In our opinion it is immaterial whether such sign technically becomes a part of the real estate or remains personal property. In either case it could be equally objectionable to the purpose sought to be accomplished by the ordinance and would fall within the terms of the ordinance. As indicated above, sec. 59.97, subsec. (1), authorizes the county board to regulate the size of "buildings and other structures." A "structure" is any production or piece of work artificially built up or composed of parts and joined together in some definite manner. Favro v. State, 39 Tex. Cr. R. 452; 46 S. W. 932. Also see Jefferson Davis County v. Riley, 158 Miss. 473, 130 So. 283, and Barr Lumber Co. v. Perkins (Cal.) 295 P. 552.


An electrically lighted swinging sign of wood and metal, five feet by three feet, eight inches, hung in front of a dental office, was also held to be a "structure". Ackerman v. Steiner, 7 N. J. Misc. 1056, 147 A. 746.

It has been held that billboards may be prohibited in the interest of safety, morality, health and decency. Cusack Co. v. City of Chicago, 242 U. S. 526.

This case also indicated that signs and billboards are structures.

Billboards may also be excluded from residence districts by a zoning ordinance. Village of Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365.

The size of billboards may also be limited as a safety factor. Perlmutter v. Greene, 259 N. Y. 327, 182 N. E. 5.

It appears that a sign would be considered a "structure" within the provisions of sec. 59.97, subsec. (1) and hence subject to regulation by county board zoning ordinance. If
the proposed ordinance is enacted, and certain premises situated in "Forestry, Recreation District 'A'," and "Agricultural District", contain signs over six feet square in area, or signs of less than six feet in area, but pertaining to matters other than the sale, lease, hire or location of the premises, said premises are being used for a nonconforming use, and hence, under sec. 59.97, subsec. (7), par. (a), a published record of the "* * * present use of all buildings and premises used for purposes not in conformity with the regulations of the district * * *", must include, among other things, the legal description of said premises and the nature and extent of the nonconforming use thereof.

However, your attention is directed to the provisions of sec. 59.97, subsec. (7), par. (d), quoted above, which eliminates the necessity for publication under sec. 59.97, subsec. (7), par. (a), if your county issues building permits as a means of enforcing the zoning ordinance or of checking non-conforming uses.

Under "SECTION I. DEFINITIONS" of your proposed ordinance, it is stated:

"* * * the word 'building' includes the word 'structure'. * * *"

SECTION XV, subsec. (3), par. (a) of the proposed ordinance provides, in part:

"No building shall hereafter be erected and no existing building shall hereafter be altered, repaired, or moved within the areas subject to the provisions of this ordinance until a building permit has been applied for in writing and has been obtained from the County Clerk * * *.*"

As sec. 59.97, subsec. (1), Stats., authorizes your county to regulate both structures and buildings, it may regulate structures by including them within an ordinance definition of "buildings".

Since, under your proposed ordinance, the word "building" includes "structure", and since as a matter of law the word "structure" includes a sign, it appears that no sign could be erected or altered in the districts in question without a permit—and hence that your county proposes to issue
building permits as a means of enforcing the zoning ordinance and incidentally as a means of checking nonconforming uses.

Such being the case, it would appear that under the proposed ordinance, it would not be necessary to publish a description of premises which are located in the two districts in question and which now contain signs not conforming to the future zoning requirements for those districts.

Your second question pertains to the method of adopting a zoning ordinance under section 59.97, Stats. sec. 59.97, subsec. (6), provides:

"The county board may by ordinance zone any lands owned by the county without necessity of securing the approval of the town boards of the towns wherein such lands are situated and without following the procedure outlined in subsection (2)."

If the county board passes a zoning ordinance effective as to all county owned lands and in terms effective in those towns which have previously approved such ordinance, you inquire as to the procedure to be used thereafter in bringing additional towns under the provisions of the ordinance already passed by the county board.

It appears to have been to some extent the practice for a county board to adopt a zoning ordinance so worded as to become effective not only in those towns which have already approved the ordinance, but also in those towns which subsequently approve the ordinance. In other words, the ordinance has been in the nature of an option ordinance as to those towns which have not approved it at the time of its adoption by the county board.

A county board has only such power as is given it by statute or is necessarily implied from the powers specifically granted. Frederick v. Douglas Co., 96 Wis. 411, 71 N. W. 798.

The authority to adopt a zoning ordinance was given to counties by statute, and the statutes prescribe the procedure to be used in adopting such an ordinance. Under sec. 59.97, subsec. (1), the county board "* * * shall before it adopts such ordinance or ordinances, submit the same to the
town board * * * and thereupon obtain the approval of said town board. * * *" The same subsection provides that the ordinance may be adopted "* * * as to such town or towns which shall have given their approval thereto." Under this subsection the county board has no authority to pass a zoning ordinance which will automatically become effective in a certain town upon the approval of said ordinance by the town board of said town. Action of the county board making a zoning ordinance effective in a certain town must follow, rather than precede, the approval of the town board of that town.

JRW
Public Welfare — Department of Public Welfare — Social Security Law — Old-age Assistance — Poor Relief — Functions vested in state pension department under sec. 49.50, subsec. (4), and in industrial commission under sec. 49.03 (8a), Stats. 1937, transferred to state department of public welfare by ch. 435, Laws 1939, should be allocated by state director of public welfare acting with approval of state board. Until such allocation said functions probably rest with state director of new department.

November 6, 1939.

FRANK C. KLODE, Director,
Department of Public Welfare.

In your letter you state:

"Your opinion is requested relative to the proper allocation of the following functions when transferred pursuant to chapter 435, laws of 1939, to the state department of public welfare:

1. Fair hearings and decisions upon review of denials of old-age assistance, aid to dependent children, and blind pensions pursuant to sec. 49.50 (4), Stats.

"Determination of claims between counties relative to poor relief pursuant to sec. 49.03 (8a), Stats."

You cite us to sec. 58.33, the applicable provision of which, subsec. (1) of said section, provides as follows:

"The powers and duties of the state board of public welfare shall be regulatory, advisory and policy-forming, and not administrative or executive,"

from which you conclude that the chapter does not contemplate performance of the functions in question by the state board. We agree with this conclusion.

The functions in question are transferred by secs. 58.36 and 58.37, Stats., recreated by said chapter. The responsibility of these functions rests with the "department of public welfare" created by said chapter. See sec. 58.36, Stats. The department, by sec. 58.31, consists of a "state board of public welfare, a director of public welfare, and such offi-
cers and employes as may be hereinafter authorized." Obvi­
osely the chapter did not contemplate that the functions in question would be performed by the department of pub­lic welfare as defined above. Sec. 58.34 (1), Stats., pro­vides as follows:

“All of the administrative and executive powers and du­ties of the department shall be vested in a director of pub­lic welfare to be administered by him under the rules and regulations of said department, and subject further to the policies and in accordance with the principles established by the state board of public welfare.”

Subsec. (3) of the same section provides as follows:

“The director with the approval of the board shall estab­lish such rules and regulations as may be necessary in the administering of the said department, and in the perform­ance of the duties assigned to this department.”

Subsec. (4) of the same section provides as follows:

“The details of the departmental organization within the field assigned to the state board of public welfare shall be within the administrative discretion of the director to de­termine with the approval of the board.”

Sec. 58.35 (1) (e), in so far as applicable, provides as follows:

“* * * Subject to the approval of the state board, the director shall have the power to allocate and reallocate functions among the divisions within the department.”

It seems very clear from the foregoing quoted provisions of the chapter in question that the legislature contemplated that the functions in question would be allocated within the new department by the director of public welfare, subject to the approval of the board. It is apparent from a reading of the chapter that the director, subject to the approval of the board, has very broad powers with respect to such allocation of function.
In the absence of such allocation of function, it would seem that the particular functions in question are probably vested in the state director.

NSB

Indigent, Insane, etc. — Sanity Hearings — Term "nearest relative or friend available" in sec. 51.01, subsec. (1), Stats., providing for applications to determine sanity, may be construed to mean relative or friend willing as well as physically available, and member of county psychiatric service who signs petition so as to institute proceedings for commitment and treatment may be considered as "friend" for purposes of statute.

November 6, 1939.

O. L. O'Boyle,
Corporation Counsel,
Milwaukee, Wisconsin.

You have called our attention to sec. 51.01 (1), Stats., relating to applications to determine sanity and which provides that applications for a judicial inquiry as to mental condition may be made "by any three citizens, one of whom is to be the nearest relative or friend available, or a person with whom the person resides, or at whose house he may be."

In this connection you state that it frequently happens in cases where the patient is definitely insane that the nearest relative or the person with whom the patient resides is unwilling to sign the application. In such cases it has been the practice of your office to construe the words "nearest relative or friend available" as meaning not only physically available, but as likewise connoting a willingness to sign, in other words, available for the purpose of the petition. In such instances it is customary to have three members of the county psychiatric service sign as petitioners.
We do not find that the courts or this office have ever construed the portion of the statute quoted, but it seems to us that considerations of sound public policy require the interpretation which you have given the statute, and which your district court has apparently been following for some time. As stated in your letter, to hold that where there is a near relative whose whereabouts is known, this relative must be one of the three signers and that where such relative refuses to join in the petition the proceeding will not lie would be, in effect, to hold that in many instances persons definitely known to be insane and who may constitute a menace to the community as well as to themselves must be permitted to remain at large.

To state such a construction is to demonstrate its unsoundness unless the statute is open to no other interpretation. Having in mind the sound social purpose of the statute, we should give to the phraseology employed such construction as will effectuate that purpose, if possible. The statute is couched in rather broad terms, and when the legislature used the words “friend available” we do not feel constrained to apply the narrowest and most restricted meaning which the words could conceivably imply. Webster’s New International Dictionary, among other definitions of the word “friend,” includes the following: — “A well-wisher,” “one not inimical or hostile” and “one not a foe or enemy.” Surely one who signs a petition to institute proceedings whereby proper medical treatment and care will be given an insane person is doing a friendly act calculated to further the welfare of the individual and society. It is an act based on “well wishing” and by no means can it be said to be inspired by inimical or hostile motives. As was said by Justice Holmes in *Towne v. Eisner*, 245 U.S. 418, 425:

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

It would seem that the members of the county psychiatric service who sign the petition may well be considered to
be "friends" of the insane person within the meaning of the statute.

We consequently conclude that the practical construction which your department and the district court of Milwaukee county have given the statute is proper under the circumstances mentioned.

WHR

Bridges and Highways — Law of Road — Counties — County Ordinances — Traffic Ordinances — Courts — Proceeding for violation of county traffic ordinance is civil action even where provisions are same as state law under which criminal action could be brought.

Where defendant in action for violation of county traffic ordinance demands jury trial in justice court, he must pay fees therefor as in other civil actions.

November 6, 1939.

Theodore A. Waller,
District Attorney,
Ellsworth, Wisconsin.

You state that Pierce county has a traffic ordinance which follows the wording of the state law, ch. 85, Stats.

We are asked whether a defendant who is on trial in justice court for violating a provision of this ordinance who asks for a jury trial should pay the justice the jury fees, as provided in the case of civil actions, or whether the county must bear the expense as in criminal cases.

It is our opinion that a proceeding for the violation of a county traffic ordinance is a civil action and that the defendant must, therefore, pay the jury fees.

It has been generally held that actions for violation of city ordinances are civil actions. Milwaukee v. Burns, 225 Wis. 296, Seely v. Milwaukee, 212 Wis. 124, Neenah v. Krueger, 206 Wis. 473, Milwaukee v. Johnson, 192 Wis. 585.
The *Seely* case involved a city traffic ordinance, and in *Milwaukee v. Johnson*, at pp. 590-591, the court stated that it adopted the rule that "all proceedings to collect penalties under municipal ordinance shall be treated as civil actions which may be brought to this court for review by appeal, regardless of whether the act complained of might also be the basis of a criminal prosecution." Thus the fact that this offense could also be punished under state law does not mean that the action is not a civil one.

To be sure, the above cases involved municipal ordinances rather than county ordinances. However, we feel that the same rule applies here, particularly in view of the following statement made in *Milwaukee v. Burns*, at p. 299:

"Under the statutes of this state, actions are of two kinds—civil and criminal (sec. 260.05, Stats.). A criminal action is defined as one *prosecuted by the state* against a person charged with a public offense, for the punishment thereof. *Every other action is a civil action.*" (Italic ours.)

See also *Neenah v. Krueger*, at p. 475.

WHR

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**Taxation — Cigarette Tax** — Questions relating to interpretation of sec. 139.50, Stats., as created by ch. 443, Laws 1939, and amended by ch. 518, Laws 1939, as to persons required thereby to have permit to purchase cigarette tax stamps, considered and answered.

November 7, 1939.

**TREASURY DEPARTMENT,**

*Beverage Tax Division.*

Attention Mr. John W. Roach.

You have asked several questions relating to the interpretation of sec. 139.50, Stats., as created by ch. 443, Laws 1939 and as amended by ch. 518, Laws 1939, which we will answer seriatim.
1. You ask whether the provisions of sec. 139.50, Stats., require every person, firm or corporation who sells tobacco products for resale within this state to obtain the fifty dollar license to purchase stamps regardless of whether he actually purchases the stamps and puts them on the products himself or buys the merchandise from a wholesaler.

Sec. 139.50, subsec. (1), par. (c), Stats., defines the meaning of the word “manufacturer” as used in the section as one “who shall manufacture tobacco products for the purpose of sale, barter or exchange” and then par. (d) defines a “wholesaler” as “any person who shall sell, barter, exchange, offer for sale, and have in possession with intent to sell tobacco products other than at retail.”

Sec. 139.50 (4) (a), Stats., provides:

“No manufacturer or wholesaler shall sell or manufacture any tobacco products within the state without first obtaining a permit from the state treasurer to purchase stamps as provided in this section. * * *.”

By the above provisions quoted very clearly every person, firm or corporation coming within the definition of a wholesaler or manufacturer as therein defined must obtain a permit from the state treasurer to purchase stamps regardless of whether he buys any stamps and affixes them himself upon the merchandise or buys the merchandise with the stamps already affixed from another wholesaler.

2. You ask whether a wholesaler doing business within this state must obtain a permit to purchase stamps even though he purchases all his merchandise with the stamps thereon from another wholesaler.

This question is answered by our answer to Question 1 above.

3. You further ask whether a subjobber who purchases tobacco products from a wholesaler for resale to retailers must obtain said permit to purchase stamps.

Such subjobber comes within the definition of a “wholesaler” as defined by sec. 139.50 (1) (d), as he sells or has in his possession, with the intent to sell, the tobacco products other than at retail. When such subjobber sells the merchandise to a retailer he is not selling the same at re-
4. You next ask whether a wagon-man who owns his own truck and purchases tobacco products from a wholesaler and then sells the same to retailers must obtain the permit to purchase stamps prescribed by the section. Does he still have to procure such permit where he purchases his stocks from a wholesaler on consignment?

A wagon-man selling to retailers and who obtains the tobacco products so sold from a wholesaler, either by outright purchase or on consignment, is nevertheless a wholesaler, because he is selling other than at retail and thus must obtain the required permit therefor. How he obtains the merchandise which he sells at wholesale is immaterial. The fact that he sells at other than retail is the thing that gives rise to the necessity of having the permit.

5. In addition, you ask whether the definition of a “wholesaler” set out in sec. 139.50 (1) (d) means that any person who handles tobacco products, as defined in the act, for resale purposes must obtain a permit to purchase stamps as prescribed by the section.

Sec. 139.50 (4) (a), Stats., very clearly prescribes that every manufacturer or wholesaler who sells tobacco products within the state must first obtain a permit to purchase stamps. Thus every “person”, which by sec. 139.50 (1) (b), Stats., includes “individuals, firms, corporations, associations, joint stock companies, co-partners, trustees, receivers, or other legal representatives”, who is not a manufacturer but sells tobacco products other than at retail must obtain such permit to purchase stamps. By sec. 139.50 (4) (a) every manufacturer who sells in the state must obtain such permit and also every wholesaler, as defined in the act as one who sells at other than retail, must obtain such a permit. Accordingly, every person who handles tobacco products other than for sale at retail must obtain a permit.

6. We are also asked whether under this statute a wholesaler who operates more than one wholesale establishment in the state must obtain a permit for each separate location.
We find nothing in the provisions of the statute that requires such wholesaler to have more than one permit. Rather, on the contrary, sec. 139.50 (7), in setting forth the contents of the application for the permit in par. (c), says that it shall contain “the place or places where the business is to be conducted.” This seems clearly to recognize that the permittee may do business at more than one place under the permit.

7. Your last question is whether one who owns cigarette vending machines which are placed in various establishments and who buys from a wholesaler the cigarettes which are dispensed through the machines to the consumers is required to have a permit to buy stamps as a wholesaler.

It is our opinion that such vending machine operator is a wholesaler and must have such permit. While he owns the machines, purchases all the cigarettes that go into the same, refills them and takes out the money inserted therein by the customers, nevertheless, the owner or operator of the establishment in which the machine is placed is required to have the usual retail cigarette license for said premises before a vending machine may dispense cigarettes therein. The owner of the establishment has the physical custody of the machine during the time that it is dispensing cigarettes to the retail trade at his establishment. The fact that the retail sale is made mechanically does not destroy the fact that the owner of the establishment is the retailer. He thus is the retailer and the owner of the machine is the wholesaler.

HHP
Appropriations and Expenditures — Claims — Counties — County Board — County Board Committees — County board may delegate function of examining, settling and allowing current accounts only to committees named in ch. 348, Laws 1939, and subject to limitations prescribed by said chapter.

November 10, 1939.

Hugh F. Gwin,
District Attorney,
Neillsville, Wisconsin.

In your letter you state:

"I would appreciate an opinion relative to the language in chapter 348 of the laws of 1939 creating section 59.08 (31). "Clark county has the following set-up in regard to the allowing of claims: Four committees, public property, forest and zoning, relief, and special auditing, have the power to audit and allow claims and certify them to the county clerk for payment. Each of these committees has the power to audit claims falling within its own field of activity. "Can our county continue to operate under its present plan in view of the language in chapter 348 of the laws of 1939 which seems to limit the power to allow accounts to one committee? 
"* * *"

Prior to the enactment of the chapter in question, it would seem that it has to be conceded that the power of passing upon claims was by statute vested in the county board. See sec. 59.07, subsec. (3), Stats. Disregarding for the time being chapter 348, laws of 1939, creating sec. 59.08 (31), renumbered (38), the question arises as to whether the county could delegate this function at all to a committee or committees and, if so, the extent of permissible delegation.

It is well settled that county boards possess only such powers as are expressly delegated or necessarily implied. Frederick v. Douglas County, 96 Wis. 411, Spaulding v.
Wood County, 218 Wis. 224. Prior to the enactment of the chapter in question there was no express provision permitting delegation of this function. The applicable rule stated in 15 C. J. 465 under such circumstances appears to be as follows:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant. In some cases the legislature has expressly authorized the board to delegate its power under certain circumstances, but the legislature is without constitutional warrant to clothe one or two supervisors with authority to name a tribunal to perform the duties devolving on the whole board. Where nothing further appears than the fact that a supervisor in doing certain acts was acting under a custom that prevailed in the county, it will be presumed that the board gave him the requisite authority."

The various delegations made by various county boards to committees with respect to the function of auditing and allowing claims filed against the county have been in the past, so it seems to us, of doubtful validity. As a practical matter, especially in those counties where the county board does not meet more than once or twice a year, the county board had to function between meetings through its officers, agents and committees. Most counties set up a claims committee as one of the regular committees possessing the ostensible power to audit, pass upon and allow claims filed against the county. This committee or similar committees usually meet periodically and perform the duties assigned. The power was usually exercised with caution by submitting all claims to the district attorney and having him pass upon the legal phases of each claim. The more prudent committees then approved for payment only those claims filed with respect to which there could be no dispute with respect to legality or amount. Proceeding under the same theory as to doubtful validity as to the delegation of power, the county boards, when they met, then proceeded to allow and
approve the claims already allowed and approved by the committee—claims already approved, allowed and paid by the county. If the claims committee or some committee proceeded with prudence and caution, the system worked as a practical matter. But under any such system the claims committee and county treasurer and county clerk, etc., can be and may be left holding the bag. Pending county board action and approval, they acted at their own risk—if we are correct in our original assumption that many of the claims passed upon and allowed oftentimes involved much more of an exercise of a ministerial function, that is, involved an exercise of discretion, the exercise of which discretion was by statute vested in the county board.

You have cited us to various rules and regulations of the county board with respect to the various committees in question whereby it seems apparent that the board attempted to delegate to the various committees full and final power to pass upon claims filed. The power attempted to be delegated was obviously more than that of a ministerial function. It seems to us that it involved the delegation of the full discretion by statute vested in the county board.

Your situation with respect to your particular county is probably not an unusual one. It probably functioned and worked but it seems to us that such a system, if there were ever occasion to challenge the validity of it, would rest upon rather tenuous legal propositions.

We believe that the foregoing analysis, not only with respect to your own system but other county systems, is an analysis rather generally recognized by those concerned with county affairs and the probable need for some legislation expressly recognizing the authority of the county board to delegate the function of passing upon claims to a committee of the county board. Chapter 348, laws of 1939, was undoubtedly enacted to meet that need.

Whatever the law was before the enactment of said chapter, it seems to us quite clear that the delegation of this power must now be made to the specific committees named in chapter 348, laws of 1939 and only to the extent authorized by said chapter.

NSB
Bridges and Highways — Encroachments — Sec. 86.04, Stats., as amended by ch. 519, Laws 1939, does not vest authority in highway commission or various municipalities in relation to roads with respect to which jurisdiction is vested in these respective bodies by said chapter to prohibit mere use of non-traveled portion of highway as encroachment.

November 10, 1939.

HIGHWAY COMMISSION.

In your letter you state:

“It is necessary that this commission be advised if occupation of the highway right of way by a vehicle or use of the right of way by the abutting property holder constitutes an encroachment in cases where automobile servicing facilities, such as gasoline pumps, are so located, immediately adjacent to but off the limits of the highway right of way, that it is necessary or opportune for the owner of such pumps to service automobiles, which are parked or standing on a driveway or platform located within the right of way and are a part of or used in connection with such servicing facility. We would ask further if statutory authority exists, enforceable by the state, county or other municipal authority (any or all of them), to restrain or prohibit such occupation of the right of way by the vehicle or use of the right of way by the property holder.

“We would respectfully ask that the opinion be drawn, if possible or necessary, to reflect the status in both incorporated places, as in cities and villages, and also on rural highways. The commission is particularly interested in the question from the standpoint of state trunk highways. We might state further that, in general, such occupation or use is at the outer limits of the right of way and as such does not interfere with the passage or movement of vehicles on the customarily traveled portion of the highway facility.”

The problem arises as a result of the federal works agency public roads administration having withheld payment of vouchers with respect to certain federal projects. In a letter of October 23, 1939, with reference to a particular project therein named, this agency wrote you as follows:
However, it has come to my attention that various installations of gasoline pumps are so located adjacent to the limits of the right-of-way that it is necessary or opportune for the owners of such pumps to service automobiles from a driveway located on the right-of-way. So far as I know, provision has not been made for the elimination of such servicing on the right-of-way. As you have previously been advised, this office holds to the principle that the state highway commission should have free and unrestricted use of the entire right-of-way.

Neither this letter nor any of the other letters which this agency has written you, taking the same position with respect to other federal projects, refer to any actual physical obstruction of the highway right-of-way. All objections go to the use of the non-traveled portion of the highway for the servicing of cars that pull up to the filling station. The actual physical equipment in each instance appears to be located off the highway right-of-way.

In response to the position taken by this federal agency, the commission, under date of October 31, 1939, wrote this agency as follows:

"In the matter of whether provision has been made to eliminate serving of vehicles on the right of way, we wish to advise that no action has been taken. The physical plant of each service station referred to is to all practical purposes entirely off the area dedicated to the public for highway purposes. In the absence of zoning restrictions or other statutory regulations, property owners are free to utilize the land abutting the right of way as they choose. Unless and until it can be clearly shown and established that vehicles serving or being served by the abutting property are violating existing statutes or interfering with the public's use of the highway as it can be defined by statute, it is the judgment of this commission that the state or subdivisions thereof cannot prohibit such servicing of vehicles on the right of way or property abutting the right of way. The principle which you apply could well be taken as applicable to mail delivery services, collection of farm produce by vehicles parked on the right of way, or parking of vehicles to take advantage of the services afforded by the wayside store. As such, then, every property abutting the highway that might incidentally or as a matter of regular business need to be served or make available services to the public,
would be in the same position as the filling stations referred to. Strict interpretation of such principles could be met only by providing limited access highways.

"In the case of the particular service stations on these projects, the commission fails to find an instance where the servicing of vehicles at such stations violates state statutes or interferes with reasonable use of the highway by the public. We would point out that it is the general principle of the law in this state that, except by zoning, the statutory regulation of use of the highway is by regulation of the vehicle operated thereon or using same and not regulation of abutting property. If the public in its use of the highway chooses to avail itself of services or facilities afforded by the abutting property and in doing so does not violate the applicable regulations of the traffic code, no action could be supported against the abutting property owner or vehicle owner.

"You ask what disposition the commission proposes to make of the encroachments within the right of way on those projects. As hereinbefore indicated, this commission does not agree that such use of the right of way constitutes an encroachment, and there is no interpretation which can be made under state laws to support the contention or principle you choose to apply that same is an encroachment. Under the circumstances, where such use of the highway clearly does not constitute an encroachment and legal machinery does not exist to stop or prohibit same, the commission cannot propose to do anything to prevent the servicing of cars in the right of way at the filling stations designated.

"The state highway commission can give no assurance nor subscribe to the principle that they or the public have free and unrestricted use of right of way except for highway purposes. In the commission's judgments, there is no statutory recourse where the public's or individual's use of the highway right of way does not contravene the public highway purposes for which it is held. It is the generally accepted fact that rights acquired by the public in right of way are only the rights associated to public travel and that all other rights and uses remain vested in abutting property.

"In this connection, and considering the far-reaching effect of the principles to which your office holds, this commission believes it necessary that the public roads administration advise whether such principles are their formal determination as concerning federal aid for highways and applicable in all states. This appears important and necessary, for if such principles are considered to be effective minimum requirements of the P.R.A., it would appear that the state, counties, townships, villages, and cities, of Wisconsin,
lack constitutional and statutory authority to provide right of way for projects and dedicate it to public highway purposes in conformity with such principles."

We have quoted this letter at length as we could not ourselves state the problem and the commission or municipal power in relation thereto in any clearer or better language. It is our opinion that the commission and municipal power in relation to the problem is well stated and is fundamentally sound in all respects. We concur in the conclusion reached and adopt the analysis as our own analysis of the subject.

In a letter of October 31, 1939, this federal agency, in amplification of the position taken by it, wrote you as follows:

"In our letter of October 17, 1939 we were referring not only to the specific encroachment of individual gasoline pumps but to the entire facility which can only be interpreted to comprise the pump and its respective servicing platform or driveway. In accordance with chapter 519 of the laws of 1939 amending sections 86.04, 86.05 and 86.06 of the Wisconsin statutes, we believe that the word 'stand' as used in section 1 of the above chapter comprises a situation such as a gasoline pump and its servicing zone."

Ch. 519, laws of 1939, was obviously passed for the purpose of making the laws with respect to encroachment of highways more workable. Sec. 86.04, Stats. 1937, made it the duty of the town board to enforce the law with respect to encroachments. Ch. 86 is old and antiquated and the placing of such duty with town boards with the various classification of highways that we have in the state obviously could not lead to adequate enforcement. As a consequence, ch. 519, laws of 1939, divides this duty in a workable manner as follows. The duty rests with the "state highway commission (in case of a state trunk highway), the county highway committee (in case of a county trunk highway) or the city council, village or town board (in case of a street or highway maintained by or under the authority of any city, village or town)".

Sec. 86.04, Stats. 1937, reads as follows:
"If any highway shall be encroached upon by any fence, building or other structure, the town board shall make an order requiring the occupant of the land through or by which such highway runs, and to which such fence, building or structure shall be appurtenant, to remove the same beyond the limits of such highway within thirty days; such order shall specify the extent and location of the encroachment with reasonable certainty; and shall be served upon such occupant."

In addition to the change made by ch. 519, Laws 1939, already referred to, the first part of sec. 86.04 was amended by said chapter to read as follows:

"If any highway right of way shall be encroached upon, under or over by any fence, stand, building or any other structure or object of any kind or character, * * *.

The encroachments referred to in both sec. 86.04, Stats. 1937, and 86.04, as amended by ch. 519, Laws 1939, are obviously actual physical encroachments. The insertion of the word "stand" in the section was obviously meant to eliminate the question as to whether a stand was an encroachment under the wording of the 1937 statutes as under the application of the ejusdem generis rule, any lawyer for the defense in an action to have the stand declared an encroachment under the old statute could obviously make quite an argument to the jury trying the case, to the effect that a stand was not an encroachment under the statutes. It will also be noted that the legislature added the following underscored words in addition to the word "stand": "any other structure or object of any kind or character, * * *." As the law now reads and by application of the ejusdem generis rule, it seems perfectly apparent that what the legislature was aiming at by ch. 519, Laws 1939, was that of making it plain that any physical encroachment of any kind upon the right of way is a removable encroachment under the statutes. Likewise by application of the ejusdem generis rule (and that rule is applicable), it seems very clear that the encroachments referred to as such are physical encroachments as distinct from a "use" of the highway. We are unable to support any view that sec. 86.04, as amended by the laws of 1939, in any wise au-
thorizes the highway commission or other municipal unit to stop a mere use of the non-traveled portion of the highway as an encroachment.

It may likewise be noted that the language of sec. 86.04, Stats., 1937, was mandatory, "the town board shall make an order." The language of the amended section is "may make an order." Giving intent to the legislative change in language and assuming that the legislature intended to accomplish something by said change, it would seem that the highway commission and municipal units in relation to the various roads with respect to which they have jurisdiction now have some measure of discretion as to whether even an actual physical obstruction of the nonused portion of the highway is such as to constitute an encroachment requiring removal. Whatever the law may be in this latter regard, it is clear to us that sec. 86.04 as amended by ch. 519, Laws 1939, does not vest authority in the highway commission or the various municipalities in relation to roads with respect to which jurisdiction is vested in these respective bodies by said chapter to prohibit a mere use of the non-traveled portion of the highway as an encroachment.

NSB
Public Officers — Register of Deeds — Sixty forms of standard instruments referred to in ch. 467, Laws 1939, are those forms approved by Wisconsin register of deeds association and filed in office of secretary of state in 1919, pursuant to sec. 235.16, Stats., and no further approval or filing of such forms by register of deeds association is required by ch. 467, Laws 1939.

Fees prescribed by sec. 59.57, subsec. (1), par. (b), Stats., as created by ch. 467, Laws 1939, apply to instruments other than sixty standard forms on file with secretary of state.

Minimum fees prescribed by sec. 59.57 (1) as existing prior to passage of ch. 467, Laws 1939, are eliminated by repeal of said subsection by said chapter.

November 13, 1939.

Olive L. O’Boyle,
Corporation Counsel,
Milwaukee, Wisconsin.

You request our opinion relative to chapter 467, Laws 1939, and enclose a letter addressed to you by the register of deeds of Milwaukee county in which the questions to which an answer is desired are set forth.

Chapter 467, Laws 1939, repeals subsection (1) of section 59.57 of the statutes and creates a new subsec. (1), par. (a), sec. 59.57, which reads as follows:

“For entering and recording the following forms of standard instruments which are to be approved by the register of deeds association and thereafter filed in the approved form in the office of the secretary of state.”

After this quoted material there are listed the names of sixty instruments and opposite each instrument is set forth the amount of the fee for entering and recording. The letter of the register of deeds sets forth that sixty standard forms were approved by the register of deeds association and filed in the office of the secretary of state about twenty years ago and that the question arises as to whether this ap-
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approval is sufficient or whether or not it is necessary for the register of deeds association to again approve these sixty standard forms. The approval and filing of these sixty standard forms, by the register of deeds association was provided for by chapter 584, Laws 1919. This chapter now comprises sec. 235.16 of the present statutes. From a reading of subsec. (1) of sec. 235.16, it appears that at the time when ch. 584, Laws 1919, was enacted the Wisconsin state register of deeds association had theretofore prepared certain forms numbered 1 to 60 and that these forms were at that time on file with the secretary of state. It was provided by section 235.16 (1) that such forms should be kept on file with and preserved by the secretary of state as a public record. There is nothing in chapter 467, Laws 1939, which would indicate that any forms other than those approved by the register of deeds association and presently on file in the office of the secretary of state are contemplated unless such a meaning could be attributed to the use of the words "which are to be approved by the register of deeds association and thereafter filed in the approved form in the office of the secretary of state". In view of the fact that the register of deeds association is a purely voluntary association and that sec. 235.16, Stats., has not in any way been changed by the 1939 legislature, it would not appear that ch. 467, Laws 1939, necessarily contemplates any further approval or filing of forms by the register of deeds association or is to be regarded as a direction to such association to so act in the future. A comparison of the names of the sixty forms listed in ch. 467, Laws 1939, with the names of the sixty forms now on file in the office of the secretary of state, which forms as we have seen constitute a public record, shows that the names of these forms and the corresponding numbers of each of them are the same in both instances. In view of the foregoing, it is our opinion that the forms referred to in sec. 59.57 (1) (a), Stats., as created by ch. 467, Laws 1939, apply to the sixty forms presently on file with the secretary of state and that no further approval or filing by the register of deeds association is required and that the fees prescribed by ch. 467, Laws 1939, for the sixty standard forms now on file with the secretary of state should now be charged. Attention is directed to
subsec. (3), sec. 235.16, which provides for an additional charge to be made for recording any of the instruments for which a form was approved in case such instrument varies from such approved forms.

A second question is presented in the letter addressed by the register of deeds of Milwaukee county to you with respect to whether or not the fees prescribed by sec. 59.57 (1) (b) as created by ch. 467, Laws 1939, applies to the sixty standard forms or whether such fees apply only to "other instruments." Since subsec. (1), sec. 59.57, Stats., as said subsection was constituted prior to the passage of chapter 467, Laws 1939, is repealed in its entirety by ch. 467, Laws 1939, there would appear to be no question but that these fees apply only to instruments other than the sixty standard forms. The complete scheme under which fees are now to be charged by a register of deeds would appear to be set forth in ch. 467, Laws 1939, in subsecs. (2) to (14), both inclusive, of sec. 59.57, and in sec. 235.16 of the statutes.

In answer to the third question presented in the letter of the register of deeds of Milwaukee county, as to whether the minimum fees as set forth in subsec. (1), sec. 59.57 prior to its repeal by ch. 467, Laws 1939, are now eliminated, it is our opinion that such is the case.

RHL
Building and Loan Associations—Subsecs. (2) and (6) of sec. 215.07, Stats., as amended by ch. 240, Laws 1939, authorize borrowing of money by one building and loan association from another upon security of borrowing member's real estate, subject to limitations set forth in said subsections.

Sec. 215.15, Stats., limiting amount which building and loan association may loan to its members in regular course of business to $25,000 to any one borrower, does not apply to loans made under subsecs. (2) and (6), sec. 215.07.

November 13, 1939.

ALLEN G. PFLUGRADT,
Commissioner of Banking.

In your letter of October 20 you request our opinion relative to certain provisions of ch. 215 of the statutes. You state that the question has arisen whether or not a building and loan association can legally lend its funds to another association upon the security of real estate and whether in such cases it is lawful for an association to make loans exceeding, in the aggregate, the sum of $25,000 to one borrowing association.

Section 215.07, subsection (2), as amended by chapter 240, Laws 1939, reads as follows:

"With the approval of the commission to borrow money, not inconsistent with the objects of the association, and issue its evidences of indebtedness therefor, and assign as collateral security its mortgages, bonds, notes and mortgage its real estate, not exceeding in the aggregate amount one-fifth of the assets on hand, except that with the approval of the commission an association may borrow an amount not exceeding two-fifths of its assets on hand."

Section 215.07 (6) provides, among other things, that a building and loan association may invest, with the advice and approval of the commission, in evidences of indebtedness of other local building and loan associations. These provisions of section 215.07 constitute the authority under which the borrowing and loaning association may act, sub-
ject to the limitations therein expressed, in securing and making loans from and to each other. It is our opinion that sec. 215.15, wherein it is provided among other things that a building and loan association may not loan to any one borrower an amount in excess of $25,000, does not apply to local building and loan associations under the authority of the aforementioned provisions of sec. 215.07. Sec. 215.15 clearly relates only to the loans which an association makes in the normal course of its business to its members.

RHL

Public Officers — Secretary of State — Public Records —
Under sec. 14.29, subsec. (3), Stats., it is duty of secretary of state to assume official custody of records of defunct departments when such records are turned over to him for such purpose. As such official custodian, secretary of state may then exercise discretion as to whether and when such records shall be transferred to state historical society under sec. 44.08, Stats., to assume official custody thereof.

November 13, 1939.

F. X. RITGER, Director of Purchases,
Bureau of Purchases.

In your letter you state:

"Information is desired regarding what department of the state government has the responsibility under the statutes to take over the preservation or disposition of the records of departments or boards which have been abolished. "Specifically, I am interested in knowing what disposition should be made of the records of the Dept. of Commerce, Dept. of Farm & Home Credit."

The statutes are not as clear as they might be on the subject. Sec. 14.29, subsec. (3), with reference to the duties of the secretary of state, provides as follows:
“The secretary of state shall:

(3) Have the custody of all books, records, deeds, bonds, parchments, maps, papers and other articles and effects belonging to the state, deposited or kept in his office, and, from time to time, make such provision for the arrangement and preservation thereof as is necessary, and keep the same, together with all accounts and transactions of his office open at all times to the inspection and examination of the governor or any committee of either or both houses of the legislature.”

There obviously must be some office or department whose duty it is to preserve and keep in custody the records of the various state departments that go out of existence and whose functions are transferred to no other department, board, bureau, etc. The above quoted section would seem to make it the duty of the secretary of state to take custody of such records when they are turned over to him for such purpose. The secretary of state will then become the official custodian. As such under sec. 44.08, Stats., he may exercise discretion as to whether and when such records shall be transferred to the official custody of the state historical society.

NSB
Public Officers — Clerk of Circuit Court — Clerk of court on salary basis is not entitled to retain clerk's fees taxed in foreclosure actions brought by HOLC, federal land bank, land bank commissioner, etc., even though such agencies are instrumentalities of federal government. Sec. 59.15, subsec. (1), par. (d), Stats., is not applicable to situation where clerk is performing duty imposed by state law and where state law fixes compensation for such duty.

November 15, 1939.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

In your letter you state that the clerk of your circuit court is on a salary basis. Sec. 59.15, subsec. (1), Stats., provides:

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

"(d) Compensation received by the clerk of the circuit court for work done for the United States government or for congress."

Under the above quoted exception your clerk claims to be entitled to keep for himself without accounting therefor clerk's fees which have been taxed as item of costs in foreclosures of federal land bank and H. O. L. C. mortgages. He is buttressed in this opinion by an opinion which he has received from a local law firm to the effect that the attorney general has ruled, XXV Op. Atty. Gen. 495, that since the federal land bank, H. O. L. C., etc. are instrumentalities of the federal government, the work done by the clerk for
these federal instrumentalities comes within the exception above quoted, and the clerk therefore is entitled to retain his clerk fees in said actions.

You have taken a contrary position and wish our opinion in the premises.

We are of the opinion that the position taken by you is sound. It may be conceded for purposes of argument that the federal land bank, the land bank commissioner, H. O. L. C., etc., are instrumentalities of the federal government. That, however, does not reach the problem presented. Granted that they are instrumentalities of the federal government, the question presented is that of whether clerk's fees assessed as such in an ordinary action pending in court can in any wise be construed as "compensation received by the clerk of the circuit court for work done for the United States government or for congress" within the meaning of sec. 59.15 (1) (d), Stats. In our opinion such fees do not come within this exception. In foreclosure actions the clerk's duties and fees are all a matter of state law. He is merely performing duties imposed upon him by state law and charging fees properly taxable as such under state law. We do not see how it can reasonably be argued that he is working for the federal government or for congress and that his compensation is received for such work. One is not working for the federal government or for congress or receiving compensation therefor when he is merely performing a duty of office, such duty being imposed by state law.

It is our opinion that the exception quoted above applies to naturalization fees where both the duty and compensation is fixed by federal law. See USCA, Title 8, secs. 400 to 402, inclusive.

NSB
Public Officers — Register of Deeds — Real Estate — Platting Lands — When plat prepared in accordance with ch. 236, Stats., is presented to register of deeds and other conditions precedent to recording of same as specified in sec. 236.11, Stats., have been satisfied, said plat is officially recorded when accepted by register of deeds and by him bound as permanent record into bound volumes, properly indexed.

November 15, 1939.

JAMES H. LARSON,
District Attorney,
Shawano, Wisconsin.

In an opinion now found in XXVII Op. Atty. Gen. 671, it was held that a register of deeds does not have authority to redraft plats for the purpose of correcting them. One sentence of that opinion, which was not material to the conclusion reached therein, has been interpreted as meaning that when a plat, prepared pursuant to the provisions of chapter 236, Stats., is presented to the register of deeds, it is necessary for him to take some steps by way of recording said plat in addition to following the procedure specified in sec. 236.11 of the statutes.

Sec. 236.11, subsections (2) and (3) refer to the “recording” of plats prepared in accordance with chapter 236. Ordinarily, instruments left with the register of deeds for recording are copied, either in longhand, typing, or by photostat. However, sec. 236.11 is a specific statute dealing with the method to be used in the recording of plats prepared in accordance with chapter 236, and is entitled, in part “Plats, how recorded * * *.”

Sec. 236.11 provides that the register of deeds shall “accept and bind as a permanent record into bound volumes, properly indexed,” the plats therein described, and it is our opinion that said section enumerates the only steps that need be taken by a register of deeds to accomplish the recording of said plats.
That section also provides certain conditions precedent to the acceptance and binding of the plat, but it is our opinion that when such conditions have been satisfied and the plat is accepted by the register of deeds and by him bound as a permanent record into bound volumes, properly indexed, said plat has been recorded and that it is not necessary for the register of deeds to copy or photostat said plat in order to complete the recording of the same.

JRW

Physicians and Surgeons — Basic Science Law — Board of Medical Examiners — Sec. 147.17, subsec. (1), Stats., which provides that state board of medical examiners may issue licenses by reciprocity under certain circumstances, does not authorize issuance of licenses by "round robin" or mail vote of individual board members. Board can act only in regular or special meeting as provided in sec. 147.13, subsec. (2), Stats.

November 15, 1939.

DR. E. C. MURPHY, Secretary,
Board of Medical Examiners,
Eau Claire, Wisconsin.

You state that a doctor licensed in another state has applied to the Wisconsin state board of medical examiners for a license by reciprocity. The application was made shortly after the last regular meeting of the board, and the doctor wishes to have his application acted upon before the next regular meeting by means of a "round robin" or mail vote of the individual members of the board.

We are asked if this may be done legally.

Sec. 147.17, subsec. (1), Stats., provides in part:

"* * * The board may license without examination a person holding a license to practice medicine and surgery,
or osteopathy and surgery, in another state, if in such state
the requirements imposed are equivalent to those of this
state, upon presentation of the license and a diploma from
a reputable professional college approved and recognized by
the board, " * * * ."

Sec. 147.13 (2) provides, among other things, that:

"The board shall meet regularly on the second Tuesday
of January at Madison and on the last Tuesday of June at
Milwaukee, and at such other times and places as it wills.
* * * ."

The board is created by the legislature and has only such
powers as are given it by statute or arise therefrom by nece-
sary implication. The statutes make no provision for ac-
tion by the board other than at regular or special meetings,
and it is true generally that a deliberative body acts only at
a meeting, regular or special, held pursuant to law. 46 C. J.
1877. It is also a well established parliamentary rule that a
quorum of a body must be present in order to validate its
action or to transact any business. 46 C. J. 1378.

In the absence of language in the statute compelling a
contrary conclusion, it is our opinion that when the legisla-
ture, in sec. 147.17 (1) said "the board may license" it
meant the board in meeting assembled pursuant to law, and
that it did not mean eight individuals scattered around the
state expressing their individual views by mail. The per-
sons composing the board are not the board itself, and the
board as a functioning unit becomes effective only when as-
sembled in meeting, pursuant to law.

Board action is normally the result of deliberation and
discussion. As a result of such deliberation and discussion
the action of the board might well be different from that
which would result by any mail vote in the absence of such
discussion. The statute providing for the board of medical
examiners is designed for the public protection and the
public is entitled to have the benefit of the deliberations of
the board acting as a board, and not as individuals.

You are therefore advised that the statutes do not author-
ize the issuance of a license by reciprocity in the manner
suggested.

WHR
Dairy and Food — Provisions of section 97.27, Stats., pertaining to preservatives, do not conflict with section 97.25, pertaining to adulteration of food products.

November 18, 1939.

C. G. Chadek,
District Attorney,
Green Bay, Wisconsin.

You state that you have been requested to issue a warrant for a violation of section 97.25, subsec. (3), Stats., because saltpeter was used in the manufacture of cheese, and the question has arisen in your mind as to whether section 97.27 does not conflict with section 97.25 (3).

You perhaps are relying upon the statute which says:

"If conflicting provisions be found in different sections of the same chapter, the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter." Section 370.02 (3), Stats.

There are other rules of construction that should be given consideration. Laws should be given a reasonable construction to the end that the legislative intent shall not fail. A statute is to be interpreted not alone by its exact words, but also by its apparent general purpose. In construing statutes, the usual and proper mode is to ascertain the intention of the legislature from the language it has used, connected with the state of the law on the same subjects prior to the passage of the statute. The true rule for judicial construction of a statute is to look to the whole and every fact, to the intent apparent from the whole, to the subject matter, to the effect and consequences, the evils to be remedied, the objects to be obtained, the mischief which the particular statute was intended to guard against, and thereby 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; State ex rel. McGrael v.
If we examine the two sections under consideration, we will find that section 97.25 orginated in chapter 166, sec. 3, Laws 1897. The title of the act is as follows: "An act to provide against the adulteration of foods and drugs." Webster defines the word "adulterate" to mean "To corrupt, debase, or make impure by an admixture of a foreign or a baser substance." Subsec. (3), sec. 97.25 defines or states when an article of food shall be deemed to be adulterated within the meaning of the section.

Section 97.27 originated in chapter 33, sec. 1, Laws 1905. The title of the act is as follows: "An act to promote the public health by restricting and regulating the sale of foods containing chemical preservatives." A preservative is defined by Webster to be "a substance added to food products * * * to preserve them against decay."

Section 97.25, while it involves health to some extent, is broader than section 97.27 because it deals with strength, quality or purity. Section 97.27 is strictly a health measure. A food product may be adulterated by the use of a substance deleterious to health but many adulterants do not come under that classification. Water added to milk is an adulterant but it is not deleterious to health.

"Cheese is the sound, solid and ripened product made from whole milk or cream by coagulating the casein thereof with rennet, pepsin or lactic acid, with or without the addition of ripened ferments or seasoning or added coloring matter." Section 97.02 (9) (a).

Salt peter can hardly be considered a seasoning.

You will note also that in section 97.27, you find this language, "provided, however, that nothing contained in this section shall prohibit the use of common salt, saltpeter, wood smoke," etc., clearly indicating that the exception is confined to section 97.27, products used as preservatives.

It is our opinion that the provisions of section 97.27 do not conflict with section 97.25.

RMO
Constitutional Law — Municipal Corporations — Municipal Borrowing — Public Utilities — National Guard — Armories — Constitutional power of municipalities to finance armories under ch. 395, Laws 1939, discussed. It is concluded legislature has wide discretion in defining what are public utilities under art. XI, sec. 3, Wis. Const.; that ch. 395, Laws 1939, is in all probability valid legislation in treating armory as public utility for purposes of financing without creating municipal indebtedness within meaning of said constitutional provision; that legislature has power to make construction and operation of armory proper county purpose; that municipalities may build armories and lease that portion not needed for municipal purposes; and that sec. 21.61, Stats. 1937, is applicable to armories financed under ch. 395, Laws 1939.

November 18, 1939.

RALPH M. IMMELL,
Adjutant General.

In your letter you state:

"During the last session of the legislature, a bill, 333,A., relative to counties or cities issuing revenue bonds was passed and signed by the governor. This is chapter 395 of the 1939 laws of Wisconsin, and among its broad purposes provides that cities and counties may construct armories to be financed through the issuance of revenue bonds.

1. Article XI, section 3, of the Wisconsin constitution, limits debt-incurring power of municipal corporations, including counties, to five per cent of the assessed value of taxable property therein, but provides an exception for indebtedness created in connection with the acquisition or extension of a public utility where such indebtedness is payable solely from revenues thereof.

Section 66.06 (9m) of the Wisconsin statutes provides that certain useful public works, including courthouses, jails, schools, hospitals, "and any and all other necessary public works projects undertaken pursuant to this federal act by any town, village, city, county, or other municipality shall be deemed public utilities within the meaning of subsection (9) of section 66.06, and any town, village, city, county or other municipality may finance such public utili-
ties in accordance with the provisions of and in the manner provided in subsection (9) of section 66.06. For the purposes of such financing, rentals and fees shall be considered as revenue. Any indebtedness created pursuant to this subsection shall not be considered an indebtedness of such town, village, city, county or other municipality and shall not be included in arriving at the constitutional five per cent debt limitation”.

You submit several specific questions, which will be taken up in their order of submission as follows:

1. “Please advise me whether the determination by the legislature in the provisions of chapter 395 of the 1939 laws of Wisconsin are conclusive in this regard. Can an armory be classified as a public utility under 66.06 (9m)?”

When you inquire “Please advise me whether the determination by the legislature in the provisions of chapter 395 of the 1939 laws of Wisconsin are conclusive in this regard”, we assume that you refer to sec. 1, creating sec. 66.51, subsec. (2), Stats., which reads as follows:

“The bonds or other evidences of indebtedness shall state upon their face that the county, or city, or both jointly, shall not be a debt thereof or be liable therefor. Any indebtedness created by this section shall not be considered an indebtedness of such county or city and shall not be included in such amounts of determining the constitutional five per cent debt limitations,”

and wish to be advised whether the above quoted provision is within legislative power under art. XI, sec. 3 of the Wisconsin constitution. This provision creates a constitutional debt limitation for every town, city, village and county. The concluding sentence of this section of the constitution reads as follows:

“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."

It became a part of the constitution in 1932, and will hereinafter be referred to as the 1932 amendment. You will note that no reference is made to counties in this 1932 amendment. It would seem to follow that county power with reference to this section of the constitution must be treated somewhat differently than that of power of a city, town or village.

In determining the import of the 1932 amendment it is necessary to determine municipal power under this section of the constitution as it existed prior to the amendment. When that is done, the purpose of the amendment seems plain and there is less difficulty in construing the term "public utility" as it is used in the amendment.

Prior to the amendment it was well settled law in this state that a municipal corporation having power to acquire a property in question might "contract for the purchase of property and pledge the proceeds arising from the operation of the property so purchased without creating city indebtedness," Loomis v. Callahan, 196 Wis. 518, 525, Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639, State ex rel. Morgan v. Portage, 174 Wis. 588, within the meaning of that term as used in art. XI, sec. 3 of the constitution.

It was equally well established by the last cited case that a municipality might pledge the property thus acquired or might improve the property at the time of acquisition and pledge such property as security for the purchase price without violating the terms of this constitutional provision. But any subsequent improvement of the property by a pledging thereof after acquirement of the property would constitute an indebtedness which must be considered as within constitutional debt limitations of the municipality.

While the cases involve acquisition of utility properties by a city, the rationale of the cases is not confined to that of acquirement of a public utility, but rather to acquirement of a property and the question of whether such financing constitutes a municipal debt within the meaning of the constitution. Such being true, it would seem that a county or
other municipal unit of government prior to the 1932 amendment might acquire any property which it was authorized to acquire, pledge the property and the revenues to be received from the operation thereof in payment of such property and improvements made at the time of acquisition, without violating the constitutional provision.

It is not deemed that the 1932 amendment was meant to restrict municipal power under this section as that power existed prior thereto. The obvious intent and purport of the amendment is to permit a town, city or village to finance a subsequent improvement of the property acquired in the same manner that it could finance the purchase of the property and improvements made at the time of acquisition, without violating the provisions of this section of the constitution. The 1932 amendment was intended as an enlargement of municipal power as it theretofore existed rather than a restriction upon the exercise of said power.

It would seem, therefore, that when the term "public utility" is used in the 1932 amendment, it is used in no restricted sense but is rather used in the sense of municipal property devoted to public uses. Thus in *Payne v. Racine*, 217 Wis. 550, 555, our court with reference to this term as used in the amendment states as follows:

"The term 'public utility,' as used in the foregoing amendment, must be considered to include all plants or activities which the legislature can reasonably classify as public utilities in the ordinary meaning of the term. * * *"

Giving the 1932 amendment the scope and purport that seems consistent with the purpose thereof, it would seem that counties have the same power with respect to financing as hereinabove discussed as they had prior to the amendment, and that towns, cities and villages have the increased power with respect thereto as heretofore indicated.

As to the second part of your question, "Can an armory be classified as a public utility under 66.06 (9m) ?", it will be noted that the legislature amended this section by sec. 2, ch. 395, Laws 1939, increasing the base of what public works construction may be deemed public utilities within this method of financing. That section does not specifically
include the term "armories". However, an analysis of section 1 of the chapter referred to makes it very evident that the legislature intended to include "armories" as a public utility for purposes of this financing. The provisions of subsec. (2), sec. 66.51, hereinabove quoted, are consistent with no other legislative intent.

As to whether the legislature may classify an armory as a public utility within the meaning of that term as used in the 1932 amendment, it does not seem to us that such classification can be said to be clearly unreasonable. Such legislative classification is entitled to great weight, and it is only where the court can say that the legislature has exceeded the boundaries of reason that it can be said that the legislature has exceeded its power in so classifying. Payne v. Racine, 217 Wis. 550. We cannot say that such classification or the classification provided in sec. 66.06 (9m) exceeds legislative power in this regard, nor does it appear that there is any disposition on the part of our court to so hold. Payne v. Racine, supra.

2. "Is the construction and operation of an armory a proper corporate purpose for a county?"

As counties are purely creatures of statutory creation and as the legislature has made the construction and operation of an armory by a county a proper corporate purpose, that would seem to completely dispose of the matter unless the legislature in so doing has violated some constitutional provision. We know of no constitutional provision violated in giving counties such power. It seems to be purely a matter of legislative discretion, and the legislature having acted with respect to, that ends the matter.

3. "Chapter 395 of the 1939 laws of Wisconsin impliedly permits the municipality to construct an armory to lease the same. Inasmuch as the act does not expressly authorize the leasing of such armories, what is the existence and extent of such powers?

"Section 21.61 of the 1937 Wisconsin statutes contains a number of provisions relative to the renting of armories. Do the provisions of said section 21.61 fit into the plans for this project?"
As to the first part of this question, county and town power cannot be approached from the same angle as that of city and village power. Counties and towns have only such powers as are expressly granted or necessarily implied. Since the enactment by the legislature in 1921 of the general charter law for cities, we do not look for express or implied powers. When the exercise of city power is called into question, one must look for a specific prohibition against the exercise of such power or a specific limitation upon the exercise of the power. In other words, the approach to a question of town and county power is just the opposite of that to the approach to that of city and village power. Hack v. Mineral Point, 203 Wis. 215. It will be noted that since the decision in the above case with respect to the proper approach to exercise of city power, the legislature has pursued the same legislative scheme with respect to villages.

Your question reads "construct an armory to lease". That is perhaps an unfortunate way of expressing the problem. If the municipality in question has power to acquire and construct and it validly exercises such power, it then has power to lease even to private persons or corporations that portion of the building not needed for municipal purposes. Bell v. City of Platteville, 71 Wis. 139. It would appear from the foregoing case that cities possessed the power in question prior to the 1921 amendment of the general charter law. As we find no specific limitation upon the exercise of that power in the now general charter law, it seems clear that cities have the power in question. The same analysis applies to villages.

As to counties and towns, the principle announced in Bell v. City of Platteville is still the applicable law. They likewise possess the power.

As to the second part of this question, ch. 395, Laws 1939, merely provides a method or means of financing armories and so forth. There is no indication in the chapter that buildings financed pursuant to the terms thereof are in a distinct class and that other sections of the statutes applicable to any particular building are not applicable to buildings constructed by such methods of financing. There is no
doubt in our mind but that any armories financed pursuant to the provisions of ch. 395, Laws 1939, are subject to the provisions of sec. 21.61, Stats. 1937.

4. "Section 43.49 of the 1937 Wisconsin statutes authorizes a city to provide for the erection, maintenance, and operation of a public auditorium. Is there any express provision authorizing a city to lease a building for auditorium purposes? If so, is the right to lease implied in the right to construct and acquire an auditorium?

It would seem that this question has been sufficiently analyzed in the analysis of question 3.

NSB

Public Officers — Coroner — County Supervisor — Malfeasance — Medical Director — When county is on system of county poor relief county supervisor may not furnish goods or services to relief clients in excess of statutory exemption, sec. 348.28, Stats., without violating said section of statutes.

As to coroner and medical director of county, solution must depend upon whether such officers have any duty, legal or otherwise, to perform in relation to contract or service within rule of State v. Bennett, 213 Wis. 456, and Reetz v. Kitch, 230 Wis. 1.


November 20, 1939.

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

In your letter you state:

"In La Crosse county certain supervisors of the county board are grocers and undertakers. They have been furnishing merchandise and professional services for certain
relief recipients, and are being paid therefor by the county.

"Section 348.28, W. S. prohibits payment to any officer, agent, etc., of the county, town or city within the state, or from having, reserving or acquiring any pecuniary interest, directly or indirectly, present or future, in any manner in the purchase or sale of any property, or in any contract in relation to any public service, order or account, made by, to or with him in his official capacity or employment, of more than one hundred dollars in any one year.

"The following questions have been submitted to me for solution; and because the opinions of the attorney general's office seem to be ambiguous, I am asking that you give me an official opinion upon the following propositions:

"1. Is it lawful, or in violation of the above statute, for a supervisor of the county, to provide groceries to relief recipients of more than one hundred dollars in any one year—either to each relief recipient or all relief recipients who go to him for commodities; that is, is a grocer, who is a member of the county board, prohibited from furnishing more than one hundred dollars' worth of commodities to one or more relief clients in any one year, the cost of which is paid by the county?

"2. Is it in violation of the statutes of Wisconsin for a supervisor who is an undertaker, to furnish burials to and for relief recipients, the cost of which may total more than one hundred dollars in any one year, and which is paid by the county?

"3. Is it a violation for the coroner of the county, who receives a salary of one hundred dollars per year, to bury relief recipients and receive more than one hundred dollars from the county in any one year for such services rendered to relief recipients?

"4. Is it a violation of the statutes of Wisconsin for the medical director of the county, who receives a salary of $100 per month as such director, to receive any additional amount, or an amount in excess of one hundred dollars, for services rendered to relief recipients for which the county is billed, such medical services to be paid for by the county? La Crosse county is operating under the county system of relief.

"I find that the attorney general in 1935 rendered an opinion to the effect that a store in which a county board member has an interest cannot legally sell more than one hundred dollars' worth of relief supplies to the county in any one year, and I presume that this is decisive to the answer to question No. 1., following the holding of our supreme court in the case of State v. Bennett, 213 Wis. 456. XXIV Op. Atty. Gen. 260; XXIV Op. Atty. Gen. 180.
“However, I also find that in 1933 the attorney general rendered an opinion to the district attorney of Oshkosh to the effect that a county officer who owns certain houses occupied by relief recipients, may be paid the rentals for the use of such houses by such relief recipients; the rentals being paid in such cases by the city instead of the county. The distinction appears to be that if the county is not operating under the county system of relief, the city may pay the rentals to a county officer, and the law is not violated; but if under the county system of relief, the county would be paying the rentals and in that event the law would be violated. XXII Op. Atty. Gen. 139; XXIV Op. Atty. Gen. 312.

“In all opinions rendered on questions of similar nature, the rule seems to have been adhered to that the prohibition of the statute above referred to does not apply in the event that the contract is made between the municipality and one in his individual capacity; but does become prohibitive in case the contract is made between the municipality and an officer or agent in his official capacity; and that city relief authorities have no such connection with the activities of a county office as to make a county officer guilty of violation of the statute by accepting money from the city for the support of relief recipients, or for commodities furnished to them. I cannot follow the line of reasoning that makes it a violation in the one case where the county is operating under the county system of relief, but not otherwise. Can it not be well argued that in each of the cases above outlined the contracts are not made by the supervisor or county officer in his official capacity, but is made as an individual grocer, undertaker, physician or other business or professional man in his individual capacity? But see XXVI Op. Atty. Gen. page 444.”

It is apparent that your real difficulty of solution lies in approaching the problem from one angle, namely that of the seller. If you will approach the same problem from the angle of the buyer we believe that you will readily see the difference between the two situations presented. In the case of a county operating on the county system of poor relief, a supervisor of the county in his official capacity as such obviously has some duty to perform in relation to the services rendered or goods furnished. The county is the buyer. The supervisor as a member of the county board has a duty to perform. In all such cases the supervisor acts in a dual capacity. He is both buyer and seller. The supervisor has a duty to perform with respect to allowance of the claim filed,
etc. It is apparent that the supervisor in such cases has a pecuniary interest in a contract "made by, to or with him in his official capacity or employment, or in any public or official service" within the rule of State v. Bennett, 213 Wis. 456. It seems to be conceded in the Bennett case that had Bennett been a member of the common council having a duty to perform in relation to the contract in question, there would be no doubt as to his having violated the statute. Furthermore, this statute received further application in Reetz v. Kitch, (Jan. 1939) 230 Wis. 1, 283 N. W. 348, from which case it appears that the foregoing observations are sound.

Where the county is not on the county system of poor relief but rather upon the unit system, it seems equally obvious that a supervisor of the county board has no official duty to perform in relation to or in respect to relief items furnished a unit of government with respect to which he occupies no official position as a member of the governing body. If you will follow your own analysis of the situation to its logical conclusion we believe that you will agree that such analysis results in a complete nullification of the statute. It would be a most unusual situation where the officer acts in an official capacity at both ends of the transaction,—buyer and seller.

It seems apparent that your first two questions must be answered Yes.

As to your last two questions, they can be answered only by reference to either the official duty or the duty which the county board has attempted to place upon these offices. If the coroner has no official duty to perform with respect to hiring persons to bury relief clients, or approving or passing upon the validity of claims filed for such employment or service, the mere fact that he is a county officer would not seem to render such contract void. It would seem that in order to render the contract void the coroner performing such service must in some wise act in a dual capacity as an officer under official duty in relation to that service. If such facts are not present, the contract would seem to be proper under the rule of the Bennett case in so far as the particular statute in question is concerned. The distinction attempted to be drawn in XXIV Op. Atty. Gen. 312, 315, be-
between the civil and penal aspects of sec. 348.28, Stats., does not appear to be sound. It is only those contracts which are declared void which the statute covers. If the statute does not cover the situation presented by the facts of the Bennett case for purposes of criminal prosecution it would seem to follow that the statute does not cover the facts of the Bennett case for purposes of making the contract void as a civil matter. Reetz v. Kitch, (Jan. 1939) 230 Wis. 1, 283 N. W. 348, puts any such attempted distinction at rest. No such distinction can be drawn.

The foregoing analysis is equally applicable to your question 4.

NSB

Public Officers — Deputy Sheriff — Where office of sheriff is on salary basis, as provided in sec. 59.15, subsec. (1), Stats., deputy sheriff cannot collect mileage from county for travel on county business.

November 21, 1939.

J. Henry Bennett,
District Attorney,
Viroqua, Wisconsin.

You state that deputy sheriffs have filed claims against the county for travel without stating the places between which the travel took place, as required by sec. 59.77, subsec. (1), par. (a), Stats. Also our attention is called to the fact that the sheriff is on a salary basis, and you inquire whether it is not the duty of the sheriff to pay the deputies' charges for mileage in serving warrants.

As was pointed out in the case of Prielipp v. Sauk County, 215 Wis. 16, to which you refer, the claim of a deputy sheriff for mileage under sec. 59.28 (27), providing that the sheriff be allowed certain mileage for traveling to serve criminal process, is payable to the sheriff rather than to the
deputy. Consequently, such claim is not payable to the deputy whether or not it is made out in compliance with sec. 59.77 (1) (a).

Moreover, it is our conclusion that neither the sheriff nor his deputies may collect mileage from the county where the office is not on a fee basis. Where the sheriff is on a salary basis, such salary is in lieu of all fees, per diem and compensation. The only exceptions are those mentioned in pars. (a) and (b) of subsec. (1) of sec. 59.15, and these exceptions do not include mileage. This statute applies as well to a deputy sheriff on a salary basis as it does to a sheriff on a salary basis.

In Douglas County v. Sommer, 120 Wis. 424, it was held that a sheriff on a salary basis is not entitled to mileage from the county. The statute at that time, while in a somewhat different form than at present, was substantially the same as to the proposition considered here. See also II Op. Atty. Gen. 663, to the effect that where the sheriff is on a salary basis, his deputies are not entitled to collect mileage from the county whether the traveling is within or without the county.

WHR

Prisons — Prison Labor — School Districts — Words and Phrases — School district is political subdivision within meaning of sec. 56.01, subsec. (1), Stats.

November 22, 1939.

DEPARTMENT OF PUBLIC WELFARE.

You have inquired as to whether or not school districts come within the meaning of the words "political subdivisions" as used in sec. 56.01, subsec. (1), Stats., (amended by ch. 501, Laws 1939).

It is our opinion that the words include school districts. Other states have construed "political subdivisions" to include school districts. See People v. Peltier, 107 N. E. 200,
A political subdivision, in its usual sense, embraces a subdivision of the state through which the state exercises its political functions. The function of education is certainly political in nature, and a local subdivision designed to further the performance of that function is a political subdivision.

We call your attention in this connection to the fact that city schools in cities of the second, third and, in some cases, fourth class, are operated as adjuncts of the city government. See State ex rel. Board of Education v. Racine, 205 Wis. 489. In such cases the city itself would constitute the political subdivision.

JWR

Indigent, Insane, etc. — Legal Settlement — Husband does not obtain derivative settlement from his wife's settlement. Children of such husband and wife derive their settlement from that of their mother.

November 24, 1939.

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

In your letter of November 18 you set out the following statement of facts and submit the following request for an opinion:

"A is a married woman, having her legal settlement in the city of Antigo. She is married to B who has no legal settlement in any town, city or village in the state of Wisconsin, and is a county at large case. They are living together as man and wife and have three children.

"A had her legal settlement in the city of Antigo at the time of her marriage. The question I would like to have
answered is: Would her husband receive relief from the municipality in which she has her legal residence? By that I mean would the husband's legal settlement follow that of his wife? Also, do the children receive relief from the municipality in which the wife has her legal settlement, or do they receive relief by following their father who is a county at large case?"

Since A's husband has no legal settlement in the state she is, as you have indicated, legally settled in the city of Antigo. Sec. 49.02, subsec. (1), Wis. Stats. The children, by reason of these facts, derive a settlement from that of their mother. Sec. 49.02 (2) Stats.

The father, as a county-at-large case, may be supported by the city and his relief charged back to the county pursuant to the provisions of sec. 49.03, or the county may care for him directly by extending relief to him at the settlement of his wife. See sec. 49.04, Stats.

You have inquired as to the meaning of the word "remove" as used in sec. 49.02, Stats. The section in question reads as follows:

"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:

"(1) A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall receive it in the place where his wife shall have her settlement."

At the time the words in question were written into the statutes there was a provision for removal of transient paupers to their place of legal settlement. Such provisions still exist. See sec. 49.03 (9), Stats. Under such provisions for removal there was the possibility, of course, that a wife temporarily living in one town, city or village with her husband, who had no settlement in the state, might be removed to her place of legal settlement and thus separated from her husband. There is a difference of opinion as to whether
or not they could be separated under such circumstances. 48 C. J. 495. Sec. 49.02 (1), Stats., makes it clear that in case a wife is removed in such circumstances her husband is to be removed with her and is to receive relief at the place of his wife's legal settlement.

It is, of course, implied in the above that a husband obtains no derivative settlement from the settlement of his wife. The matter of settlement is purely statutory and, in the absence of a statutory provision for such derivative settlement, it may not be acquired. See 48 C. J. 481.

JWR

Automobiles — Law of Road — Revocation of Drivers' Licenses — Answer to question 7 in XX Op. Atty. Gen. 13 explained and modified. It is held that costs may not be taxed against officer making complaint under sec. 85.08, subsec. (13), Stats., in absence of showing of malice or bad faith in making complaint in event that hearing upon complaint results in non-revocation of license.

November 25, 1939.

GEORGE W. RICKEMAN, Director,
Motor Vehicle Department.

One of your deputies has made complaint under sec. 85.08, subsec. (13), Stats., for revocation of a driver's license. The particular complaint involves a driver with defective eyesight,—so defective, the complainant alleges, as to make it unsafe for the driver to continue to operate motor vehicles upon the highways. The attorney for the licensee and the district attorney have advised the complainant that under a ruling of this department, XX Op. Atty. Gen. 13, if the hearing results in non-revocation of the license, costs will be taxed against him.

You wish to be advised whether such is the situation.
There is some unfortunate language used in answer to question 7 of the opinion referred to, but if the answer to that question is read in conjunction with the answer to question 5 it is apparent that there is no basis for a conclusion that costs are taxable against the public official making the complaint.

In answer to question 5 the opinion states:

"* * * The prosecution for revocation is, I think, intended to be an action instituted by a specified public official on behalf of the state, and prosecuted by the district attorney, and not an action prosecuted by one citizen against another in their private capacities" (p. 15).

It is well settled that at common law no costs were recovered by either party. 3 Wait's Practice (1874 ed.) 458; Faust v. State, (1878) 45 Wis. 273, 277; Wyoming Central Irrigation Co. v. La Porte, (1920) 26 Wyo. 522, 188 Pac. 360; 7 R. C. L. 781.

The right and liability of litigants to costs is wholly statutory and, for the court to allow costs, it is necessary to point to some specific provision of the statutes giving such authority. In re Donges's Estate, (1899) 103 Wis. 497, 79 N. W. 786; Wis. Cent. Co. v. Kneale, (1891) 79 Wis. 89, 48 N. W. 248; In re Reeseville Drainage Dist., (1914) 156 Wis. 238, 145 N. W. 671; Strange v. Harwood, (1920) 172 Wis. 24, 177 N. W. 862; Am. Exp. Co. v. Citizens State Bank, (1923) 181 Wis. 172, 194 N. W. 427; Illinois Automobile Ins. Exchange v. Braun, (1924) 280 Pa. St. 550, 124 Atl. 691; State v. Barrs, (1924) 87 Fla. 168, 99 So. 668; State v. Williams, (1905) 101 Md. 529, 61 Atl. 297.

General statutes are not to be construed to include, to its hurt, the state or sovereign.


Costs are not taxable against a public official in the performance of a duty, at least in the absence of a showing of bad faith or malice.


The foregoing principle is necessarily applicable to a public official making a good faith complaint under sec. 85.08 (13), Stats. The legislative policy of placing the responsibility with the officers named in said section for seeing that only competent drivers continue to operate upon the highways would be completely nullified if a rule were adopted that these officers proceed at their own risk as to costs or that in the event of a determination of non-revocation by the court the costs in the proceeding are taxable against the officer. Such a situation would be nothing short of ridiculous.

It is suggested in answer to question 7 in the opinion of the attorney general above cited that the answer should be entitled, In the name of the state upon the relation of the complainant. No authority is cited for such conclusion. We do not agree with it. Sec. 260.03, Stats., defines an action. The proceeding in question does not appear to come within the terms of such definition. Sec. 260.03 further provides "* * * Every other remedy is a special proceeding." It
would appear, therefore, that a complaint made pursuant to the provisions of sec. 85.08, (13), Stats., and the proceedings had thereunder are in the nature of a special proceeding. No reason is perceived why the proceeding should not be entitled as any other special proceeding, namely, "In the Matter of the complaint for revocation of the license of _________." If there are any actions or proceedings labelled, State ex rel., other than those based upon the various writs issued by the courts, they do not occur to us.

As to whether costs are taxable against the licensee in the event that the proceeding results in revocation of the license, the court would appear to have a discretion under sec. 271.02 (2), Stats.

NSB

Public Welfare — Department of Public Welfare — Unemployment relief student loan program, which was set up by provision in state unemployment relief act, ch. 363, Laws 1933, is included in transfer of relief agencies to department of public welfare created by ch. 435, Laws 1939.

November 28, 1939.

FRANK C. KLODE, Director,
Department of Public Welfare.

You call to our attention the following facts relating to the student loan program:

"1. The unemployment relief student loan fund was set up by a provision in the state unemployment relief act, chapter 363, Laws 1933, section 7, subsection (6) (c) for students who 'are either unemployed or would otherwise be unable to continue their education and thus add to the number of unemployed.'

"Two subsequent appropriations were made to this fund by chapter 10 (Special Session 1933) and chapter 17 (1935). The latter provides that repayments from loans under chapter 363, chapter 10 and chapter 17 should be-
come a revolving fund. Chapter 17 was an appropriation from the general fund to be reimbursed from any moneys made available by the state for unemployment relief.

"2. In 1933 the student loan program was a part of the unemployment relief department, in the industrial commission, and original bulletins to local relief directors and to colleges were signed by Florence Peterson, supervisor of unemployment relief. Rules and regulations of the commission, still in effect, provided that applications be investigated by local relief departments.

"3. In August 1934 (and perhaps before) and during all of 1935, Miss Hoiby, junior clerk in charge of student loans, appeared on the WERA payroll.

"4. An organization chart of the industrial commission of April 1933 shows student loans as an activity separate from the WERA.

"5. During 1935 one bulletin regarding student loans was signed by Alfred W. Briggs and another by Voyta Wrabetz.

"6. Executive Order No. 4, dated December 7, 1935, gave the public welfare department, then in the industrial commission, authority to execute all responsibilities relative to the administration of relief imposed upon the industrial commission by chapter 363, Laws 1933, as amended by chapter 15, Laws 1935. Since the student loan program was included in the unemployment relief act, it may be presumed that it was part of the relief responsibilities transferred. However, on December 31, 1935, Miss Hoiby's salary was transferred to the industrial commission payroll, although all other services continued to be paid by the public welfare department.

"7. When all relief responsibilities of the industrial commission were transferred to Voyta Wrabetz by executive order in February 1936, the student loan program was not transferred, although about July 1937 Miss Hoiby's office was moved to the public welfare department building, and clerical and stenographic services have been continuously provided by the public welfare department. Administration has remained with the industrial commission.

"The various specific statutes relating to administration of student loans, read in part as follows:

"Such loans shall be made by the industrial commission, Sec. 7 (6) (c) of chapter 363, Laws 1933, and chapter 10, Laws Special Session 1933, chapter 17, Laws 1935.

"Of course, section 5 of chapter 363, Laws 1933, relating to relief funds, reads in part:

"There shall be allotted by the industrial commission to county and local relief agencies administering relief,
We are asked whether the student loan program is included in the transfer to the public welfare department of the functions of the industrial commission relating to relief under the transfer provided for by ch. 435, Laws 1939.

Sec. 58.37, Stats., amended by ch. 435, Laws 1939, provides for the transfer of numerous agencies to the department of public welfare. Among these are included:

"* * * the public welfare department of the state of Wisconsin, the industrial commission or such agency as the governor has designated to administer relief in Wisconsin under chapter 363, laws of 1933, chapter 15, laws of 1935, chapter 14, laws of special session 1937, or any act amendatory thereof or supplementary thereto, or under any other law, insofar as such laws relate to the administration of relief in Wisconsin; * * *."

This language is very broad and evidences an intention to transfer all phases of relief, which would include the student loan program, this having been created as a relief program.

The fact that some of the employees under this program are paid by the public relief department also indicates that it is considered to be a relief measure, although the administration is handled by the industrial commission. It was originally provided for as a relief measure by ch. 363, Laws 1933, as you have indicated. To be sure certain changes have been made since that time, but they are not sufficient to show an intention to alter the original aim of the provisions for student loans.

You are therefore advised that, although not specifically mentioned in ch. 435, Laws 1939, the student loan program is to be included in the transfer as a function of the industrial commission relating to relief.

WHR
Public Health — Embalmers — Under sec. 156.04, subsec. (2), Stats., person may own funeral establishment although he is not licensed funeral director, provided he hires some one who is licensed to conduct business and does not hold himself out to public as being engaged in funeral directing business.

Under sec. 156.095, person owning funeral establishment may serve apprenticeship under funeral director employed by him.

November 28, 1939.

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

You state that a person who is not licensed as a funeral director contemplates the purchase of a funeral establishment, but plans to employ a licensed funeral director and embalmer, and to serve a funeral director's apprenticeship under his licensed employee.

We are asked whether this can be done under sec. 156.04, subsec. (2), Stats., which reads in part:

"No person shall engage in the business of a funeral director or hold himself out as engaged in such business, in whole or in part, unless first licensed as a funeral director by the board; * * * ."

The question as to what is meant by "the business of a funeral director" is at least partially answered in subsec. (3) of sec. 156.01, Stats., which enumerates certain activities, and in which it is stated that he is a person engaged in, or conducting, or holding himself out, in whole or in part, in the maintenance of a funeral establishment.

We do not understand that mere ownership in and of itself constitutes the "maintenance of a funeral establishment" if the actual management and all of the funeral director's work is performed by a licensed funeral director. However, the owner's name must not be used in connection with the establishment.
In XXIV Op. Atty. Gen. 28, it was stated that one who permits his name to be used as part of the corporate name of a company maintaining a funeral establishment may be holding himself out as engaged in the business of a funeral director within the meaning of the statute.

Hence it is not illegal for the person mentioned to own the establishment under the above conditions. However, there still remains the question of his acting as an apprentice under his licensed employee.

We have carefully read sec. 156.095, Stats. 1939, relating to apprenticeships of funeral directors and embalmers and can find nothing which would specifically prohibit such a procedure. It seems somewhat anomalous for one to be an apprentice of his own employee, but apparently the legislature has not seen fit to restrict this practice, and we are not at liberty to substitute our judgment for that of the legislature as to what its policy should be on this point. As we read the apprenticeship requirements of sec. 156.095, there is nothing therein which could not be met under this somewhat unusual arrangement, and if an applicant for the funeral director's examination has met all of the statutory apprenticeship prerequisites, the state board of health must admit him to the examination.

WHR
Physicians and Surgeons — Basic Science Law — Massage and Hydrotherapy — Licensed physician may operate establishment for practice of massage and hydrotherapy without obtaining massage license under sec. 147.185, Stats.

Foreign license to practice medicine and surgery confers no privilege to practice any branch of healing art in this state.

E. C. Murphy, D. O., Secretary,
Board of Medical Examiners,
Eau Claire, Wisconsin.

You state that a physician licensed to practice medicine and surgery in this state desires to open an establishment for the practice of massage and hydrotherapy, and you inquire if he may do this without obtaining a massage license.

Licenses to practice massage and hydrotherapy are issued by the board of medical examiners under sec. 147.185, Stats. An applicant must have a high school education or its equivalent and in addition must have completed in a scientific or professional school an adequate course in physiology, descriptive anatomy, pathology and hygiene. He must also be familiar with the state health laws and regulations of the state board of health relating to communicable diseases. He is examined in the above mentioned subjects by the board of medical examiners, and is further examined in massage and hydrotherapy under the supervision of the board by a registered practitioner in massage or hydrotherapy. The certificate of registration authorizes practice in massage or hydrotherapy or educational gymnastics, but not the treatment of a specific disease, except upon the advice of a licensed medical physician.

Practically all of the educational requirements of a masseur or hydrotherapist are included in the examination given to applicants for licenses to practice medicine and surgery or osteopathy and surgery under sec. 147.16, Stats.

Moreover, the statutes nowhere attempt to limit the scope of treatment by physicians in treating the sick. Massage has been defined as a method of rubbing, kneading, or stroking of the superficial parts of the body by the hand or an instrument, for the purpose of modifying nutrition, restoring
power of movement, breaking up adhesions, etc., and hydrotherapy is the treatment of disease by means of water. See Scott's edition of Gould's Medical Dictionary.

These methods appear to be widely used by physicians as a standard form of treatment in various situations. For instance, it is pointed out in Maloy, Legal Anatomy & Surgery, at p. 15, that massage should be employed soon after the accident in the case of sprains of the spine, and at pp. 175-176, he states that it is used a few days after the arm is placed in a sling in the case of a fracture of the anatomical neck of the humerus. Both massage and hydrotherapy are commonly employed by physicians in the treatment of anterior poliomyelitis (infantile paralysis). Also massage is being increasingly used for purposes of restoring the power of movement in industrial accident cases and numerous illustrations doubtless suggest themselves to the practicing physician.

The foregoing is sufficient to illustrate the relatively widespread use of massage and hydrotherapy in treating the sick, and we do not consider that sec. 147.185, relating to certificates of registration to practice massage or hydrotherapy, was intended to prohibit licensed physicians from employing these methods of treating the sick, nor do we deem it material that the physician specializes in such fields to the extent of opening an establishment for the exclusive practice of these methods of treatment. As we read it, sec. 147.185 is limited in its application to those not otherwise licensed to treat the sick.

Lastly you inquire as to whether a physician not licensed to practice medicine and surgery in this state may practice massage and hydrotherapy under the supervision of another licensed doctor.

The answer is, No. A license from another state or foreign country confers no privileges in this state except the right to obtain a license by reciprocity in a proper case and in accordance with our statutes relating to reciprocity. Since a license has no extra-territorial effect as far as the right to practice is concerned, it is immaterial whether the license is to practice medicine and surgery or massage or hydrotherapy.

WHR

Morvin Duel,
Commissioner of Insurance.

You have called our attention to XXII Op. Atty. Gen. 844, in which it was ruled that the Milwaukee auditorium, owned jointly by the city of Milwaukee and the Milwaukee Auditorium Company, a private corporation, is a public building within the meaning of sec. 210.04, Stats., and may be insured in the state insurance fund. It was also stated in that opinion that such policy would protect the interests of the stockholders of the Milwaukee Auditorium Company, which company owns a half interest in the building.

Since that opinion was rendered, the state insurance fund has carried one-half of the total insurance on the building and an equal amount has been carried by commercial companies. We are informed that the question of full coverage by the state fund may again be submitted to the commissioner of insurance and you have, therefore, resubmitted the problem discussed in the former opinion in the following form:

"1. May the state insurance fund insure the Milwaukee auditorium building and contents against loss by fire and/or tornado?

"2. If the state insurance fund can legally insure the Milwaukee auditorium against loss by fire and/or tornado, may the state insurance fund insure the equity which is owned by the Milwaukee Auditorium Company, a private corporation?

We adhere to our former opinion in answering your first question for the reasons given in that opinion. The only additional factors presented by your first question are whether
the contents of the building may also be insured in the state fund and whether such insurance may be extended to cover loss on either the building or its contents by tornado. These additional inquiries contained in your question likewise call for affirmative answers, since sec. 210.04, subsec. (1), refers to "public building or property" and provides for insurance "against fire or any other risk upon property."

However, we believe that your second question calls for some re-analysis of the language used in the former opinion. It was said there at page 845, "* * * The general rule is that lessees, lessors, mortgagees, mortgagors and tenants in common may join in the insurance of the building with the other parties interested and that they have an insurable interest in such building. 26 C. J. 34."

Upon the strength of this undoubtedly correct statement of the law, it was concluded that the interest of the Milwaukee Auditorium Company was protected by a policy in the state insurance fund. While it is true that the Milwaukee Auditorium Company has an insurable interest in the building, it does not follow that such interest is insurable in the state insurance fund merely because the city's interest is insurable in that fund.

Hence if the interest of the Milwaukee Auditorium Company is insurable in the state fund, either directly or indirectly, such conclusion must be based upon other grounds.

Sec. 43.46 (1), relating to the Milwaukee auditorium, provides:

"The title to all property acquired for the purposes of said institution shall be in the name of said city, and shall be held by said city perpetually for such purposes."

Sec. 43.47 (2), provides in part, that:

"Said institution shall be used primarily for public meetings, conventions, expositions, and other purposes of a public nature, which are hereby declared to be public purposes; * * * *"

Under sec. 43.45 (1) the buildings, maintenance and operation of the institution is vested in a board of eleven members, five being elected by the corporation and the other
six consisting of the mayor, city attorney, city comptroller, city treasurer, and the presidents of the board of trustees, respectively, of the public library and public museum, of said city, *ex officio*.

Thus to all practical intents and purposes, the city, through the officers above named, has control of the building, and it is to be noted that sec. 210.04 (1) gives the officers or agents of the city having charge of a public building or property the authority to insure in the state fund on vote of the council.

The Milwaukee Auditorium Company has but an equitable interest in the property as distinguished from the legal title which is in the city. While equitable interests are properly the subject of insurance, there is no provision in the statutes for the insurance of such privately owned equities in the state insurance fund. This does not mean, however, that the city, having the entire legal title, would be precluded from insuring the full value of the property in its own name in such fund. For instance, it has been ruled that a fire insurance policy taken out by a mortgagor in his own name, but reciting that it shall be payable to the mortgagee as his interest may appear, is an insurance on the property of the mortgagor as owner, and not on the interest of the mortgagee, the contract being between the insurer and the mortgagor, who is the insured. 26 C. J. 84.

Where one has possession of property of others for which the insured may be called on to account, he may insure the entire value of the property and recover such value, accounting to the real owner who sees fit to avail himself of the benefit of the insurance for any excess beyond the interest or liability of the insured. 26 C. J. 85-86.

In view of the foregoing it would appear that the city might insure the entire value of the property in its own name, but that no contract of insurance can properly be entered into by the state fund with the Milwaukee Auditorium Company.

Except as herein modified, we adhere to the views expressed in XXII Op. Atty. Gen. 844.

WHR
Copyright — Public Officers — Secretary of state has no duty to enforce compliance with provisions of ch. 177, Stats. His duty is confined to issuing licenses and collecting license fees there provided for.

December 1, 1939.

Fred R. Zimmerman,
Secretary of State.

You have asked us to advise you as to whether or not the law invests you with the duty and authority of seeking out violators of ch. 177 of the Wisconsin statutes and of, in general, compelling compliance with the provisions of that chapter.

Chapter 177, Stats., is entitled "Copyrighted music" and on its face purports to regulate the activities of music brokers. As in the case of many other regulatory measures, the scheme of regulation is based upon a licensing provision. It is provided that no person other than the original composer shall license the public rendition of copyrighted music within this state without first obtaining a license so to do from the secretary of state. Thus, the secretary of state is supposed to issue licenses covering the transaction in the state of the business of licensing the rendition of copyrighted music. It is further provided that certain informative material shall be filed with the secretary of state in connection with the application for a license and that a license fee be paid, measured by gross receipts derived from licensing the rendition of music in this state for the year prior to the application for a license.

The chapter goes on to provide for the punishment by fine and imprisonment of persons licensing the rendition of musical numbers without obtaining the license provided for. In addition, it provides a license fee for those engaged in the business of investigating into the public rendition of copyrighted musical numbers within the state of Wisconsin and denominates it as a misdemeanor to carry on such investigations without the license.

We can see no rational basis of distinction between the duties with which the secretary of state is invested by ch. 177 and the duties with which he is invested by several
other provisions of the statutes. Thus, by virtue of the provisions of secs. 346.20 to 346.24, inclusive, a comprehensive system of registering lobbyists is provided for. In substance it is stated that lobbyists shall register with the secretary of state and shall be punished for the crime if they do not. Sec. 175.07, Stats., provides for the registering of private detectives with the secretary of state, and it is denounced a crime to engage in the business of a private detective without obtaining such a license. Sec. 226.02, Stats., provides for the licensing of foreign corporations by the secretary of state and further provides that corporations transacting business without obtaining a license shall be subject to certain penalties. Many other instances imposing licensing duties upon the secretary of state might be enumerated, but these which are set out are sufficient to show that his duties in that direction are extensive and varied. And it would no doubt come as quite a shock to the secretary of state if he were now to find that he is entrusted with the duty of enforcing compliance with such requirements and of seeking out and causing to be prosecuted those who do not comply with them.

That is to say, as a matter of administrative construction it has never been supposed that the secretary of state was under any such duty. In addition to this, we have searched the statutes in vain for the slightest indication that any such duty is imposed upon him. And, of course, it would be conceded if there is any such duty it is purely statutory. Certainly it does not come within any constitutional duties imposed upon the secretary of state.

In view of the foregoing it is our opinion that the duties of the secretary of state in connection with the administration of ch. 177, Stats., are confined to the ministerial function of registering applicants, issuing licenses and collecting the license fees for which provision is there made.

It is quite possible that ch. 177 was enacted as a tax measure as well as a regulatory measure. There is nothing, however, relating to any such question that would affect the question you have presented.

JWR
Constitutional Law — Public Health — Beauty Parlors
— Under sec. 159.02, subsec. (3), Stats., relating to educational requirements for admission to school of cosmetic art, authority to determine equivalency of tenth grade education be exercised only by agencies named in statute.

Ordinarily attorney general does not pass upon constitutionality of statute in absence of showing that officer requesting such opinion will be injured in his person, property or rights by enforcement of statute involved.

December 5, 1939.

BOARD OF HEALTH.
Attention Dr. C. A. Harper, State Health Officer.

You direct our attention to sec. 159.02, subsec. (3), Stats., 1939, which reads, in part, as follows:

“No school teaching cosmetic art shall be granted a certificate of registration unless it requires as a prerequisite to admission, completion, as shown by certificate or affidavit, of the tenth grade or an equivalent education as determined by the extension division of the university of Wisconsin or the Milwaukee board of school directors, and unless it requires as a prerequisite to graduation a course of instruction of not less than fifteen hundred hours to be completed within a period of not less than eight months instruction of not more than eight hours in any one day. Said instruction shall be given only between the hours of 8:00 A. M. and 6:00 P. M. on week days. * * *.”

We are asked if the matter of determining the equivalency of a tenth grade education which is delegated to the extension division of the university of Wisconsin or the Milwaukee board of school directors, could be exercised by a director of a vocational school if so designated by the state board of vocational and adult education.

The answer is,—No. The language of the statute is clear and express. There is no room for construction, and we must assume that when the legislature said the extension division of the university of Wisconsin or the Milwaukee board of school directors, it meant exactly what it said. Any other view would result in a plain disregard of the legislative mandate.
You also inquire as to the reasonableness of the tenth grade education requirement and of the requirement that instruction be given only between the hours of 8:00 A. M. and 6:00 P. M. on week days.

We assume that in asking us as to the reasonableness of these provisions you have in mind some sort of ruling from this department as to the constitutionality of these features of the law, and we wish to state that it is not the function of this department to pass or attempt to pass upon the constitutionality of a statute at the request of a ministerial officer where no question of personal liability is involved, and we see no such question here.

The only function of your department, so far as the requirements under consideration are concerned, is either to grant a license to a school complying with the provisions of the statute or to deny the license when such requirements are not met, and if a school is denied a license because it does not comply with the terms of the statute, it may test the validity of such provisions in a mandamus action against the board to compel the issuance of a license. Until declared otherwise by the courts, a statute is presumptively valid. As was said in 11 Am. Jur. 713:

"* * * It has been thoroughly stated that the right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution. The oath of office 'to obey the Constitution,' means to obey the Constitution, not as the officer decides, but as judicially determined, for since every law found on the statute books is presumptively constitutional until declared otherwise by the court, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement."

See also XXVIII Op. Atty. Gen. 86.

We therefore refrain from expressing any views which we may entertain as to the constitutionality of the provisions in question.

WHR
Automobiles — Law of Road — Auto Registration —

Under sec. 85.01, subsec. (5), Stats., motor vehicle department may not issue registration numbers of current year on applications received after October 31, and this provision is unaffected by sec. 85.01 (4) (h) as amended by ch. 489, Laws 1939.

December 5, 1939.

Motor Vehicle Department.

Attention George W. Rickeman, Commissioner of Motor Vehicles.

You call our attention to ch. 489, Laws 1939, which amends sec. 85.01, subsec. (4), par. (h), Stats., so as to provide that the legal date of application for motor vehicle registration in the case of a new vehicle, a vehicle not previously registered, or a vehicle being transferred, shall be the date on which such vehicle was first operated on the public highways after it was acquired by the applicant.

Sec. 85.01 (5), Stats., provides in part:

“* * * October thirty-first, any application for registration of an automobile, motor bus, or motor cycle shall be given a registration number of the succeeding year, which shall serve as a registration for the balance of the current year.”

We are asked whether sec. 85.01 (4) (h) as amended will permit the issuance of a 1939 license after October 31st, or whether the provisions of sec. 85.01 (5) make it mandatory that all applications received after October 31st must be issued a 1940 license.

It is our opinion that the language of sec. 85.01 (5) is mandatory, and that it has not been impliedly repealed by ch. 489, Laws 1939. A repeal of a statute by implication is not favored. On the contrary, the earlier act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless in the later act some express notice is taken of the former plainly indicating an intention to abrogate it. Attorney General ex rel. Taylor v. Brown, 1 Wis. 513.
The provisions of ch. 489, to which you refer, and the language of sec. 85.01 (5), when read together, do not give rise to any irreconcilable conflict. The legislature by amending sec. 85.01 (4) (h) has said in effect that, in those instances where the payment of a part of a year's registration fee for the balance of the current registration year is proper, the date of the application shall be considered to be the date of the vehicle's first operation on the highways. This, however, does not mean that the October 31st deadline, which was previously in force and not repealed, is to be abandoned.

The sole purpose of the amendment of sec. 85.01 (4) (h) by ch. 489 appears to have been to insure to the state the receipt of a part-year license fee computed from the date of the first operation of the vehicle on the highways during the current year. Under the statute prior to the amendment, the date of actual application was used in computing such fee, which often occasioned some loss of revenue due to the operation of the vehicle prior to the date of application.

This, however, can have nothing to do with the legislative mandate in sec. 85.01 (5) to the effect that after October 31st no further registration numbers for the current year may be issued, and consequently the amendment plays no part in the construction of this statute. In other words, you are to continue interpreting sec. 85.01 (5) just as it has been interpreted in the past. That is, applications received after October 31st are to be given a registration number of the succeeding year, regardless of the particular date in the current year on which the vehicle was first operated on the public highways.

WHR
Indigent, Insane, etc. — Poor Relief — Legal Settlement — Person living in automobile trailer with his family within limits of town may acquire legal settlement there within meaning of sec. 49.02, Stats., if during period of his residence he carries on his usual vocation and does not receive poor relief. It is immaterial that he does not vote and that he does not pay taxes or that he lives in automobile trailer instead of permanent dwelling.

December 5, 1939.

CLARENCE G. TRAEGER,
District Attorney, Dodge County,
Horicon, Wisconsin.

You have requested our opinion as to the following:

“A married man, living with his wife and family, had established residence in the town of Portland, Dodge county. He then removed to the town of Shields, Dodge county, and resided there for more than one year in a trailer parked on the side of the highway, and during this period of time of more than one year he paid no taxes nor did he vote in the town of Shields, and he did not return to the town of Portland until after more than one year.

“The question confronting us is whether or not a man residing in a trailer, either on private or public lands, who paid no taxes and did not exercise his right to vote, would gain a residence in such township after one year. * * *”

Upon the basis of the facts stated and upon the assumption that the man in question carried on his usual business while living in the town of Shields, it is our opinion that the family acquired a legal settlement in the town.

Under the applicable statutes, “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 * * *” (sec. 49.02, subsec. (4), Stats.), the legal settlement of the wife and children would follow that of the husband and father. (Sec. 49.02 (1) and (2), Stats.)

The question, therefore, is this: Does residing in a trailer within the town limits while carrying on his usual vocation
Opinions of the Attorney General

constitute such a residence as will enable one to obtain a legal settlement within the meaning of sec. 49.02, Stats.? We are of the opinion that it does.

The case of Monroe County v. Jackson County, 72 Wis. 449, is controlling. We quote the following language from the decision of the court, p. 456:

"It is urged that the proofs do not clearly establish the fact that Benjamin Skutt acquired a legal settlement in the town of Angelo, in Monroe county. We think the learned circuit judge was right in holding the evidence conclusive on that question. The evidence shows that he lived in such town for more than one year, the length of time required to obtain such settlement, and that for more than two years immediately preceding the time when the aid was furnished his wife he had lived in such town without receiving any aid as a pauper or poor person. That he may have contemplated leaving such town at some future time does not defeat his gaining a settlement in such town. He had his only home and business in such town for more than the time required by the statute, and that is sufficient. * * *

The fact that the man in question did not pay taxes and did not vote during his period of residence is not material. We are, of course, assuming that the person in question did not receive pauper support during the period of his residence.

JWR
Public Officers — School Districts — School Board — Salaries of school board members fixed pursuant to ch. 163, Laws 1939, are not subject to limitations contained in sec. 62.09, subsec. (6), par. (b), Stats., should be carried in school board budget and may become effective at any time after January 1, 1940, but not prior thereto.

December 11, 1939,

JOHN CALLAHAN,
Department of Public Instruction.

Ch. 163, Laws 1939, reads as follows:

"A new section is added to the statutes to read:
40.605 Power of Cities to Provide Salaries for Board Members. The governing body of any city may, before the annual city budget is prepared, provide for and fix the amount of compensation of city school board members for the ensuing year. Such amount shall be included in the annual city budget as part of the city school tax."

Ch. 238, Laws 1939, completely revamped or revised the method of arriving at tuition which may be charged to non-residents and vested certain duties with respect thereto in the state superintendent. To enable you to perform your duties under said ch. 238, you would like our opinion upon the following three questions:

1. Should the item of school board salaries be included in the school board budget or should it be included in the city council's budget?
2. Are all of the present members of the city school board eligible for salaries, or does section 62.09 (6) (b) of the statutes apply?
3. If all present members are eligible to receive salaries, should the same become operative as of July 1, 1939, or as of January 1, 1940?"

Sec. 40.55, Stats., provides as follows:

"The school board shall annually, before October, make an estimate of the expenses of the public schools for the ensuing year, and of the amount which it will be necessary to
raise by city taxation, and certify the same to the city clerk who shall lay the same before the common council at its next meeting. It shall be the duty of the common council to consider such estimate, and by resolution determine and levy the amount to be raised by city taxation for school purposes for the ensuing year, which amount shall be included in the annual city budget and be called the 'City School Tax.'"

As ch. 163, Laws 1939, provides that the salaries shall be included in the city school tax and as the city school tax by sec. 40.55 is based upon the budget submitted by the school board as revised by the city council, it would seem that these items were intended to be included in the school board budget or estimate. We can see no other purpose in the legislature providing that the items shall be "included in the city annual budget as a part of the city school tax."

With reference to your second question, sec. 62.09 (6) (b) is a general statute. Ch. 163, Laws 1939, is specific. The specific controls the general. We can find nothing in ch. 163, Laws 1939, that would justify a conclusion that the authority conferred by said chapter is in any wise limited by the general provisions of sec. 62.09 (6) (b).

As to your third question, it would seem that salaries fixed pursuant to the terms of ch. 163, Laws 1939, may become operative at any time fixed in the resolution so long as that time is subsequent to the fixing of salaries pursuant to ch. 163, Laws 1939, and at a time when the school board is operating under the budget which includes said item of salaries. Obviously that cannot be prior to January 1, 1940, but there would appear to be no reason why it might not be at any time subsequent thereto.

NSB
Markets — Trade Regulation — Unfair Sales — Under ch. 56, Laws 1939, creating sec. 110.15 (renumbered to be 100.30) Stats., merchant may offer commodities for sale or sell at price not lower than invoice or "replacement cost" as defined by act, whichever is lower. Using higher of two as standard would not constitute violation of act.

December 13, 1939.

Patrick A. Dewane,
District Attorney,
Manitowoc, Wisconsin.

With reference to ch. 56, Laws 1939, creating sec. 110.15 of the statutes (renumbered to be 100.30), you state a case as follows:

"Take for example the case of a certain merchant who purchased certain merchandise at $1.00 a dozen on the first of July, 1939; this merchandise has not been disposed of by the first of December, 1939. May said retail merchant use the actual invoice cost of $1.00 per dozen which he paid in July as the basis for determining his selling price or is he forced to use the cost at which said merchandise could have been replaced at any time thirty days prior to the first of December?"

In reference to the stated case, you state:

"It is my opinion that the above sections of the said law mean that the actual invoice cost no matter when purchased can be used by the retailer in computing his selling price. Section (a) provides 'cost to retailer' means invoice cost."

You request our opinion.

At the outset, it may be observed that the chapter in question is not a price-fixing statute except in so far as it fixes a minimum price below which the seller may not go in selling or offering articles or commodities for sale.

Subsec. (3) of sec. 100.30, entitled "Illegality of Loss Leaders" provides:

"Any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as de-
"Cost of retailer" is defined in subsec. (2), par. (a), which reads:

"'Cost to retailer' means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower; * * *".

The "replacement cost" is defined in subsec. (2), par. (c) of the section and provides:

"'Replacement cost' means the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise."

It seems perfectly apparent that the retailer in the case which you state may use either invoice cost or "replacement cost" as above defined, whichever is the lower. In so doing, he will not be violating the law but will be within the strict letter of it so long as either cost is a bona fide cost within the meaning of per (d) of subsec. (2) of the section, which provides as follows:

"'Cost to retailer' and 'cost to wholesaler' as defined in paragraphs (a) and (b) of this section mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler."

The act fixes no maximum, it merely fixes a minimum. It is aimed at selling or offering for sale the so-called "leaders" at below either invoice or "replacement cost" as those terms are defined in the act.

There is obviously no reason why, in the case that you put, the merchant may not use invoice cost as defined in the act as a standard below which he may not sell without vio-
lating the act. If he uses invoice cost as a standard and that cost is lower than "replacement cost," there can be no violation of the act as the act specifically provides that he may use such lower cost without violating the terms thereof. If he uses invoice cost as a standard and that cost is higher than "replacement cost," there would be no violation of the act, as the act by its express terms would have permitted him to use the lower figure as the standard. One cannot violate the terms of this act by using the higher figure as a standard, as the act is not concerned with maximum prices but rather with minimum prices below which commodities may not be sold or offered for sale.

NSB

Automobiles — Law of Road — Counties — County Ordinances — Traffic Ordinances — Town may not pass speed laws under authority of sec. 85.43, subsec. (1), Stats.

County ordinance regulating speed under authority of sec. 85.43 (1) and sec. 59.07 (11) and following ch. 85, Stats., in its provisions need not be entirely reenacted because of changes made in secs. 85.40 and 85.43 by ch. 407, Laws 1939, but should be changed so as to increase speed limits in conformity with sec. 85.40 (6), Stats.

December 13, 1939.

CHAS. M. PORS,
District Attorney,
Marshfield, Wisconsin.

You inquire whether a town may pass speed laws under the authority given in sec. 85.43, subsec. (1), Stats., and also whether a speed law passed by the county board under authority of sec. 59.07 (11), Stats., and following ch. 85 in its provisions should be reenacted, due to the changes made in sec. 85.40 (6) (7) and (8) by ch. 407, Laws 1939.

Sec. 85.40, subsecs. (6) (7) and (8) formerly provided for different rates of speed in certain districts within a vil
lage or city. Ch. 407 repealed these provisions and added a new subsec. (6) to read:

"The maximum permissible speed within the corporate limits of any city or village shall be twenty-five miles per hour, provided that in outlying districts within any city or village where on each of both sides of the highway there is an average distance of not less than five hundred feet between buildings fronting thereon the maximum permissible speed shall be thirty-five miles per hour."

Sec. 85.43 (1) formerly provided:

"Local authorities may by ordinance increase the speeds specified in subsections (6), (7) and (8) of section 85.40."

This has been changed by ch. 407 to read:

"Local authorities may by ordinance increase the speeds specified in subsection (6) of section 85.40."

Sec. 59.07 (11) provides that the county board is empowered to enact ordinances or by-laws regulating traffic of all kinds on any highway in the county which is maintained at the expense of the county and state, or either.

In answer to your first question, you are advised that a town has no authority to pass speed laws under sec. 85.43 (1) because the laws referred to in that section concern traffic on streets within villages and cities, and the town has no power within their corporate limits. If the law included streets in unincorporated villages the town could probably pass laws governing the speed there, but this is not the case.

Since the speed law to which you refer in your second question is the same as in ch. 85 of the statutes, it need not be reenacted except as to those parts of ch. 85 which have been changed. The rest of the law is a continuation of the old statute, since it has been held that the reenacted portion of a repealed statute will be regarded as a continuation of the old statute. Husting Co. v. City of Milwaukee, 200 Wis. 434.

However, the parts which were changed, that is, sec. 85.40 (6) (7) and (8), now sec. 85.40 (6), involve an in-
crease in the speed limit. The county ordinance should coincide with the state law, or the speed limit will be lower than the one provided by the state. The county cannot decrease the speed limit, but may increase it under sec. 85.43 (1). See XXII Op. Atty Gen. 588.

WHR
LKR

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*Taxation — Taxation of Utilities* — Under sec. 76.48, Stats., as created by ch. 132, Laws 1939, rural electric cooperative associations are required to make report and pay license fee in 1939 on gross receipts in 1938.

Report form prescribed may call for such supplementary information as is necessary to provide office check of accuracy of report.

December 15, 1939.

DEPARTMENT OF TAXATION.

Sec. 76.48 of the statutes was created by sec. 1 of ch. 132, Laws 1939, which took effect following its publication on June 3, 1939. Subsec. (1) thereof provides that every rural electric cooperative association organized under chapter 185 "shall pay in lieu of all other general property and income taxes an annual license fee of three per cent to be computed upon its total gross receipts." Subsec. (2) of said sec. 76.48, Stats., provides that every such association "shall on or before the first day of March in each year" file with your department "a true statement of the gross receipts from the operation of its business during the preceding calendar year", containing such information as you may require and in the form you prescribe and furnish. Subsec. (3) of said sec. 76.48, Stats., provides that you shall compute and assess the license fee on or before June 1 and that such fee shall be paid to the state treasurer on or before June 30, in each year. The remaining provisions of sec. 76.48 relate to the apportionment of the license fees collected thereunder.
Sec. 2 of chapter 132 provides as follows:

"The provisions of this act shall apply to the taxable year of 1989. For said year the date of the report required to be made to the tax commission under subsection (2) of section 76.48 of the Wisconsin statutes, the date upon which the license fee shall be computed and assessed by the tax commission pursuant to subsection (3) of said section, and the date upon which the license fee shall be paid to the state treasurer pursuant to said subsection shall be determined by the tax commission."

Under date of July 31, 1989, the Wisconsin tax commission sent to each of such associations two copies of a printed annual report form prepared by the tax commission and a notification that one copy of said report containing information covering the year ending December 31, 1989, should be filed with the Wisconsin tax commission not later than September 1, 1989.

A number of said associations take the position that the first license fee payable by them under the provisions of sec. 76.48 is that which will be measured by three per cent of the gross receipts in the calendar year 1989 for which the requirement of making a report and the computation and payment of the fee will not arise until in the calendar year 1940. Consequently it is their position that in the year 1989 no report is required of them and no license fee is assessable and collectible in respect to their gross receipts of the calendar year 1988.

In support thereof it is urged that the use of the words "taxable year of 1989" in sec. 2 of ch. 132, Laws 1989, shows that these associations and their properties were not to be subject to taxation in 1989 nor were they required to pay a license fee in the calendar year 1989. This completely disregards the last sentence of said sec. 2. Had the legislature intended that these associations were not to pay that license fee under sec. 76.48 until in the calendar year 1940 then there was no occasion for the enactment of the last sentence of said sec. 2 of ch. 132. The language used in sec. 2 by the legislature must be given effect. The only possible situation that such language could have contemplated was the payment of the license fee during the calendar year
1939, which is the "taxable year of 1939". In any event cer-
tainly the act cannot be construed by looking just to the
first sentence of sec. 2 and completely disregarding the re-
mainder of the section, especially in view of the fact that
the first sentence uses the words "the taxable year of 1939"
and then the last sentence prescribes what shall be done for
"said year". The last sentence must be read just as though
it started out with the words "for the taxable year of 1939".

In further support of the contention of the said associa-
tions it is contended that they have already paid their taxes
for the tax year 1939. This contention is based upon the
fact that in the year 1938 the properties of the several rural
electric cooperative associations in the state were assessed
by the local political subdivisions in which the properties
were located and taxes levied on such 1938 assessments
were paid in the early months of the year 1939. The taxes
thus assessed and collected are claimed to be taxes for "the
taxable year of 1939" and therefore it is urged that the leg-
islature in enacting said ch. 132 could not thereby have in-
tended to provide that these associations which had already
paid their property taxes for the "taxable year of 1939"
should also be required to pay during "the taxable year of
1939" the annual license fee prescribed by sec. 76.48. The
local property taxes paid by the service associations in the
early months of 1939 were, however, 1938 taxes for the tax-
able year of 1938. They were levied in 1938 upon the 1938
assessments and became due January 1, 1939. All through
the general property tax laws of this state runs the tradi-
tional concept that general property taxes fall due and are
collectible in the year subsequent to the taxable year for
which they are assessed and levied. This is well illustrat-
ed by reference to the provisions of sec. 74.62, Stats., which
provides, in respect to conveyances of land, that "the taxes
assessed thereon for the year in which the conveyance is
made" shall be paid by the grantee if the conveyance is on
or before December 1, and by the grantor if after that date,
in the absence of express agreement to the contrary. The
legislature has power to say when taxes or license fees shall
be payable. If it was not meant by the provisions of sec. 2 of
ch. 132 that for the taxable year 1939 the reports should be
filed and the license fees paid during that year, based on the
gross receipts of the prior year, then the provisions thereof are meaningless. The express language of the legislature may not be ignored and must be given effective meaning.

It is therefore our opinion that the provisions of ch. 132 of the laws of 1939 provide that rural electric cooperative associations organized under ch. 185 shall, during the calendar year 1939, file a report covering the year ending December 31, 1938 and pay a license fee of three per cent of the gross receipts during the year 1938, upon such dates as your department shall fix.

The blank report forms as prepared and sent out by the tax commission for use by the said associations in making report to it on or before September 1, 1939 in respect to the calendar year 1938, contained not only a table for statement of gross receipts, but also tables for complete income statement, balance sheet and analysis of surplus. The tax commission deemed that the information required by these tables is necessary to provide an office check of the accuracy of the reports filed. Our opinion is asked whether the tax commission may require the supplementary information called for in the blank report form sent out. It is our opinion that the tax commission has the power under subsec. (2) of sec. 76.48 to require such supplementary information as is called for in the report for the purpose of efficiently and economically administering its duties under sec. 76.48.

HHP
Unemployment Compensation — In computing "payroll" under sec. 108.02, subsec. (8), Stats., industrial commission having, as authorized therein, prescribed change from "wages payable" basis to "wages paid" basis, effective as to contributions made by employers for year 1939 and thereafter, sums paid during 1939 for work done during 1938 and already included in computation on "wages payable" basis for 1938 should not be included in 1939 computation.

December 15, 1939.

UNEMPLOYMENT COMPENSATION DEPARTMENT,

Industrial Commission.

You request our opinion as to the interpretation to be placed upon subsec. (8) of sec. 108.02, Wis. Stats. You state that under the provisions of ch. 108 relating to unemployment, the contribution to the reserve fund of employers in the state subject to the operation of this chapter is based upon a certain percentage of the particular employer's "payroll". Prior to 1937, the word "payroll" was defined in ch. 108 as including "all wages payable." By ch. 343, Laws 1937, the provisions of the statutes defining the word "payroll" were repealed and recreated. The definition as now found in sec. 108.02 (8) (excluding certain additions made by ch. 372, Laws 1939, which are not material here) reads as follows:

"An employer's 'payroll' shall include all wages payable for a given period (or paid within such period, if this basis is permitted or prescribed by the commission) to the employer's employes for their 'employment' by him."

You state that under the authority of the foregoing quoted material your commission contemplates prescribing that for the year 1939 and thereafter, the term "payroll" shall mean wages "paid within" the given period. You ask our opinion as to whether, in determining "payroll" under sec. 108.02 (8) for the year 1939, it will be necessary to consider as "payroll" in the year 1939 all amounts actually paid in that year including sums payable for work done in
1938 which were included by the employer when computing “payroll” for the year 1938 upon the “wages payable” basis. We believe it is clear from a reading of sec. 108.02 (8) and a consideration of the unemployment compensation law as a whole that no such result was intended by the legislature. Should payments made during the early part of 1939, the year of the change over, which have already been included in determining “payroll” for the year 1938 on the “wages payable” basis be again included in the computation for 1939 on the “wages paid” basis, an abnormal situation would result. Upon consideration of the entire chapter no possible reason for belief that the legislature intended a temporary dislocation of the basis for contributions, affecting various employers in varying degree in accordance with the mere rules of chance, can be discerned. In view of the foregoing, it is our opinion that in computing “payroll” for the year 1939, the commission may permit to be deducted therefrom all sums payable for work done during 1938 and which were included in the computations for “payroll” for 1938, whether or not such sums were actually paid over during 1939.

Authority to make the change in the manner of computing payroll is by sec. 108.02 (8), Stats., vested solely in the commission. In exercising this authority it should act in accordance with the purposes and scheme of the chapter of which it is given the administration.

RHL

Public Lands — Forest Lands — Conservation commission may sell to United States forest lands within boundaries of national forests pursuant to provisions of sec. 24.01, subsec. (12), Stats., and without regard to reservations mentioned in sec. 24.11 (3), Stats.

December 20, 1939.

Conservation Department.

You state that the conservation department desires to sell to the forest service of the federal government some 10,400
acres of state forest lands which are located entirely within the boundaries of national forests. We are informed that this sale will not only make possible a more efficient and unified administration of these lands by the United States forest service, but also will relieve the state conservation commission of various administrative burdens, inconvenience, and expense. At the same time the lands will serve precisely the same purpose in the hands of the federal government as they now serve in the hands of the state, that is, they will continue to be publicly owned forests. We are further informed that in order to complete the transaction it is necessary to make the sale solely under the provisions of sec. 24.01, subsec. (12), Stats., without regard to the reservations mentioned in sec. 24.11 (3), since the United States forest service will not accept a conveyance which contains such reservations. The governor's approval of this sale has already been obtained under sec. 24.01 (12) and you inquire whether such a sale will be valid and permissible under this statute.

Sec. 24.01 (12), which was enacted by ch. 448, Laws 1935, reads as follows:

"For the purpose of blocking out state forest areas, for the acquisition of recreational areas or for otherwise extending the usefulness of state forest lands, the conservation commission is authorized to sell parcels of such lands as defined in chapter 28, or the timber thereon, and to issue deeds on behalf of the state to consummate such sales. The conservation commission is authorized to conduct such sales for state forest lands as defined in chapter 28 in accordance with the procedure now delegated to the commissioners of public lands for the trust fund lands and which is more particularly specified in this chapter, except that lands lying within the boundaries of national forests may be sold to the United States according to the purchase procedure of the forest service. Such sales shall be subject to the approval of the governor. All moneys received from such sales shall be paid into the state treasury to the credit of the reforestation fund."

Sec. 24.11 (3) is an earlier statute and applies in general to all sales of public lands made under ch. 24. It reads as follows:
"Every contract, certificate of sale, or grant hereunder of public lands shall be subject to the continued ownership by the state, of the fee to all lands bordering on any meandered or nonmeandered stream, river, pond or lake, navigable in fact for any purpose whatsoever to the extent of one chain on every side thereof, and shall reserve to the people the right of access to such lands and all rights necessary to the full enjoyment of such waters, and of all minerals in said lands, and all mining rights therein, and shall also be subject to continued ownership by the state of all water-power rights on such lands or in any manner appurtenant thereto. Such conveyance shall also be subject to a continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the removal of such mineral from such lands and to the proper exercise of such mineral rights, and shall be further subject to the continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the development, maintenance and use of any such water rights. Nothing contained in this section shall be construed to provide for the continued ownership in the state of any stone used for building purposes nor of any sand or gravel."

The general purpose of sec. 24.01 (12) appears to be almost identical with that sought to be accomplished by the sale in the instant case, that is, to enable the state to relieve itself of the administration of isolated tracts contained within the boundaries of national forests, while at the same time retaining the benefits of the use of such lands for public forests under a more unified federal administration.

While the statute is not as clear and definite as it might be, it is our opinion that the sale of lands to the federal government pursuant to the provisions of sec. 24.01 (12), is a proper and valid means of accomplishing the purpose of that section, even though the reservations mentioned in sec. 24.11 (3) are omitted.

Sec. 24.01 (12) provides that the conservation commission may sell state forest lands under the conditions therein specified "in accordance with the procedure now delegated to the commissioners of public lands for the trust fund lands and which is more particularly specified in this chapter, except that lands lying within the boundaries of national forests may be sold to the United States according to the purchase procedure of the forest service."
It appears that the legislature in referring to "the procedure now delegated to the commissioners of public lands * * * which is more particularly specified in this chapter" had reference to something more than the mere formal steps by which the land is sold and conveyed and that it was intended to refer to all the applicable provisions of ch. 24, including sec. 24.11 (3). However, the exception as noted in the italicized language above, in favor of sales of state lands within the boundaries of national forests to the United States forest service shows quite clearly that the legislature intended to facilitate such sales by authorizing the conservation commission to consummate such sales without regard to "the procedure now delegated to the commissioners of public lands" and therefore without regard to the provisions of sec. 24.11 (3), and subject only to the approval of the governor. Similarly, it must have been intended that if sec. 24.01 (12) is to have any practical effect whatsoever, sales to the United States forest service would be made without regard to sec. 24.11 (2), which requires that each contract shall contain a clause binding the purchaser to pay taxes on the land from the time of the contract. This could have no application since the federally owned lands are exempt from taxation. It would also appear that such sale is to be consummated without regard to sec. 24.13, which limits the sale of public lands to any one person to a maximum of one hundred sixty acres.

You are therefore advised that the proposed sale may be consummated without regard to the reservations mentioned in sec. 24.11 (3), Stats.

WHR
Criminal Law — Sale to Employees — Public Officers — Public Employees — Various activities of highway commission analyzed as to whether sale of certain articles or rendering of certain services to public employees would constitute violation of ch. 357, Laws 1939, as amended by ch. 500, Laws 1939.

December 20, 1939.

HIGHWAY COMMISSION.

In your letter you state:

"Section 348.54 of the statutes, relative to the above subject matter, has been created by chapter 357, laws of 1939, and reads as follows:

"(1) No department or agency of the state or any political subdivision thereof, or member or officer of any village, town or county board or common council of any city, or any purchasing agent or purchasing agency of the state or any political subdivision thereof, shall sell or procure for sale or have in its possession or under its control for sale to any employees of the state or any political subdivision thereof or any other person any article, material, product or merchandise of whatsoever nature excepting meals, public services and such specialized appliances and paraphernalia as may be required for the safety or health of the employees.

"(2) Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail not less than thirty days nor more than ninety days, or both.'

"It has been the practice of this department, for a nominal charge, to furnish copies of aerial maps, to citizens desiring them, of the various sections of the state.

"We also have a complete set of county maps and we sell either individual sheets or complete sets at a nominal fee, which about covers the cost of the labor and material used.

"We also maintain a service during the tourist season whereby we furnish weekly detour maps to hotels, filling stations, and individuals who desire to pay a charge of $6.00 a year for this service.

"We also charge the contractors who desire to bid on work $1.00 for a set of plans and specifications for the pending job, and also in this respect our blueprint department does a great deal of copy work for the several different de-
departments of state for which there is a nominal charge equal to the cost of the labor and material.

"In view of the recent legislation enacted, known as chapter 357 of the 1939 session laws, are we stopped from carrying on this service to the public? An interpretation of your construction of the present law will be appreciated."

Since this submission, the chapter in question was amended by ch. 500, Laws 1939. This latter chapter omits the underscored words above "or any other person." The amendment therefore takes care of any problem that you might have had with respect to sale to the public generally. Since the amendment, there obviously can be no violation of the statute unless the sale is to one occupying the position of a public employee.

Ch. 357, Laws 1939, was also amended in other particulars by ch. 487, Laws 1939. Such amendment does not appear to be material to the particular problems under consideration. In an opinion dated October 24, 1939, to District Attorney Edmund H. Drager*, and in construing the same chapter, we stated as follows, p. 616:

"It appears that ch. 357 as amended by ch. 500 is designed to prohibit the state or its subdivisions or agencies from acquiring products and merchandise for resale to employees in competition with or to the detriment of private enterprise. This purpose appears even more clearly when ch. 500 is read in connection with ch. 129, Laws 1939, which imposes similar restrictions on private employers."

Also in said opinion we concluded that if a governmental agency otherwise has authority to sell or dispose of materials or products, the statute does not discriminate against safe to a public employee. We concluded that the sale of junk or salvaged materials would not fall within the purpose or prohibition of the statute.

Application of these principles to the particular questions submitted must lead to the conclusion that the statute does not discriminate against public employees in relation to any of the particular activities of your department which you cite. Authority for carrying on these activities must be

*Page 615 of this volume.
based upon either (1) express statutory provisions or (2) the rendering of an essentially public service in relation to specific or implied duties and authority of the highway commission. If based upon (1) above, it would seem apparent that ch. 357, Laws of 1939, as amended, does not prohibit sale of or the rendering of service to a public employee, that is, the statute does not discriminate against employees if the public agency otherwise has authority to carry on the activity. If based upon (2) above, the sale or disposition of the article or service to the general public is justified upon the basis that the activity is an essential "public service" within the power and authority of the commission. As such, such public service is expressly excepted from the provisions of the chapter.

The chapter does not make that which has heretofore been recognized as a public service a non-public service. As stated in our prior opinion to District Attorney Drager, the intent of the chapter is that of preventing public agencies from rendering an essentially private service to public employees.

NSB

_Bridges and Highways — Town Highways — Railroads_ — Ch. 249, Laws 1939, which decreased duty or obligation of railroad with respect to building or improving highways across tracks or right of way of company, should not be applied to those improvements with respect to which notice has been given and period of election (thirty days) expired prior to effective date of said chapter.

December 21, 1939.

HIGHWAY COMMISSION.

In your letter you state:

"Section 81.20 (1) of the statutes, as amended by chapter 249, laws of 1939, provides in part that when certain streets or highways are about to be paved, surfaced, or otherwise
improved, if such streets or highways cross a railroad track or right of way at grade, the railway company shall at its own expense improve, pave, or surface 'such crossing between the tracks and rails and extending four feet beyond the outside rails on the right of way of such railway company in substantially the same manner and with substantially the same materials.'

"Prior to the enactment of chapter 249, laws of 1939, which became effective on July 17, 1939, section 81.20 (1) provided in such cases that the railway company should improve, pave, or surface 'the portion of such street or highway which extends upon, over or across the right of way of such railway company * * *'

"We respectfully request that you give us your opinion as to whether the changes made by chapter 249, laws of 1939, are effective to reduce the cost to be borne by the railway company in each of the following cases:

"1. An improvement of which a railway company has been notified pursuant to section 81.20 (2) but on which construction was not actually started prior to July 17, 1939.

"2. An improvement which was completed and for which an invoice was rendered to the railway company prior to July 17, 1939, but for which payment had not been made by the railway company by that date.

"3. An improvement which was completed prior to July 17, 1939, but for which an invoice had not been rendered to the railway company by that date.

"4. An improvement on which construction was started prior to July 17, 1939, but which had not been completed on that date,

"(a) As to an improvement constructed in one stage, and

"(b) As to an improvement to be constructed in two or more stages, on which the first stage, such as grading, has been completed prior to July 17, 1939, but on which the final stage, such as concrete paving, had not been started by that date.

"With reference to paragraph (b) under case 4, please consider separately the stages which have been completed prior to July 17, 1939, and the stages of construction on the same improvement which have not been started on that date."

The situations you refer to obviously refer to situations where the railroad has not elected to do the work itself and where the public agency is accordingly performing the work for the railroad. We shall treat the questions accordingly.

It is a well settled rule of construction that statutes of
this nature operate prospectively and not retrospectively in the absence of a clear legislative intent that the statute shall be given a retrospective operation. *Building Height Cases*, 181 Wis. 519; *In re Dancy Drainage Dist.*, 199 Wis. 85; *Chicago M. & St. P. R. Co. v. Railroad Comm.*, 187 Wis. 380; *Town of Bell v. Bayfield Co.*, 206 Wis. 297; *Filipkowski v. Springfield F. & M. Ins. Co.*, 206 Wis. 39; *Pawlowski v. Eskofski*, 209 Wis. 189; *Dallmann v. Dallmann*, 159 Wis. 480; *Wabeno v. State Conservation Comm.*, 220 Wis. 502.

There is no difficulty with the rule, the difficulty comes in attempting to apply the rule to specific situations. The cases deal with specific situations. Some cases deal with questions of legislative power as distinct from questions of legislative intent. See for instance, *Morris v. Wisconsin Tax Comm.*, 205 Wis. 626; *Town of Bell v. Bayfield Co.*, supra; *Richland County v. Village of Richland Center*, 59 Wis. 591.

It is clear that the legislature may not, even where there is a clear legislative intent to do so, enact a retroactive statute which impairs an obligation of contract. Quite apart from the question of power of the legislature to impair the obligation of contract or change or affect vested rights in the constitutional sense, that is, vested beyond the power of legislative change, there may well be the question of whether a right has vested in the sense that application of legislative enactments thereto amounts to a retrospective application of a statute. A right may not have vested in the sense that it is beyond the power of the legislature to deal therewith, but it may have vested in the sense that application of a new legislative enactment thereto amounts to a retrospective application of the statute.

There is no language in ch. 249, Laws 1939, that would in any wise indicate the legislature intended a retrospective application or operation of the law. Such being true, the statute should not be applied to situations that would amount to a retrospective application of the law. It accordingly becomes necessary to determine in the various situations that you cite what would be a retrospective application of the law. None of the cases above cited can be deemed conclusive upon the conclusion hereinafter reached, nor have we been able to find any case that is conclusive. It accordingly becomes necessary to analyze the problem by resort to fundamental concepts.
A retroactive or retrospective law "in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed." 59 C. J. 1158.

Ch. 249, Laws 1939, does not change the legal procedure or the effect of giving notice. If the railroad company fails to elect to do the work itself within thirty days, under the new law as well as under the old, the public agency is authorized to do the work and collect the cost from the railroad company. The only effect of ch. 249, Laws 1939, is that of changing the duty or obligation of the railroad company. It seems to us and we are of the view that as to any improvement proposed under the old law with respect to which notice had been given and the thirty days expired without the railroad company electing to do the work itself, the respective rights and duties of the public agency and the railroad company became fixed. The duty of the railroad company was to pay for the improvement pursuant to the terms of the old law and the right of the public agency performing the work was that of collecting the cost of the improvement pursuant to the terms of the old law.

It would seem clear that if the new law increased the burden or obligation of the railroad company after the expiration of the thirty-day period, and such statute were held applicable to such a situation, there would be a clear case of change of duty and change of obligation as applied to a situation where the respective rights had become fixed. There might even be a serious question of legislative power to change such fixed rights. Can the fact that the present law decreases the duty and obligation of the railroad effect the conclusion that as applied to such situations (situations with respect to which the thirty-day period has run) the application of the statute to them is in effect a retroactive or retrospective application of the statute? We think not. Whether the duty of the railroad is revised upward or downward at the expiration of thirty days would seem to be quite immaterial. Either constitutes a change of duty as applied to rights fixed under the prior statute.

We conclude, therefore, that ch. 249, Laws 1939, should not be applied to those improvements with respect to which
notice had been given and a thirty-day period in which to elect had expired prior to the effective date of the chapter, namely, July 18, 1939, and that the application of ch. 249 to such situations would be a retrospective application of a statute intended to operate prospectively.

NSB

Civil Service — Constitutional Law — Counties — County Ordinances — Ch. 263, Laws 1939, providing for adoption of county ordinance by direct legislation pursuant to provisions of sec. 10.43, Stats., is unconstitutional.

If ch. 263 is constitutional it is mandatory upon governing body under provisions of sec. 10.43, subsec. (4), Stats., to submit proposed ordinance to electors. It is not necessary in submission of proposed ordinance to comply with provisions of sec. 6.23 (8). It is proper to submit such proposed ordinance by printing it in full upon official ballot, followed by such material as would provide for elector expressing his choice.

If ch. 263 is constitutional mandamus will lie to compel governing body to submit proposed ordinance to electors.

Public officer may question constitutionality of law requiring him to act.

December 22, 1939.

NORRIS E. MALONEY,
District Attorney,
Madison, Wisconsin.

You have submitted three questions to us as follows:

"1. Is chapter 263, laws of 1939, which provides that a system of civil service may be adopted for a county pursuant to Wisconsin statutes 10.43 entitled, ‘Direct legislation’, constitutional?

"2. Assuming said section to be constitutional, is it mandatory upon the governing body pursuant to subsection (4) of section 10.43, to submit the question of the adoption of such ordinance to a referendum, and if it is mandatory to
submit it to a referendum, should the governing body, pursuant to Wisconsin statutes 6.23 (8), determine the form of 'concise statement of the nature' of the ordinance?

"3. Assuming that the act is constitutional and that the submission to referendum is mandatory, in the event of failure of the governing body to act, would a writ of mandamus lie to compel the clerk to submit to referendum?"

We shall discuss the questions in the order in which they are submitted.

1. We are of the opinion that ch. 263, Laws 1939, providing for a county system of civil service by initiative and referendum pursuant to the provisions of sec. 10.43, Wis. Stats., contemplates an unconstitutional method of enacting such legislation. That is to say, sec. 10.43, Stats., as applied to the adoption of county ordinances, is unconstitutional and ch. 263, Laws 1939, which in substance applies the provisions of sec. 10.43 to the adoption of county ordinances, is unconstitutional.

For some years provision has been made by the statutes for the adoption of county ordinances and resolutions in the manner provided by sec. 10.43, Stats. Cf. sec. 59.02 (2), Stats. This provision has been held to be unconstitutional by two former attorneys general. Cf. IX Op. Atty. Gen. 66 (Blaine), and XI Op. Atty. Gen. 106 (Morgan). These opinions are based upon a decision of the supreme court in the case of Meade v. Dane County, 155 Wis. 632. The underlying basis of the conclusion reached is that the initiative and referendum, as applied to the enactment of county ordinances, is an unconstitutional delegation of legislative power. The constitution places legislative power in the state legislature. Cf. art. IV, sec. 1, Wis. Const. It further provides, however, that the legislature may confer upon the boards of supervisors of the several counties local legislative powers. Cf. art. IV, sec. 22, Wis. Const. The court in the Meade case, supra, construed the delegation of legislative power provided for by art. IV, sec. 22, as exclusive. That is, the court arrived at the conclusion that if such local legislative power were to be delegated at all by the state legislature, it must be delegated to the boards of supervisors of the various counties.
In your request you raise the question as to whether or not the conclusion above set out is consistent with the decision of the supreme court in the case of State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472. We are of the opinion that it is. The Whitman case involved a delegation of power to an administrative agency of the state government. The question there at issue assumed that certain legislative functions could be delegated and concerned the extent to which they could be delegated. On the contrary the Meade case held that no power at all could be delegated to the electors of a county in view of the constitutional provision requiring that such power, if delegated, be vested in the county boards of supervisors. It denied the power to make any sort of delegation to the electors, and consequently any question as to the extent of delegation, where delegation was proper, was not involved in the case.

2. If a petition has been properly presented to the county board for consideration under the provisions of sec. 10.43, (4), Stats., we are of the opinion that it is mandatory upon the board to submit the ordinance to a referendum vote, assuming ch. 263 to be constitutional.

As to the remaining portion of your second question: In State ex rel. Oaks v. Brown, 211 Wis. 571, the court passed upon proceedings involving the validity of a charter ordinance adopted by the city of Oshkosh pursuant to the provisions of sec. 10.43, Stats. The form of submitting the ordinance there approved consisted of printing the proposed ordinance in full on the official ballot, followed by the following: “Shall the ordinance be adopted? Yes ( ). No. ( )”. In view of the approval of the form of submission in that case we think it might well be followed in connection with submitting any proposed ordinance pursuant to the provisions of ch. 263 and that it will not be necessary to follow the provisions of sec. 6.23, subsec. (8), Stats. It is rather apparent, however, that it would be necessary for the county board, in the event the ordinance was submitted to the people, to determine the form of submission. This was done in the case cited by the commission council of the city of Oshkosh, and we know of no other way in which the question as to how the ordinance should be submitted could
be appropriately determined. Moreover, the statute specifically provides that a proposed ordinance shall be submitted by the local legislative body. Sec. 10.43, (4), Stats.

3. If, as we hold, it is necessary for the county board to provide for the manner in which a proposed ordinance shall be submitted, it is perhaps a necessary conclusion that the county clerk could not submit a proposed ordinance to a referendum vote, in the absence of action by the county board. We might, therefore, discuss this question upon the basis of whether or not mandamus would lie against the board to require it to properly submit the question. We are of the opinion that under the decisions of the Wisconsin supreme court such an action would lie. In the case of State ex rel. Faber v. Hinkel, 131 Wis. 103, for example, it was held that mandamus would lie against a city clerk to compel him to call an election. And in State ex rel. Hawley v. Board of Supervisors of Polk Co. and another, 88 Wis. 355, mandamus was considered an appropriate remedy to compel a county board to consider and act upon a petition for submitting to the electors of the county the question of removal of the county seat.

You also raise a question as to whether or not a county officer may question the constitutionality of ch. 263. We are of the opinion that under the decisions of the Wisconsin supreme court public officials may question the constitutionality of laws which require them to act. The cases on the subject are collected in a note in 30 ALR 378, et seq. The decided weight of authority seems to be that a public official may not question the constitutionality of a statute in the absence of unusual circumstances. For example, some courts hold that unless an officer in discharging his duties under a statute might thereby render himself personally liable, he cannot raise a question as to the constitutionality of the statute. As we have said, however, the early Wisconsin decisions seem to point the other way.

JWR
Corporations — Small Loans — Under small loans law, lender may not collect from borrower items of costs, fees or disbursements incurred in bringing suit against borrower for collection of loan unless judgment is entered and such items are duly taxed and included therein. No effect on provisions of statutes relating to taxation of costs in favor of prevailing party upon entry of judgment is intended by ch. 214, Stats.

Specified provisions of loan instruments given under ch. 214 providing for payment by borrower of certain items in addition to interest at lawful rate held to invalidate loans.

December 28, 1939.

John F. Doyle, Supervisor,
Division of Consumer Credit,
Banking Department.

You have requested our opinion relative to the interpretation of certain provisions of chapter 214 of the Wisconsin statutes.

Your first question is whether, under the provisions of chapter 214, it is permissible for a lender to collect from a borrower court costs, fees and disbursements either at the time when action is commenced for the recovery of the amount loaned or after the entry of judgment in such an action.

The answer to this question will depend upon the construction to be placed upon sec. 214.14, subsec. (6), as well as upon other provisions of the statutes relating to allowable costs in actions. Section 214.14 (6) reads as follows:

“No licensee shall, in addition to the interest or charge herein provided, directly or indirectly charge, contract for or receive any other charge or amount whatsoever for any examination, service, brokerage, commission, expense, fee, bonus or other things or otherwise. If any interest, consideration or charges in excess of those permitted by this chapter, are charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever.”
It will be noted at the outset that the language of sub-
sec. (6) is sweeping in its scope. A lender, in addition to
the permitted interest may not "directly or indirectly
charge, contract for or receive any other charge or amount
whatsoever for any examination, service, brokerage, com-
mission, expense, fee, bonus or other things or otherwise."
Chapter 214 is an adaption of a model uniform small loan
law as prepared by the Russell-Sage Foundation (see Huba-
chek, Annotations on Small Loan Laws, p. 64), which has
been enacted in one form or another in thirty-three states.
Subsec. (6) of sec. 214.14 is an adaption of section 13 of the
aforementioned uniform small loan law. Similar provisions
are contained in the law as enacted in the various states and
while there is no decision which we have been able to find
upon the precise point in question here, an examination of
decisions of other states upon cases involving somewhat
similar circumstances is of some assistance.

In Ideal Financing Association v. LaBonte, (Conn. 1935)
180 A. 300, a chattel mortgage providing for the reimburse-
ment to the lender of "any expense which the lender has in-
curred or contracted for in reclaiming said goods or chat-
tels, including reasonable attorneys fees and costs" was,
under statutory provisions practically identical to ours, held
void. In Richmond v. Conservative Credit System, (N. J.
1933) 164 A. 563, the note provided for reasonable costs
including an attorney's fee of fifteen dollars plus fifteen per
cent of the amount of the judgment on entry of judgment.
The comparable section of the New Jersey statute prohib-
ited charges other than the permitted interest but also con-
tained the additional words "except upon actual foreclosure
of the security or upon the entry of judgment". The New
Jersey court distinguished the case of Consolidated Plan v.
Shanholtz, (N. J. 1929) 147 A. 401, where the note was held
void because the agreement was to pay the attorney's fee
upon default. In Hartsfield Co. v. Shoaf, (Ga. 1937) 191
S. E. 693, the lender was suing a guarantor on the borrow-
er's note, the contract of guaranty providing that the lender
would exhaust its legal remedies against the borrower and
that in such event the guarantor would be liable for the
amount due together with interest and any "accrued court
costs." The court held that as used in the contract "ac-
"crued court costs" meant only such costs as were recoverable by a creditor in a suit against the principal debtor and since they were collectible by law (becoming under other statutes a part of the judgment) they were not a prohibited charge. In *Southern Loan Company v. McDaniel*, (Ga. 1934) 177 S. E. 834, the note provided for "costs legally incurred by the holder hereof in any proceeding properly brought hereon". It was held that such a provision voided the note since it authorized an extra charge in violation of the act. The court considered that the clause would prevent the borrower from collecting costs from the lender to which the borrower might, for example, be entitled in a case which it had lost in a lower court but won on appeal. In *Seaboard Security Company v. Jones*, (Ga. 1930) 151 S. E. 412, it was held that a mortgage providing for the payment of "reasonable attorney's fees or court costs incurred by the grantee in enforcing any part of the contract" rendered the loan uncollectible. A similar result was reached in *Fishburne v. Hartsfield Loan & Savings Co.*, 145 S. E. 495. In *Rothchild v. Citizens Loan Company of Indianapolis*, (Ind. 1936) 2 N. E. (2d) 810, the note provided for attorney's fees in case of foreclosure of the security and it was held that this did not invalidate the note since the statute permitted (as did the New Jersey statute in the *Richmond* case, supra) a reasonable attorney's fee "upon final judgment in foreclosure proceedings in a court of record". Generalizing as to the results reached in the foregoing cases, we may observe that costs or attorney's fees provided for or collected prior to the entry of judgment are condemned, costs and fees which under other provisions of law are allowed upon entry of judgment are permitted, and that in New Jersey and Indiana the statutes, by exception, expressly so provide.

In Louisiana there are several decisions which appear to sustain the right of the lender to contract for and collect costs of collection and attorney's fees without either commencement of suit or entry of judgment, among others, *Automobile Security Corporation v. Randazza*, (La. 1931) 135 So. 45 and *Unity Plan Finance Co. v. Green*, (La. 1934) 155 So. 900. These cases are distinctly in the minority and the fact that the court of appeals had wavered back and forth
on the question and that the supreme court had its doubts (and two dissents) is shown in the Green case. The Louisiana decisions were followed in Mason v. City Finance Co., (Fla. 1933) 151 So. 521. In Commonwealth v. Pennsylvania Loan Corporation, (Pa. 1937) 193 A. 141, the lender was prosecuted for attempting to collect illegal charges in addition to interest. Judgment had been entered by the company for the amount of the note plus a ten per cent collection fee for which the note had provided. The court held that the collection of fees was a violation of the law and also apparently held that the collection of costs properly taxable upon entry of the judgment would have been permissible but, since under Pennsylvania law attorney’s fees were not so taxable, the statute had been violated.

In Wisconsin the allowance of certain items of costs, fees and disbursements in actions is provided for by statute. In courts of record, it is provided by section 271.01 that costs shall be allowed of course to the plaintiff upon a recovery in the particular cases therein specified. By section 271.03, it is provided that the costs mentioned in section 271.01 are to be allowed to the defendant unless the plaintiff is entitled to costs. The items of costs are set forth in section 271.04. Subsec. (1) thereof relates to fees, these fees being (as they might be applied in an action brought for collection of a small loan) twenty-five dollars when the amount recovered is over two hundred dollars and less than five hundred dollars and fifteen dollars when the amount recovered is less than two hundred dollars. Subsection (2), sec. 271.04 provides for disbursements and fees of officers, suit tax, service of process and the like. In subsec. (6), sec. 271.04, it is provided that if judgment be entered by default or upon voluntary dismissal by the adverse party, the costs taxed under subsec. (1) shall be one-half what they would have been had the matter been contested.

In sec. 271.10 it is provided that the clerk shall tax and insert in the judgment and in the docket thereof, upon application of the prevailing party upon three days’ notice to the other, the sum of the costs and disbursements as provided, verified by affidavit. By sec. 271.16, it is provided that upon settlement of an action no greater sum shall be demanded for costs than at the rate prescribed in ch. 271.
Costs and fees in justice court are provided for in ch. 307, it being provided, similarly to the provisions relating to courts of record, that the prevailing party shall recover the items of costs set forth and that at the time of entering judgment the justice may proceed to tax costs in the cause without notice to the party to whom judgment is rendered.

It will be observed that in all cases it is the prevailing party, that is, the party in whose favor judgment is rendered who is entitled to recover costs and that after judgment and not before, these costs are taxable. While a creditor may issue process for the purpose of commencing a suit against a debtor, he acquires no enforceable right to recover his expenses by merely so doing. Should the debtor resist the action successfully, the creditor would have no claim and in fact would himself have to pay over to the debtor the taxable costs. Prior to entry of judgment and taxation of costs, there is but a contingent liability on the part of the defendant for such costs.

Under sec. 214.07 the banking department is given the duty and the power of determining the "rate of interest or charge" which may be made by licensees. In this grant of power to the banking department the Wisconsin law is distinguished from the enactments in most of the other states, and this feature of our law is most persuasive in assisting us to a conclusion. The department has by general order fixed the "reasonable maximum rate of interest or charge" to be made by licensees at certain fixed percentages with respect to loans of various sizes. It has made no rule authorizing any other charges. Should it appear to the banking department to be desirable or necessary, it has ample authority to permit the collection by a lender from a borrower of some or all of the items of expense incurred in the commencement of legal proceedings for collection of loans. It has been held that small loan laws are to be liberally construed in favor of the borrower. Commonwealth v. Pennsylvania Loan Corporation, (Pa. 1937) 193 A. 141, 143, and to prevent the abuses that are intended to be corrected. Walker v. People's Finance & Thrift Co., (Ariz. 1935) 42 Pac. (2d) 405, 407. Having this rule in mind and in view of the foregoing considerations, it is our opinion that under sec. 214.14 (6) a licensee under the small loan law may not collect from a borrower any sum for court costs, fees or dis-
bursements incurred in bringing suit against a borrower unless judgment is entered and such items are duly taxed and included therein. With respect to the taxation of costs after entry of judgment in favor of the prevailing party as authorized by express provisions of the statutes, it is our opinion that no effect thereon is intended by any of the provisions of chapter 214.

You also ask our opinion as to whether certain statements in notes or chattel mortgages given under chapter 214, which statements are underlined in your request, would invalidate such notes or mortgages. The provisions in question are as follows:

1. "* * * Said mortgagee may pay all attorney's fees, costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising and selling such property * * *"

2. "That the mortgagee may retain out of the proceeds of sale of the mortgaged property 'all expenses incurred for pursuing, searching for, taking, removing, caring for, advertising and selling said property, any prior liens thereon, and twenty-five dollars attorney's fees.'"

3. "That the mortgagee may sell the mortgaged property for so much as shall be necessary to satisfy the said debt, interest charges, 'reasonable expenses of foreclosure and storage (including such reasonable attorney's fees actually incurred by second party as may be legally chargeable against first parties)'.

4. "That out of the proceeds of sale the mortgagee may deduct 'all costs and expenses, including legal attorney's fees'.

5. "That the mortgagee, upon taking possession of the mortgaged property, might sell it to satisfy the debt, interest 'reasonable expenses of repossession and foreclosure, storage, (and a reasonable attorney's fee if allowed by law')."

Holding as we do that in addition to the interest charges specifically authorized by the banking department, the lender may not charge, contract for or receive any other amount whatever except such amounts as may be lawfully taxable for costs after entry of judgment in favor of the prevailing party, it is our opinion that the inclusion of the language in the five cases above specified in the loan instruments would invalidate the loan.

RHL
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Street improvements. See Bridges and Highways.
Structure. See Words and Phrases.
Student safety patrols. See Education.
Superintendent of county home. See Public Officers.
Superintendent of public instruction. See Public Officers.
Superintendent of workshop for blind. See Public Officers, board of control.
Supervisor, county. See Public Officers.
Supervisor, county. See Public Officers, county board.

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