

OPINIONS
OF THE
ATTORNEY GENERAL

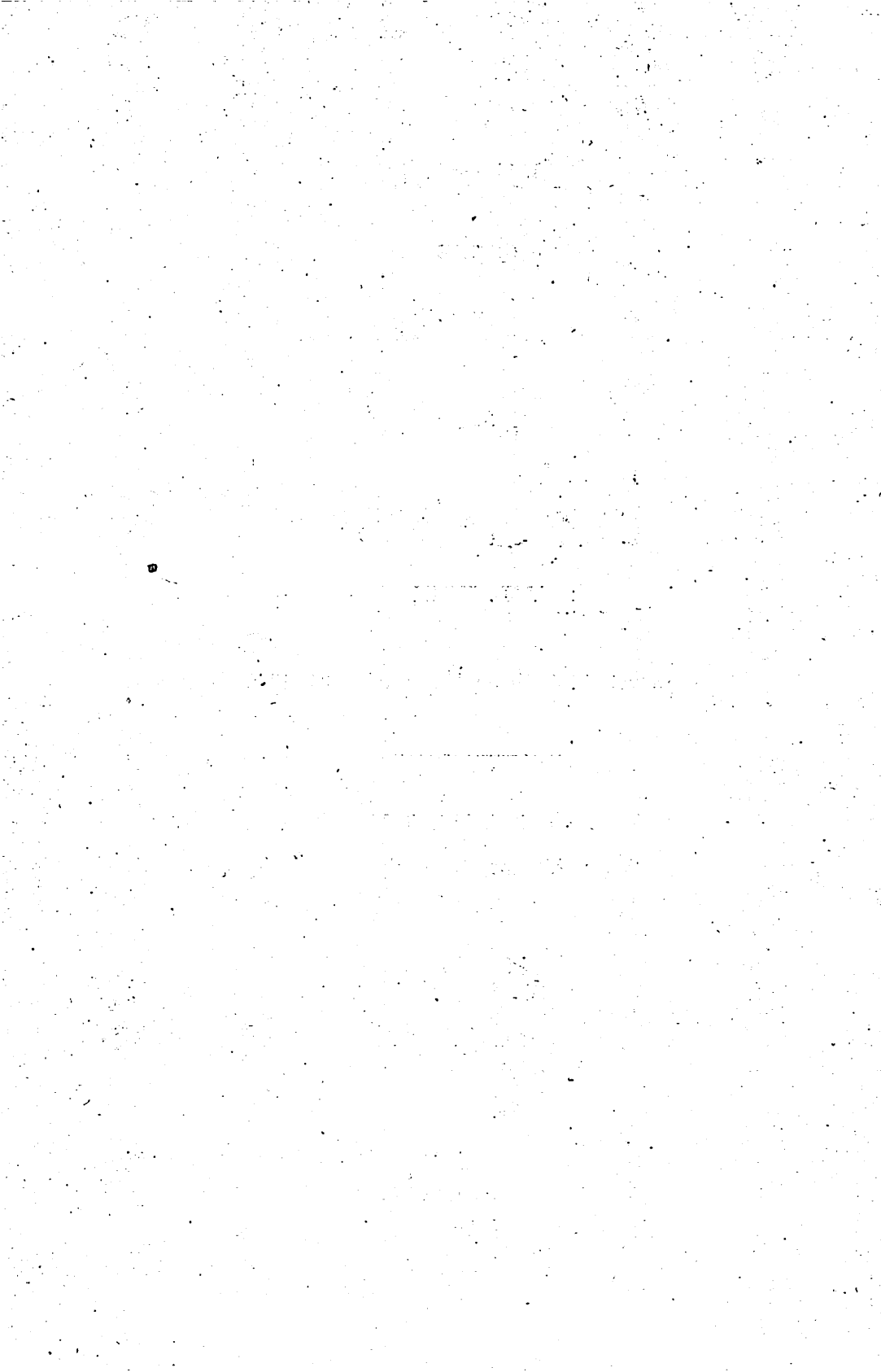
OF THE
STATE OF WISCONSIN
VOL. XXIX

January 1, 1940, through December 31, 1940

JOHN E. MARTIN
Attorney General



MADISON, WISCONSIN
1940



ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukeefrom June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukeefrom Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK,

Genevafrom Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madisonfrom Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point..from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkoshfrom Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bayfrom Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukeefrom Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertownfrom Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ...from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Damfrom Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON,

Mineral Pointfrom Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend..from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK,

Manitowocfrom Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madisonfrom Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ...from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkoshfrom Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT,

Neillsvillefrom Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madisonfrom 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, Hudsonfrom Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobelfrom Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee..from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madisonfrom 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, Maustonfrom Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukeefrom Jan. 2, 1939, to

ATTORNEY GENERAL'S OFFICE

JOHN E. MARTIN	Attorney General
JAMES WARD RECTOR	Deputy Attorney General
MORTIMER LEVITAN	Assistant Attorney General
NEWELL S. BOARDMAN	Assistant Attorney General
R. M. ORCHARD	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
RICKARD H. LAURITZEN	Assistant Attorney General
J. R. WEDLAKE	Assistant Attorney General
ALBERT G. HAWLEY	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General

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Contracts — Insurance — Wages — Sec. 241.09, Stats., requiring signature of wife on assignment of husband's salary, does not apply to request from employee to his employer to furnish group insurance for such employee and take amount of premium for insurance company from employee's salary.

January 2, 1940.

LESLIE J. VALLESKEY,
Assistant District Attorney,
Manitowoc, Wisconsin.

You state that a certain insurance company has presented a plan for group sickness and accident insurance to the employees of Manitowoc county. This company has turned over to the county clerk and the county highway commission a request for deduction of premiums from the salaries of such employees, the request card reading substantially as follows:

"I hereby request my employer to arrange the following insurance for me in the _____ Insurance Company in accordance with the provisions of the group policies issued to my employer by said Insurance Company:—

\$———— Weekly indemnity, sickness and accident insurance

\$———— Daily hospital benefit

and I authorize the deduction of \$———— per ——— from my wages or salary as my contribution towards the cost of this insurance.

"I understand if for any reason all or a part of the insurance is not issued as requested by me, the corresponding contribution which I may have made will be refunded by my employer.

"Dated

Applicant's full signature

"Employer retains this card as authority for payroll deductions."

We are asked whether this constitutes an assignment of wages within the meaning of sec. 241.09, Stats., so as to require the signature of the wives of such employees and so as to be subject to the two months' limitation provided in that section.

Sec. 241.09, Stats., provides:

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

The problem to determine here is whether the request card hereinbefore quoted is either in form or legal effect an assignment of salary or wages within the meaning of the foregoing statute.

Obviously it is not. To constitute a valid written assignment at law there must be an assignee who takes and an assignor who gives title at the time the assignment is made. 6 C. J. S. 1097. Here there are no words of sale or assignment nor any other language which shows an intention to transfer irrevocably any property rights of the employee. The first part of the language employed in the form

in question is merely a request that the employer arrange for certain group insurance in a specified company on behalf of the employee. Certainly this is no assignment nor is it even a request which the employer is legally bound to grant.

The next and most important part of the form is the language reading "and I authorize the deduction of \$_____ per _____ from my wages or salary as my contribution towards the cost of this insurance."

A mere authorization is by no means an assignment. To constitute an assignment the transfer must be of such a character that the holder of the funds can safely pay the assignee and is compellable to do so, although forbidden by the assignor. *Bartholomew v. Thieding*, 225 Wis. 135, 137.

Here the employer could not be compelled to pay the insurance company on the strength merely of an authorization to pay. Furthermore, there is nothing in the language used which would preclude the employee from revoking the authorization at any time. To hold otherwise would mean that the employee could never allow his insurance to lapse even though he desired to do so, and we are reluctant to read into the transaction any such interpretation in disregard of the well established rights of an insured to voluntarily discontinue his insurance.

The remainder of the foregoing has to do with refunding the money to the employee, in the event the insurance is not issued as requested, and has no bearing on the question of assignment.

We therefore conclude that the request and authorization for salary deduction is not in form or legal effect an assignment within the meaning of sec. 241.09, and we refrain from expressing any opinion on any other question which might be suggested by the proposed arrangement.

WHR

Corporations — Cooperative Associations — Ch. 398, Laws 1939, applies to corporations in existence at time law became effective. It is necessary that cooperative associations conform to requirements imposed by that chapter in amending their articles of organization. No such cooperative association may impose voting requirements inconsistent with those provided by ch. 398 and corporate articles containing inconsistent requirement are ineffective to extent of such inconsistency both in case of corporations now in existence and in case of those to be organized.

January 3, 1940.

FRED R. ZIMMERMAN,
Secretary of State.

You submit the following statement and request for an opinion:

"Prior to the enactment of chapter 398, laws of 1939, section 185.07 of the statutes required the vote of a majority of the total membership in order to amend the articles of incorporation of a cooperative association. (Under chapter 398, the vote of $\frac{3}{4}$ of those voting is sufficient.)

"The distinction between the cooperative law and the general corporation law on amendment should be pointed out: The general corporation law provides for amendment of articles by a certain vote, 'unless a greater vote shall be required in its articles'. In the cooperative law, there is no similar language.

"In the past, the articles of incorporation of practically all cooperative associations have, in definite language, provided for amendment 'by vote of a majority of the members'. In some few instances, the articles have, in definite language, required a greater vote, for example, 'by $\frac{2}{3}$ of the members'. A few articles provide for amendment 'in the manner provided by law'.

"* * *

"(1) As to articles which require a vote of a majority to amend, will such provision in the articles control, or will the vote necessary be that required by chapter 398, laws of 1939?

"(2) As to articles which, in definite language, require a greater vote than a majority, will such greater vote be necessary for amendment, or will the vote fixed by the said chapter 398 be required?"

In our opinion, following the effective date of ch. 398, Laws 1939, the vote required to amend the charter of a co-operative association organized pursuant to the provisions of ch. 185, Stats., is that designated by sec. 185.07, subsec. (1) as amended by said ch. 398. The corporate articles can require neither a greater nor a lesser vote to amend the articles. And all corporate articles which contain provision for amendment in conflict with the provision contained in sec. 185.07, as amended, are ineffective and invalid to that extent.

It is perfectly clear that under the reserved power to alter, amend, or repeal general laws relating to corporations (see art. XI, sec. 1, Wisconsin constitution), the legislature may so legislate as to affect existing corporations provided no vested rights which are subject to constitutional protection are disturbed. It is equally clear that in the present case no such vested right is in any wise disturbed. In fact, the books are full of instances in which far more serious disturbances of a similar nature have been upheld. See 7 Fletcher, Cyc. Corporations, perm. ed., secs. 3695 *et seq.*

It being in our judgment plain that the legislature may constitutionally impose the changed requirement upon existing corporations, the question remains as to whether it has intended to do so. We are of the opinion that the clear language of the law, as amended, shows that it is intended to apply to all cooperative associations whether presently existing or to be organized. That is, as amended, sec. 185.07, Stats., provides as to the manner in which corporations organized pursuant to the provisions of ch. 185 may amend their charters. There is nothing in the language which distinguishes between corporations already in existence and corporations to be organized. And we see no reason for reading into the statute a distinction which the legislature has not seen fit to provide.

JWR

Taxation — Inheritance Taxes — Emergency inheritance tax imposed by sec. 3, ch. 15, L. 1935, is in addition to and to be measured by aggregate amount of taxes imposed by secs. 72.01 to 72.26 and 72.50 to 72.61, Stats.

January 4, 1940.

DEPARTMENT OF TAXATION,

Income, Inheritance and Gift Tax Division.

Attention Neil Conway, *Inheritance Tax Counsel.*

Sec. 301 (b) of the federal revenue act of 1926, provides as follows:

"The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed eighty per cent of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

Secs. 72.50 to 72.61 of the Wisconsin statutes impose a state estate tax which is in addition to the normal inheritance tax imposed by secs. 72.01 to 72.26 of the said statutes. This estate tax was imposed for the purpose of taking advantage of the provisions of the above mentioned section of the federal estate tax law and securing the benefit thereof for the state. That is, whenever the total inheritance taxes payable to the state under secs. 72.01 to 72.26 are less than eighty per cent of the federal estate tax computed under the federal estate tax act of 1926, an additional tax is imposed by secs. 72.50 to 72.61 in an amount equal to the difference between the tax imposed by secs. 72.01 to 72.26 and said eighty per cent of the federal estate tax.

Sec. 3 of ch. 15, Laws 1935, provides as follows:

"Emergency Relief Tax on Transfers of property. (2) In addition to the taxes imposed by chapter 72 of the statutes, an emergency tax for relief purposes is hereby im-

posed upon all transfers of property which are taxable under the provisions of said chapter 72 and which are made subsequent to the enactment hereof and prior to July 1, 1939, which said tax shall be equal to twenty-five per cent of the excess of one hundred dollars of tax imposed by said chapter."

Subsec. (3) of said sec. 3 of ch. 15, Laws 1935, provides that the emergency tax imposed thereby shall be administered, assessed, collected and paid in the same manner, at the same time, and subject to the same regulations as provided for the administration, assessment, collection, and payment of the taxes imposed in ch. 72 of the statutes.

An estate of a resident decedent, who died prior to July 1, 1939, is now in the process of administration wherein it appears that the total inheritance taxes imposed by secs. 72.01 to 72.26 will be substantially less than eighty per cent of the federal tax on said estate computed under the 1926 federal estate tax law. Hence, secs. 72.50 to 72.61 will impose a tax on said estate equal to the difference between the total normal state inheritance taxes and eighty per cent of said federal tax.

Our opinion has been requested on whether the emergency tax imposed by sec. 3 of ch. 15, Laws 1935, above mentioned, is to be applied to and measured by the normal tax imposed by secs. 72.01 to 72.26 of the statutes, or whether it is to be applied to and measured by the aggregate amount of taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61. It is our understanding that this request for an opinion is occasioned by the fact that this question has arisen for the first time in the estate mentioned.

At the outset, the language used in sec. 3 of ch. 15, Laws 1935, must be considered. It is there specifically stated that the emergency inheritance tax for relief purposes thereby imposed is "in addition to the taxes imposed by chapter 72 of the statutes," and that such tax "shall be equal to twenty-five per cent of the excess of one hundred dollars of tax imposed by said chapter." This language is clear and unambiguous and therefore not subject to construction. The taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61, Stats., are beyond question "taxes imposed by chap-

ter 72 of the statutes." Giving to the unambiguous language thus used in sec. 3 of said ch. 15 its clear meaning, the tax imposed by said sec. 3 of ch. 15, Laws 1935, necessarily must be applied to and measured by the aggregate amount of taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61, Stats. To apply and measure the tax thereby imposed in any other manner would be in direct contravention of the clear and unambiguous provisions of the imposing statute.

Even if the language used in sec. 3 of ch. 15, Laws 1935 were open to construction, it is our opinion that the tax thereby imposed was intended by the legislature to be applied to and measured by the aggregate of the taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61, Stats. In order to conclude that the twenty-five per cent emergency inheritance tax imposed by sec. 3 of said ch. 15, Laws 1935, should be applied to and measured by solely the normal inheritance tax imposed by secs. 72.01 to 72.26, Stats., there must be found in the provisions of the act something to indicate that such was the legislative intention. There must be accorded to the legislature at the time of the enactment thereof knowledge of instances where the normal tax imposed by secs. 72.01 to 72.26, Wis. Stats., did not equal the eighty per cent credit on the federal estate tax, if such instances had previously occurred and likewise the possibility of such instances occurring in the future, plus the then existing provisions of secs. 72.01 to 72.26, Stats., imposing normal inheritance taxes and also the provisions of secs. 72.50 to 72.61, Stats., imposing the additional tax to equal the eighty per cent federal credit. It seems inescapable that if the legislature, having knowledge of the foregoing, had intended the twenty-five per cent emergency inheritance tax imposed by ch. 15, Laws 1935, to be applied to and measured by solely the normal inheritance tax imposed by secs. 72.01 to 72.26, it would have so provided by specific and unequivocal language to that effect. Certainly such an intention is not evidenced by the general language that was used in the enactment which clearly is broad enough to cover both the normal inheritance tax imposed by secs. 72.01 to 72.26 and the additional tax imposed by secs. 72.50 to 72.61.

The above and foregoing conclusions are adequately supported by the circumstances surrounding the enactment of ch. 15 of the laws of 1935. At that time the legislature was looking about for means of raising additional revenue for relief purposes. It had before it the total revenue raised in the past by the taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61, Stats., an estimate based thereon as to what might be expected in the future by way of revenue from the same taxes and an estimate of the increased demands for revenue in the future. Being faced with the necessity of raising revenues for the future in excess of the revenues produced in the past, it imposed thereby a number of taxes which were new and in addition to the preexisting taxes, among which was the emergency inheritance tax in question. Clearly it thereby intended to impose taxes which would raise revenue in excess of the revenues that would be produced by the taxes theretofore existing.

It is therefore our opinion that the emergency inheritance tax imposed by sec. 3 of ch. 15, Laws 1935, is to be applied to and measured by the aggregate amount of taxes imposed by secs. 72.01 to 72.26 and secs. 72.50 to 72.61, Stats., and that it should be so asserted in the estate heretofore mentioned.

HHP

Trade Regulation — Money and Interest — Usury —
Charges permitted by sec. 115.07, subsec. (3), Stats., in addition to lawful interest may be made but once and no further such charges may be made upon renewal of loan.

Under sec. 115.07 (3) lender may require borrower to furnish reasonable insurance coverage upon security for loan, but where insurance requirements are unusual or unreasonable or where lender receives profit out of insurance transaction, such requirements will not be permitted.

Sec. 115.07 (3) should be construed similarly to sec. 214.14 (6) with respect to contracting for or charging attorney's fees or collection costs. In addition to charges other than interest permitted by sec. 115.07 (3) only statutory costs actually taxed and allowed upon entry of judgment may be contracted for or received.

Specified provisions of loan instruments given under sec. 115.07, subsec. (3), providing for payment by borrower of certain items of attorney's fees and collection costs are prohibited under said subsection in so far as such items exceed sums allowable for charges other than interest thereunder.

Similar questions answered with respect to loans made under sec. 115.09.

January 4, 1940.

JOHN F. DOYLE, *Supervisor,*
Division of Consumer Credit,
Banking Department.

You have requested our opinion relative to certain provisions of section 115.07 of the Wisconsin statutes. Your questions relating to section 115.07 are designated in your request as A, B, C, and D.

You ask (A) whether under sec. 115.07, subsec. (3), it is permissible for a lender to charge a borrower an additional fee of seven per cent on the first one hundred dollars loaned and four per cent on the additional moneys loaned upon renewal of the balance due on a loan which has matured. Under subsec. (3), sec. 115.07 certain limitations are placed upon the amount in addition to lawful interest which may

be received, taken, accepted or charged upon loans secured by goods or property or assignments of wages. The words of this subsection, in so far as they relate to the question here presented, are as follows:

“* * * any person who, as principal or as agent for another, shall ask, demand, or receive, take, accept or charge, in addition to the interest aforesaid, more than an amount equal to seven per centum per annum of the original sum actually loaned for the time of such loan, on sums of a hundred dollars or less, not more than four per cent per annum of the original sum actually loaned for time of such loan, on sums over one hundred dollars, disregarding part payments and the dates thereof, but not to be computed for a period exceeding one year in any event, in full for all examinations, views, fees, appraisals, commissions, renewals and charges of any kind or description whatsoever in the procuring, making and transacting of the business connected with making such loan, shall be guilty of a misdemeanor. * * *”

In subsec. (3a), sec. 115.07 it is provided that those desiring to do business under the provisions of 115.07 must obtain a permit from the commissioner of banking. There can be little doubt as to the nature of the exactions intended to be proscribed by these provisions of the statutes. In *State ex rel. Ornstine v. Cary*, 126 Wis. 135, where the constitutionality of ch. 278, Laws 1905, containing provisions substantially similar to those now found in sec. 115.07 (3) was sustained, the court said at page 140:

“Contracts made in connection with the transaction of loaning money, under a scheme whereby the lender or his authorized agent receives payments of money or its equivalent in excess of the legal rate of interest, have been held to be prohibited by the law and not enforceable as valid obligations. *McFarland v. Carr*, 16 Wis. 259; *Ottillie v. Woechter*, 33 Wis. 252; *Payne v. Newcomb*, 100 Ill. 611; *Dunham v. Gould*, 16 Johns. 367; *Clague v. Creditors*, 2 La. 114; *Miller v. Life Ins. Co.*, 118 N. C. 612, 24 S. E. 484. The most common devices to accomplish such purposes were by means of charges against the borrower in the form of commissions, fees for appraisals, views, examinations, and renewals in connection with the loan. The making of such contracts and insuring performance by pledge of personal

property so readily and generally results in inflicting injuries on the borrower through unreasonable exactions that they are held as injurious to the community and as much against public policy as the unreasonable charges of interest. * * *

It will be noted that the seven per cent and the four per cent permitted to be charged in addition to interest are to be computed on the *original* sum actually loaned and that "renewals" are, judging from the position of the word in the context of subsec. (3), *in pari materia* with the words "examinations, views, fees, appraisals, commissions, and charges of any kind or description." From a reading of the statute and a consideration of its purposes in the light of the quoted language from the *Cary* case and from a consideration of other decisions involving similar statutes, we are of the opinion that the charges in addition to interest are limited to seven per cent on the first one hundred dollars and four per cent on the balance of the original sum loaned and that with respect to a particular loan, this charge may be made but once and no further such charges may be made upon any renewal of the loan.

You inquire (B) whether it is permissible for a lender under subsec. (3) of sec. 115.07 to charge a borrower for and require that he procure through an agency recommended by the lender single interest collision insurance, single interest fire and theft insurance, single interest conversion insurance and single interest confiscation insurance. In the case of *Friedman v. Wisconsin Acceptance Corporation*, 192 Wis. 58, the court held that a requirement that a borrower procure health and accident insurance and fire and theft insurance at a total cost of twenty-one dollars upon a three hundred dollar loan secured by an automobile did not render the loan usurious. The court based its holding on the fact that the cost of the insurance did not appear from the evidence in that case to have been excessive and that in the absence of proof to the contrary, it would seem that the exaction as to insurance was reasonable. The court stated that by the weight of authority where the insurance contract was entered into in good faith and where the evidence does not disclose the exaction of a higher pre-

mium than what is usual or customary, the charge is considered a proper one and not in violation of the usury law. An examination of the cases indicates that in the event that the insurance requirements in a particular case are unreasonable or unusual, or where the lender directly or indirectly receives a profit out of the insurance transaction, such requirements will not be permitted. In the absence of additional facts regarding the particular insurance coverages specified in your inquiry, we are unable to determine whether or not the requirement of such insurance would violate the provisions of sec. 115.07 (3).

You inquire (C) whether it is permissible for a lender under the provisions of sec. 115.07 (3) to contract for, charge or receive a fee for attorney's services or collection costs under the following conditions:

- (1) When judgment is secured and the delinquent balance of the loan is renewed by the lender.
- (2) After judgment has been taken and a new contract is written by the lender, the attorney's fees being included in the new contract.
- (3) When judgment is not secured and the delinquent balance of the loan is renewed by the lender and attorney's fees added.
- (4) When judgment is not secured and a new contract is written by the lender including attorney's fees.

With respect to these questions, it is our opinion that subsec. (3) of sec. 115.07, being similar in scope and purpose to certain of the provisions of the small loans law, ch. 214, Stats., particularly subsec. (6), of sec. 214.14 thereof, is to be similarly construed. This office rendered an opinion to you under date of December 28* with respect to subsec. (6) of section 214.14. In accordance with the conclusions reached in that opinion and the decisions cited therein, it is our opinion that with respect to conditions (1) and (2), where judgment is secured, either upon renewal or the writing of a new contract, the statutory costs actually taxed and allowed by the court may be contracted for or collected. With respect to conditions (3) and (4), where judgment is not secured, it is our opinion that costs of collection or at-

*XXVIII Op. Atty. Gen 723.

torney's fees may not be contracted for or collected under either circumstances if such charges exceed the seven per cent and four per cent limitation fixed in sec. 115.07 (3).

You inquire (D) whether the inclusion of certain portions of the context of notes or chattel mortgages given in connection with loans made under sec. 115.07 (3) (which portions are underlined in your request) would invalidate such notes or mortgages. The underlined portions of the notes and mortgages in items (1), (2), (3) and (4) as set forth in your request provide under varying terms and conditions for the payment of attorney's fees fixed at a certain percentage of the loan debt in case of default. Item (3) is somewhat different from the others in that costs of suit and attorney's fees are provided for upon confession of judgment. Similar questions with respect to costs of collection and attorney's fees were answered in our opinion relating to chapter 214 dated December 28, 1939, mentioned above. Following the conclusions thereof, it is our opinion that the contracting for, charging or receiving of attorney's fees or collection costs under the circumstances described in the loan instruments as set forth in items (1), (2), and (4) of your request are prohibited by the terms of sec. 115.07 (3), at least in so far as such fees and costs exceed the sums allowable for charges other than interest thereunder. With respect to costs and attorney's fees in item (3), which are to be collected upon confession of judgment as authorized in the loan instrument, it is our opinion that upon entry of judgment such costs and fees as are expressly authorized by statute may be charged for or collected. We note that you have asked specifically whether the inclusion of these items would "invalidate" the loan. It is not clear from the statute as to whether the contracting for or collecting of charges other than interest in excess of the amounts permitted by sec. 115.07 (3) would totally invalidate the loan and render it uncollectible in its entirety or whether only the excess would under such circumstances be held to be uncollectible. With respect to excess interest, the statutes specifically provide that the principal amount of the debt may be collected but that no interest may be recovered thereon (see secs. 115.06, 115.07 (1) and 115.08). We assume that questions as to invalidation would be primarily

of interest to the borrower and the lender in a particular case and that your department is more concerned with questions as to whether the lenders are violating the provisions of sec. 115.07 (3) than with questions as to the effect which such violations might have upon the collectibility of particular loans. Under the statutes as at present constituted and under the general law (see 66 C. J. p. 240) the question would be one of considerable doubt and we express no opinion thereon.

You also request our opinion relative to questions arising under sec. 115.09, Stats., similar to those already answered. Your questions relating to sec. 115.09 are designated in your request as A, B and C.

You ask (A) the same questions with respect to the items of attorney's fees and collection costs as asked and answered in this opinion with respect to your question (C) relating to sec. 115.07. It is our opinion that sec. 115.09 (1), which limits the amount which may be deducted at the time of making a loan thereunder to "a sum not to exceed ten dollars upon each one hundred dollars for each year, including all fees and charges" and the provisions of sec. 115.09 (9), which contains language similar to that of sec. 115.07 (3), should be construed similarly to sec. 115.07 (3) in this respect and that the exaction of any charge for attorney's fees or costs in excess of the permitted percentage will not be permitted. With respect to costs and fees allowed by the court upon entry of judgment, it is our opinion that the collection of such costs and fees is not affected by sec. 115.09. As to whether the exaction of an excess fee would render the loan invalid in whole or in part, it is expressly provided in sec. 15.09 (9) :

"* * * No loan for which a greater rate of interest or charge than is allowed by this section has been contracted for or received, wherever made, shall be enforced in this state * * *".

Under these express provisions, the exaction of prohibited fees invalidates the entire loan.

You inquire (B) as to whether the underlined portions of the context of notes or chattel mortgages given under sec.

115.09 (said underlined portions being the same as the portions underlined in items (1), (2), (3) and (4) of item (D) of your request relating to sec. 115.07, and the portion underlined in item (5) providing for a fifteen per cent attorney's fee in the event the note is placed in the hands of an attorney for collection) would invalidate a note or mortgage given under sec. 115.09. Our opinion in this respect is the same as our opinion rendered above upon your similar inquiry under item (D) of your request relating to sec. 115.07. By the express provisions of sec. 115.09 (9), to contract for prohibited charges renders the entire loan invalid.

You next inquire (C) whether it is permissible for a lender operating under sec. 115.09 to acquire title by a pretended purchase of a security upon which a loan is to be made and then have the borrower sign a conditional sales contract as if said borrower were making a time purchase. You state that in this instance the finance charge or interest would not exceed the maximum permitted under sec. 115.09. There does not seem to be any prohibition in sec. 115.09 with respect to drawing loan instruments in such a manner that a purchase by the borrower is evidenced even though such is not the true situation. However, under sec. 115.09 (9), it is expressly provided that under such circumstances the limitation as to charges shall apply. Without having the loan instrument before us it is difficult to ascertain whether under any other provisions of law such a transaction would be prohibited. We take it that what you refer to is in fact a form of chattel mortgage transaction where the lender takes title at the outset on the theory that upon default he will not have to resort to foreclosure proceedings. Without further facts, however, we do not express any opinion as to whether such a procedure is prohibited by law in this state.

RHL

Taxation — Exemption — Cement mixers mounted upon motor trucks are not exempt under sec. 70.11, subsec. (35), Stats.

Freezing units incorporated in large refrigerator trucks used to transport meat are exempt under sec. 70.11 (35).

January 6, 1940.

DEPARTMENT OF TAXATION.

An opinion has been requested as to whether certain cement mixers mounted on motor trucks are exempt from taxation under the provisions of sec. 70.11, subsec. (35), Stats., which includes in the property exempt from taxation "every automobile, motor truck, motor delivery wagon, passenger automobile bus, motorcycle, or other similar motor vehicle, or trailer or semitrailer used in connection therewith."

Sec. 70.11 (35), Stats., was enacted by ch. 68, Laws 1931, the purpose of which was stated to be:

"An act to create subsection (35) of section 70.11 of the statutes, relating to the reconciliation of the exemption statute with the provisions of the new highway law."

An opinion dated May 15, 1931, XX Op. Atty. Gen. 290, dealt specifically with the question of whether a truck equipped with a sawing outfit or feed grinding outfit was within the exemption granted by said subsec. (35). It was there concluded that the vehicle itself alone was exempt and that the attaching thereto or a mounting thereon of a sawing outfit or a feed grinder would not bring such machines within the exemption. This conclusion was based upon the legislative intention in enacting ch. 68, Laws 1931, of granting an exemption to vehicles used upon the highways whose operators, by the enactment of ch. 22, Laws 1931, were required to pay an additional motor fuel tax of two cents per gallon thereby imposed. In view of this intention the opinion held that only the truck itself was within the intent of the legislature in granting the exemption and that no apparatus attached or connected thereto was exempt under sec. 70.11 (35), Stats.

You state that in certain instances the use of cement mixers mounted upon trucks eliminates the necessity of a concrete mixer at the manufacturing plant and also at the place of the construction job at which the concrete is used. The right proportion of cement, sand, gravel and water are put into the mixer on the truck at the central manufacturing plant of the company operating the same and during the transportation of this material to the construction job upon which they are working at the time, the mixer is operated so that the mixture is completed upon arrival. We perceive no substantial distinction between a cement mixer so mounted and used and a feed mill or sawing outfit mounted securely upon a truck which would bring the former within the exemption provision. In either case the apparatus is installed for use on the truck. In each instance the apparatus installed is principally for a manufacturing use as distinct from a transportation use. The latter is the controlling factor. The primary purpose of the concrete mixer mounted on the truck is not to serve the ends of transportation but to effect a manufacturing process. That the cement mixer is used while the truck is operating over the highway, while a feed mill or sawing outfit is used only when the truck is stationary is not sufficient to give the cement mixer a transportation use so as to be a part of the vehicle which is exempt. That the opinion in XX Op. Atty. Gen. 290 correctly construes the applicability of sec. 70.11 (35), Stats., is attested by the fact that the legislature, although it has met several times since the date of said opinion, has not made any change in that regard and that the construction placed upon said provision by said opinion has been consistently adhered to thereafter by your department in the administration of sec. 70.11 (35), Stats.

In addition, our opinion has been requested also as to whether freezing units incorporated in large refrigeration trucks owned by meat companies and used for transportation of meat are within the exemption accorded by sec. 70.11 (35), Stats.

It seems quite clear that the distinct and sole use of such freezing units in refrigerator trucks is in aid of transportation. Their function is the preservation of the commodity

carried while in transit. By virtue of this function such freezing units are an integral part of the truck that is dedicated to the common purpose to which other parts of the truck are dedicated, such as the chassis, the cab, etc., which is a use upon the highways in transporting property thereover. Being an integral part of the transportation unit and used for purposes of transportation it is our opinion that such freezing units are exempt under the provisions of sec. 70.11 (35), Stats.

HHP

Taxation — Exemption — Wood lots and slope lands otherwise complying with provisions of sec. 70.11, subsec. (40), Stats., are exempt thereunder only if enclosed by fences sufficient to keep out all farm animals.

Sale of wood products therefrom does not defeat exemption thereunder unless so extensive as to destroy character as wood lot or constitute failure to make reasonable effort to reforest slope lands.

January 8, 1940.

TAX COMMISSION.

You ask whether wood lots and slope lands fenced sufficient only to keep out horses and cattle are entitled to exemption under subsec. (40), sec. 70.11, Stats., when no sheep or hogs are kept on the farm or if so kept thereon are penned up and not allowed to run at large, or whether such lands are entitled to exemption under such statute only when fenced sufficiently to keep out sheep and hogs as well as horses and cattle.

By the provisions of subsec. (40), sec. 70.11 Stats., as originally created by ch. 27, Laws 1935, and as it now exists after amendment by ch. 79, Laws 1937, wood lots forming an integral part of any improved and regularly operated farm not exceeding one-fifth of the area thereof and any

portion of a regularly operated farm of a gradient of more than thirty per cent are accorded exemption from taxation. As originally enacted the exemption extended to such wood lots if, among other things, they were "enclosed with a legal fence sufficient to keep out horses, cattle, sheep, hogs or other grazing animals" and "fully stocked with growing trees" and the owner certified they would not be pastured. Likewise, it was originally provided that said slope lands were exempt when

"* * * inclosed with a fence consisting of not less than three barbed wires and the owner refrains from cultivating, or mowing such portion, grazing any type of live stock thereon and from burning over such land or takes reasonable precautions to prevent such burning; and if the owner makes reasonable effort to reforest such portion or to revegetate the same with grass or shrubs such as will prevent erosion or excessive run-off."

Ch. 79, Laws 1937, rewrote and materially shortened said sec. 70.11 (40) to its present form, which provides that such wood lots and slope lands are exempt from taxation if they

"* * * are inclosed with a fence sufficient to keep out farm animals and the owner has refrained, during the year prior to the date of assessment, from cultivating or mowing or grazing any type of live stock thereon and from burning over such lands or has taken reasonable precaution to prevent such burning; and if the owner makes a reasonable effort to reforest slope lands or to revegetate the same with grass or shrubs such as will prevent erosion or excessive run-off."

Before amendment the statute required that wood lots be enclosed by a *legal* fence sufficient to keep out horses, cattle, sheep, hogs or other grazing animals. As to slope lands it required that they be enclosed by a fence of not less than three barbed wires. After amendment the statute prescribes a uniform requirement of enclosure by a fence sufficient to keep out farm animals, for both wood lots and slope lands.

Although there were relatively few applications for exemption under the law as originally enacted the reason

therefor is not clear. There may be some force in the claim that the cost of constructing the prescribed fences was disproportionate to the benefits obtained from the exemption. On the other hand it may have been due, in a large measure, to the deterring influence of the complicated and numerous conditions and restrictions imposed in the original statute. The legislature may have given consideration to these matters when enacting ch. 79 of the laws of 1937, but there is nothing in said enactment that indicates any intention on the part of the legislature to do any more than simplify and condense the law and so far as possible apply the same fencing requirements to both wood lots and slope lands.

The underlying purpose of the exemption is the encouragement of the conservation and promotion of growing trees and vegetation on the lands. The function of the fencing requirements is the furtherance of that purpose. The legislature in amending this statute in 1937 revised the fencing requirements so as to prescribe only such as are germane to the purpose of the exemption. It recognized that for the purpose prescribed there was no difference in the fence requirements of the two types of lands and that the enclosure thereof by a fence of a particular structural design, detail or type may not be the only fence that will effectuate that purpose. Such fences as will keep farm animals from grazing on the lands carry out the purpose even though they may not be of any particular structural design, detail or type. So the legislature changed the fencing requirements so as to conform to the function thereof in carrying out the purpose of the exemption by no longer making the exemption dependent upon the maintenance of a fence of any particular structural design, detail or type, but solely upon the sufficiency of the fence to keep farm animals off the lands. This is all that can be read out of the changes made by the amendment and there is nothing in the statute that indicates any intention to use the words "farm animals" in any other than their ordinary meaning.

It is a familiar rule of construction that words in a statute are to be given a common and ordinary meaning unless there is something to indicate a contrary intent. Likewise it is a cardinal rule of construction that where the lan-

guage of the statute is clear and unambiguous there is no room for construction thereof.

The language used in respect to fencing requirements in the statute as amended is perfectly plain and says that for slope lands or wood lots to be entitled to the exemption they must be enclosed by a fence sufficient to keep out farm animals. It seems perfectly clear that the term "farm animals" includes sheep and hogs as well as horses and cattle. Certainly no one would say that in Wisconsin sheep and hogs are not farm animals. The common and accepted meaning of the words "farm animals" includes sheep and hogs, as well as cattle. Any contention that wood lots and slope lands are entitled to exemption under sec. 70.11, Stats., other than when fenced sufficiently to keep out sheep and hogs, as well as horses and cattle would seem to arise only when, as was said by Chief Justice Winslow in *State ex rel. Attorney General v. Northern Pacific R. Co.*, (1914) 157 Wis. 73, at 106, "one fails to give plain words their plain meaning." The fact that some or all kinds of farm animals are not kept on the farm or, if so, are kept penned up would not in any way satisfy the requirement of the statute that for the land to be entitled to the exemption thereunder it must be sufficiently fenced to keep out farm animals. The thing that accords the property the exemption is not the keeping of farm animals off from the same, but having it fenced as prescribed by the statute.

It is therefore our opinion that sec. 70.11 (40), Stats., prescribes that wood lots and slope lands shall be exempt only if enclosed by a fence sufficient to keep out all farm animals.

You also ask whether the sale of wood products such as cordwood, bolts and maple sugar would defeat the exemption of such lands if they otherwise qualified therefor under sec. 70.11 (40).

The statute is silent upon the subject except as it makes certain fundamental requirements. In our opinion nothing in the statute would make the sale of such products operate to defeat the right to exemption unless carried on to such extent as to rob the land of its character as a wood lot or a failure to make a reasonable effort to reforest the slope lands.

HHP

Bridges and Highways — State Highways — Ch. 355, Laws 1939, amending sec. 83.01, subsec. (6), and sec. 83.06, subsec. (1), Stats., considered and construed.

January 9, 1940.

HIGHWAY COMMISSION.

Ch. 355, Laws 1939, amended sec. 83.01, subsec. (6), Stats., relating to county trunk highways, by inserting therein the following:

"Any city or village street or portion thereof may be selected as a portion of such system, and any such village or city street so selected prior to May 1, 1939, shall be a portion of such system. All streets and highways in any city or village over which is routed a county trunk highway or forming connections through such city or village between portions of such county trunk highway system shall be considered a part of such system unless the governing body of such city or village shall by resolution require that the county shall remove such street or highway from the county trunk system. No county shall be responsible for the construction and maintenance of any such city or village street to a greater width than those portions of the county trunk system outside of such village or city limits and connecting with such street."

Said ch. 355, Laws 1939, also amended sec. 83.06 (1) Stats., to read as follows, the italicized portion being added thereby:

"All city and village streets and highways improved with state or county aid under the provisions of this chapter shall be maintained by the cities and villages in which they lie *but this provision shall not diminish or otherwise affect the duty of the county with respect to any street which is a portion of the county trunk system.* All other state highways shall be maintained at the expense of the county in which situated, and the county board shall make adequate provisions therefore."

You have submitted several questions as to the effect of amendments made to secs. 83.01 (6) and 83.06 (1) by ch.

355, Laws 1939. Specific factual situations have not been set out but the questions are in a form which call for generalizations. Accordingly, this opinion and the interpretation of the effect of the enactment of ch. 355, Laws 1939, are of that nature and must be so considered. At the outset it appears to us that the amendments thus effected were all a part of a legislative objective of making city and village streets over which county trunk highways pass or extend, a part of the county trunk highway system and imposing upon the county the duty of maintaining the same. The amendments must thus be given such interpretation as will carry out that legislative intention.

1. May any city or village street or portion thereof be selected as a portion of the system of county trunk highways, even though it does not connect with any other portion of such system?

The underlying idea of a county trunk highway system, as mentioned in sec. 83.01 (6), Stats., is a system of highways maintained by the county of a continuous and inter-connecting nature which provide routes of travel between various points within the county and also points in adjoining counties, similar in nature to and supplementing the state highway system. It is not just a system of highways maintained by the county but is a system of *trunk* highways maintained by the county. It is inherent in a trunk system that the highways thereof shall serve as continuous and through routes of travel between different points, *termini* or localities of an appreciable and substantial distance apart. The selection of a portion of a city or village street which is not physically connected to some other part of the county trunk highway system would not serve the purpose for which a county trunk highway is designed.

The provision of the amendment to sec. 83.01 (6), Stats. that "any city or village street or portion thereof may be selected as a portion of such [county trunk highway] system", does not mean that one or more blocks or a portion of a city or village street may be selected as a part of the county trunk highway system where such portion does not actually physically connect with some other part of the county trunk highway system inside or outside of the mu-

nicipality. Rather, in our opinion, this amendment was intended to preclude the possibility that there is any restriction as to what streets or portions thereof may be selected by the county as a part of the county trunk system other than that the same shall be integral to the trunk system. This provision was designed to give the county freedom of routing county trunk highways through or into cities and villages and to remove any idea that a county trunk highway in passing through or into a village or city, when being located by the county, must take the shortest or follow any particular route. It is to be noted that this provision now under consideration applies solely in the instance of selection of streets or portions thereof as a part of the county trunk system and that selections are made by the county.

It is therefore our opinion that under sec. 83.01 (6), Stats., as amended by ch. 355, Laws 1939, city or village streets or portions thereof may be selected by the county as a portion of the county trunk system only if the selected streets or portions thereof each actually physically connects with some other portion of such system.

2. If the answer to question 1 is affirmative and if such street is not otherwise eligible under the provisions of sec. 83.01 (6), Stats., as amended, is the consent of the state highway commission necessary to make such street a part of the county trunk highway system?

The provisions of sec. 83.01 (6), Stats., prior to amendment by ch. 355, Laws 1939, provided that a map of the county trunk system selected by each county should be filed with the county clerk and copies thereof with the state highway commission on or before April 1, 1926, and that after filing with the state highway commission and approval by it, the system "shall be altered or increased only with the consent of the commission". Nothing in the amendment of this subsection by said ch. 355 made any change in this regard and it is our opinion that the right of the county to select highways as a part of the county trunk system, as applied to village and city streets after the amendment by ch. 355 making such municipal streets eligible for selection, is exercised in the same manner as the county's selection of portions of highways in towns prior to the amendment and

that the approval of the state highway commission is necessary before a village or city street or portion thereof selected by the county becomes a part of the county highway system. See XXVIII Op. Atty. Gen. 15.

3. If a city or village street was selected prior to May 1, 1939 as a portion of the county trunk system, may such street be removed from such system subsequently to the effective date of ch. 355, Laws 1939?

The provisions of sec. 83.01 (6) mentioned in answer to the previous question, prior to the enactment of ch. 355, Laws 1939, provided that after selection in the first instance by the county and approval thereof by the state highway commission, "the system shall be altered or increased only with the consent of the commission". While we find no provision of the statutes expressly giving the county the power to remove any street, highway or portion thereof from the county trunk highway system of that county it does not appear that it was intended that such selection should be in perpetuity. The language thus above quote that the system "shall be altered or increased only with the consent of the commission" implies that the county may do something more or other than just increase the system. Withdrawal of a street, highway or portion thereof would be an alteration of the system and within the power of the county to be implied from the above language.

If a portion of a city or village street was selected by a county as a part of the county trunk highway system prior to May 1, 1939, then by virtue of the express language of the amendment to sec. 83.01 (6), effected by ch. 355, Laws 1939, it is a portion of the county trunk highway system of that county. Such selected street or portion may then be removed from the system by the county the same as any other selected portion of the system may be removed. This is subject, however, to one limitation. By virtue of the amendment to sec. 83.01 (6), Stats., made by ch. 355, Laws 1939, so long as a county trunk highway is routed over a street, highway or portion thereof in a village or city or said street, highway or portion thereof forms a part of the connection through such city or village between portions of the county trunk highway system, the same remains a part

of such county trunk highway system unless the city or village takes action as prescribed in the amendment to have the same removed therefrom.

4. If the answer to question 3 is affirmative, by what procedure and by what authority of what governmental bodies or departments may such street be removed from the county trunk system?

As stated in the answers to the previous questions, a village or city street or portion thereof which has been selected and has become a part of the county trunk highway system may be removed therefrom by county board action and subsequent approval by the state highway commission. This is true only if the selected street or portion thereof, after removal from the system, will not have a county trunk highway routed over it nor form a connecting link through the municipality between portions of the county trunk system. Where a county trunk highway is routed over such selected street or portion thereof and it is proposed that the same remain there or if such street will be a part of the connection through such municipality between portions of the county trunk highway system, it may be removed from such system only by action of the governing body of the city or village in adopting a resolution requiring the removal thereof. When the village or city takes such action in respect to streets over which a county trunk highway is routed or which form connections through such municipality between portions of the county trunk highway system, no further action is required and the action of the governing body of the city or village effects a removal thereof from the county system.

The required approval of the state highway commission existing in the statute prior to the amendment related to what a county may do in respect to the county trunk highway system. It is our opinion that it must now still be so limited. As such, said approval is referable only to action of the county in adding to or removing from the county highway system as selected by the county. In view of the purpose behind the enactment of ch. 355, Laws 1939, such prior existing provision cannot be construed as having any application to those city or village streets or portions

thereof which are to be "considered" a part of the county trunk highway system because of having a county trunk highway routed thereover or being a part of the connection through such city or village between portions of the county trunk highway system. The right given to the local municipalities by the amendment made by ch. 355 in respect to these situations is unequivocal and clear. It must be presumed that if the legislature intended such right to be exercised only with the approval of the state highway commission it would have so expressly provided. The obvious reason it did not is that to do so would have defeated the existence of control in the local municipalities, which it obviously intended to confer.

5. If the county trunk system is not "routed" through a city or village, and if there should be a disagreement or difference of opinion as to which streets form a connection through such city or village between portions of the county trunk system, how shall the final determination be made as to which streets shall be considered a part of such system?

The whole tenor of the amendments effected by ch. 355, Laws 1939, is to place the responsibility for maintaining the streets and highways covered thereby upon the county and to give to the cities and villages the right to say whether or not such of their streets as have county trunk highways routed over them or form connecting links through the municipality between portions of the county trunk system, but which have not been selected by the county as a part of the system, shall be maintained by the county. In many instances it will be clearly apparent that a street or streets constitute such a connecting link. If the situation in a particular city or village is so complex that it requires some one to decide which of the streets would constitute a connection between portions of the county trunk system, then there would in fact be no connecting link in that particular municipality which would come within the intended purpose of the enactment. In other words, for a street or streets or any portion or portions thereof to be considered a part of the county trunk highway system it must appear very clearly that the same are in fact the connecting link between portions of the county trunk system

and unless the factual situation is such that there is a well defined connecting link there is in fact no connecting link. Whether or not there exists such a connecting link is purely a question of fact in each individual situation.

6. If the governing body of a city or village shall by resolution require that the county remove from the county trunk system a street over which is routed a county trunk highway or forming connections through such city or village between portions of such county trunk highway system, what further action, if any, is necessary by the county board or state highway commission before such removal becomes effective?

The answer to question No. 4 likewise answers this question. It would, however, be an orderly procedure for the village or city, after the adoption of the resolution, to notify the county thereof and for the county board and the state highway commission to then take formal action in conformity therewith. As before indicated, were the statutes construed as requiring action of the county board or the state highway commission, or both, in this instance, the effect would be to take from the local municipality the right to have the removal effectuated whenever it so decides. It is apparent from the amendment that the absolute right in this regard was to rest in the local governing board.

7. If a street or highway in a city or village meets the qualifications of section 83.01 (6) as amended, so that it shall be "considered" a part of the county trunk system, does such street or highway actually constitute a part of the county trunk system?

The effect of the amendment to sec. 83.01 (6) by ch. 355, Laws 1939, that "all streets and highways in any city or village over which is routed a county trunk highway or forming connections through such city or village between portions of such county trunk highway system *shall be considered* a part of such system" is to make such street a part of the system for all statutory purposes. There may be a fine technical distinction between those streets and highways in a city or village which become part of the county trunk system through selection by the county board subse-

quently approved by the state highway commission and those which acquire that status through having a county trunk highway routed over them or because they form connections through the local municipality between parts of the selected county trunk highway system. Such distinction is merely as to the form or manner in which the particular highway acquires that status and has no significance in respect to the benefits and obligations arising from such status. Whether the particular street or portion thereof is selected pursuant to legislative authority as a part of the county trunk highway system or is made a part thereof by legislative fiat has no bearing on the duties, obligations, rights and liabilities which arise out of being a part of the system. The same duties, obligations, rights and liabilities attach no matter by what means that standing is acquired. For the purposes of the statutes a street becoming a part of the system by one method is as much a part thereof as a street which came in under another method.

8. If a street or highway in a city or village meets the qualifications of sec. 83.01 (6) as amended so that it shall be "considered" a part of the county trunk system shall it be included in computing the mileage of county trunk highways on which a county is to receive an allotment of sixty-five dollars per mile as provided in sec. 84.03 (2) from the appropriation made by sec. 20.49 (4) both as amended by ch. 42, laws of 1939?

Sec. 84.03 (2) as amended by ch. 42 of the laws of 1939, after providing for the allotment of the sum of \$3,500,000 as state aid to the several counties for the respective county trunk highway systems, forty per cent thereof in the ratio that the number of motor vehicles registered from the county bears to the total registered in the state and sixty per cent thereof in the ratio the mileage of highways in each county exclusive of highways in cities and villages, bears to the total mileage of highways in the state, also provides that "there shall be an additional allotment to such counties of sixty-five dollars per mile for each mile of county trunk highway". Sec. 20.49 (8), Stats., as amended by said ch. 42, provides for certain allotments to cities, towns and villages by way of state aid in varying amounts

per mile for the streets within their respective limits, "which are not portions of the state or county trunk highway systems." Sec. 20.49 (4), Stats., as amended by said ch. 42, after appropriating a sum of money to carry out the general allotments to counties and cities, towns and villages made by sec. 20.49 (8) and 84.03 (2), Stats., also appropriates "in addition thereto a sum sufficient to meet the additional allotment to counties of sixty-five dollars per mile for each mile of county trunk highway as provided in subsec. (2) of sec. 84.03." Under these provisions the local municipalities do not receive a specific allotment per mile for the streets and highways within their limits which are portions of the county trunk highway system, but the counties receive sixty-five dollars per mile "for each mile of county trunk highways" and it is specifically stated that such per mile allotment to the counties, together with the general allotments, shall be used for constructing, repairing and maintaining the county trunk highway system.

The provision in sec. 83.01 (6), Stats., as amended by ch. 355, Laws 1939, that certain highways shall be considered a part of the county trunk system is consistent with and complementary to the provisions of secs. 20.49 and 84.03 hereinbefore mentioned. They both contemplate that the highways which constitute the county trunk highway systems shall be maintained by the respective counties and that state aid therefor shall be given to each county. It is our opinion that all streets and highways in any city or village over which a county trunk highway is routed or which form connections through the municipality between portions of the county trunk system shall be included in computing the mileage of county trunk highway systems for which a county is to receive an allotment of sixty-five dollars per mile as provided in secs. 84.03 (2) and 20.49 (4), Stats., as amended by ch. 42, Laws 1939, unless the governing body of the city or village in which the same is situated shall have adopted a resolution requiring the renewal thereof from such system.

9. If a street or highway in a city or village meets the qualifications of sec. 83.01 (6) as amended so that it shall be considered a part of the county trunk system, is it the

duty of the county to maintain such street under the provisions of sec. 83.06 (1) of the statutes as amended by ch. 355, Laws 1939?

It seems quite clear that the provision inserted in sec. 83.06 (1) by ch. 355, Laws 1939, being the portion underlined in the previous quotation of said subsection, intended that streets and highways in any city which are to be considered a part of the county trunk highway system by virtue of having routed thereover a county trunk highway or forming a connection through such municipality between portions of the county trunk highway system are to be maintained by the county. Especially must this be the effect of the amendment to sec. 83.06 (1) in view of the last sentence added to sec. 83.01 (6) by the same enactment. This last sentence so added to sec. 83.01 (6) provided,

“No county shall be responsible for the construction and maintenance of any such city or village street to a greater width than those portions of the county trunk system outside of such village or city limits and connecting with such street.”

The legislature, in passing ch. 355, intended to impose the duty of maintenance on the counties and had in mind the opinions of this office in XX Op. Atty. Gen. 471 and XXIII Op. Atty. Gen. 612.

HHP

Fish and Game — Police officers, sheriffs, deputy sheriffs, coroners or other police officers, being, under sec. 29.07, Stats., *ex officio* deputy conservation wardens, may act as such whether or not requested by conservation commission or any of its deputies.

Deputy sheriff may request hunters to exhibit licenses and may act in capacity of conservation warden although not requested so to act by conservation commission or any of its deputies.

January 11, 1940.

CLARENCE G. TRAEGER,
District Attorney,
Horicon, Wisconsin.

You have requested our opinion relative to the interpretation of section 29.07 of the statutes, which reads as follows:

"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."

You state you have a situation wherein a deputy sheriff called upon numerous hunters to produce their hunting licenses and acted in the capacity of a game warden. The question you desire to have answered is whether a deputy sheriff, under section 29.07, has the power to interfere with hunters legally hunting and to order them to show their licenses where there is no violation of law and none is suspected or claimed.

Sec. 29.09, subsec. (1), as amended by ch. 182, Laws 1939, provides:

"Except as expressly provided, no person shall (a) hunt with a gun any wild animal, or (b) trap any game, or (c) take, catch or kill fish or fish for fish in inland water of this

state unless a license therefore has been duly issued to him which shall be exhibited to the conservation commission or its deputies on demand."

We believe it is clear that under this section there is attached to the issuance of a hunting or fishing license the condition that such license shall be exhibited to the state conservation commission or its deputies on demand. In order for the conservation commission or its deputies to demand the production of a license no violation of law need be suspected or claimed. Nonproduction of the license upon demand would probably be regarded as a violation of sec. 29.64 as obstructing a conservation warden in the performance of his duty for which, upon conviction, the license could be revoked under sec. 29.63.

It will be noted that sec. 29.07 provides that certain officers including deputy sheriffs are *ex officio* deputy conservation wardens and shall assist the state conservation commission and its deputies in the enforcement of this chapter whenever a notice of a violation thereof is given by the commission or its deputies. A deputy sheriff being *ex officio* a deputy conservation warden, there would seem to be no doubt that he could and should exercise all the powers and duties of a deputy conservation warden. The fact that it is also provided that the officers named in sec. 29.07 should assist the conservation commission upon notice would not appear to detract from these powers and duties. We may assume that police officers, sheriffs, etc., are normally engaged in other duties and that the conservation commission and its deputies are primarily concerned with the enforcement of the game laws. Upon discovery of violations, the commission or its deputies may have occasion to request the assistance of other officers and it would appear that the statute makes it the duty of such officers to respond upon such request. There is no inference that such officers may not act in the enforcement of the game laws without the request of the conservation commission or its deputies. The term "deputies" of the conservation commission mentioned in sec. 29.09 (1) and the term "deputy conservation wardens" as used in sec. 29.07 appear from a consideration of other sections of the statutes and the history of the sections

involved to be synonymous. See sec. 23.10, ch. 456, Laws 1917, ch. 668, Laws 1917, ch. 594, Laws 1915.

It is our opinion, therefore, that police officers, sheriffs, deputy sheriffs, coroners or other police officers have the same powers and duties as conservation wardens appointed under sec. 23.10 and referred to as deputies of the conservation commission in sec. 29.09 (1) and may act as such whether or not requested by the conservation commission or any of its deputies. Thus, a deputy sheriff would be acting within his lawful powers in requesting hunters to exhibit their licenses and acting in the capacity of a game warden although not requested so to act by the conservation commission or any of its deputies and whether or not a violation of law is suspected or claimed. A similar result was reached in XX Op. Atty. Gen. 1140.

RHL

Corporations — Articles of Incorporation — Proposed article providing that board of directors shall consist of not less than — nor more than — does not conform to requirements of sec. 180.02, subsec. (1), par. (e), Stats.

January 11, 1940.

FRED R. ZIMMERMAN,
Secretary of State.

You have submitted the following statement to us:

"Section 180.02 (1) of the statutes specifies what articles of incorporation must contain and includes in paragraph (e) 'the number of directors'.

"In an opinion found in 1904 Opinions, page 365, it was held that this statute requires a definite number of directors and does not permit articles to provide for 'not less than — nor more than —'."

The statement is submitted in connection with a request that we express an opinion as to whether in our judgment the attorney general's opinion referred to is correct.

We have searched carefully for any judicial authority or other helpful data bearing upon the subject and have found very little assistance. The opinion to which you refer is in itself of little value because the conclusion rests upon nothing more solid than its mere assertion.

We must remember, however, that the opinion was delivered some thirty-five years ago and that many legislatures have come and gone since the year in which it was rendered. Theoretically, at least, had the opinion been wrong or not in accord with the legislative intent, the statute would have been clarified. The fact that it has not been is at least evidence that the opinion correctly interpreted the legislative intent. *Union Free High School District of Montfort v. Union Free High School District of Cobb*, 216 Wis. 102, 106.

On July 7, 1939, XXVIII Op. Atty. Gen. 439, we expressed an opinion upon a somewhat related question. You will recall that in the question there involved the proposed article set out a certain number of directors but further provided that there might be an additional number elected upon the happening of certain contingencies. The contingencies themselves were stated and it was provided as well that, upon the happening of the contingencies and the election of the directors, those facts should be certified to the secretary of state. We held that the proposed article conformed to the requirements of sec. 180.02, subsec. (1) (e), Stats.

We adhere to the view expressed in our opinion of July 7, 1939, but we do not feel that upon the basis of either that opinion or the 1904 opinion we could approve the proposed article here in question. In our opinion of July 7 we assumed that the 1904 opinion was correct in so far as it held that articles of incorporation must provide for a definite number of directors. We held to the view, however, that the article there in question did provide for a definite number. The article here in question does not by any stretch of the imagination provide for a definite number.

We are, accordingly, of the opinion that the proposed article does not conform to the requirements of the statute in question.

JWR

Civil Service — Public Officers — State Employees — In reduction of personnel pursuant to provisions of 16.24, Stats., lay offs must be made upon basis of seniority unless cause can be shown justifying deviation from that rule. In event that employee contests lay off upon ground that seniority rule is not followed, it is incumbent upon official laying him off to show existence of cause justifying deviation.

January 12, 1940.

INDUSTRIAL COMMISSION,

Unemployment Compensation Department.

You have requested our opinion as to whether or not, in reducing personnel because of stoppage or lack of work or funds or because of material changes in duties or organization, civil service employees may be laid off on any basis other than that of strict seniority.

Sec. 16.24, Wis. Stats., provides as follows:

“(1) No permanent subordinate or employe in the competitive division who shall have been appointed under the provisions of sections 16.01 to 16.30 or the rules made pursuant thereto shall be removed, suspended without pay, discharged, or reduced in pay or position except for just cause, which shall not be religious or political. In all such cases the appointing officer shall, at the time of such action, furnish to the subordinate in writing his reasons for the same. The reasons for such action shall be filed in writing with the director prior to the effective date thereof. Within thirty days of the receipt of such notice and reasons from the appointing officer, the employe may appeal to the board, and within sixty days after the date of appeal,

the board shall hold a public hearing thereon.

“(a) * * *

“(2) Provisional employes as defined in subsection (1), emergency employes as defined in subsection (2), and temporary employes as defined in subsection (4) of section 16.20 may be dismissed or laid off at any time at the discretion of the appointing officer. Seasonal employes provided for in subsection (3) of section 16.23 may be dismissed or laid off at any time during the first six months of service, and, if such service extends beyond six months, they may be laid off at the expiration of the seasonal period, at the discretion of the appointing officer. In case of a reduction in force because of stoppage or lack of work or funds or because of material change in duties or organization, permanent employes shall be laid off in accordance with rules established by the bureau. Resignations from the classified service shall be regulated by rules of the bureau.”

In accordance with the authority conferred above to promulgate rules governing lay offs, the bureau of personnel has established the following rule:

“LAY OFFS

“In case of a reduction in force because of stoppage or lack of funds or work or because of material change in duties or organization, permanent employees shall be laid off in inverse order to their length of service, *unless cause is shown for doing otherwise.*” (Italics ours.) (Rule XVII, Rules for the Administration of the Civil Service Law.)

The procedure by which lay offs are to be effected under the civil service law is by no means clear. Such statutory provision as exists in the matter is that which appears above. It will be noted that sec. 16.24, Stats., purports to apply to “removals, suspensions, discharges, reductions, dismissals, lay offs, resignation.” Thus, it might well be contended that each word has a peculiar significance and that those provisions of subsec. (1) which provide that an employe shall not be “removed, suspended without pay, discharged, or reduced in pay or position except for just cause” are exclusive of the provisions of subsec. (2), relating to dismissals, lay offs and resignations. This contention is supported by the fact that the bureau of personnel, in the exercise of its rule-making power, has attributed to

each of the words employed a peculiar meaning. Cf. Rule I, Definitions, Rules for the Administration of the Civil Service Law. If lay offs or dismissals are not included within the "removals" or "discharges" specified in subsec. (1), then the provisions of subsec. (1) relating to written notice to the employee, appeal, etc., do not apply. And, so far as we know, no rule has been promulgated by the bureau of personnel providing for a procedure to be followed in effecting lay offs.

In view of the uncertainty as to the appropriate procedure, and until such time as the matter receives either judicial or legislative classification, we suggest that it would be well for department heads, in reducing personnel due to stoppage or lack of funds or work or because of material change in duties or organization, to follow the procedure set out in sec. 16.24, subsec. (1); that is, a department head should give the written notice there provided for, specifying as his reason, stoppage, or lack of funds or work, etc.

As we have pointed out, Rule XVII of the Rules for the Administration of the Civil Service Law provides, in substance, that lay offs shall be made on the basis of seniority "unless cause is shown for doing otherwise." We are not familiar with any procedural requirement which could possibly be applicable in the case of lay offs that would necessitate a showing, such as is referred to in Rule XVII prior to the lay off itself. As we have already indicated, the only procedural requirement that might be applicable is that provided for by sec. 16.24 (1), Stats. If that section is applicable, then it is required that the reasons for the lay offs be specified in writing prior to the effective date, but there is no requirement that evidence in support of the reasons given be adduced at that time or that the reasons given shall consist of anything other than the statutory grounds justifying lay offs. In other words, we do not construe the language, "unless cause is shown for doing otherwise" to require a showing to the employee, or to anyone else, prior to the effective date of the lay off. Rather, we construe it to mean that in the exercise of such privilege as the employee may have by way of recourse to the bureau of personnel or to the courts following a lay off, he may obtain reinstatement.

ment, provided the department head effecting the lay off cannot show some legitimate cause for departing from the seniority rule. And a legitimate "cause", as here used, must refer to relative competency or fitness, or some other such consideration. That is, the showing must be such as would preclude a finding that the department head has acted arbitrarily in deviating from the seniority rule. *Cf. State ex rel. Gill, Att'y Gen'l v. The Supervisors of Milwaukee County*, 21 Wis. 443.

The burden of showing that such cause exists rests, of course, upon the department head.

If the provisions of sec. 16.24 (1), Stats., do not apply to lay offs under sec. 16.24 (2), our conclusion is the same. There would be no statutory appeal to the board in such an event and all appeals would go direct to the courts pursuant to the power vested in the courts to review the acts of public officers and tribunals. But that would make no material difference in the analysis of the question at issue.

JWR

Industry Regulation — Painters' Licenses — One who does not engage in business of mixing paints, decorating, hanging paper or planning, designing and superintending mixing of paints, is not master painter within meaning of sec. 101.40, subsec. (1), par. (a), Stats., and is not required to obtain master painter's license.

January 13, 1940.

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

You have submitted the following request for an opinion:

"Section 101.40 (1) (a) reads as follows:

"The term "master and contracting painter" as used in this section shall mean any person skilled in the work or

art of painting, decorating and paper hanging and in the mixing and tinting of paints and painting material, planning, designing and superintending, who is familiar with the laws, rules and regulations governing the same, who has served at least three years as a journeyman or the equivalent and who has obtained, a master painter's license in conformity with this section'

"The first sentence of subsection (6) of 101.40 reads as follows:

"No person, firm or corporation shall engage in the business or occupation of, or advertise or hold himself out as master and contracting painter or journeyman painter, without obtaining the license therefor as provided in this section. * * *

"* * *

"A complaint, under section 101.40, has been lodged against a local individual. He maintains that the only painting he does is by means of a power spray gun. He is furnished a color chart by a paint company and the customer selects the desired tint or color from said chart and the paint comes ready mixed, except that oil must be added which is put into the machine with the paint and mixed by the machine. He then turns on the power and applies the paint with the spray gun. He neither mixes nor tints paints or painting material. Most of his work is done on barns.

"In your opinion does spray painting of the kind described come within the contemplation of section 101.40 so as to require a person doing the same to comply with the provisions of said section?"

We assume that the complaint charges the individual in question with engaging in the business or occupation of a master and contracting painter without first obtaining a license as required by sec. 101.40, Stats. That is, we assume that no question as to carrying on the business of a journeyman painter is involved.

On the basis of the foregoing statement we are of the opinion that no crime has been committed.

"* * * It is a fundamental rule of criminal law that no case is to be brought within a statute charging an offense unless completely within its words; and no person is to be made subject to the provisions of a criminal statute by implication. * * *

"* * *

"A statutory offense, therefore, has precisely the proportions which the statute gives to it, and can have no other or greater. * * *." *Shinners v. State ex rel. Laacke*, 219 Wis. 23, 27-28.

Applying the appropriate rule of construction, it is perfectly evident that the individual in question is not carrying on the business of a "master and contracting painter" within the meaning of sec. 101.40, Stats. Certainly he is not carrying on the business of a master and contracting painter as that term is defined by sec. 101.40, subsec. (1), par. (a), Stats. And, aside from the fact that the statute is not to be extended by implication, it is the rule that statutory definitions exclude resort to other definitions in determining the meaning of language used in a statute. *McCarthy v. State*, 170 Wis. 516.

JWR

Counties — County Board — Municipal Corporations —
Where territory is detached from one town and attached to another, pursuant to provisions of sec. 59.08, subsec. (1), Stats., it is not necessary that election be held.

January 20, 1940.

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

You ask whether under secs. 59.08, subsec. (1), and 60.05, Stats., it is necessary to hold an election of the voters of the towns concerned in order to detach a township from one town and attach the township to another adjoining town.

In our opinion, such an election is not necessary.

Subsec. (1) of sec. 59.08, Stats., entitled, "Special powers of board [county]", reads as follows:

"In addition to the general powers and duties of the several county boards enumerated in section 59.07 special powers are conferred upon them, subject to such modifications and restrictions as the legislature shall from time to time prescribe, to:

"(1) Set off, organize, vacate and change the boundaries of the towns in their respective counties, designate and give names thereto, fix the time and place of holding the first town meeting therein, and make all necessary orders for the preservation of the records and papers of any town which may be vacated, but no town shall be vacated unless a majority of all the members entitled to seats in the county board shall so decide; and no county board, except in the counties of Ashland, Barron, Bayfield, Burnett, Douglas, Juneau, Marathon, Oconto, Polk and Shawano, and except as provided in section 60.05 shall set off, establish or organize any town that at the time of being so set off and organized does not contain a population of at least one hundred and twenty-five inhabitants, at least twenty-five of whom shall have been actual electors of this state and resident within the territory of the proposed new town at least six months prior to the time such organization shall take effect."

Unless, therefore, the powers of the board are expressly limited by sec. 60.05, Stats., the county board has power, without an election of the voters of the respective towns concerned, to transfer territory from one town to another, providing such latter town is contiguous thereto. See *The Chicago & Northwestern Railway Co. v. The Town of Oconto*, 50 Wis. 189.

In 1919 old sections 671 and 671a, which provided that a vote of the electors was necessary in cases of *division* or *vacation* of towns, were consolidated, renumbered, and amended to form the pertinent part of present sec. 60.05. Prior to that time decisions of the supreme court made it quite clear that a vote of the electors was not necessary to detach territory from one town and add it to another. That the county board had such independent power under sec. 59.08, (1) (formerly sec. 670, subd. 1,) was held in *State ex rel. Rosander v. Lippels*, 133 Wis. 211 and *State ex rel. Ervin v. County Board*, 163 Wis. 577.

The present sec. 60.05, the pertinent parts of which were so constituted by ch. 551, sec. 4, Laws 1919, deals with or-

ganization of new towns, division and dissolution. Its present provisions as to *division* existed before *State ex rel. Rosander v. Lippels* and *State ex rel. Ervin v. County Board, supra*, were decided, and both those cases held that the action which you have asked our opinion upon is not a division under the statute.

The word "dissolution" is new to the statute since 1919, as is the provision in sec. 60.05 as to organization of new towns. It seems to require no argument, however, to sustain the view that if detaching territory from one town and attaching it to another is not a division, neither is it an organization of a new town nor the dissolution of any town. The latter two are greater than the first and unless the process of detachment and attachment constitutes the less, it cannot constitute the greater.

In our opinion, therefore, the limitations of sec. 60.05, Stats., do not apply, since the action you have asked about is neither a division, dissolution or organization of a new town but is, under the authority of *State ex rel. Rosander v. Lippels, supra*, a change of the boundary of towns, which the county board is empowered to legislate upon independently of any action by the electors of the towns concerned.

JWR.

Criminal Law — Gambling — Slot Machines — Money contained in slot machines seized under sec. 348.17, Stats., is validly seized and subject to forfeiture under said section. Op. Atty. Gen. for 1912, 268, and XIII Op. Atty. Gen. 258 overruled in so far as they conflict herewith.

January 27, 1940.

ROBERT C. BULKLEY,
District Attorney,
Elkhorn, Wisconsin.

You have requested an opinion as to the proper disposition of money contained in slot machines seized under the provisions of sec. 348.17, Wis. Stats. Although previous opinions of the attorney general have dealt with this problem, the lack of uniformity among the several counties in handling the situation and the repeated inquiries in relation thereto have prompted this department to reexamine the question.

Sec. 348.17, Stats., provides in part:

“* * * such justice or other officer, * * * shall issue a warrant commanding the sheriff or his deputy or any constable to enter into such house or building * * * and take into their custody all the implements of gaming as aforesaid, and keep the said persons and implements so that they may be forthcoming before such justice or other officer to be dealt with according to law; * * * and it shall be the duty of every judge, justice of the peace and police justice or other officer before whom such prohibited gambling implements, constructions or devices shall be brought to cause the same to be publicly destroyed by burning or otherwise.”

A recent opinion of this department, upon the authority of a number of cases, construed the language used in sec. 348.17 to authorize the seizure and destruction of only those objects and instruments used in the actual playing of the game or the operation of the gambling device and which formed an integral part of the gambling device itself.

XXVII Op. Atty. Gen. 669. As noted in that opinion, it has been held that money itself does not fall into this category. *Miller v. State ex rel. Holt*, 46 Okla. 674, 149 Pac. 364; *Attorney General v. Justices of Municipal Court, etc.*, 103 Mass. 456. As a general proposition this may be true. In many gambling transactions, the money involved simply represents the stake,—it is the prize for which the game is played not the object or device with which it is played. On the other hand, money may and frequently does become the actual instrument of gaming. Thus, in *Rosen v. Supt. Police Le Strange, et al.*, 120 Pa. Sup. Ct. 59, 181 Atl. 797, the court cited the example of men gambling on the toss of a coin and, while holding that under the facts presented in that case the money in question had lost its link or connection with any gambling operation and was not subject to confiscation, intimated that had it been found in or upon any gambling instrument or device it would have been subject to seizure. Similarly, in *Miller v. State ex rel. Holt, supra*, the court held that money found upon the person of a gambler could not be confiscated by the authorities under a statute closely approximating sec. 348.17, but at the same time distinguished the case from that in which the money is found in the pot or “kitty”.

No court has advanced the proposition that money itself can not be an instrument or implement of gambling or a part of such an implement. The decisions on the point have always been based upon the ground that the money was not, under the circumstances, used in that manner. Upon examination of the way in which a slot machine operates, it will be found that the coins therein play an entirely different part from that of the bank roll of a gambler in a card game. Unlike the latter, such coins are not used merely to settle the account after it has been determined who is the winner and who the loser. The coins are an indispensable part of the actual gambling device. The very coins are necessary to set the mechanism of the machine in motion. Without the coins, the device cannot function as a gambling instrument. The coins found in the machines have not been appropriated by the operator as profits but remain therein as an inducement to the players to continue to try their luck and as an integral part of the gambling device. Not

only are coins necessary to commence the gambling operation but their retention in the machine is essential not only to encourage further play but because the machine can pay only in coin. Thus, until the money is taken from the machine and reduced to the possession of the operator it continues to function as a part of the machine and the gambling device and transaction. As was said in *Dorrell v. Clark et al.*, 90 Mont. 585, 589-590, 4 Pac. (2d) 712:

“* * * Under such circumstances the coins, and all of them, were as much a part of the gambling device as was the lever, or dials, or slot; * * *.”

Can it be said that, in those instances in which special tokens are used instead of money to operate the machines, such tokens are not a gambling device or a part thereof? Clearly not. Just so, the coins found in slot machines, even though they may be put to an innocent use, are part of a gambling implement and subject to seizure as such.

It follows from the foregoing that the money in the slot machines is lawfully seized. What to do with it? It was held in XIII Op. Atty. Gen. 258, following an opinion, Op. Atty. Gen. for 1912, 268, that since the statute in question requires the destruction of the gambling implements seized and since it is a federal offense to destroy money, the statute is not applicable to the money in the machines and hence, in the absence of a showing to the contrary, belongs to the owners of the machines and should be returned to the owners of the machines. Does this result necessarily follow merely because the money may not be lawfully destroyed? We think not. We know of no way in which property may be destroyed except through confiscation or forfeiture. It is our opinion that sec. 348.17, Stats., properly construed is a forfeiture statute and that the legislature intended that so much of the property seized and forfeited as is capable of destruction should be destroyed. The fact that money may not be destroyed does not mean that it may not be forfeited. We know of no rule of statutory construction which would prevent application of forfeiture to all of the property seized and destruction of so much as may be lawfully destroyed. The money in the machine should be disposed of as are all forfeitures.

Outside of a gratuitous surrender of the money to the ostensible owner as suggested in the prior attorney generals' opinions, it is not perceived just how the ostensible owner could ever succeed in an action brought to recover the money. The money is clearly the fruit of an illegal transaction. It is elementary that courts will not assist one in obtaining the fruits of an illegal transaction but will leave anyone so circumstanced where it finds him.
NSB

Intoxicating Liquors — Sec. 176.41, Stats., as amended by ch. 94, Laws 1939, providing for forfeiture and revocation of license without notice upon second conviction, does not require that prior conviction be obtained in same license year.

January 27, 1940.

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

In your letter you state:

"I would like to have an opinion relative to section 176.41 of the Wisconsin statutes amended, chapter 94, laws of 1939.

"I have made a search but am unable to find any case or attorney general's opinion which decides the question which has been raised as to whether or not this section applies only to convictions within the license term. In other words, must two convictions be had during the year of the license in order to automatically revoke the license, or does a conviction had in 1937 carry over and join with one in 1939 so as to automatically operate as a revocation of the license?"

You further state that it has been suggested that such a construction of the statute would be harsh, unjust, and not within the contemplation of the legislature since they have

given the local authorities power to decide what applicants should be licensed each year. Consequently, such a construction would indirectly limit the power intended to be given to the local authorities.

Sec. 176.41, as amended by ch. 94, Laws 1939, provides:

"Any person who shall violate any of the provisions of this chapter for which a specific penalty is not herein provided shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail or house of correction for not more than ninety days, or by both such fine and imprisonment, and any license issued to him shall be subject to revocation by a court of record in its discretion. In the event that any such person shall be convicted of a second offense, under the provisions of this chapter such offender, in addition to the penalties herein provided, shall forthwith forfeit the right to purchase any stamps from the state treasurer, and any license which may have been issued to him by any city, village, or town shall without notice be forthwith forfeited. In the event that such person shall be convicted of a felony, in addition to the penalties provided for such felony, the court shall revoke the license of such offender. Every town, village or city shall have the right to revoke any license by it issued to any person who shall violate any of the provisions of this chapter or any municipal ordinance adopted pursuant to this chapter as provided in sections 176.11 and 176.12."

We are unable to agree with the above suggestions. Licensing is one thing, revocation is another. Certainly it cannot be said that this section manifests any legislative intent that the local authorities have any sole discretion with respect to revocation or forfeiture of a license. Some such discretion is given to the local authorities. Some discretion is given to the court in certain situations and it is mandatory upon the court to revoke or forfeit in other situations. The particular situation involved appears to be a mandatory situation, the statute providing for automatic forfeiture. The language is as broad in terminology as it possibly can be, and provides for forfeiture without notice upon a second conviction. There is no language limiting the second conviction to the same license year in which the prior conviction was obtained. It would seem an unwar-

ranted usurpation of legislative power to so limit the plain provisions of the statute when the legislature has not provided for any such limitation. Had the legislature intended to so limit the operation of the statute, it would have been a simple matter for it to so specify.

It is our opinion that the second conviction need not occur during the same license year as the prior conviction in order to make the particular provisions of the statute in question applicable.

NSB

Appropriations and Expenditures — Constitutional Law
— Ch. 534, Laws 1939, vesting in emergency board power to determine whether and extent to which appropriation therein made should become effective, is unconstitutional.

January 31, 1940.

FRED R. ZIMMERMAN,
Secretary of State.

We have received the following request from you:

“Please give me your opinion as to the constitutionality of Bill No. 41, A., which became chapter 534, laws of 1939?

“We have received from the emergency board requests that funds be set up for several purposes, and before any payments are made, we must know that the act is constitutional.”

It is our opinion that ch. 534, Laws 1939, is unconstitutional. Our opinion is based upon the holding of the Wisconsin supreme court in the case of *State ex rel. Zimmerman v. Dammann*, 229 Wis. 570.

In the case referred to, the court held that sections 8 and 9 of ch. 181, Laws 1937, were unconstitutional. The sections there in question provided as follows:

"SECTION 8. There is appropriated from the general fund to the secretary of state a sum sufficient to pay the amount which has accrued during the economic depression and is due the retirement deposit fund and the contingent fund of the state retirement system under the provisions of subsection (7) of section 71.26. The amount herein appropriated shall not become effective or available until released in whole or in part by the emergency board.

"SECTION 9. There is appropriated from the general fund to the secretary of state a sum sufficient to pay the common school fund and the normal school fund the full amount of the principal due said funds on certificates of indebtedness now outstanding. The amount herein appropriated shall not become effective or available until released in whole or in part by the emergency board."

The court took the view that the legislature had attempted to abdicate essential legislative functions by permitting the emergency board to determine whether the appropriations should become effective, and the extent to which they should become effective.

Ch. 534, Laws 1939, reads as follows:

"SECTION 1. A new subsection is added to section 20.07 of the statutes to read: (20.07) (7) EMERGENCY RELIEF. On July 1, 1939, two million five hundred thousand dollars, and on July 1, 1940, two million five hundred thousand dollars to the agency designated by the governor to administer the provisions of chapter 363, laws of 1933, chapter 15, laws of 1935, and chapter 14, laws of special session 1937, and laws amendatory thereof or supplementary thereto, for emergency relief. No part of this appropriation shall be available until released in whole or in part by the emergency board."

It is perfectly evident that this appropriation is subject to the same objection as that which was made against the two appropriations in the case to which we have above referred.

JWR

Railroads — Sec. 192.52, Stats., does not contemplate that public service commission shall hold hearing and make finding upon complaint that there has been abandonment of railroad shops in violation of section.

February 6, 1940.

PUBLIC SERVICE COMMISSION.

You have submitted the following statement of facts:

"There has been filed with this commission the petition of the city of Adams asking the commission to determine whether or not the Chicago & North Western Railway Company has removed or abandoned its shops at Adams in violation of law.

"The commission has conducted an investigation by way of public hearing upon the petition of the city and is now in possession of considerable evidence bearing on the subject matter of the petition.

"The railway company appeared at the hearing, presented evidence, and filed brief but has not notified the commission of any proposal to abandon or remove its shops at Adams. It is contended on behalf of the petitioner that there has been an abandonment or removal within the meaning of section 192.52, statutes, which contention is denied by the company."

Upon the basis of the foregoing you desire our advice as to whether it is incumbent upon the commission to make a formal finding upon the question of abandonment and, if so, whether such a finding would be a determination within the meaning of that term as used in sec. 196.41, Stats., and reviewable as such in the manner therein provided.

It is our opinion that the commission has no lawful duty and is not empowered to make any such finding on the question of abandonment as would constitute a determination within the meaning of sec. 196.41, Stats., and as would be reviewable in the manner therein provided. So far as we are informed the only restriction on the right of a railroad to abandon facilities such as those involved is that contained within sec. 192.52, Stats. Among other things the section provides that no railroad company shall abandon

its shops without first notifying the public service commission of its intention so to do. It is then provided that the commission shall investigate the matter and that there shall be no such abandonment if the commission finds it to be against public interest or unreasonable or unfair to the employees of the company.

We have searched the section without finding the slightest indication that any hearing, complaint, finding, or other step usually attendant upon a hearing or proceeding before the commission is contemplated in a case where a railroad company proceeds to abandon shops without consent of the commission. That is, the section contemplates that a railroad shall not abandon its shops without the consent of the commission, and that such consent may be obtained under certain circumstances, following certain steps. An abandonment without such steps being followed and without such circumstances being present simply constitutes a situation which is not within the purview of the section except as it would be in violation thereof and could be penalized by the general penalty provisions found in sec. 192.54, Stats.

If a finding or a formal determination were made upon the basis of the evidence now before the commission, it would, in our opinion, be irrelevant in any future proceeding bearing upon the question. It would not be successfully argued that the commission could order a restoration of the shops. It is a well understood principle that the power of the commission is purely statutory and that it can exercise no power except such as is expressly conferred. *Monroe v. Railroad Comm.*, 170 Wis. 180, 187. Neither could it be successfully argued that a finding by the commission would have the effect of subjecting the railroad to the penalty provided by sec. 192.54, Stats. Aside from other considerations of a constitutional character, it is perfectly clear that the penalties imposed by ch. 192 are to be recovered as a forfeiture in a civil action brought in the name of the state. See sec. 195.07.

About the only significance that a finding by the commission could have would be that of serving as the basis for an instruction to a district attorney or to the attorney general pursuant to the provisions of sec. 195.07, Stats. Thus, if

the commission found that there had in fact been an abandonment it could instruct the attorney general or the district attorney to institute a civil action for the recovery of the penalty provided for by sec. 192.54, Stats. We may add, however, that an informal conclusion by the commission would be just as weighty and just as effective as a formal finding, so far as this particular provision is concerned. We find no indication at all that such a direction or a request as is contemplated by sec. 195.07, Stats., must be based upon a formal finding.

JWR

Criminal Law — Fraud in Obtaining License — Fish and Game — Hunting Licenses — Sec. 348.383, Stats., providing for penalty in case of fraud in obtaining hunting license, applies only where false statement is made to county clerk or deputy county clerk. Ch. 502, Laws 1939, relating to penalties for violation of game laws where no other penalty is provided, does not apply.

February 15, 1940.

HERBERT J. STEFFES,
District Attorney,
Milwaukee, Wisconsin.

You have inquired whether sec. 348.383, Stats., relating to fraud in obtaining a hunting license, applies where the false statement was made, not to the county clerk, but to a clerk of a sporting goods company which had obtained blank licenses from the county clerk for the purpose of resale to its customers.

The false statement consisted of a representation that the applicant's residence was Milwaukee, whereas, in fact, it was Chicago.

Sec. 348.383 reads:

"Any person who shall make to any county clerk authorized to issue licenses for the pursuit, hunting or killing of game a false statement concerning his citizenship or residence, and thereby obtain such a license therefor as only citizens or residents of this state are entitled to, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than four months nor more than one year, or in the state prison not exceeding one year."

It is our opinion that the foregoing statute applies only to statements made to the county clerk or a deputy county clerk. Under sec. 59.16, subsec. (1), a deputy county clerk assists the county clerk in the performance of his duties and performs the duties of the clerk in the event of his absence or disability.

However, to extend the application of the statute beyond statements made to the county clerk or deputy county clerk would be violence to the well established rule that penal statutes must be strictly construed. See *Minneapolis Threshing Machine Co. v. Haug, et al.*, 136 Wis. 350.

Secondly, you inquire whether the general penalty provisions of ch. 502, Laws 1939, would apply to the facts mentioned.

Ch. 502, Laws 1939, repeals and recreates paragraphs (c) and (f), creates par. (g) and amends pars. (b) and (d) of sec. 29.63 (1), relating to penalties for hunting and fishing.

Sec. 29.63 (1) (f), which you quote in your letter, now reads:

"For the violation of any provision of the statutes or of any conservation commission order relating to fishing, or the possession of game fish, except where some other penalty is specifically provided, by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment."

In our opinion the general penalty provisions of ch. 502, above quoted, would not apply for the reason that a specific penalty is provided in sec. 348.383. 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. *Kollock v. Dodge*, 105 Wis. 187. Furthermore, the provisions of ch. 502, above quoted, could not possibly apply, because there is involved no general violation of the fish and game laws. Fraud in obtaining a license is a violation only in so far as it has been made so by sec. 348.383 and only to the extent therein specified.

You have also inquired as to the powers and duties of an issuing agent where the license, as in this case, was issued by some one other than the county clerk or a deputy clerk duly appointed, and you inquire further who has authority to appoint such an issuing agent.

In view of the conclusions which we have already reached respecting the advisability of a prosecution on the facts stated, it becomes unnecessary to consider who had authority to appoint the sporting goods company as an issuing agent and what powers or duties such an issuing agent may have.

WHR

Appropriations and Expenditures — Industrial Commission — Unemployment Compensation — Under sec. 108.161, Stats., unemployment contributions by state budget subdivision are to be charged to appropriation covering salaries of employees by reason of whom such contributions must be paid. In case of employees in unemployment compensation division of industrial commission and in public employment offices and related activities proper appropriation is 20.573, not 20.57, subsec. (1), Stats.

Unemployment contributions under sec. 108.161 charged by secretary of state to sec. 20.573 must be charged ultimately to federal grant under social security act, by treasurer of unemployment reserve fund, although pending receipt of federal funds to cover item he may charge it to state moneys in appropriation constituting revolving fund for such purpose.

February 15, 1940.

VOYTA WRABETZ, *Chairman,*
Industrial Commission,
Madison, Wisconsin.

You have requested an opinion on the following question:

“Is the appropriation made by section 20.573 the proper appropriation to be charged under section 108.161, so far as the industrial commission’s unemployment compensation and employment service activities and related statistical work are concerned?”

Section 108.161, Stats., provides that “each of the state’s *budget subdivisions*” shall be an employer subject to the unemployment compensation act through each fiscal year in which it has employees subject thereto; that its contributions shall be “duly paid” from the general fund upon filing by the commission with the secretary of state of a certificate specifying amounts and the appropriation to be charged; that “each of the state’s boards, commissions, departments and other budget subdivisions shall have charged to and deducted from its *proper appropriation* the amount

of contributions paid on its account, unless the budget director certifies that a stated amount of contributions cannot thus be charged," in which case it shall be charged to the general fund; and that "each budget subdivision of the state shall be a separate employer and have a separate employer's account."

You desire a ruling as to whether, if contributions are payable by reason of employees who are paid from the appropriation under sec. 20.573, such contributions are properly chargeable to that appropriation or to subsec. (1) of sec. 20.57, which is a general appropriation to the industrial commission "for the execution of its functions."

There is no doubt that the industrial commission is the "budget subdivision" which is involved in your problem, since there is no appropriation to the commission's unemployment compensation division or the public employment offices as such. But it is also clear that the "*proper* appropriation" in the meaning of section 108.161 is in every case the appropriation from which the salaries of the employees in question are paid — section 20.573 in the case of employees in the unemployment compensation division, public employment offices and related activities. While the statute is not as specific on this point as it might be (compare sec. 20.07 (3)), no other interpretation of sec 108.161 which would give full effect to the term "*proper* appropriation" is possible.

Contributions to the unemployment reserve fund are as much a cost of administration as workmen's compensation benefits. Both enter into and form a part of the cost of labor. So far as workmen's compensation benefits are chargeable to the employing departments, the legislature has provided by subsec. (3) of sec. 20.07 that they shall be paid from "the appropriation covering the salary or maintenance of the person injured," which amounts to a legislative declaration that such appropriation is the "*proper*" one for the purpose. There is no conceivable reason for not charging unemployment contributions in exactly the same manner. The appropriation which is proper for one is proper for the other.

The question may be raised whether, if the appropriation under sec. 20.573 should be exhausted, the amount

should *then* be charged to section 20.57 (1) — in other words, whether the latter would then be the “proper appropriation.” But section 108.161 contemplates that in each case there will be but one proper appropriation and if that is exhausted the charge must be to the general fund. No appropriation can be contingently liable in the manner suggested.

You also inquire whether, in view of the fact that the salaries in question are financed from federal grants under Title III of the social security act, the contributions to the unemployment reserve fund are a proper charge against such federal funds. In an opinion to you dated October 20, 1939, XXVIII Op. Atty. Gen. 608, this department ruled that workmen’s compensation payments charged to sec. 20.573 must be ultimately charged to the federal grant but could be paid in the first instance from other (state) moneys in the appropriation constituting a revolving fund. The reasons there relied on apply to the present question as well, and unemployment contributions should be charged in the same manner by the treasurer of the unemployment reserve fund.

WAP

Criminal Law — Judgments — Repeater Statute — Prior convictions alleged for purpose of imposing penalty under repeater statute, sec. 359.14, may be realleged in subsequent repeater complaint for purpose of imposing repeater penalty for subsequent offense.

February 19, 1940.

J. C. RAINERI,

District Attorney,

Hurley, Wisconsin.

You state that X was convicted of vagrancy in 1937, that prior convictions were then alleged and X was sentenced under the repeater statute, sec. 359.14, and that X is again

being prosecuted for vagrancy. You inquire whether the prior convictions alleged in the first repeater complaint of 1937 may now be realleged.

You state that defense counsel argues that by serving a sentence imposed under sec. 359.14 for a second offense, X started over as though she had never committed an offense, that she has discharged her obligation to the state, and that the offenses used in the first repeater complaint cannot be realleged in a second repeater complaint. This argument reveals a misconception of the purpose of the repeater statute.

Section 359.14 does not violate art. I, sec. 8, of the Wisconsin constitution, which prohibits putting a person twice in jeopardy for the same offense. *Ingalls v. The State*, 48 Wis. 647, 4 N. W. 785 (1880). It does not prescribe a punishment for a distinct and separate offense. *Watson v. State*, 190 Wis. 245, 208, N. W. 897 (1926); *Mundon v. State*, 196 Wis. 469, 220 N. W. 650 (1928). The sole office of the repeater statute is to provide for an increased penalty for an offense which the defendant committed notwithstanding a previous conviction for a prior offense. It is not a further punishment for the previous offense, but a measure of the punishment for the later one. The purpose of the statute is best revealed in the following quotation:

“* * * The increased severity of the punishment for the subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and *demands* a severer punishment than should be inflicted upon the person guilty of a first crime.” (Italics ours.) *Ingalls v. The State*, 48 Wis. 647, 658, 4. N. W. 785 (1880). See also *Howard v. State*, 139 Wis. 529, 121 N. W. 133 (1909); *Belter v. State*, 178 Wis. 57 (1922).

Section 359.14, then, has reference only to the extent of the penalty to be imposed for a given offense. Where a person, previously sentenced for a second offense under the repeater statute, has committed another offense, the commission of that offense is further evidence of the “incorrigible

and dangerous character of the accused". The purpose of the repeater statute "demands" that the fact of the prior convictions be made known to the court in order that the proper penalty may be imposed.

WAP

Public Health — Beauty Parlors — One is not eligible for examination provided for by sec. 159.08, subsec. (4), par. (b), Stats., until he meets requirements of sec. 159.08 (4) (a).

As used in sec. 159.08, subsec. (4), par. (a), words "who has completed the course prescribed by section 159.02 in a registered beauty school" imply that entire period of training required by sec. 159.02 must be had in registered beauty school. It is not possible to transfer from unregistered beauty school and to receive credit for any time spent at such school in computing period of attendance at registered school.

February 23, 1940.

BOARD OF HEALTH.

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

You have called our attention to sec. 159.08 (4), Stats., relating to beauty parlor operators, and which reads:

"An operator's license shall be issued to one:

"(a) Who has completed two years as a registered apprentice under the supervision of a managing cosmetician, or who has completed the course prescribed by section 159.02 in a registered beauty school.

"(b) Who has satisfactorily passed an examination conducted by the board to determine his fitness to practice cosmetic art."

In this connection you inquire whether a person who has completed a course of one thousand hours in a school of cosmetology in a state which has a prescribed course of one thousand hours is eligible to take an examination for an operator's license provided such student attends an accredited beauty school in Wisconsin for an additional five hundred hours, so as to have the one thousand five hundred hours of instruction prescribed by sec. 159.02, Stats.

It is implied in your statement of the question that an applicant for a license must pass an examination in addition to possessing the other prescribed qualifications. We agree with this interpretation of the statute for two reasons: (1) The treatment of the subject of manager's license in sec. 159.08 is as follows:

"(2) A manager's license shall be issued only to one:

"(a) Who is at least twenty-one years of age.

"(b) Who has practiced cosmetic art at least two years under an operator's license in this state.

"(c) Who has satisfactorily passed an examination conducted by the board to determine his fitness to practice as a managing cosmetician."

It is perfectly apparent that the various paragraphs relating to qualification for a manager's license are cumulative and are not alternative. Otherwise anyone twenty-one years of age could obtain a manager's license whether he had practiced cosmetic art or whether he had passed an examination or whether he met any other qualification.

There seems to be no reason for concluding that the statute intended to deal with the subject of operators' licenses in any different manner. That subject is treated in the same section and in the same form and consequently should receive the same construction in the absence of some indication that a different construction is intended. There is no such indication here. (2) In addition to the foregoing, it will be observed that par. (a), above set out, contains an alternative provision. The alternative provision there being plainly set out, the legislature would presumably have set out any other alternative provisions intended. Since there is nothing indicating that par. (b) is an alternative provi-

sion to par. (a), it must be inferred that it was not intended to be alternative.

We are of the further opinion that the entire one thousand five hundred hours prescribed by sec. 159.02, Stats., must be completed in a beauty school registered pursuant to the provisions of that section. The section in question prescribes a course of study for registered beauty schools and imposes certain requirements upon beauty schools relating to the conduct thereof which must be observed if they are to be registered. Presumably, these requirements were imposed upon these schools in order to insure that those people qualifying as beauty parlor operators should possess certain basic training in institutions possessing certain prescribed facilities. It certainly cannot be assumed that the legislature intended to place it within the power of any registered school to thwart the legislative purpose. Yet this would be the result if students could transfer from an unregistered school to a registered school shortly prior to completing fifteen hundred hours of study. Thus a student might spend, let us say, fourteen hundred hours or fourteen hundred fifty hours in an unaccredited school which did not possess the facilities prescribed by sec. 159.02, Stats. Could a registered beauty school accept this student, train him for fifty or one hundred hours and thereby endow him with the qualifications necessary to take the prescribed examination? We think not. Quite to the contrary, we think it to be the clear intent of sec. 159.08 (4) (a) that one, in order to be eligible for examination, must attend a registered beauty school for the length of time specified (fifteen hundred hours) in sec. 159.02, Stats.

JWR

Public Health — Rendering Plants — Under ch. 423, Laws 1939, only licensed renderer or his employees may engage in business of transporting dead animals.

Sec. 146.12, subsec. (11), par. (b), Stats., provides for transportation of dead animals into other states under reciprocal agreements with adjoining states or under rules of state board of health. Out-of-state renderer may not transport dead animals on Wisconsin highways unless he has licensed plant in Wisconsin.

One engaged in business of collecting and processing dead animals for purposes of resale to operators of fox, fur or dog farms must obtain renderer's license.

February 23, 1940.

BOARD OF HEALTH.

You have asked for our opinion on several questions involving the interpretation of ch. 423, Laws 1939, relating to the regulation and licensing of rendering plants.

First we are asked whether sec. 146.12, subsec. (11), par. (a), as created by ch. 423, contemplates that one engaged in the transportation of carcasses of dead animals may continue to operate unless he establishes a rendering plant or becomes the employee of a licensed renderer.

Sec. 146.12 (11) (a), so far as material here, reads as follows:

"No person other than a licensee or his employees may haul and transport the carcasses of dead animals that have died or been accidentally killed, * * *. Each wagon, truck, trailer attachment or vehicle employed in the transportation of dead animals or carcasses or parts thereof must carry a card issued by the board, showing the delivery point of the plant and the renderer's license number or permit number of the plant and card disclosing the rightful owner of the truck or vehicle. * * *."

It is clear from the language above quoted that only a licensee or his employees may transport carcasses of dead animals, but this provision of the statute does not tell us who may become licensees and, therefore, we turn to other portions of the law.

Sec. 146.12 (2) likewise provides that no person shall engage in the business of collecting and disposing of the bodies of dead animals or parts thereof, not slaughtered for human consumption, without first obtaining a license.

The only licensing provisions of the law are those contained in sec. 146.12 (5). Par. (a) thereof provides for making application for the license to the state board of health. Pars. (b), (c), (d) and (f) of subsec. (5) contain various provisions which have some bearing on the question, and we will quote from these paragraphs, italicizing the significant portions.

Par. (b) is very significant, and reads:

"On the receipt of such application, the board shall cause the building in which the applicant proposes to conduct such business to be inspected. If the inspector finds that said building complies with the requirements of this section and with the rules of the board, and that the applicant is a responsible and suitable person, he shall so certify in writing to such specific findings and forward the same to the board."

It is apparent from the italicized language of par. (b) that no license can be granted unless the applicant has a building available in which he proposes to conduct a rendering business.

Par. (c) makes provision for the issuance of the license and provides:

"On the receipt of the said certified findings and on receipt of an additional payment of twenty-five dollars, the board shall issue a license to the applicant for one license year, commencing July first, but no approved plant shall pay an annual application fee after the first inspection fee. Such license is not transferable either from person to person or from place to place."

Par. (d) provides:

"If the inspector finds that the applicant's building does not comply with the requirements of this section or with the rules of the board, he shall notify the applicant wherein the same fails to so comply. If within a reasonable time to be fixed by the board, but not more than ninety days there-

after, the specified defects are remedied, the board shall make a second inspection and proceed therewith as in the case of an original inspection. Only two inspections need be made under one application."

Subsecs. (c) and (d), above quoted, bear out the view which we have expressed above, as does par. (f), which reads:

"In case of transfer of ownership of rendering plant property and business, the new owner shall make application to the state board of health on forms provided by it for a license, and said application shall be accompanied by a fee of twenty-five dollars, and in such case there shall be no prorating of the license fee."

Reading together the various paragraphs of subsec. (5), quoted above, which are the only license provisions in the law, it is our opinion that a license may be issued only to the operator of a rendering plant and that under sec. 146.12 (11) (a) only such licensee or his employees may engage in the business of transporting carcasses of dead animals. This would eliminate the independent contractor heretofore engaged solely in the transportation end of the rendering business.

Secondly, you inquire whether the state board of health is authorized under this law to issue a license to any individual to operate as a renderer unless he is actually operating a rendering plant. We believe this question is already answered in the negative in our discussion of the first question.

Thirdly, you inquire whether the state board of health may license a renderer who has a plant in an adjacent state, but who collects carcasses in Wisconsin.

We are of the opinion that the Wisconsin law does not contemplate the issuance of licenses covering rendering plants located in other states. So far as sec. 146.12 prescribes qualifications for a renderer's license, they relate to the condition of the premises upon which dead animals are to be rendered and to the personal qualifications of the

licensee. See secs. 146.12 (5), 146.12 (7), and 146.12 (8), Stats. No requirements are imposed with respect to the collection of dead animals and none are imposed with respect to their transportation other than that none but licensees may transport them and other than that the vehicles employed in transporting must carry a card showing the license number of the plant, the delivery point of the plant and the rightful owner of the vehicle. See sec. 146.12 (11), Stats. It thus appears that there is no intention to license the transportation of animals apart from the rendering thereof, and that in fact the transportation of such animals is regarded as purely incidental to rendering them. Consequently since, as we have indicated, such licensing requirements as exist pertain to the regulation of conditions which arise without the territorial jurisdiction of this state, in the case of out-of-state plants, it is quite apparent that it was not the intent of the law to license such out-of-state plants. And, since no one other than a licensee may transport the carcasses of dead animals upon the highways of this state, see sec. 146.12 (11), it is apparent that an out-of-state renderer cannot do so unless he has a plant licensed and located in the state of Wisconsin.

It is, of course, understood that under the provisions of sec. 146.12 (11) (b), Stats., dead animals may not be transported into other states except by reciprocal agreement or by rules of the board.

Lastly you inquire whether the individual who collects animals for processing by means other than rendering and who sells the product to owners of fox, fur or dog farms will be permitted to continue in business under this law.

Sec. 146.12 (3), Stats., provides:

"Any person who receives from any other person the body of any dead animal for the purpose of obtaining the hide, skin, grease, meat, bones, or parts thereof from such animals unless in a finished form commonly known as meat scraps, in any way whatsoever, is deemed to be engaged in the business of disposing and rendering of the bodies of dead animals or parts thereof."

There are certain exemptions to the law under the heading—"Scope and definition" in subsec. (1) of sec. 146.12, which reads as follows:

"A dead animal within the meaning of this section is any dead animal carcass not slaughtered for food or if slaughtered, becomes unsuitable for food. This section shall not apply to the disposal of the bodies of animals slaughtered for human consumption nor to the disposal and transportation of dead animals by a packer of meat products operating under the supervision of the United States department of agriculture. This section shall not apply to fur farms or dog farms or the individual farmer who, as the owner, only collects carcasses for food for his own animals."

It is to be noted that the exemptions set forth in subsec. (1), quoted above, do not extend to the individual who collects animals for processing and resale unless he be a packer of meat products operating under the supervision of the United States department of agriculture. Those who collect carcasses for food for their own animals are exempt, but not those who collect for resale.

However, there is no good reason why such individuals could not continue in business, provided they comply with the rendering license law. They will be confronted in any event with the problem of disposing of the residue of carcasses which cannot be used to any great extent as food on fox, fur or dog farms. This has constituted one of the problems of those engaged in this type of business, since renderers do not want to be bothered to pick up such residue, and, in some instances, have refused to receive it as well as the meat which has spoiled before it could be processed and sold to fur farmers. If such material is not disposed of in a sanitary manner and subject to the provisions furnished by the rendering law, a public nuisance is very likely to result. We therefore conclude that the individual who collects and furnishes dead animals for sale to fur and dog farms is not within the exemptions provided by sec. 146.12 (1), Stats.

WHR

JWR

Taxation — Taxation or Utilities — Under sec. 76.48, Stats., electric cooperative is exempt from paying personal property tax upon its stock of electrical appliances kept for sale to public.

February 26, 1940.

J. HENRY BENNETT,
District Attorney,
Viroqua, Wisconsin.

You state that a certain electric cooperative association has in stock electrical appliances, fixtures, and merchandise for sale to the general public. It claims exemption from personal property tax under subsec. (1) of sec. 76.48, Stats., created by ch. 132, Laws 1939. This subsection provides:

"Every co-operative association organized under chapter 185 that carries on the business of generating, transmitting, distributing or furnishing electric energy to its individual members at wholesale or retail 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."

The question is whether or not this provision exempts an electric cooperative from paying personal property tax upon its stock of electrical appliances.

There are two rules for the construction of statutes exempting property from taxation in this state. One holds such a statute must be construed with the utmost strictness and all doubts in respect to a specified piece of property or owner resolved in favor of the taxability of the property. *Armory Realty Co. v. Olsen*, 210 Wis. 281, 246 N. W. 513 (1933). The second is that if the statute exempting property from general taxation is a part of a general statutory scheme substituting a license fee or other impost in lieu of general taxation, the rule of strict construction has no application, but, on the contrary, such a statute is to be construed liberally in favor of the person required to pay

taxes in the substituted license form. *Merrill R. & L. Co. v. Merrill*, 119 Wis. 249, 96 N. W. 686 (1903).

Section 76.48 provides for a license fee in lieu of general taxes as a general licensing scheme for electric cooperatives. This being true, it calls for the application of the second rule mentioned above, that of liberal construction in favor of the cooperative.

Moreover, the statute here involved specifically provides for exemption from *all* general property taxes. This wording is clear and leaves no room for construction. *Milwaukee Electric R. & L. Co. v. City of Milwaukee*, 95 Wis. 42, 47, 69 N. W. 796 (1897), involved the interpretation of a similar statute which provided for a license fee to be paid by street railway companies in lieu of all other taxes, assessments, and licenses. All personal property, franchises, and real estate owned by such companies were exempted from assessment and taxation. It was held that such exemption extended to *all* property owned by such companies and not merely such as used for railway purposes. The court stated, p. 47:

“* * * This court holds that in all such cases ‘it is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing’. * * * It is true that exemptions of property from taxation are, in general, to be construed strictly; but in the present case there is no language in the act justifying or requiring construction. The terms of the act are so clear as to exclude all occasion for it. If the act is unfair and inequitable, that is a question for the legislature, and the courts have no power to remedy it.”

It is therefore clear that under sec. 76.48 an electric cooperative is exempt from paying personal property tax upon its stock of electrical appliances kept for sale to the public.

WAP

Public Officers — County Pension Commissioner — Soldiers and Sailors Relief Commissioner — Full-time administrator of county pension department may hold office of soldiers and sailors relief commissioner and may receive remuneration for both positions.

February 26, 1940.

GEORGE M. ST. PETER,

District Attorney,

Fond du Lac, Wisconsin.

You state that one of the members of the soldiers and sailors relief commission of your county was subsequently appointed as pension commissioner, we assume under section 49.51, subsec. (2), par. (b), Stats. The position of pension commissioner is a full-time appointment at a regular salary. The members of the soldiers and sailors relief commission have filed with the county their claims for mileage and per diem and you inquire whether it is proper for the county to allow the per diem and expenses of the commission member who is also the county pension commissioner.

The position held by the pension commissioner is not an office but is an employment under a contract made with the county board. See XXVI Op. Atty. Gen. 313. By sec. 49.51 (2) (b) the county board is empowered to "by ordinance provide for a county pension department with such personnel, qualifications, duties and compensation as the county board may determine." If the duties of the pension commissioner appointed pursuant to this statute are performed to the satisfaction of the county board and the time devoted to the position is such as the board requires, there can be no objection to his accepting another office or employment even though he be compensated therefor by the county. If the official duties of the soldiers and sailors relief commission interfere with his duties as pension commissioner, that is a matter for the county board to consider in determining whether his salary as pension commissioner should be reduced. Op. Atty. Gen. for 1908, 862; Op. Atty. Gen. for 1910, 604. In your case, however, the pension

commissioner was already a member of the soldiers and sailors relief commission at the time of his appointment to the former position and presumably this was known to the members of the county board at that time.

The question is also raised whether the two positions are incompatible so that they may not be held by the same person. You do not state in detail the duties required of each position, but a study of the statutory provisions relating thereto does not reveal any incompatibility. On the contrary the duties of the two positions appear to be in harmony.

Incompatibility does not depend upon physical inability to engage in the duties of both positions at the same time. The test of incompatibility is whether the functions of the two positions are inherently inconsistent and repugnant. *State v. Anderson*, 155 Ia. 271, 136 N. W. 128 (1912). The inconsistency which makes the positions incompatible lies in conflict of interest, as where one is subordinate or where one incumbent has power to audit the accounts of the other. XXIII Op. Atty. Gen. 605, XIX Op. Atty. Gen. 609. It is apparent that there is no inherent inconsistency or repugnancy between the office of soldiers and sailors relief commissioner and the position of pension commissioner.

For the foregoing reasons the county board should allow the compensation and expenses of that member of the soldiers and sailors relief commission who is also the full-time pension commissioner.

WAP

Counties — Courts — County Judge — Validity of numerous fee items filed as claims by county judge against county analyzed in light of particular resolution of county board fixing salary of county judge.

February 28, 1940.

J. HENRY BENNETT,

District Attorney.

Viroqua, Wisconsin.

In your letter you inquire as to the validity of certain claims filed against Vernon county by the county judge of said county. You state:

"The county board fixed the salary of the county judge by ordinance which reads as follows:

"BE IT RESOLVED, by the county board of supervisors of Vernon county, that the salary of the county judge for the coming term * * * be and the same hereby is fixed at \$3,000 to cover all charges for his services imposed upon him by law as county judge; no charge to be made against the county for any such service, and any and all fees collected by him for such services shall be paid into the county treasury—this to include his services as an examining magistrate; but shall not include his charges for certified copies nor services while acting as a justice of the peace by authority of special act and performing services which any justice of the peace has authority to perform. Dated this 14th day of November, A. D. 1930.

C. J. Smith, Supervisor.'

"This salary resolution has never been changed.

"It has always been assumed that the salary fixed for the 'term' of six years was really meant to be the salary for *each year* of the term. We concede that the salary for the ensuing term meant the salary *per year* of the ensuing term. We do not want any one to conclude that the salary was really \$500 per year or \$3,000 for the six year term. It was undoubtedly meant to be \$3,000 '*per year*.'

"* * *

"The county judge has filed bills, some of which have been allowed, others disallowed, others held up pending your opinion. It is understood that if you hold any of these claims legal that they will be paid pursuant to your opinion

and that those allowed are tentatively allowed and will be repaid to the county by the county judge if you hold them illegal.

"The county judge has filed bills as follows:

"Hearings in insanity examinations -----\$105.00

"(This claim is based upon a per diem charge of \$5.00 per day. It is in my opinion clearly illegal. This service was covered by the \$3000 salary.)

"Hearing 10 foreclosure actions at \$5.00 per day --\$ 50.00

"(We have a law giving the county court concurrent jurisdiction with the circuit court in foreclosures and divorces. This claim in my opinion is clearly illegal unless the circuit judge should be allowed \$5.00 per case.)

"Hearing 22 divorce actions at \$5.00 per day -----\$110.00

"(This claim is clearly illegal. These were duties imposed by law for which he is paid \$3,000 per year. He can no more charge this per diem than the circuit judge.)

"Preliminary examinations, etc. -----\$446.05

"(This item is not legal as the salary resolution provided specifically that the salary was to cover charges while acting as examining magistrate.)

"'Acting as circuit judge,' in judgments and sentences on requests to plead before county court prior to sitting of circuit court -----

-----\$110.00

"(This item is clearly illegal because the county judge never acts as 'circuit judge' and such services are imposed by law and he is not entitled to any fees. His \$3,000 salary covers this item.)

"Juvenile hearings at \$5.00 per day -----\$ 65.00

"(Clearly illegal in my judgment.)

"Fees for certified copies -----\$432.75

"(This is doubtful. The statute says he shall not be entitled to fees for certified copies but they shall be paid into the treasury. But our ordinance says that the salary of \$3,000 shall not include his services for certified copies. The question here is whether the county board, contrary to the statute, can allow as a part of his salary, the right to retain fees for certified copies. I am of the opinion all these charges are clearly illegal—except possibly his charges for certified copies.

"* * *."

With the exception of the last item, "Fees for certified copies," we agree with all of your conclusions. See XXVIII Op. Atty. Gen. 139 and the recent case which was handed down a couple of weeks ago, *H. P. Axelberg v. Bayfield County*, — Wis. —, 290 N. W. 276.

As to the last item, "Fees for certified copies," we are of the opinion that the judge is entitled to said item under the resolution of the county board. We do not believe that the resolution conflicts with the statute, sec. 253.15. (2). Under said section the county judge clearly would not be entitled to such fees "except in the counties in which it is otherwise expressly provided by law." We think the resolution in question, excepting as it does fees for certified copies from the terms of the resolution providing for salary in lieu of fees, brings such fees within the terms of the exception to sec. 253.15 (2), Stats., "except in the counties in which it is otherwise expressly provided by law."

If the county has power to create such exception then these fees must be within the language of the exception to sec. 253.15 (2), above quoted. There would seem to be no question but that the county did have power to make such an exception. See sec. 253.15 (2), Stats.

NSB

Public Health — Rendering Plants — Ch. 423, Laws 1939, does not authorize town to prohibit construction of rendering plant.

Rules of state board of health regarding trucks employed by renderers do not apply to fur farmers collecting carcasses for food for their own animals.

Licensed renderer may lease trucks and hire drivers to operate them.

Ch. 423, Laws 1939, applies only to carcasses of animals which are not slaughtered for food or which if slaughtered become unsuitable for food.

Fur farmer may (a) cook meat and bones for own animals in open cooker, (b) render tallow in open cooker as incident to conduct of fur farm business, (c) operate hog farm in connection with fur farm. Such operation is exempt from regulatory provisions of sec. 146.12, Stats.

February 28, 1940.

BOARD OF HEALTH.

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

You have asked for our advice on a number of questions arising under ch. 423, Laws 1939, relating to the regulation of rendering plants.

First we are asked whether sec. 66.05 (7), Stats., authorizes a town to prohibit the construction of rendering plants within its limits, in view of the limitations mentioned in the last sentence of subsec. (7), and the final sentence in sec. 146.12 (14).

The portion of sec. 66.05 (7) to which you refer reads:

“* * * The provisions of section 146.12 shall not be construed as any limitation upon the powers granted by this subsection to cities or villages but powers granted to towns by this subsection shall be limited by the provisions of section 146.12 and any orders, rules and regulations promulgated thereunder.”

The last sentence in sec. 146.12 (14) reads:

“* * * The provisions of this section shall be construed as expressly modifying the powers granted to towns.”

It is apparent from the quoted portion of sec. 66.05 (7) that, notwithstanding any language contained in that section to the contrary, sec. 146.12 is intended to constitute a definite limitation upon the powers of towns. The only reference to towns in sec. 146.12 is that quoted above from subsec. (14). The remainder of sec. 146.12 (14) is devoted to provisions to the effect that nothing in that section is to be construed as limiting the regulatory powers of cities or villages respecting rendering, thereby giving rise to the implication that the powers of towns are to be limited in this respect.

We therefore conclude that it was not intended by ch. 423 to authorize towns to prohibit the construction of rendering plants.

Secondly you inquire whether it is the intent of ch. 423 that a fur farmer shall be required to comply with the rules of the state board of health in regard to trucks, and to use a water-tight truck, similar to the type of truck which a licensed renderer must use for the transportation to his fur farm of carcasses to be used for the purpose of feeding the animals on the fur farm.

Sec. 146.12 (1), among other things, provides:

“* * * This section shall not apply to fur farms or dog farms or the individual farmer who, as the owner, only collects carcasses for food for his own animals.”

In view of this provision it is plain that it was not the intent of ch. 423 to subject the fur farmer to such rules regarding his trucks as may be imposed upon licensed renderers.

Thirdly you inquire whether sec. 146.12 permits a licensed renderer who does not have a sufficient number of trucks to properly conduct his business to lease trucks and hire drivers to operate them, or whether the licensed renderer must own all of the trucks used in transporting carcasses to his plant.

Sec. 146.12 (11) (a) provides, in part:

“No person other than a licensee or his employes may haul and transport the carcasses of dead animals that have

died or been accidentally killed, except as otherwise provided by section 95.50. Each wagon, truck, trailer attachment or vehicle employed in the transportation of dead animals or carcasses or parts thereof, must carry a card issued by the board, showing the delivery point of the plant and the renderer's license number or permit number of the plant and card disclosing the rightful owner of the truck or vehicle.
* * *

This statute prohibits any one except the licensee and his employees from transporting the carcasses of dead animals, but it does not prohibit the leasing of trucks. In fact, it is contemplated by that portion of the statute which requires that there be carried a card disclosing the rightful owner of the vehicle. If the renderer were required to own it, this provision would be wholly unnecessary.

Fourthly, you inquire whether it is permissible under ch. 423 for a person who has heretofore been an independent contractor in the business of transporting carcasses to kill animals at a farmer's property, and transport the animal so killed to his slaughter house or place of business, where he prepares food for fur animals.

This question is answered in the affirmative.

Sec. 146.12 (1) defines a dead animal within the meaning of the rendering law as "any dead animal carcass not slaughtered for food or if slaughtered, becomes unsuitable for food." Furthermore, this same definition is implied in the provisions regulating transportation of dead animals contained in that portion of sec. 146.12 (11) (a) hereinbefore quoted. It refers to "the carcasses of dead animals that have died or been accidentally killed." This would exclude by implication the carcasses of animals freshly slaughtered for feeding at fur farms.

Your last question is divided into three subdivisions, and reads:

"(5) Is it permissible under chapter 423 for a fur farmer who collects carcasses for food for his own animals,

(a) To cook meat and bones in an open cooker, preparing such material for food for his own animals?

(b) To render the tallow from such animals in an open cooker, provided he does not sell the tallow, but uses such products for his own use?

(c) To maintain a hog farm in connection with his fur farm, and to feed meat, but not entrails, to his hogs, provided he does not sell any of this meat to other fur farmers?"

As we have pointed out above, it is provided:

"* * * This section shall not apply to fur farms
* * * or the individual farmer who, as the owner, only
collects carcasses for food for his own animals." Sec.
146.12 (1), Stats.

It is perfectly apparent that the question propounded by subdivision (a) must be answered in the affirmative. It is just as apparent that the question propounded by subdivision (b) must be answered in the affirmative. We assume that the rendering referred to is incidental to the conduct of a fur farm. That is, it might involve disposition of dead animals unfit for food or parts of animals unfit for food for the purpose of producing a by-product to be utilized in the farm operation. So far as subdivision (c) is concerned, it may be said that if the hog farm is operating in connection with the fur farm and as incidental to the fur farm business, it would probably come within the exception pertaining to fur farms. It might also be reasonably argued that the operation could come under the exemption granted to the individual farmer who collects carcasses for food for his own animals. That is, to the extent that hog farms are operated in connection with fur farms there would seem to be no reason for treating them any differently than a hog farm having no such connection.

WHR

JWR

Indigent, Insane, etc. — Poor Relief — Minors — Legal Settlement — Subsec. (5), sec. 49.02, Stats., permitting minors to gain legal settlements in their own right in certain cases, applies to illegitimate as well as to legitimate minors.

Subsec. (7), providing how legal settlements may be lost, applies to legal settlements of minors as well as to those of persons of full age. Settlement will not be lost if minor is supported as pauper at any time during year of absence, however, and in cases of young children voluntary character of absence will be serious question of fact.

February 28, 1940.

DEPARTMENT OF PUBLIC WELFARE.

You inquire whether it is possible for an illegitimate minor child to acquire a legal settlement in Wisconsin under the provisions of subsec. (5), sec. 49.02, Stats., which reads as follows:

“Every minor whose parent and every married woman whose husband has no settlement in this state who shall have resided one whole year in any town, village, or city in this state shall thereby gain a settlement therein.”

You suggest the case of an illegitimate minor who has not acquired a derivative settlement in this state at birth because his mother then had no settlement (sec. 49.02 (3)), and raise the question whether such a child could acquire a settlement of his own.

Subsec. (5) contains no language which would indicate that its application is restricted to legitimate children. On the contrary, it applies to “every minor.” Subsecs. (2) and (3) of the same section provide for derivative settlements of legitimate and illegitimate children, respectively, and if the distinction were intended to be preserved in subsec. (5), it would contain apt language for the purpose. It follows that an illegitimate minor will acquire a settlement by one year’s residence in a municipality in this state, provided his

mother does not have or acquire a settlement in the state within that year (See: *Grand Chute v. Milwaukee County*, 230 Wis. 213, 282 N. W. 127 (1939); *La Crosse County v. Vernon County*, — Wis. —, 290 N. W. 279, Feb. 13, 1940), or if his mother is dead (XX Op. Atty. Gen. 1109; XXIV Op. Atty. Gen. 5), and provided that he does not receive pauper support within the year (XX Op. Atty. Gen. 1109). The opinion in XII Op. Atty. Gen. 109 must be modified, so far as it is in conflict with the foregoing, for the writer apparently overlooked the possible application of subsec. (5) to the facts there stated. The present opinion is in harmony with XXVIII Op. Atty. Gen. 469, which deals only with the minor's derivative settlement under subsec. (3).

You also inquire whether, if a minor acquires a settlement of his own, he may lose it in the manner provided by subsec. (7), sec. 49.02, which reads as follows:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

The foregoing subsection plainly applies to "every settlement" and clearly includes those acquired under subsec. (5).

It was said in XX Op. Atty. Gen. 1109 that minor children would lose their settlements by voluntary and uninterrupted absence from the place of settlement for one year, even though supported as paupers during that time. This is in conflict with the decisions in *The Town of Scott v. The Town of Clayton*, 51 Wis. 185, 8 N. W. 171 (1881), which holds that pauper support during such absence will prevent loss of the settlement. To that extent the opinion in XX Op. Atty. Gen. 1109 must be modified.

Moreover, in the case of young children who are taken out of the town of settlement by persons having their cus-

tody, without having any voice in the matter themselves, it will be a serious question of fact whether the absence was "voluntary," where it is claimed that the old settlement was lost without gaining a new one. The voluntary character of the minor's *residence* under subsec. (5) is immaterial, however (See: *Bjornquist v. Boston & A. R. Co.*, 250 Fed. 929, 931-932 (C. C. A. 1st, 1918) ; 19 C. J. 410-414), and a settlement may be *acquired* by involuntary residence, though it cannot be *lost* by involuntary absence unless a new settlement is gained at the same time.

WAP

Counties — Labor — Power of county to bargain collectively with labor unions and to make agreements, oral or written, as to hours, wages, seniority, classification, non-discrimination, etc., discussed and analysed.

February 28, 1940.

EMPLOYMENT RELATIONS BOARD.

In your letter you state:

"The attention of the board has been called to a threatened strike by certain employees of the county highway department of Washburn county.

"The employees in question have organized for the purposes of collective bargaining, and have sought a written contract with the highway committee, covering wages, hours, and working conditions. County officials are doubtful of their authority to enter into such a contract.

"I therefore request that you furnish this board with an opinion as to whether county highway officials are authorized to enter into collective bargaining agreements with labor organizations, covering wages, hours, and working conditions of persons employed upon county highway projects or maintenance work."

We have previously had occasion to determine the question as to whether county employees may join labor unions. We ruled in XXVII Op. Atty. Gen. 254 that they could. We ruled in XXVII Op. Atty. Gen. 30 that the county highway committee might bargain with employees as a group and by such means reach agreement as to hours, wages, seniority, classifications, non-discrimination, etc., but that neither the county highway committee nor the county board could make a contract stipulating that all employees must be members of a particular organization. In the last cited opinion we did not have occasion nor did we examine into the question as to what form any such agreement either with the county board or the county highway committee must take. We assumed that any such agreement would be entered into subject to fundamental concepts in relation to powers of counties or municipalities to contract for employment. It is fundamental that counties are units of government of legislative creation and have only such powers as are specifically conferred by statute or necessarily implied. Neither the county board nor the county highway committee has any power to contract away its duty to act in the public interest. Such bodies must be free at any time to act in the public interest. They cannot by contract tie their hands so that they are not free to exercise their discretion at any particular time as to what is and what is not in the public interest.

In the absence of specific legislation authorizing same, neither the county board nor a county committee has any right to hire for a definite term or at a fixed wage for a definite period of time. County employment must be upon a basis of need and in the public interest as that public interest appears at any particular time. Agreements as to wages must be subject to revision at any time that the public interest dictates revision. Hours of work, terms of employment, seniority, classifications, non-discriminations, and all such, must be subject to the same limitation. Any agreement reached as a result of collective bargaining must be subject to the above named limitation with respect to lack of power of the county board or any committee of the county to enter into an agreement which is not subject to change or alteration at any time that the public interest dic-

tates change or alteration. The county must be free to employ whomsoever it chooses, whensoever it chooses, and howsoever it chooses, and must likewise be free to discharge whomsoever it chooses, whensoever it chooses and without cause. It must be free to hire at will and discharge at will.

Agreements may be reached as a result of collective bargaining but they must be reached subject to the foregoing limitations. When the foregoing limitations are realistically applied to such collective bargaining, it simply means that the county board or the county committee for the time being agrees to such and such as a sort of memorandum covering the subject matter of the collective bargaining, such agreements being subject to change at any time that the county or the committee acting for it deems it in the public interest to make such change.

In the memorandum submitted it is suggested that the committee is willing to recognize a particular union as the bargaining agency in the agreement to be reached. We think the committee has no power to recognize any agent as an exclusive bargaining agent. Furthermore, any agreement reached must treat all county employees similarly situated alike. The county would be without power to expend public moneys for the benefit of the members of a particular labor organization. All public employees similarly situated and with like capacity for work must be treated alike. Distinction with respect to wages, hours of work, discriminations, seniority, classification, etc., must affect all public employees alike and must be based upon something more substantial than membership in a union.

The county is under no duty to bargain collectively with any group or union. The county may do so and if agreements are reached, those agreements must be subject to alteration or change if and when the public interest dictates alteration or change. The county, as an employer, is not subject to the employment peace act, ch. 111, Stats. 1939. See sec. 111.02 (2), Stats.

NSB

Elections — Citizenship — Person who has been resident of state for past year and of election district for ten days is entitled to vote, notwithstanding fact that he became citizen of United States within past year.

February 28, 1940.

CONNOR HANSON,

District Attorney.

Eau Claire, Wisconsin.

You state that a number of persons, naturalized within the past year, have applied to be registered as voters, many of whom have resided in Eau Claire for most of their life, and that the registration officials have declined to register them on the ground that they have not resided in the state *as citizens* for a period of one year or more. You inquire whether there is any provision in the constitution or the statutes requiring an elector to have been a citizen of the United States for at least one year.

Article III, section 1 of the Wisconsin constitution provides in part as follows:

“Every person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election:

“(1) Citizens of the United States.

“* * *”

Sec. 6.01, subsec. (1) of the statutes provides as follows:

“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.”

It is clear that the constitutional provision contemplates only that the elector must be a citizen at the time that he

offers to vote and not for the period of one year prior thereto. The year's residence may have been partly fulfilled prior to naturalization. Aliens may, of course, acquire a residence in this country regardless of whether they are citizens. In fact, the naturalization laws require that aliens applying for citizenship have been residents of the United States for five years immediately preceding the date of the petition. 8 USCA (Supp.) section 382.

While section 6.01 (1) is not as clear on this subject as the constitutional provision, the latter is controlling since the legislature may not impose additional qualifications beyond those set forth in the constitution. *The State of Wisconsin ex rel. v. Williams*, 5 Wis. 308, 317, (1856).

However, the legislature has indicated its own construction of section 6.01 (1) in section 6.50, which provides what questions shall be put to a person offering to vote whose qualification has been challenged. Subsec. (1) thereof provides as follows:

"If a person be challenged as unqualified on the ground that he is not a citizen: Are you a citizen of the United States?"

It will be observed that the question is not "Have you been a citizen of the United States for the past year?" If the prospective voter is a citizen at the time he offers to vote, that is all that is required.

You are advised, therefore, that such persons as have been residents of the state for the past year and of the election district for ten days are entitled to vote, notwithstanding the fact that they became citizens of the United States within the past year.

WAP

Minors — School Districts — Tuition — Child placed in home by state department of public welfare after having been committed to state public school at Sparta has residence for school purposes in municipality in school district in which such home is located and is entitled to attend school of such district tuition free. Prior opinions on same subject, XXII Op. Atty. Gen. 149 and XXV Op. Atty. Gen. 410, adhered to.

February 28, 1940.

FRANK C. KLODE, *Director,*
Department of Public Welfare.

In your letter you state that since the establishment of the state public school for dependent and neglected children at Sparta there have been thousands of children placed in various communities throughout the state of Wisconsin in accordance with the law establishing the state public school. These children have been placed in various homes throughout the state so that the children may live a normal life in home surroundings rather than being reared in an institution. Children so placed attend the public schools in the community where the families with which they are placed reside. You are experiencing difficulty at several points in the state in that the school authorities take the position that such children are not entitled to the school facilities of the district in which the families reside tuition free. You wish to be advised as to whether children so placed and residing with families are entitled to attend the public schools in the school districts in which the families with whom the children are placed reside.

The problem is not a new one. It has been specifically passed upon in several prior opinions of this office. See XXII Op. Atty. Gen. 149 and XXV Op. Atty. Gen. 410, in which opinions it was held that a child so placed has a residence for school purposes in the district in which the home of the family with whom the child is placed is located and that the child is, accordingly, entitled to attend the district school of said district tuition free.

The opinions cited are essentially sound. There is no doubt that a child may have a 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 that to participate in the advantages which the school affords." *The State ex rel. School Dist. etc. v. Thayer*, 74 Wis. 48, 59, 41 N. W. 1014; *State ex rel. Smith v. Board of Education of City of Eau Claire*, 96 Wis. 95, 71 N. W. 123.

There would appear to be no close question as to the main purpose of placing the children sentenced to this school in suitable homes throughout the state. The main purpose is that of finding a home for such children where they will be reared under the advantages of home life as against the disadvantages of life in an institution. Such being true, there can be no serious doubt that a child so placed has a residence for school purposes with the family with which the child is placed. Such has been the uniform holding of this department throughout the years. There would seem to be little excuse for the question arising at this time. We know of no changes in the law that can in any wise affect the soundness of the prior opinions in relation to this problem. The prior opinions impress us as fundamentally sound in analysis. They are adhered to.

NSB

*Abandonment — Marriage — Divorce — Mothers' Pen-
sions* — Sec. 247.095 Stats., which creates civil remedy for
nonsupport, differs from sec. 351.30, which creates criminal
offense of abandonment, in that under latter wife or chil-
dren must be in "destitute or necessitous circumstances,"
which is not true of former.

Defendant in action under sec. 247.095, Stats., is not
"legally charged with abandonment" in meaning of sec.
48.33, subsec. (5), par. (d), since term "charged with
crime" applies only to criminal proceedings, not to civil ac-
tions based upon acts which also constitute violations of
criminal statutes.

February 28, 1940.

FRANK C. KLODE, *Director,*
Department of Public Welfare.

You inquire whether a complaint by a wife under sec.
247.095, Stats., created by ch. 211, Laws 1939, is a sufficient
charge of abandonment under sec. 48.33 (5), relating to aid
to dependent children, which provides in part as follows:

"Such aid shall be granted only upon the following con-
ditions:

"* * *

"(d) Aid shall be granted to * * * the wife of a
husband who has continuously deserted her for one or more
years, if the husband has been *legally charged with aban-
donment* for a period of one year * * *."

By sec. 351.30, wilful neglect or refusal to support a wife
or child under sixteen *in destitute or necessitous circum-
stances*, without just cause, is made a crime. Although the
word "abandonment" is not used in this section, it is clear
that sec. 48.35 (5) (d) refers to the offense thereby created.

Sec. 247.095 creates a *civil* remedy whereby a wife
"whose husband fails or refuses, without lawful or reason-
able excuse, to provide for the support and maintenance of
his wife or minor children" may compel such support. While
the civil right thus created is very similar to the criminal

offense provided by sec. 351.30, the latter contains the additional requirement that the wife or child must be in "desperate or necessitous circumstances." Thus sec. 247.095 is available to wives who have independent means but sec. 351.30 is not, and therefore an action under the former would not necessarily allege a violation of the latter.

But even if the civil and criminal statutes applied to identical fact situations the commencement of an action under the former would nevertheless be insufficient to comply with the terms of sec. 48.33 (5) (d). The term "charged with crime" has been given various constructions with reference to what stage a criminal proceeding must reach before the accused is regarded as "charged", but all the authorities are agreed that the term applies exclusively to criminal proceedings. None of the leading law dictionaries, and no court so far as we are able to discover, has ever suggested that the expression applies to a civil action for damages based upon an act which also constitutes a violation of a criminal statute. 11 C. J. 293-295.

Moreover, the same reasoning relied upon in XXVI Op. Atty. Gen. 490, where this department ruled that sec. 48.33 (5) (d) required the issuance of a warrant and not merely the swearing out of a complaint, applies here as well. If a criminal complaint may be without merit, a civil action may likewise be without foundation. In requiring that the husband be legally charged with abandonment the legislature provided a check against fraud. To permit the substitution of a civil action, which might be collusive or at any rate groundless, would defeat the legislative intent and open the door to the very thing sought to be avoided.

You suggest that a liberal construction of ch. 48, Stats., may compel a contrary ruling. It is true that the statute should be liberally construed, but even a "liberal" construction must be found within the four corners of the act. Liberality does not require the distortion of language to a strained and unnatural meaning. In this case, the statute is so clear that there is no room for construction, liberal or otherwise.

WAP

Fish and Game — Hunting Licenses — Public Officers —
County clerk on salary basis who receives salary in lieu of all other fees and compensation pursuant to provisions of sec. 59.15, subsec. (1), Stats., is not entitled to retain ten cent fee for issuing hunting licenses under sec. 29.09 (7), Stats.

February 29, 1940.

NORRIS E. MALONEY,
District Attorney.
Madison, Wisconsin.

In your letter you state:

"I have been requested by the judiciary committee of the Dane county board to seek your advice as to whether or not the county clerk for Dane county is entitled to retain for his own use and benefit fees earned by virtue of Wisconsin statutes 29.09 (7).

"On March 27, 1936, there was adopted by the Dane county board of supervisors a salary schedule for public officials to be elected in the election of 1936, such salary schedule to become effective as of January 1, 1937. The provision in said salary schedule relative to the county clerk was as follows: 'County clerk, the sum of two thousand dollars per annum, excluding fees of office.'

"In May of 1938 there was referred to the finance committee of the Dane county board the following resolution:

"Resolved, by the Dane county board of supervisors that from and after the first Monday of January, 1939, the compensation for all county offices, with the exception of the county surveyor and the county coroner, be solely on a salary basis, and that all fees appurtenant to each office shall be collected and paid over to the Dane county treasurer.'

"The finance committee did not report for recommendation this identical resolution, but instead thereof did make a report on the matter of setting a salary schedule for elective officers, which such report was adopted May 11, 1936, and read as follows:

"Your finance committee, to whom was referred the matter of setting a schedule of salaries for elective officers, begs leave to submit the following schedule:

District attorney -----	\$4,000
County treasurer -----	2,800
Clerk of court -----	2,100
County clerk -----	3,000
Register of deeds -----	2,000
Superintendent of schools -----	2,000

"Your committee further recommends that salaries so fixed shall be in lieu of all fees, per diem, for all services rendered by said officer except the additions provided in paragraphs (c) and (d) of subsection (1) of section 59.15 of the Wisconsin statutes of 1937."

"From the foregoing it would appear that the county board attempted to act under Wisconsin statutes 59.15 which reads as follows:

"(1) 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: . . ."

"Prior to the adoption of this resolution, the county board had by ordinance adopted civil service for the sheriff's department and provided for the maintaining of prisoners at county expense. Dane county is less than 300,000 in population, and, therefore, paragraphs (a) and (b) apparently were omitted from the resolution for that reason.

"Subsection (7) of 59.15 of the statutes reads as follows:

"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."

"It should be stated that hunting and fishing licenses have, since January 1, 1939, been issued in two ways: First, at the county clerk's office by the county clerk, as well as the employees of that office paid by the county, and secondly, at various depots established throughout the county by the county clerk, such as hardware stores and sporting goods houses, through agents specially deputized by the county clerk for the one purpose of issuing such hunting and fishing licenses. Some expense was borne by the county clerk personally in the establishment of these depots, such as traveling expenses to and from those depots in delivering hunting and fishing licenses. The specially deputized agents in the outlying depots were not recompensed for their services in any way.

"In Dane county the fees from hunting and fishing licenses have for several years averaged \$1800 annually."

You cite us to the cases of *Barron County v. Beckwith*, 142 Wis. 519, *Burgess v. Dane County*, 148 Wis. 427, and *Gregory v. Milwaukee County*, 186 Wis. 235. You cite us to the *obiter dictum* contained in the latter case, in which the court stated as follows, p. 239:

"* * * 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, such as the ten-cent fee allowed the county clerk for the issuance of every hunting license. Sub. (7), sec. 29.09, Stats."

In view of the issues involved in *Gregory v. Milwaukee County*, and particularly the manner in which any question of the right of a county clerk to retain the ten cent fee for issuing hunting licenses was presented to the court, it seems quite apparent that the *obiter dictum* cannot be taken too seriously. No question of right of a county clerk to retain the ten cent fee for issuance of a hunting license was involved in the case. The case involved only the right of the assistants to the county clerk to recover notarial fees for the years 1913, 1914, 1915 and 1916, which fees had been paid into the county treasury. The court held that such fees belonged to the county.

In presenting the case to the supreme court, Milwaukee county, in the brief submitted in its behalf, stated with reference to the claim of protest payment, which was in the following language, p. 10:

" 'Hunting license fees and other fees not provided for in the statutes, turned over to the County Treasurer, paid under protest' (C. p. 64)"

as follows:

"It is not claimed that the foregoing statement had any reference to notarial fees. It referred to a ten cent hunting license fee, concerning which there had been a dispute and

which was settled by chapter 172, laws of 1913, *enacted May 13, 1913*, and which give the County Clerk the right to retain such fee. (C. pp. 19, 22-23.) * * *

At a later point in the brief, in citing the court to the statutes involved, sec. 1498s, statutes of 1913, was set forth in full and was prefaced by language as follows, p. 19:

* * * Section 1498s (Stats. 1913; Section 62.12, Stats. 1915). * * *

It was assumed in briefing the case that the question of the right of a county clerk to retain the ten cent fee for issuing a license was put at rest by chapter 172, Laws 1913.

Chapter 172, Laws 1913, amended subsec. 3 of sec. 1498s of the statutes of 1911 so as to read as follows:

"The county clerk shall receive with each such application for license the sum of one dollar, ten cents of which he shall retain *as his personal fee and as compensation for services rendered the state*, and the remainder he shall transmit to the state treasurer. *The retention by any county clerk of any such ten-cent fee heretofore paid to such clerk is hereby legalized and authorized.*" (The italics above indicate the 1913 amendment to said subsection.)

You will note the use of the language "personal fee" in the 1913 amendment.

This section was changed in 1915 (ch. 594, Laws 1915), so as to read as follows:

"Of the fees paid for such licenses the county clerk may retain ten per cent as compensation for his services to the state; the remainder he shall return to the state conservation commission on the first day of each month, with a report of the number of licenses issued by him during the preceding month and the amount of money thus remitted. All such moneys received by the commission shall be paid into the state treasury. All unused license blanks shall be returned by the county clerks to the state conservation commission at the close of the year for which they were supplied." (Sec. 62.11 (7), Stats. 1915.)

You will note in the 1915 amendment the dropping of the language of "personal fee". You will further note that the case was presented by Milwaukee county as if the 1915 statutes read similar to the 1913 statutes. You will further note that sec. 62.11 (7), Stats. 1915 (in so far as material to any question that you submit), is identical in language with the present sec. 29.09 (7), Stats.

You will further note that the following language, "The retention by any county clerk of any such ten-cent fee heretofore paid to such clerk is hereby legalized and authorized," in the 1913 amendment, was dropped in the 1915 amendment. Both omissions in the 1915 amendment impress us as highly significant upon the problem which you present. Sec. 59.15 (1), Stats., provides that the salary "shall be in lieu of all fees, per diem and *compensation for services rendered*, * *." When the 1915 amendment dropped the language "personal fees" and the only language retained was that now found in 29.09 (7), "as compensation for his services to the state", it would seem that the change in 1915 must have been for the specific purpose of bringing the language of sec. 29.09 (7) within the language and provisions of sec. 59.15 (1), "and compensation for services rendered".

Since the 1915 amendment, we can see no valid reason for individuating the ten cent hunting license fee as a "compensation for services" from any other "compensation for services" within the meaning and language of sec. 59.15 (1), Stats.

We conclude that the county clerk of Dane county is not entitled to retain the ten cent fee for issuing hunting licenses in addition to his salary.

NSB

School Districts — Common school district does not have legal authority to establish junior college.

March 1, 1940.

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

In your letter of January 25 you state that a certain village in the state which has been running as a common school district is considering the question of starting a junior college, that is, a college which would offer the freshman and sophomore work which is done in the university and other colleges. The question with respect to which you desire our opinion is whether or not a common school district in the state of Wisconsin has the legal authority to establish a junior college.

It has been established as a general rule in this state that school districts are merely *quasi*-public corporations and as such have only the powers given to them by statute and such implied powers as are necessary to execute the powers expressly given to them. *State ex rel. Von Straten v. Milquet*, 180 Wis. 109, 192 N. W. 392; *Iverson v. Union Free High School Dist.*, 186 Wis. 342, 202 N. W. 788. School districts are agents of the state for the sole purpose of administering the state's system of public education and have only such powers as are conferred expressly or by necessary implication by the legislature.

Chapter 40 of the statutes sets forth in detail the establishment, control, and duties of school districts. It is noted, for example, that sec. 40.04 states specifically the powers of the district meeting; sec. 40.16 makes provision for the school board and its powers; sec. 40.30 sets forth the procedure for the establishment or dissolution of common school districts; and this chapter 40 contains various sections providing for local and state support of the schools. A specific system for public education is set up and provided for in order to carry out the mandate of article X entitled "Education", of the Wisconsin constitution. No specific provision is made for a junior college nor is there room for

implication within the powers of the district meeting or school board. From this definite system of grade and high schools there can be no deviation except by legislative act.

This view is further substantiated by sec. 40.62, which makes specific provision for the establishment and abolition of high schools in common school districts. It will be noted that a certain valuation for the district must be shown before establishing a high school doubtlessly dictated by the experience and knowledge that a modern high school with proper standards of instruction and equipment cannot be adequately maintained by a district having less valuation than that prescribed. XXIII Op. Atty. Gen. 393, 394. This section of the statutes shows, again, that the legislature has made provisions for the conditions under which a certain school can be established, the types of schools to be established, and their regulation.

When one considers these various provisions of ch. 40 of the statutes along with provisions for the state university and normal schools in chapters 36 and 37 respectively—specifically providing for schools for learning above the high school grades—it seems quite clear that the legislative will in providing for a public educational system has been enunciated. Any changes in such a system must come through that body.

Thus, the answer to your question is that a common school district in the state of Wisconsin has not the legal authority to establish a junior college.

NSB

Charitable and Penal Institutions — Department of Public Welfare — Public Health — Orthopedic Hospital — Collection from relatives on cases at Wisconsin orthopedic hospital is governed by sec. 142.08, subsec. (1m), Stats., as created by ch. 232, Laws 1939, rather than by sec. 46.10 (7) as amended by ch. 65, Laws 1939, and state department of public welfare is not authorized to make collection under sec. 142.08 (1m).

Since amendment of sec. 142.08 (1) by ch. 232, Laws 1939, county boards are no longer authorized to make collections on cases at Wisconsin orthopedic hospital.

March 1, 1940.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, *Executive Secretary*.

We are asked whether your department has authority to make collections on cases at the Wisconsin orthopedic hospital under sec. 46.10, subsec. (7), Stats., since the publication of ch. 232, Laws 1939, and, if so, whether such authority applies to cases hospitalized subsequent to July 15, 1939, as well as to those hospitalized prior to that date.

Sec. 46.10 (7), as amended by ch. 65, Laws 1939, reads:

“The actual per capital cost, as defined by rule of the state board of control, of maintenance furnished an inmate of any state institution, or any county institution in which the state is chargeable with all or a part of the inmate’s maintenance, except as to tuberculosis patients provided for in chapter 50 and subsection (2) of section 58.06, may be recovered by the state board of control, or in counties having a population of five hundred thousand or more by the county, from such person, or from his estate, or may be recovered from the husband or wife, father, children or mother of such person. In any such action or proceedings the statutes of limitation shall not be pleaded in defense. In all claims of the state board of control or of any such county upon such relatives for support of an inmate or upon moneys or property held by said inmate or held by some one in his behalf, the state board of control or any such county shall be deemed a preferred creditor. The sworn statement of the collection and deportation counsel of the state board of

control, or the superintendent of such institution, for the purpose of showing the names, time in the institution, and the actual per capita cost of maintenance furnished, shall be prima facie evidence of such facts. The state board of control shall make adjustment with the several counties, for their proper share of all moneys recovered, in the settlement with the counties provided in subsections (2) and (3) of this section."

The above statute standing alone would be broad enough to authorize the state board of control or such other department or agency as succeeds it to collect from relatives on cases at the Wisconsin orthopedic hospital, since such hospital comes within the category of "any state institution" mentioned in the statute, and is not within the exception as to tuberculosis patients.

However, ch. 232, Laws 1939, created sec. 142.08 (1m), to which you also call our attention. This section reads:

"One-half of the net cost of caring for a patient certified to the Wisconsin orthopedic hospital for children shall be paid by the state and one-half by the county of his legal settlement. At the time that the application for admittance of a patient to the Wisconsin orthopedic hospital for children is submitted to the bureau for handicapped children, the county court shall include a statement regarding the financial status of the parents or guardian and an agreement signed by the parents or guardian as to the amount of money which the parents or guardian will contribute toward the child's care in the hospital. All money so collected by the county court or the Wisconsin orthopedic hospital for children from parents or guardians shall be transmitted to the bureau for handicapped children of the state department of public instruction, to be deposited in the general fund. One-half of the amount received for each patient admitted through certification of the county court for care at the Wisconsin orthopedic hospital for children, shall be credited to the county on the account of each such patient. Financial arrangements for hospital care of children admitted through county court procedure shall be made with parents or guardians of such children only by the county court, or by an agent designated by it, or by the bureau for handicapped children of the state department of public instruction, with the knowledge of the county court."

This being a later statute than ch. 65, and relating specifically to the Wisconsin orthopedic hospital, it would be

controlling rather than any general provisions to the contrary in ch. 65, the earlier statute.

The wording of sec. 142.08 (1m), as far as collection from relatives is concerned, implies that the collections are to be made by the county court or the hospital itself, as is apparent from the following language:

"All money so collected by the county court or the Wisconsin orthopedic hospital for children from parents or guardians shall be transmitted to the bureau for handicapped children of the state department of public instruction, to be deposited in the general fund."

Furthermore, there may well be a difference in computation of rates which would lead to confusion were your department to make collections under sec. 46.10 (7). That statute authorizes collection of actual per capita costs as defined by rule of the state board of control, whereas rates at the Wisconsin orthopedic hospital are fixed by sec. 142.07 (1m) (a) at actual cost as determined by the board of regents of the university, but not in excess of \$4.20 per day. The fact that authority for collection under sec. 46.10 (7) is limited to rates determined by one agency, whereas the rates for orthopedic cases are determined by a different agency, indicates that the legislature did not intend that collection for orthopedic cases should be made under sec. 46.10 (7).

Secondly you inquire whether the authority given the county board under sec. 142.08 (1) still applies even though it may involve a recovery from a case hospitalized at the Wisconsin orthopedic hospital.

This question is answered in the negative.

By ch. 232, Laws 1939, sec. 142.08 (1) was amended so as to specifically delete any reference to the Wisconsin orthopedic hospital for children, which institution was included in the former wording of the statute. As it now stands, its scope is limited solely to the Wisconsin general hospital. Consequently, that portion of sec. 142.08 (1), which authorizes the county board to collect on cases under sec. 142.08 (1) no longer covers cases at the Wisconsin orthopedic hospital.

WHR

Corporations — Motor Vehicle Transportation — Assignability of Licenses — Public Officers — Public Service Commission — Assuming sec. 196.39, Stats., to be applicable to ch. 194 (motor transportation chapter), said section is nevertheless inapplicable to order of commission entered under sec. 194.25, subsec. (2), Stats., with respect to which commission has single determinative function and with respect to which parties have fully executed contracts made pursuant to prior determination of commission.

March 1, 1940.

PUBLIC SERVICE COMMISSION.

In your letter you state:

“Pursuant to section 194.25 (2) statutes this commission, without notice and without public hearing but upon a finding, after due investigation that same was not against the public interest, approved the assignment of a contract motor carrier license from carrier ‘A’ to carrier ‘B’, and pursuant to its administrative practice, canceled the license held by carrier ‘A’ and issued an amendment to carrier ‘B’'s already existing license including therein the authority which was previously contained in the license of carrier ‘A’. There was no publication of the commission's order approving the assignment but said order was of record in the files of the commission and available to any number of the public.

“No application for rehearing was made within 20 days of the issuance of said order which is a condition precedent to an appeal from an order of this commission under the provisions of section 196.405 statutes. That section is specifically made applicable to orders issued under chapter 194 by the terms of section 194.13 statutes.

“At a date considerably beyond said 20 day period, a petition for reopening was filed by certain carriers who are engaged in competition with carrier ‘B’. The commission reopened the proceeding on the theory that it had power to do so because of the language of section 194.14 statutes, which appears to bring into the administration of chapter 194 all procedure authorized in chapter 195 and 196 statutes, and would therefore appear to include section 196.39 statutes, which provides for the reopening of proceedings before this commission.

"At the time fixed for hearing on reopening carrier 'B' appeared specially, moved to dismiss, and challenged the jurisdiction of the commission to reopen the proceeding on the ground that the order approving the assignment became final at the time the 20 days for application for rehearing under section 196.405 statutes expired and that the commission was thereafter without jurisdiction to modify or change the same except in a proper proceeding under section 194.46 statutes.

"The commission desires your opinion as to whether under the circumstances above set forth section 196.39 statutes is applicable or whether said order became final 20 days after its issuance since there was no application for rehearing made. For your information copies of briefs submitted by the parties on this jurisdictional point are attached."

Sec. 194.14, Stats. 1937, provides as follows:

"In exercising the powers conferred by this chapter or by section 76.54, the commission shall be guided as to the procedure by the provisions of chapters 195 and 196 in so far as the same are applicable and not inconsistent with the specific requirements of this chapter or of section 76.54."

For purposes of this opinion we shall assume that the section above quoted makes section 196.39 applicable to proceedings under chapter 194 (motor transportation chapter). Sec. 196.39 provides as follows:

"The commission may at any time, on its own motion or upon motion of an interested party, and upon notice to the public utility and after opportunity to be heard, rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order therein, for the taking of further evidence or for any other reason. Any order rescinding, altering, amending or reopening a prior order shall have the same effect as an original order."

At first blush it would seem that the language of the above quoted section "or any other order made by the commission" is sufficiently broad in terminology to include the order in question and, thus, to authorize a reopening of the

particular order in question. We are satisfied, however, that such clause or language upon further analysis does not authorize a reopening of an order such as the one in question. As is pointed out in the brief submitted on behalf of carrier "B", this clause "or any other order made by the commission" must be subject to some limitation. It is argued in said brief that in construing this language, the rule of *ejusdem generis* applies and that this generalization must be applied to the inclusion only of orders of the same nature as those specifically enumerated. We agree with this conclusion. *State ex rel. Dinneen v. Larson*, 231 Wis. 207. The orders specifically enumerated are all orders which relate to orders of a continuing function of the commission as distinct from orders which relate to a single determinative function of the commission which, when acted upon by the parties, become fully executed and beyond the power of recall by the commission. Thus, in the instant case the commission's function under section 194.25 (2), Stats., upon the original application for assignment was to determine whether such assignment was "not against the public interest". Having made such determination and the parties having acted upon it, it would seem that the status of the parties is fixed beyond any power of the commission to recall, alter or amend. It would seem that this would be true quite regardless of procedural defects (if any) in the entry of the original order. The order was entered, the parties have acted upon it and that would seem to be the end of the commission's function with respect to an order of such nature. There is no order that the commission might make now on reopening which could restore the *status quo* of the parties and if the commission were inclined to reopen and after hearing determine that the *status quo* should be established, it is not perceivable wherein the commission would have power under this section of the statutes to make an order which would operate retrospectively and with respect to contracts completely executed under the prior order.

In support of the foregoing interpretation, counsel for carrier "B" cite a supposed case in which a public utility seeks under the provisions of section 196.49 an order of the commission to construct a new plant. The commission makes the order and determination authorizing such con-

struction and operation. The utility proceeds to and does construct the new plant, spending many thousands of dollars in reliance on the order of the commission. Could it be contended under such circumstances that section 196.39 is applicable, that the order in question is "or any other order made by the commission" within the language of the statute, and, therefore, the commission has authority at any subsequent time in the future to reopen, alter and amend the prior order? A mere statement of the case, it seems to us, shows the unsoundness of any such intention. There obviously is some limitation to the language "or any other order made by the commission" as used in section 196.39. It would seem that the only logical interpretation of said language of said section is that of the application of the *ejusdem generis* rule. That rule necessitates limiting the commission's power under the language "or any other order made by the commission" to that of orders such as those specifically named and which are all orders in relation to which the commission has a continuing function. The order in question is not of that nature. The commission's function has been completely exercised and the rights of the parties acting thereunder have become fixed beyond the commission's power to alter or modify. The contract rights entered into in reliance upon the commission's order have passed the executory stage and are completely executed.

It is our opinion that the language of section 196.39 "or any other order made by the commission" is not sufficiently broad when applied in the light of the *ejusdem generis* rule to permit the commission to alter or modify executed contract rights acquired under a prior order of the commission and with respect to which the commission has only a single determinative function as distinct from a continuing function.

We enclose herewith the briefs which you submitted for our consideration.

NSB

Corporations — Land Mortgage Associations — Trade Regulation — Real Estate Brokers — Company which is not bank, trust company, building and loan association, land mortgage or farm loan association organized under Wisconsin or federal law and which is formed for purpose of loaning its own money, to be secured by mortgage, is real estate broker under sec. 136.01, Wis. Stats.

"Land mortgage or farm loan association organized under the laws of this state", referred to in sec. 136.01, subsec. (3), par. (c), refers to "land mortgage association" organized under ch. 225, Wis. Stats.

March 1, 1940.

REAL ESTATE BROKERS' BOARD.

You inquire: "whether a company organized for the purpose of loaning money to be secured by a mortgage comes within the definition of a real estate broker where such company loans its own money and does not act as an agent on behalf of either the borrower or the lender."

Sec. 136.01, subsecs. (2) and (3), Wisconsin Stats. 1931, provided as follows:

"(2) 'Real estate broker' means any person, firm or corporation, not excluded by subsection (3) of this section, who, for another, and for commission money or other thing of value:

"(a) Sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate; or,

"(b) Collects, or offers or attempts to collect, rent for real estate; or,

"(c) Negotiates, or offers or attempts to negotiate a loan, secured, or to be secured, by mortgage or other transfer of or incumbrance on real estate.

"(3) The term 'real estate broker' does not include:

"(a) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under the judgment or order of any court; or,

"(b) Public officers while performing their official duties; or,

"(c) Any bank, trust company, building and loan association, or any land mortgage or farm loan association or-

ganized under the laws of this state or of the United States, when engaged in the transaction of business within the scope of its corporate powers as provided by law; or,

"(d) Employes of persons, companies or associations enumerated in paragraphs (a), (b) and (c) of this subsection, when engaged in the specific performance of their duties as such employes."

By ch. 184, Laws 1933, section 136.01, subsec. (2) was changed so that it now reads as follows:

"(2) 'Real estate broker' means any person, firm or corporation, not excluded by subsection (3) of this section, who:

"(a) For another, and for commission money, or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate; or,

"(b) Who is engaged wholly or in part in the business of selling real estate, whether or not such real estate is owned by such person, firm or corporation.

"(c) Negotiates, or offers or attempts to negotiate a loan, secured, or to be secured, by mortgage or other transfer of or incumbrance on real estate."

It will be observed that under section 136.01, subsec. (2), of the statutes of 1931, a real estate broker included only those persons, firms and corporations not specified in subsec. (3) of section 136.01 who, or which, *as an agent*, and for commission money or some other thing of value, performed any of the acts enumerated in paragraphs (a), (b) and (c) of said subsection (2).

By chapter 184, Laws 1933, the words "for another" were transposed so that instead of modifying the activities referred to in paragraphs (a), (b) and (c) of section 136.01, subsec. (2), they now modify only the activities described in paragraph (a) of said subsection. Also, the words "for commission or other thing of value," which imply an agency relationship, were omitted. Consequently, a "real estate broker" now means "any person, firm or corporation, not excluded by subsection (3) * * * who:
* * * (c) Negotiates, or offers or attempts to negotiate a loan, secured, or to be secured, by mortgage or other transfer of or incumbrance on real estate." "Negotiate"

means, among other things, to conclude by bargain, treaty or agreement. *Aurora State Bank v. Hayes-Eames Elevator Company*, 88 Nebr. 187, 129 N. W. 279; *Inhabitants of Palmer v. Ferry*, 72 Mass. 420. The word refers to those things which pass between parties, as well as between their agents, in the course of, or incident to the making of a contract. *Werner v. Hendricks*, 121 Pa. Super. 46, 182 A. 748.

A company which loaned its own money and accepted a mortgage on real estate as security would have negotiated a loan and, clearly, would be included in the definition of "real estate broker" found in section 136.01, subsec. (2), par. (c), unless excepted therefrom under section 136.01, subsec. (3), which excludes:

"Any bank, trust company, building and loan association, or any land mortgage or farm loan association organized under the laws of this state or of the United States, when engaged in the transaction of business within the scope of its corporate powers as provided by law; * * *.

While chapter 136 does not contain any definition of "land mortgage or farm loan association organized under the laws of this state", it is our opinion that these words refer to the associations described in chapter 225, Wisconsin statutes, entitled—"land mortgage associations." Under chapter 225, a "land mortgage association" means a corporation organized as provided in said chapter, "for the purpose of making loans upon improved or partially improved agricultural lands" in Wisconsin. Consequently, if the company to which you refer is not organized under the provisions of chapter 225, Wisconsin statutes, or under the laws of the United States as a land mortgage or farm loan association, and is neither a bank, trust company or building and loan association, it is our opinion that it is included in the definition of "real estate broker".

JRW

Police Regulations — Illegitimacy — Notwithstanding provisions of sec. 166.03, Stats., it is advisable that filiation agreements be made pursuant to sec. 166.07 for proper protection of all parties.

Under sec. 166.03 it is duty of justice rather than of district attorney to make docket memorandum of filiation agreement.

Justice court has inherent control of filiation proceedings before it rather than district attorney, who is limited to such powers and duties as are prescribed by statute or which arise therefrom by necessary implication.

March 2, 1940.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, *Executive Secretary*.

You state that under sec. 46.03, subsec. (12), Stats., it appears to be the duty of the child welfare division of the state department of public welfare to see "that appropriate steps are taken to establish the paternity of an illegitimate child," and in this connection you make several inquiries regarding filiation agreements made under ch. 166 of the statutes.

We are asked first, whether filiation agreements may be made in justice court under the provisions of sec. 166.03, or whether such settlements will be binding only if made under sec. 166.07.

It appears that prior to 1929, when ch. 166 was amended by sec. 10 of ch. 439, Laws 1929, filiation or settlement agreements between the mother and the putative father of an illegitimate child could properly be made in justice court, where the preliminary hearing was held. The effect of the amendment contained in ch. 439, Laws 1929, is not entirely clear. In fact, when sec. 166.03 and sec. 166.07, as they now stand, are read together, they lend themselves with equal reasonableness to the construction, (1) that such illegitimacy settlement agreements may still be made in justice court under sec. 166.03, providing all of the provisions of sec. 166.07 are followed therein; or, (2) that such settle-

ments may now be made only in a court of record under sec. 166.07. While it is very possible that the legislature intended that such agreements could still be made in justice court under sec. 166.03, we must advise you, in view of the language of sec. 166.07, that "no other agreement or settlement of any illegitimacy proceedings shall be valid," that we would deem it much safer for all parties to have such settlements made in the trial court under sec. 166.07 rather than in the justice court during preliminary proceedings. Such a procedure would remove all doubt and insure the binding effect of the agreement or settlement.

We also wish to point out that it appears from sec. 166.03 that the justice may not discharge a defendant, once probable cause has been shown in the preliminary proceeding, merely upon the entry of a memorandum of the settlement agreement, but may discharge such defendant only "upon entry of judgment on such agreement."

You inquire further whether the district attorney is required to dictate the memorandum of the settlement agreement mentioned in sec. 166.03 for the docket of the justice. Sec. 166.08 provides that the district attorney shall appear and prosecute all illegitimacy proceedings, including both the preliminary examination in the justice court and the proceedings in the trial court. This section also provides that the district attorney shall draft all settlement agreements referred to in sec. 166.07. As amended by ch. 524, Laws 1939, sec. 166.07 contains the broader requirement that "All agreements referred to in chapter 166 shall be drawn by the district attorney."

Neither sec. 166.07 nor sec. 166.08 mentions any duty on the part of the district attorney to dictate the memorandum. The memorandum mentioned in sec. 166.03 is not an agreement "referred to in chapter 166," but it is merely what its name implies, a memorandum of an agreement which the justice is to enter upon his docket. Note the language: "The justice shall make a memorandum of said agreement on his docket." Therefore, while the district attorney must draw any agreements, whether made in justice court or in the trial court, it is our opinion that he need not dictate the memorandum mentioned in sec. 166.03.

Your inquiry regarding "the extent to which the district attorney has control of preliminary proceedings, particularly with reference to the agreements mentioned in sec. 166.03" cannot be answered much more specifically than has already been done without a more specific question or statement of facts which gives rise to your inquiry. As previously pointed out, the district attorney has the duty of appearing in and prosecuting illegitimacy proceedings both in justice court and in the trial court and of drawing all settlement agreements under ch. 166. Beyond that he appears in court as any other attorney does, as an officer of the court, and is subject to its inherent power to control proceedings before it. The courts established by the constitution (including justice courts) are endowed with all the incidental, implied, or inherent powers not expressly limited by the constitution which are essential to the efficient performance of the judicial functions delegated to them. *State v. Cannon*, 199 Wis. 401. This being true, it is the court rather than the district attorney which has primary control over filiation proceedings before it, and the district attorney is limited to such powers and duties in connection therewith as the statute provides or as arise therefrom by necessary implication.

Lastly you inquire whether the putative father in an agreement made and noted on the records in justice court, as provided in sec. 166.03, would be protected against future liability.

This question involves the same doubts as were expressed in reply to your first question. It may be that filiation agreements made in justice court are still good and, if such is the case, such an agreement would relieve the putative father of any liability other than as provided in an agreement made under sec. 166.07. However, as hereinbefore indicated, we must reiterate that it would be safer for the putative father to enter a settlement agreement under sec. 166.07 in the trial court rather than to enter such an agreement in justice court under sec. 166.03.

WHR

Trade Regulation — Warehouse Commission — Grain and warehouse commission is authorized by sec. 126.05, subsec. (1), Stats., to weigh all grain received in Superior for milling or storage, or milled or stored in Superior, or bought or sold in Superior, regardless of whether it is kept in public warehouse, and also to weigh grain shipped from public warehouses.

Phrase "doing business for a compensation" in sec. 126.06, defining public warehouses, means "doing such business as is usually carried on by public warehousemen." Mill which stores only its own grain cannot be compelled to become licensed as public warehouse.

Corporation owning elevators in which its warehousing division stores corporation's grain, for which storage it is paid by corporation's purchasing division for accounting purposes, but which has ceased storing grain for others is no longer public warehouse under sec. 126.06 and may surrender its license and cancel its bond.

Merely performing old storage contracts without seeking or accepting new business does not constitute "doing business for a compensation" under sec. 126.06.

March 6, 1940.

GRAIN & WAREHOUSE COMMISSION,
Superior, Wisconsin.

You have submitted three questions with reference to the construction of ch. 126, Stats. They will be answered in the order submitted.

(1) You first inquire whether your authority to weigh grain under sec. 126.05 is limited to such as is received or stored in a mill or warehouse which is a "public warehouse" as defined in sec. 126.06. Subsec. (1) of sec. 126.05 provides as follows:

"The grain and warehouse commission shall weigh all grain which is milled or received for milling, bought or sold in the city of Superior, *and* all grain received for storage,

stored or shipped, either by boat or railway from any and all public warehouses, as defined by or declared to be such warehouses under the provisions of section 126.06 of the statutes."

It is clear that so far as concerns grain "milled or received for milling, bought or sold in the city of Superior," the authority of the commission to weigh it is in no wise dependent upon whether the mill or warehouse is a public warehouse. The balance of the subsection is poorly phrased, but it appears to mean that the commission will also weigh all grain (a) received for storage (in Superior), (b) stored (in Superior) or (c) "shipped * * * from any and all public warehouses." Had it been intended to limit that clause to grain stored or received for storage *in public warehouses*, the preposition "in" as well as "from" should precede "any and all public warehouses." Grain cannot be stored *from* a warehouse.

In summary, then, the commission is authorized to weigh all grain received in Superior for milling or storage, milled or stored in Superior, or bought or sold in Superior, regardless of whether it is kept in a public warehouse, and is also authorized to weigh grain *shipped from* public warehouses.

(2) You next inquire whether you have authority to require a mill in Superior to be licensed as a public warehouse under sec. 126.07. It will be assumed that the mill receives grain only for milling purposes and does not store grain for others and issue warehouse receipts, since if it did that there would be no problem.

Public warehouses are defined as follows by sec. 126.06:

"All elevators and warehouses located in the city of Superior doing business for a compensation, and all elevators and warehouses located in said city in which the grain of different owners is stored in bulk or mixed together, or stored in such manner that the identity of different lots and parcels cannot be accurately preserved, and all elevators and warehouses located in said city which issue warehouse receipts for grain received or stored are hereby declared to be public warehouses. Any elevator or warehouse in any other city in this state doing business for a compensation

which is operated in a manner described in this section and which issues warehouse receipts for grain received, or stored may, upon request, be declared public warehouses by the grain and warehouse commission and shall thereafter be subject to the provisions of sections 126.01 to 126.73, inclusive, of the statutes."

The answer to your question depends upon the construction of the words, "doing business for a compensation." The question is: Doing *what* business?

For two reasons, the phrase must be strictly construed: First, because the statute (sec. 126.09) imposes a heavy penalty for operating without a license, and penal statutes are always subject to strict construction. *State ex rel. Shinnors v. Grossman*, 213 Wis. 135, 140 (1933). Second, because the statute imposes heavy burdens upon those to whom it applies, among which are the filing of a bond and payment of a license fee (sec. 126.08), the duty to serve all who apply for storage, without discrimination (sec. 126.10), the duty to furnish to the commission on demand a statement as to the condition of its business (sec. 126.16), regulation of rates (sec. 126.18), and many other restrictions. See *Jones v. Milwaukee E. R. & L. Co.*, 147 Wis. 427, 435 (1911).

Public grain elevators are traditionally a business "affected with a public interest." *Munn v. Illinois*, 94 U. S. 113 (1877). But unless the owner actually holds himself out as willing to serve others, there is no "dedication to a public use" which is essential to the creation of a public utility. See *Schumacher v. Railroad Comm.*, 185 Wis. 303 (1924). To require every owner of a grain warehouse or elevator in Superior to operate it as a public utility, even though he intends and desires only to store his own grain in it, would be of doubtful validity and should not be read into a statute of this kind by construction.

In a statute which required insurance companies "doing business" in this state to file certain reports (Stats. 1898, sec. 1954) the term was construed as meaning "such business as was usually carried on by corporations regularly licensed to transact business in this state." *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557, 563 (1910). An

insurance company which had ceased to solicit new business but which still had 283 old policies in effect in this state was held not to be "doing business" in the meaning of the statute. Reasons similar to those relied on in that case make a similar construction mandatory here. The statute means "doing such business as is usually carried on by public warehousemen for compensation." See also XIX Op. Atty. Gen. 544.

You are accordingly advised that a mill which does not store grain for others cannot be required to comply with the license provisions of ch. 126, Stats.

(3) In your last question you state that you have a request from a corporation operating two elevators as public warehouses to surrender its license, cancel its bond and close its elevators. There is considerable grain belonging to the corporation in the elevators, but there are no outstanding warehouse receipts. The corporation has several divisions, two of which are the warehousing and the purchasing divisions. For accounting purposes, the purchasing division pays the warehousing division for storing the corporation's grain. You inquire whether under such an arrangement the corporation is "doing business for compensation" in the meaning of sec. 126.06, and so required to continue to be licensed.

For the reasons set out above in the answer to your second question, the corporation is not doing business as a public warehouse and is no longer subject to the licensing provisions of chapter 126, Stats. See also XIX Op. Atty. Gen. 544, where this department ruled that a private warehouse company which issued warehouse receipts to itself for convenience in dealing with its parent corporation could not come within the optional provisions of the last sentence of sec. 126.06.

In this connection it should be pointed out that under the reasoning of *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557 (1910), discussed above, it would seem that a public warehouse may surrender its license even though it still has outstanding warehouse receipts, provided that it does not seek new contracts but only winds up its old business. Merely performing contracts theretofore made, without so-

liciting or accepting new business, is not "doing business" within the meaning of the statute. In fact, that might well be the only practical way of going out of the business, since as long as it is a "public" warehouse the owner is bound to continue to receive grain if there is available storage space. Sec. 126.10. Obviously the business was not intended to be made self-perpetuating.

WAP

Municipal Corporations — Towns — Dissolution of Towns — Villages — County board may not vacate town without vote of electors of that town.

If such unauthorized action was taken it could constitutionally be validated by state legislature.

State legislature may not constitutionally enact law annexing adjoining rural territory to village.

March 6, 1940.

JAMES H. LARSON,

District Attorney,

Shawano, Wisconsin.

In your request of February 21 you state that the county board of your county desires to vacate a town and divide its territory between two adjoining towns. You inform us further that it is undesirable to hold an election in the town to determine whether it should be vacated. As a possible alternative you ask whether the vacated town might not, without a vote of the electors, be divided between two adjoining towns and the village of Bowler. If we are of the opinion that a vote is required you inquire as to whether the legislature might not validate any such action by the county board taken without the consent of the electors.

The problem you thus raise requires the consideration of three questions, as follows:

1. May the county board vacate a town without a vote of the electors of that town?
2. Assuming that the county board takes such unauthorized action (if it be so), could the state legislature validate the act?
3. May the legislature enact a law annexing adjoining rural territory to a village?

Question 1 is answered in the negative. While it was held in *State ex rel. Hiles v. The Board of Supervisors of Wood County*, 61 Wis. 278, that a vote of the electors was not necessary for vacating a town, the effect of that decision was nullified by a statute subsequently enacted and by a decision construing that statute. Following the decision in the *Hiles* case the legislature enacted ch. 253, Laws 1899, creating section 671a, Stats. 1898. Sec. 671a provided for a vote of the electors in the matter of vacating towns. It was held in *State ex rel. Jensen v. Yankee*, 120 Wis. 573, that the method provided for by sec. 671a was exclusive and that action taken by the county board to vacate a town without compliance with its provisions was void.

In 1919, by revisor's bill, ch. 551, sec. 671a, along with sec. 671, was incorporated into what is now sec. 60.05. At that time the word "*dissolution*" was substituted for the word "*vacation*." It is quite apparent that the change in wording was not intended to effect a change in the substantive law. In fact, the words had theretofore been used interchangeably. Cf. *Knight v. The Town of Ashland*, 61 Wis. 233, where the two words are used interchangeably at p. 242 of the opinion.

We thus hold that the action contemplated falls within the rule of the *Jensen* case and that an election pursuant to the provisions of sec. 60.05, Stats., is necessary.

Question 2 is answered in the affirmative. In *State ex rel. Ervin v. County Board*, 163 Wis. 577, it was held that the legislature could, by a validating act, sanction and give effect to the unauthorized creation of new towns by county boards. The ruling of that case seems to cover the present factual situation since the towns were vacated and new towns were created. In your case the territory is to be

added to already existing towns. See also *Cathcart v. Comstock*, 56 Wis. 590; *State ex rel. Graef v. Forest County*, 74 Wis. 610, and IV Op. Atty. Gen. 433, where the *Graef* case is cited.

Question 3 is answered in the negative. Art. IV, sec. 31 of the Wisconsin constitution provides:

“The legislature is prohibited from enacting any special or private laws in the following cases:

“* * *

“9th. For incorporating any city, town or village, or to amend the charter thereof.”

It has been held that the boundaries of incorporated cities form a part of their charters under the general charter law and that they cannot be changed by special legislative act. *State ex rel. Shawano v. Engel*, 171 Wis. 299; *Wauwatosa v. Milwaukee*, 180 Wis. 310. The law would be the same in the case of villages.

JWR

Public Officers — Board of Trustees of County Institutions — Superintendent of County Home — Member of board of trustees of county asylum and poor farm may not receive per diem compensation for time spent in assisting acting superintendent in performance of latter's duties.

Limitation, if any, upon amount of compensation which member of board of trustees of county asylum and poor farm may receive in year on per diem basis must be found in county ordinance establishing rate of compensation.

March 6, 1940.

MILTON L. MEISTER,
District Attorney,
West Bend, Wisconsin.

You state that the superintendent of the county asylum and poor home died and the trustees have appointed an acting superintendent. The chairman of the board of trustees has been asked to become superintendent, but it is conceded that under sec. 46.18, subsec. (2), Stats., he will be ineligible during the term for which he has been elected a trustee. The question is whether he may assist the acting superintendent, in effect thereby taking over part of the duties of superintendent, and be paid therefor at the per diem rate of compensation covering service as a trustee.

Section 46.18 (2) provides in part as follows:

“* * * No such trustee shall have any other lucrative office or employment in the county government; nor be eligible, during the term for which he was elected, to the office of superintendent of the institution in his charge
* * *”

Clearly, no trustee can become superintendent during his term as trustee, nor become eligible by resigning as trustee. See XIV Op. Atty. Gen. 534. Aside from the fact that the proposed scheme would constitute an evasion of the plain intent of the statute, there are two compelling reasons why a trustee cannot be paid as such for performing any or all of the duties of the superintendent.

In the first place, the position of trustee is an office and that of superintendent, although called an "office" in the statute, is an employment. The functions to be performed by the chairman under the proposed arrangement must belong to one position or the other. If they belong to the position of superintendent (and this is clearly the fact), then the trustee cannot be paid for performing them without violating the malfeasance statute, sec. 348.28, under the decision in *Henry v. Dolen*, 186 Wis. 622, 203 N. W. 369 (1925). See also Op. Atty. Gen. for 1912, 227; III Op. Atty. Gen. 808. But if they belong to the position of trustee, then they cannot be performed by a single trustee but require action by a majority of the board. Sec. 370.01 (3), Stats. See also 1 Restatement of the Law of Trusts, p. 518; 3 Scott on Trusts (1939), sec. 383.

Secondly, the two positions are clearly incompatible wholly apart from the statutory disability, and could not in any event be held by the same person, from which it follows that the same person cannot perform and be paid for the duties of both even though he pretends to retain but one position. The superintendent is appointed by and removable at the pleasure of the board of trustees. Sec. 46.19 (1); XXI Op. Atty. Gen. 1020; XXVIII Op. Atty. Gen. 19. The trustees fix the compensation and prescribe the duties of the superintendent, and fix the amount and approve the sureties of his bond. Sec. 46.19 (2). The superintendent's acts are subject to approval by the trustees. Sec. 46.19 (3); XIII Op. Atty. Gen. 83. The trustees audit all claims incurred in behalf of the institution, most of which would necessarily have been incurred in the first instance by the superintendent. Sec. 46.18 (6). Some of these elements of incompatibility would exist under the proposed arrangement.

For the foregoing reasons, therefore, the chairman of the board of trustees may not be paid for services performed in assisting the acting superintendent.

You inquire also whether there is any limitation as to the amount which a trustee may be paid in a year on a per diem basis. Under sec. 46.18 (4) the compensation of trustees is

to be determined by the county board. Therefore, the place to look for such limitation is in the county ordinance establishing the per diem rate.

WAP

Indians — Taxation — Whether privately owned Wisconsin lands which were purchased by United States government and conveyed with restrictions as to alienation to individual Stockbridge Indians who are no longer wards of federal government are tax exempt as constituting instrumentalities of federal government under 25 USCA 412a is question that should be passed upon by courts and, in absence of any adjudication upon question, tax authorities should assess and tax such lands.

March 12, 1940.

JAMES H. LARSON,
District Attorney,
Shawano, Wisconsin.

You state that for the past few years the United States government has been purchasing considerable tracts of land in Shawano county for the Stockbridge Indians who have been emancipated and are no longer wards of the federal government. Title to such lands have been conveyed to individual Indians, subject to the condition that while the title is in the "grantee or heirs, the property herein described shall not be alienated or encumbered without the consent of the secretary of the interior."

By Title 25 USCA 412a, congress provided:

"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Pro-*

vided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost \$5,000, to be designated as a homestead." (June 20, 1936, c. 622, Sec. 2, 49 Stat. 1542, as amended May 19, 1937, c. 227, 50 Stat. 188.)

All of the lands in question were previously owned by private individuals and were subject to taxation. Some town assessors are continuing to assess such lands, while others are not. A representative of the Indian agency has requested the county board to cancel outstanding tax certificates, and you have asked for our advice on the matter.

It is apparent at the outset that these lands are not exempt from taxation under the Wisconsin statutes. They are not lands owned exclusively by the United States within the meaning of the exemption provided by sec. 70.11, subsec. (1), Stats., nor do they fall within the exemption for Indian lands provided by sec. 70.11 (7), Stats., since they are held by the Indians who are citizens. The only question then is that of the effect or effectiveness of the act of congress above quoted, since it is quite apparent from an analysis of the authorities cited in your study of the problem that the lands would not be exempt from taxation in the absence of a federal statute, such as the one involved here.

From the facts you have stated, the question appears to be one of constitutional law, or, as it was put in the case of *Sunderland v. United States*, 266 U. S. 226, the question of the supremacy of power. The question, assuming that the lands involved fall within the provisions of 25 USCA 412a, is whether congress may constitutionally exempt from state taxation property within the state simply by declaring it to be an instrumentality of the federal government, even though the Indians for whose benefit the exemption is declared enjoy all of the rights of citizenship, and are no longer wards of the federal government.

The only decision which has passed upon the constitutionality of 25 USCA 412a, is the decision of the federal

district court for the northern district of Oklahoma, in the case of *United States v. Board of Commissioners*, (1939) 26 Fed. Sup. 270. In that case the court held, among other things, that the statute was not an unconstitutional invasion by congress of the sovereignty of Oklahoma. The decision on this point, however, was based upon the ground that the enabling act which Oklahoma accepted as a condition precedent to its admission into the Union, expressly provided that the state of Oklahoma should never limit the power of the federal government to make laws or regulations respecting Indians or their property. The court considered that this carried with it the right to exempt such lands from taxation, as well as the right of congress to reimpose restrictions thereon, or to constitute them federal instrumentalities, and that there could, therefore, be no invasion of the state rights because a condition of statehood was the reservation by the federal government of power and authority over Indians, their lands and property.

Neither the act which enabled the people of Wisconsin territory to form a constitution and state government (9 U. S. Stats. at Large 56), nor the act which admitted the state of Wisconsin into the Union (9 U. S. Stats. at Large 233), contains a reservation such as was included in the Oklahoma enabling act. Accordingly the decision cited above is of scant authority in determining the constitutionality of sec. 25 USCA 412a, as applied to Wisconsin lands.

While congress undoubtedly has wide powers in designating instrumentalities of the federal government and in declaring such instrumentalities to be exempt from taxation, it is, nevertheless, without power to grant a tax immunity upon federal agencies and instrumentalities in excess of that conferred by the constitution of the United States. Otherwise, congress could declare all private property to be an instrumentality of the federal government and, by withholding it from the taxing jurisdiction of the state, could, in effect, destroy the sovereignty of the state. If, as has been said, the power to tax is the power to destroy, likewise the power to exempt from taxation is the power to destroy the governmental unit whose functioning depends upon the receipt of tax revenues. The precise limits of the powers of congress with respect to the prob-

lem here involved have never been exactly defined and, in fact, as far as we are able to find, there are but three cases which discuss the proposition at all.

In *Graves v. People of the State of New York*, (1939) 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. 927 at p. 932, the court said:

“* * * And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. * * * Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.”

A more direct clue to the correct answer is to be found in *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. ed. 998. There congress conferred tax immunity upon United States bonds, in this language:

“* * * all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, *as well as from taxation in any form by or under state, municipal or local authority; * * **” (Italics ours.)

The state of New York in the face of this exemption levied an inheritance tax upon \$40,000 worth of United States bonds. The taxpayer appealed from the tax as a violation of the statute and the supreme court dismissed all consideration of the exemption statute in these words at p. 830 (Sup. Ct. Rep.):

“* * * *Such a declaration did not operate to withdraw from the States any power or right previously possessed, nor to create, as between the States and the holders of the bonds, any contractual relation. It doubtless may be regarded as a legitimate mode of advising purchasers of such bonds of their immunity from state taxation, and of*

manifesting that Congress did not intend to waive this immunity, as it had done in the case of national banks, which are admittedly governmental instrumentalities." (*Italics ours.*)

In *Graves v. People of State of New York*, *supra*, Justice Stone said at p. 933 (L. ed.)

"* * * and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

This language also seems to imply that whatever immunity congress could validly grant is within the constitutional immunity and is bounded thereby.

In view of the foregoing, we conclude that if the lands in question cannot in fact be said to constitute instrumentalities of the federal government, there are no magic powers to be ascribed to the words of congress in declaring them to be so. Whether or not under all the facts and circumstances such lands are federal instrumentalities is a question that should be passed upon by the courts and, as a matter of administrative tax policy, it is our advice that the lands should be considered and treated as subject to state taxation unless and until the exemption claimed has been judicially determined by the courts.

This view is further supported by certain language in the case of *Shaw v. Gibson-Zahniser Oil Corp.*, (1928) 276 U. S. 575, 48 Sup. Ct. 333, 72 L. ed. 709, which held that lands purchased for an Indian out of royalties on allotted land, from one in whose hands they are subject to taxation, continue so subject, although not subject to alienation without consent of the secretary of the interior. While that case was decided prior to the enactment of 25 USCA 412a, and is consequently not controlling here, the court, nevertheless, did have occasion to comment about Indian lands as constituting instrumentalities of the federal government. It was said at p. 714:

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the respon-

sibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility."

Since, in view of the foregoing, we are not satisfied that the lands in question are in fact instrumentalities of the federal government so as to be entitled to exemption from taxation, it becomes unnecessary for us to consider now the second portion of your request raising several questions relating to the lien of outstanding taxes at the time of the purchase, assessments made prior to the passage of 25 USCA 412a, and the reassessment of such lands as had not been assessed prior to the enactment of said statute,—these questions being predicated upon the assumption of a ruling that the statutory exemption applies.

WHR

Automobiles — Law of Road — Tractors used as motive power for conveyance of farm products are used exclusively in agricultural operations when so used by farmer as incident to operation of his farm.

March 12, 1940.

MOTOR VEHICLE DEPARTMENT.

In your letter of March 5 you call attention to the following provisions of sec. 85.01, Stats.:

"(1) * * * After April first, any person who shall operate an automobile, passenger automobile, bus or motor cycle, or any person, except as hereinafter provided, who shall operate after July fifteenth, a motor truck, tractor truck, tractor, trailer or semitrailer, unless the same shall have been registered, as hereinbefore provided, may be arrested by any sheriff, deputy sheriff, city or village marshal, constable or any other police officer, and brought before any judge of a court of record or justice of the peace.
* * *

"* * *

"(4) * * *

"* * *

"(f) 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."

You then state that farmers "are using their farm tractors with pneumatic tire equipment to tow trailers and the trailers only are licensed. Examples of the nature of their operations are:

"(1) The hauling of agricultural limestone for their own use. In some cases farmers are hauling this limestone as many as forty miles.

"(2) Hauling hay. The farmer may haul several tons of baled hay to market or to his farm from a place of purchase, the load being hauled on a properly licensed trailer towed by an unlicensed farm truck.

"(3) Hauling of peas to a viner station. These are often hauled on a trailer properly licensed and towed by an unlicensed farm tractor.

"(4) The hauling of feed to a gristmill and back to the farm."

These statements are submitted in connection with a request for our opinion as to whether the uses of tractors above set out are within the exemption from registration.

We are of the opinion that they are. The statute plainly says that tractors used exclusively in agricultural operations shall be exempt from registration. All the operations to which you have referred are obviously agricultural in that they are incidental to the operation of a farm. Cf. XXVII Op. Atty. Gen. 209.

Incidentally, while the matter becomes academic in view of what we have said, we have been unable to find any provision for fees in ch. 85 for the registration of tractors. And if there be no such fees it is rather evident that they are entitled to operate without registration and payment of fees irrespective of the exemption involved.

JWR

Taxation — Tax Collection — Except pursuant to provisions of sec. 74.10, Stats., while in hands of local treasurers unpaid real estate taxes are not collectible from owner by assertion of personal liability against him by action of debt or otherwise or through distress or attachment proceedings.

March 12, 1940.

GEORGE A. RICHARDS,

District Attorney,

Rhineland, Wisconsin.

You recite that, following notice by the county of application for tax deeds on 1931 tax certificates owned by it covering six parcels of land, owned by the same person but

separately described and assessed, the owner endeavored to remove buildings from said lands, which the county prevented through injunction proceedings. Thereafter, the owner tendered the total taxes, interest and penalties on two of the descriptions to the county treasurer and then applied to the court for a release of the injunction as to those two parcels.

Our opinion is requested as to whether the county can enforce payment of the unpaid taxes on the remaining four parcels through the assertion of liability against the owner by way of personal judgment or through seizure of the two parcels, upon which the taxes were paid, in distress or attachment proceedings.

Actions for the collection of unpaid taxes will lie only in those instances where the statutes provide for the same. In an opinion dated February 1, 1932, XXI Op. Atty. Gen. 102, it was held that under the statutes then existing no action of debt (which would be prerequisite to a proceeding, under the general procedural statute, to obtain a personal judgment against the owner or his properties) would lie in Wisconsin for the collection of unpaid taxes except for taxes on personal property (sec. 74.12, Stats. 1931), taxes against the real estate of a public service corporation (sec. 74.13, Stats. 1931), and real property taxes on buildings on lands under lease or permit (sec. 70.17, Stats. 1931). Subsequent thereto sec. 70.17, Stats. 1931, was changed to its present form by chs. 349 and 444, Laws 1933, which apparently eliminates the last exception mentioned.

Thereafter, in XXIII Op. Atty. Gen. 841, it was stated at page 843, that an action in debt in Wisconsin for unpaid taxes would lie only for taxes on personal property (sec. 74.12) or for taxes against the real property of a public service corporation (sec. 74.13) or for income taxes (sec. 71.18 (3)). It was there also stated that sec. 74.10, Stats., providing for collection of unpaid taxes by distress is limited to unpaid taxes while in the hands of the local treasurers.

The provisions of sec. 74.10, Stats., are broad enough to cover both unpaid real estate taxes and unpaid personal property taxes and provide for the collection thereof by distress against the property of the taxpayer, but such rem-

edy thereby granted is limited to the local treasurers only. The use in subsec. (1) of sec. 74.10 of the words "his town, city or village" as referable to the treasurer, who is thereby authorized to levy a distress and sale of goods and chattels of the delinquent taxpayer, clearly indicates that the treasurer intended is the treasurer of the town, city or village.

An extended examination and study of the present statutes discloses no provision, other than sec. 74.10, Stats., which, in our opinion, in any way authorizes or provides for the collection of unpaid real estate taxes through the assertion of personal liability against the owner by an action of debt or otherwise, or through the use of attachment or distress proceedings, except in the instance of taxes against the real property of a public service corporation provided for in sec. 74.13.

It is therefore our opinion in the instant case that under the circumstances mentioned the county has no remedy except to proceed to collect the unpaid taxes on the remaining four parcels of land through the assertion of the lien of the tax certificates thereon.

HHP

Corporations — Cooperative Associations — Sec. 185.02, subsec. (3), Stats., applies to amendment of articles of organization of cooperative association creating preferred stock.

March 12, 1940.

FRED R. ZIMMERMAN,
Secretary of State.

You have requested our opinion as to the vote necessary to amend the articles of a cooperative association organized pursuant to ch. 185, Wis. Stats., to authorize the issuance of preferred stock.

In the absence of statutory provision for the issuance of preferred stock following the organization of a corporation and subscription of its common stock, there can be no such issuance without the unanimous consent of the common stock holders. Each common stock holder has a vested right to participate in the dividends of the corporation and to participate in its assets upon dissolution and this right cannot be so impaired without his consent. 18 Corpus Juris Secundum 652.

So far as we know there is no provision in the statutes authorizing the creation of preferred stock by existing co-operatives other than that contained in sec. 185.02, subsec. (3), Stats. The subsection in question reads as follows:

"Only par value stock is authorized. The association, if it issues preferred stock, may provide, by contract with its members or patrons, for retaining, out of any money due from the association to said members or patrons, an amount sufficient to pay the dividends on and to retire such preferred stock. An amendment relating to preferred stock must be adopted by a vote of three-fourths of the holders of the preferred stock and three-fourths of the holders of the common stock."

An argument is advanced that the words "an amendment relating to preferred stock" refer only to a case where preferred stock has been issued and some amendment with respect thereto is contemplated. The difficulty with this argument seems to be that it attempts to read into the language of the subsection something that is not there. An amendment authorizing the issuance of preferred stock is obviously an amendment relating to preferred stock.

The only other statutory provision which might apply is sec. 182.13, subsec. (1), Stats. It is provided by sec. 185.20, Stats., that the general corporation law shall apply except where it expressly exempts cooperative associations or where the provisions of the general law are opposed to or are inconsistent with the provisions of ch. 185. The general corporation law provides that preferred stock may be issued in the case of existing corporations with the consent of a three-fourths vote of the stockholders. (See sec. 182.13, (1), Stats.)

It is rather apparent that if sec. 185.02, (3), Stats., does not apply, then sec. 182.13 (1) does apply. If neither applies, then the unanimous consent of the common stock holders is required. We are of the opinion, however, that sec. 185.02, (3), Stats., clearly applies.

JWR

Appropriations and Expenditures — Contracts — Bids
— Where contract for furnishing services to state has been entered into pursuant to sec. 15.33, subsec. (1), Stats., and it subsequently develops during performance of work called for by contract that specifications for bidding in original contract did not fully cover all services to be required by state, contract may be modified by mutual consent without readvertising for new bids, provided subject matter and general scope of contract remains essentially same and there is no collusion.

In such event, surety bond for faithful performance of contract should be modified so as to cover changes in original contract.

March 14, 1940.

BUREAU OF PURCHASES.

Attention F. X. Ritger, *Director*.

You state that on January 10, 1940, a contract was entered into by the state and a certain individual to cover transportation of laundry between the state prison at Wau-pun and the Wisconsin general hospital and its various facilities at Madison. This contract was made pursuant to sec. 15.33, subsec. (1), Stats., which reads:

"All materials, supplies, equipment and contractual services except as otherwise provided herein, when the estimated cost thereof shall exceed three thousand dollars, shall

be purchased from the lowest responsible bidder, after due notice inviting proposals, except that stationery and printing shall be let to the lowest bidder in all cases. Such notice shall be published on at least one day in the official state paper and the bids shall not be opened until at least seven days from the last date of publication and ten days from the first date of publication shall have elapsed. In addition to such notice in the official state paper, the executive council may use such other methods of inviting proposals as it may deem necessary to secure competitive bidding. The official advertisement shall give a clear description of the article to be purchased, the amount of the bond or check to be submitted as surety with the bid and the date of public opening."

In the specifications covering the invitation for bids every effort was made to include all the requirements of the hospital. However, as often happens in the commencement of new ventures, the specifications did not fully and adequately cover all of the necessary service, and it has become necessary to secure additional trucking service and to impose additional requirements upon the contractor.

These additional requirements and specifications have now been worked out and have been submitted to your department for approval in the form of a supplemental agreement.

We are asked whether you have authority to approve of the supplemental agreement, or whether you must readvertise the whole matter and secure new bids.

It is rather difficult to find any authority, statutory or otherwise, which covers even in a general way the exact problem you have raised. However, the general rule as to public contracts seems to be that it is permissible to modify such contracts without getting new bids, so long as there is merely a modification and not a new contract. In the latter event, there must be readvertisements. Shealey, *Law of Government Contracts* 3d ed. sec. 76. It is said there:

"* * * No hard and fast rule can be laid down, but the spirit of the statute should at all times be observed."

While the above text relates primarily to contracts of the federal government, we see no reason why the foregoing

principle should not apply equally to state contracts under sec. 15.33 (1), and the problem resolves itself into one of deciding whether or not under all the facts and circumstances the proposed modifications are so extensive as to constitute an essentially new arrangement not within the scope of the original venture. This being true, it becomes necessary to make some examination of the proposed alterations.

The original contract price was \$118.98 per week; additional services will result in increasing the compensation to \$173.00 per week. The original specifications contemplated the use of one truck; the proposed additions and changes in the pick-up and delivery service occasioned because the laundry cannot be assembled for delivery to the truck at the hospital by 9 A. M. requires a change in the schedule which makes it impossible for one truck to make two trips daily and come within the closing hours of the state prison. Added delivery and loading service is necessary at some seven different points in Madison connected with the Wisconsin general hospital and the university medical school. Consequently two trucks are now required to give the service demanded as well as the services of a full-time man on the pick-ups instead of a part-time man as originally contemplated by the parties.

The original specifications regarding the schedule were "subject to modifications and revisions," and you state that you have every reason to believe that the modifications are necessary and are not the result of any collusion between the bidder and the state department of public welfare, which made the contract on the part of the state.

As illustrating the type of alteration which the courts will construe as constituting a new contract rather than a modification of the original contract, we call attention to *Schneider v. United States*, 19 Court of Claims 547, where one contract was to furnish sandstone for a public building at a designated price, and a further agreement was made to substitute marble. It was held that the latter contract could not be regarded as a modification of the former, since the material was the sole subject matter in both agreements.

Here, however, the type of the venture or undertaking remains the same, and the variation is only as to the amount of services to be performed under the contract. In a situation where the full scope of the activity cannot be fully foreseen at the time of the making of the original contract, there must necessarily be some flexibility. Changes, alterations and omissions often suggest themselves after the work has been entered upon, and a contractor who is placed in such a position by the state that it becomes necessary to incur additional expense for extra work, is entitled to just compensation therefor. *McDonald, et al. v. State*, 203 Wis. 649.

On many occasions this office has furnished legal assistance to various state departments where alterations in contracts have become necessary, and where the department concerned and the contractor have agreed on the increased compensation called for by the additional work involved, and in no instance where the subject matter and general scope of the contract remain essentially the same, have we considered it necessary to advise readvertisement for new bids after the contractor had already entered upon the performance of the contract, as in this case.

It is therefore our opinion that since you are satisfied as to the necessity of the changes and proposed modifications of the contract occasioned thereby, you may approve the same as constituting a modification of the original contract, rather than as the making of a new contract calling for a readvertisement under sec. 15.33 (1), Stats.

Lastly you inquire whether the surety bond furnished for the faithful performance of the original contract should be modified so as to cover the contract as changed.

This should be done. A surety has the right to stand upon the letter of the contract, and in case of any material alteration or change of the contract, the performance of which he has guaranteed, he is discharged. 50 C. J. 116. Since the proposed changes substantially increase the risk of the surety, the foregoing rule would apply.

WHR

Prisons — Prisoners — “Good” Time — Parole — Under sec. 53.11, subsec. (3), Stats., prisoner who, after commencing to serve sentence, is tried and convicted of another offense for which he is given sentence to run concurrently with one then being served is entitled to have both sentences treated as one for purposes of calculating credit for good behavior. Example stated.

Such prisoner is second offender for parole purposes under sec. 57.06 (1), Stats.

March 18, 1940.

DEPARTMENT OF PUBLIC WELFARE.

In XXVIII Op. Atty. Gen. 12, this department ruled that sec. 53.11, subsec. (3), Stats., applies to cases where prisoners are tried and convicted upon additional charges while serving their sentences on previous convictions, and upon such subsequent conviction receive additional sentences to run *consecutively* to the sentence then being served. In such cases the two consecutive sentences must be treated as but one sentence for the purpose of calculating good time. You now inquire whether the same rule applies if such a convict receives, upon a subsequent trial and conviction, a new sentence to run *concurrently* with the one then being served. Sec. 53.11 (3) provides as follows:

“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.”

It is clear that the statute makes no distinction between concurrent and consecutive sentences. It is unnecessary to repeat here the reasons given for the ruling in XXVIII Op. Atty. Gen. 12. They apply equally to the case of subsequent concurrent sentences and the rule there laid down must be applied to concurrent as well as to consecutive sentences.

You state the case of a prisoner sentenced January 31, 1933, and received February 2, 1933, on a series of con-

current sentences later commuted to from one to ten years. Later, on December 15, 1938, he was taken from the prison and convicted on another charge, for which he was sentenced to from three to three years to run concurrently. His original discharge date on the first (commuted) sentence was figured at May 2, 1939, figuring that he must serve six years and three months, or conversely that he earns three years and nine months good time. Later he earned four more days of good time (under sec. 53.12 (1)) which brought his discharge date back to April 28, 1939. You inquire how his discharge date on the subsequent sentence is to be calculated.

Assuming continued good behavior and consequently no loss of good time, this prisoner was serving his tenth sentence year of the original (commuted) sentence when, on December 15, 1938, he received the new concurrent sentence of three years. This tenth year had commenced on November 2, 1938. By reason of sec. 53.11 (1) this year could, with good time, be served in six months. In other words, each month in prison counted as two months of the sentence. Under the rule above announced, he is entitled to the same good time privilege with respect to the new sentence and it follows that each year of the new sentence could, with good time, be served in six months, and his original discharge date would be figured at 18 months from December 15, 1938, or June 15, 1940.

He is also entitled to additional good time in the ratio of five days for each month of thirty days spent outside the walls on the honor system, under sec. 53.12 (1). He went to a camp on April 4, 1939. Assuming that he remains outside the walls continuously from that date, he will have served 372 days and earned 62 days extra good time by April 10, 1940. Taking 62 days from June 15, 1940, makes April 14, 1940, the discharge date of this prisoner.

You inquire further whether such a person is a first or a second offender for parole purposes under sec. 57.06 (1), which provides as follows:

“The board of control, with the approval of the governor, may, upon ten days’ written notice to the district attorney and judge who participated in the trial of the prisoner, pa-

role any prisoner convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served thirty years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum, or one-half the maximum, whichever shall be less, for which he was sentenced not deducting any allowance for time for good behavior or who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, or one-half the maximum, whichever shall be less, not deducting any allowance of time for good behavior."

Under previous rulings of this department, he is to be regarded as a second offender. XXIII Op. Atty. Gen. 532. See also XVI Op. Atty. Gen. 80, XIX Op. Atty. Gen. 382. But because his second sentence was for from three to three years, the minimum and the maximum terms being the same, his eligibility for parole is the same whether he be regarded as a second offender or not; *i. e.*, he must serve one-half or eighteen months of that sentence, without deduction for good time; in either case before he may be paroled.

WAP

Newspapers — Taxation — Newspaper mailed and distributed from place of business within county is printed within county within meaning of secs. 74.33 and 75.07, Stats., though actual printing may be done elsewhere.*

March 18, 1940.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

In your request of March 4 you present substantially the following set of facts: A newspaper has its place of business in your county but the actual printing, folding, and bundling of the papers are done in another county. The papers, prior to distribution, are returned to the local place of business in your county and mailed from that place.

You ask whether this paper is "printed" in Burnett county within the meaning of secs. 74.33 and 75.07, Stats., which pertain to publication of notice of sale of tax delinquent lands.

This precise question has never been decided by the Wisconsin supreme court. Such authority, however, as is available points toward an affirmative answer to your question.

In *Hart v. Smith*, 44 Wis. 213 (1878), half of a newspaper was printed outside of the county. It was held that this paper was "printed in the county" within the meaning of the statute.

A case which closely follows the instant set of facts is *Nebraska Land S.-G. & I. Co. v. McKinley-Lanning L. & T. Co.*, 52 Neb. 410, 72 N. W. 357 (1897). There the statute required a notice of foreclosure sale to be published in a newspaper printed in the county. The Nebraska court held that a paper made up and circulated within the county was "printed" therein, though the actual physical process of printing was done in another county.

For an analogous case, where the statute read "printed and published within the county," see *In re McDonald*, 201 Pac. 110, 187 Cal. 158 (1921), where the court reached the same result. *Bayer v. Hoboken*, 44 N. J. L. 131 (1881), and

*See page 225 of this volume.

Amos Brown's Estate v. City of West Seattle, 85 Pac. 854, 43 Wash. 26 (1906), are in close accord with the *McDonald* case both as to facts and as to reasoning. An opinion following these cases is given at XIX Op. Atty. Gen. 409.

JWR

Courts — County Judge — Legislature has power to increase or decrease salary of judge of county court (in act increasing or decreasing jurisdiction of said court) during his term of office. Salary fixed becomes effective as of date named in act and it is no valid objection that county board had not at time of enactment appropriated funds with which to pay additional salary.

March 19, 1940.

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

In your letter you state:

"Since the enactment of chapter 64, laws of 1939, I have had some difficulty with the county board in that I have been unable to convince them that the county judge of our county is entitled to the increased salary as provided in this new law as of the time of the enactment of this legislation. The judge began drawing his salary under this law, which sets up a minimum salary of not less than \$5,000.00 per year, on June 1, 1939.

"It is the contention of some of the members of the county board who, I believe, have seen some other attorney, that the judge's salary cannot be increased during his term of office. They argue that the budget as set up for the year 1939 did not provide for such an increase and that in reality there are no proper funds available.

"Article IV, section 26, of the Wisconsin constitution provides, in effect, that the legislature shall not increase or diminish the compensation of any public officer during his term of office. In construing this constitutional provision, our supreme court has held that it applies only to officers who receive a fixed salary from the public treasury of the state. (See: *State ex rel. Sommer v. Erickson*, 120 Wis. 435, and *Sieb v. Racine*, 176 Wis. 617.) The Sieb case points out that it is generally recognized that unless forbidden by law, the salaries of public officers may be changed from time to time, even during the officer's term. I wish to call your attention also to a case in 50 Wis. 178, which seems somewhat in point. Section 59.15 of the statutes, which relates to county officers, provides: 'The salaries so fixed shall not be increased or diminished during the officer's term.' I don't suppose, though, even in view of section 59.15, that the legislature is precluded by reason of it, from passing another law which does increase the salary of the judge.

"The question is: Can the legislature, by an enactment of the kind here in question, increase the salary of a county judge during the term of office, even in view of section 59.15, and even though no appropriation has been made for such purpose in the county's budget?"

We fully agree with you that ch. 64, Laws 1939, unless unconstitutional upon some other ground, is not unconstitutional or beyond legislative power in so far as it changes and fixes the salary of the county judge during his term of office even though no appropriation, at the time of enactment, had been made for such purpose by the county board.

Secs. 59.15 and 253.15, Stats., obviously cannot and do not purport to act as limitations upon legislative power. These statutes are legislative enactments and act as limitations upon county power.

The legislature has plenary power to deal with the subject matter of such salary unless the constitution otherwise provides. Art. IV, sec. 26 of the Wisconsin constitution is not applicable to the compensation of a public officer such as county judge. The authority which you cite clearly so holds. There is no other provision of the constitution which can act as a limitation upon legislative power with reference to this subject. It must follow that the legislature had

constitutional power to deal with the subject in the manner dealt with and that the particular provision is valid and binding upon the county board.

NSB

Indigent, Insane, etc. — Poor Relief — Where there has been compliance with removal order issued under sec. 49.03, subsec. (9), Stats., and relief recipient at some subsequent time again moves from place of legal settlement to county he had previously been ordered to leave, new removal order is necessary to bar receipt of further relief in such place and to discharge county of legal settlement from further liability.

March 25, 1940.

RICHARD G. HARVEY, JR.,
District Attorney,
Racine, Wisconsin.

You state that one T, having a legal settlement for poor relief in the town of N, Marathon county, moved to Racine county on May 11, 1935; relief in Racine county was issued in December of that year, statutory notice was served and reimbursement was made by Marathon county to Racine county until January, 1937, when an order was issued by the county judge of Marathon county directing T to return to his place of legal settlement in Marathon county. In April, 1937, T complied with the order and moved back to Marathon county, but soon became dissatisfied and again returned Racine county in July, 1937; he refused to return to Marathon county, and since he was actually in need, relief was granted, and later WPA employment was furnished. A new statutory notice was sent out by Racine county in November, 1938. T has never supported his family uninterruptedly for a period of a year in Racine county.

Under these circumstances we are asked whether T's return to his place of legal settlement from April to July, 1937, terminated the effect of the court order issued in January so as to make necessary a new order dependent upon T's "best interests" in order to bar Racine county from recovering for relief subsequently furnished.

Sec. 49.03, subsec. (9), Stats., reads:

"When a poor person is given relief in some other county or municipality than the one in which he has a legal settlement, either county or municipality involved may apply to the county judge or municipal judge of its county or municipality for an order directing such poor person to return to the county or municipality of his legal settlement, all expenses of removal to be paid by the county or municipality in which such poor person has a legal residence or settlement. Upon the filing of such petition the county or municipal judge shall issue an order directing the poor person to return to such municipality, unless it shall clearly appear that such removal would be against his best interests. Upon issuance of any such order no further relief shall be given to the person to whom it is directed until he shall comply therewith."

By the terms of the foregoing statute T would have been barred from receiving further public relief had he failed to comply with the provisions of the removal order, and the county of legal settlement would be relieved of further liability. See XXII Op. Atty. Gen. 771 and XXIII Op. Atty. Gen. 730. However, he did comply with the order and remained in the place of legal settlement for several months. In the absence of information to the contrary, we are assuming that his compliance with the order was in good faith, and that he returned to the town of his legal settlement in Marathon county, with every intention of staying there, but that after living there for some time he came to the conclusion that the family might better its circumstances by again making a try of it in Racine county. In other words, we do not assume that there was any collusion between him and the relief authorities of either place or any bad faith on his part.

There is nothing in sec. 49.03 (9), Stats., to indicate that after compliance with a removal order issued pursuant

thereto, the status of the relief recipient is any different from what it would be had such relief recipient never moved away from the place of legal settlement in the first instance. This being true, when T again moved to Racine county in July, 1937, he did so on exactly the same footing as though he had never been there before, and it would therefore be necessary that a new removal order be issued in order to bar T's further right to public relief in Racine county, and to bar the right of Racine county to recovery for the relief furnished subsequent to the effective date of the new statutory notice.

As we see it, the entire matter hinges upon whether or not there has been a substantial and good faith compliance with the removal order so as to restore the *status quo* which existed prior to the initial moving away from the place of legal settlement.

This makes unnecessary any consideration of your second question based upon the possibility of the old removal order continuing in full effect.

WHR

Public Officers — Deputy County Clerk — Justice of the Peace — Offices of deputy county clerk and justice of peace are not incompatible at common law nor is incumbent of one office ineligible to hold other under constitution and statutes of this state.

March 26, 1940.

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

You request an opinion as to whether the offices of deputy county clerk and justice of the peace are compatible, stating that in your opinion they are not, by reason of the provisions of subsec. (3), sec. 59.77, Stats. That statute requires

justices of the peace to file with the clerk annually on or before the first Monday in November a detailed statement of cases in which the county has become liable for costs and provides that if the justice fails to file such statement within the time fixed he shall not be paid by the county for any services performed by him in criminal cases during the year preceding the date such statement was due. It provides further that the justice shall annex to such statement a sworn statement of all criminal actions tried before him during such year in which any defendant was convicted and state that he filed a certificate of conviction in each such case within the time required by law, and that no justice's bill shall be allowed in whole or in part unless accompanied by such statement nor unless all such certificates of conviction have been filed. To this may be added that under subsec. (3) of sec. 59.17 the clerk is forbidden to sign or issue an order for the payment of any justice until the latter shall file an affidavit that he has paid into the county treasury all moneys due the county and collected by him in his official capacity.

Although the county clerk is the disbursing officer of the county, he does not pass upon the claim of the justice. He merely draws orders for the payment of accounts allowed by the county board, and "he shall in no case sign or issue any county order except upon a recorded vote or resolution of the board authorizing the same." Sec. 59.17 (3). His duties with reference to the filing of the statements and affidavits of justices of the peace, above enumerated, are purely clerical, and his duties as disbursing officer are ministerial and involve no exercise of discretion on his part, *State ex rel. Treat v. Richter, County Clerk, etc.*, 37 Wis. 275 (1875). Accordingly, there is no such conflict of interest as would render the two offices incompatible, within the principles stated in V Op. Atty. Gen. 852 and XXIII Op. Atty. Gen. 605.

It has been said, however, that "a judicial office and a ministerial office are incompatible." Throop, Public Officers (1892) sec. 33. But the author cites no authority for this broad proposition, nor have we found any which would apply in this state. Probably the foundation for the assertion is that in some states the constitution specifically provides

for the separation of executive, legislative and judicial powers and forbids the exercise of functions of one branch by officers of another. See, *e. g.*, *Opinion of the Justices*, 3 Me. 484, 486 (1825) ; *The State v. Hutt*, 2 Ark. 282 (1840).

In Wisconsin there is no such sweeping constitutional disqualification. Art. VII, sec. 10, Wis. Const., provides that judges of the supreme and circuit courts "shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected, and all votes for either of them for any office, except a judicial office, given by the legislature or the people, shall be void." Art. VI, sec. 4, which provides for the election of county officers, provides that "sheriffs shall hold no other office," but is silent as to eligibility of other officers to hold more than one office. Subsection (2) of sec. 256.02, Stats., provides that "the judge of any *court of record* in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he was elected, or appointed," but does not affect justices of the peace. See XXV Op. Atty. Gen. 55.

It follows that the deputy county clerk may also hold the office of justice of the peace.

WAP

Taxation — Tax Sales — County treasurer is required to publish notice of expiration of redemption period of special assessments, pursuant to sec. 75.07, subsec. (1), Stats., notwithstanding county has title to land under previous tax deed.

March 26, 1940.

K. T. SAVAGE,
Assistant District Attorney,
Kenosha, Wisconsin.

You state that Kenosha county has in the past taken tax deeds to certain lands and has also purchased special assessment certificates on the same lands, at the sale thereof. The period of redemption of the special assessments is about to expire and you inquire whether it is necessary, in view of the fact that the county owns the lands, for the county treasurer to publish the notice of expiration of the period of redemption required by sec. 75.07, subsec. (1), Stats.

The county holds the special assessment certificates not as owner but as trustee for the owners or bondholders and must deliver them to such owners or bondholders on demand, pursuant to sec. 62.20 (3) (c). *Gross v. Sommers*, 225 Wis. 266, 274 N. W. 255 (1937), and cases cited. Moreover, if they were issued prior to the passage of ch. 204, Laws 1937, which added the last proviso in sec. 62.20 (3) (c), such certificates are not inferior to the lien of prior general taxes. *Gross v. Sommers, supra*. Thus, there are parties other than the county who have a substantial interest in these assessment certificates and it is the solemn duty of the county, as trustee for such parties, to protect that interest.

The question then resolves itself into whether failure to publish the notice required by sec. 75.07 (1), which would only result in the county's giving notice to itself, would affect the rights of the owners of the assessment certificates or bonds. It has been held by way of *dictum* that an irregularity as to the time of giving such notice will not avoid a tax deed since the statutes do not so provide. *Wright v. Sperry and wife*, 21 Wis. 331 (1867); *Allen v. Allen*, 114

Wis. 615, 625, 91 N. W. 218 (1902). But it has never been determined in this state whether a complete omission of publication would avoid the deed and until that is decided the only safe practice is to publish. See, *e. g.*, *Smith v. Huber*, 224 Iowa 817, 277 N. W. 557, 115 A. L. R. 131 (1938), holding failure to serve such notice renders tax title unmerchantable.

Actual knowledge is no substitute for formal notice, where such notice is jurisdictional. Thus, it has even been held that where a statute requires notice of expiration of the period of redemption to be served by the purchaser upon the person in whose name the lands are assessed for taxation, and the purchaser happens also to be such person, he must *serve notice upon himself* before he can take a valid deed. See Note, 44 L. R. A. (N. S.) 679 (1913). Such a situation is analogous to the position of the county here and illustrates the dangers of failing to comply strictly with the statute.

The county clerk is forbidden by sec. 75.14 (2) to issue a tax deed unless he finds by comparison with the treasurer's book of sales that the land was properly described in both the advertised sale list and the advertised list for redemption. If the lands are omitted altogether from the published list for redemption, no such comparison can be made and the clerk can in no event give a deed without violating this section. This fact distinguishes this situation from that in the *Wright* and *Allen* cases, *supra*, since the description could be compared whether or not the publication was made at the proper time, but could not be made if publication was omitted altogether.

Moreover, in case of failure to publish within the time prescribed, the treasurer may publish the notice within two years after the expiration of the five-year redemption period, specifying a new date upon which the time for redemption will expire, which shall not be less than six months nor more than ten months after the publication is completed. Sec. 75.10, Stats. Thus, the publication of the notice itself determines to some extent the expiration of the period of redemption, and should be done for that purpose even if for no other.

WAP

Public Health — Osteopathy — Vaccination against smallpox is "practice of medicine" as that term is used in secs. 147.13 to 147.18, Stats., and may not be done by one licensed only to practice osteopathy and surgery.

March 26, 1940.

CLARENCE G. TRAEGER,
District Attorney,
Horicon, Wisconsin.

You have requested an opinion as to whether a person licensed to practice osteopathy and surgery may vaccinate against smallpox under our statutes.

Sections 147.01 to 147.12, Stats., provide for examination and registration in the "basic sciences" of persons desiring to "treat the sick," which is defined as follows in sec. 147.01, subsec. (1), par. (a):

"To 'treat the sick' is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof."

It is doubtful whether vaccination falls within this definition, since it does not require that a diagnosis be made nor is the patient sick and in need of treatment. So far as the basic science law is concerned, therefore, it is probable that even a lay person could vaccinate were it not for the provisions of secs. 147.13 to 147.18, which provide for regulation of the practice of medicine, surgery and osteopathy. In any event, however, osteopaths are examined and registered in the basic sciences, so that even if such registration is required for authority to vaccinate, no violation of that law is involved.

This brings us to the more difficult question whether vaccination by an osteopath violates sec. 147.14 (1), which provides in part as follows:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute, nor unless he shall record the same with the county clerk of the county in which he resides and pay a fee of fifty cents for such recording. * * *."

Section 147.16 provides as follows:

"Having complied with section 147.15, the applicant shall be examined in anatomy, physiology, general diagnosis, pathology, histology, chemistry, hygiene and sanitation. All applicants shall be given the same examination in the foregoing subjects, so far as practicable. Applicants for license to practice medicine and surgery, or osteopathy and surgery, shall be further examined in the branches usually taught in reputable professional colleges."

We are advised that the board of medical examiners does not examine applicants for licenses to practice osteopathy and surgery in the subject of *materia medica*, which is required of applicants for licenses to practice medicine and surgery.

There is no statutory definition of "practice of medicine and surgery" nor of "practice of osteopathy and surgery." Hence these terms must be construed "according to the common and approved usage of the language." Sec. 370.01 (1), Stats. (These terms have no technical meanings that we can discover which differ from their meaning in ordinary speech.) In other states such terms are frequently defined in the statutes, but such definitions vary widely and are of little assistance here since they are obviously designed to meet the needs of the particular forms of regulation prescribed in those states. See all series of Words and Phrases under the headings: Practice of Medicine, Practice of Surgery and Practice of Osteopathy.

In the absence of statutory definition, it has been held that the practice of medicine is not limited to treatment of disease alone. See, *e. g.*, *Commonwealth v. Porn*, 196 Mass. 326, 82 N. E. 31, 17 L. R. A. (N. S.) 94, 95 (1907):

“* * * Although childbirth is not a disease, but a normal function of women, yet the practice of medicine does not appertain exclusively to disease, and obstetrics as a matter of common knowledge has long been treated as a highly important branch of the science of medicine.”

And in *Stewart v. Raab*, 55 Minn. 20.56 N. W. 256 (1893), it was held that a person licensed to practice medicine may practice surgery, which is a branch of medicine. Medicine was therein defined as “the art of *preventing*, curing and alleviating diseases, and remedying so far as possible the results of violence and accident.” (Italics supplied.) And in *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923, 925 (1889), the court said:

“* * * The practice of medicine includes the application of the knowledge of medicine, of disease, and of the laws of health.”

“Medicine” is defined as follows in Vol. VI, Oxford Dictionary (1908), p. 295 of letter “M”:

“1. That department of knowledge and practice which is concerned with the cure, alleviation, and *prevention* of disease in human beings, and with the restoration and *preservation* of health. Also, in a more restricted sense, applied to that branch of this department which is the province of the physician, in the modern application of the term; the art of restoring and *preserving* the health of human beings by the administration of remedial substances and the regulation of diet, habits, and conditions of life; *distinguished from Surgery and Obstetrics.*” (Italics supplied.)

It is defined as follows in Funk & Wagnalls, New Standard Dictionary (1923):

“* * * 2. The healing art; the science of the *preservation of health* and of treating disease for the purpose of cure, specif. as *distinguished from surgery or obstetrics.*” (Italics supplied.)

And it is defined as follows in *Webster's New International Dictionary* (2d ed., 1935):

"2.a The science and art dealing with the *prevention*, cure, or alleviation of disease. b. In a narrow sense, that part of the science and art of restoring and *preserving* health which is the province of the physician as *distinguished from the surgeon and obstetrician*." (Italics supplied.)

It is pretty clearly implied in ch. 150, Stats., that the practice of obstetrics is limited to physicians and surgeons, except those limited functions which are permitted to licensed midwives under that chapter. See V Op. Atty. Gen. 470, 473. Since licenses are granted to practice medicine *and surgery*, and since physicians and surgeons are both permitted to practice obstetrics, it is plain that the term "medicine" in sections 147.13 to 147.18 is used in its narrow sense as given in the three dictionary definitions *supra*. It may be said to include the treatment and *prevention* of disease by *medication* through the administration of drugs, serums, vaccines and the like, collectively referred to as "medicines," and to exclude surgery and osteopathy. Vaccination against smallpox is plainly within the meaning of the term "practice of medicine" as thus defined.

It is also clear that vaccination is not included in osteopathy, which is defined as follows in Funk & Wagnalls, New Standard Dictionary (1923) :

"1. A system of treating disease without drugs, * * * based on the belief that disease is caused by some part of the human mechanism being out of proper adjustment, * * * resulting in unnatural pressure on or obstruction to nerve, blood or lymph. Osteopathy * * * seeks to adjust correctly the misplaced parts by manipulation."

See also: Webster's New International Dictionary (2d ed., 1935) ; vol. VII Oxford Dictionary (1909), p. 225 of letter "O"; V Op. Atty. Gen. 471; Herzog, Medical Jurisprudence (1931) sec. 121.

Since the person to whom your question refers is licensed to practice osteopathy and surgery, it remains to determine whether surgery includes vaccination. "Surgery" is thus defined in vol. IX (pt. 2), Oxford Dictionary (1919) p. 235 of letter "S":

"1. The art or practice of treating injuries, deformities, and other disorders by manual operation or instrumental appliances; surgical treatment."

Funk & Wagnalls, New Standard Dictionary (1923), defines it thus:

"1. The branch of the healing art that resorts to manual operations or mechanical appliances for the treatment of injuries, deformities, or internal morbid conditions."

Webster's New International Dictionary (2d ed. 1935) gives the following definition:

"1. That branch of medical science, art, and practice, which is concerned with the correction of deformities and defects, the repair of injuries, the diagnosis and cure of diseases, the relief of suffering, and the prolongation of life, by manual and instrumental operations."

It will be noted that although all definitions of "medicine" include the *prevention* of disease, none of the definitions of surgery does so. Surgery concerns itself with the sick, the disfigured, the deformed and some phases of obstetrics, but not with healthy persons who are apprehensive that they may become ill. Its methods are the separation, excision and transplanting of tissues, the aligning of fractured bones, the application of dressings, sutures, splints, casts, braces and other devices to the body, and other procedures more or less mechanical in their nature, designed to correct existing disfigurements or abnormal or pathological conditions, or to prevent their spread. It resorts to the use of drugs such as antiseptics, narcotics and anaesthetics *for purposes incidental to its methods* (see XII Op. Atty. Gen. 160; XXI Op. Atty. Gen. 137, 163), but it does not cure directly by the use of drugs. Some operations require a combination of surgery and medication and in our opinion may be performed only by persons licensed in both medicine and surgery. Whether vaccination belongs to the latter group it is unnecessary to determine here, since it is apparent that it is not surgery *per se*.

It is plain that the mere use of an instrument in the administration of medicine is insufficient to bring the opera-

tion out of the field of the physician and into that of the surgeon. It is possible to think of many forms of therapy, such as X-ray therapy for example, which are difficult to classify, but we are satisfied that to the extent that the practitioner makes use of drugs, serums, antitoxins, vaccines and the like to bring about the desired results directly and through their own action, he is practicing medicine whether he introduces them into the body through the mouth or through the skin by means of an instrument adapted for the purpose.

Accordingly, it appears that a license to practice surgery does not authorize its holder to vaccinate, since that requires a license to practice medicine as well.

We are advised that all reputable osteopathic colleges now recognize and teach the use of vaccination against smallpox as well as other preventive serums, antitoxins and the like, and that practically all osteopaths and surgeons employ these methods in their practice. It is, therefore, with extreme reluctance that we are forced to conclude that such activities on their part are unwarranted in law. It may be that osteopaths are as well qualified in many fields of medicine as are regular medical practitioners (M. D.'s), but this can also be said of persons licensed to practice medicine in other states, who nevertheless, may not practice in this state unless they are first licensed here. The point is that if an osteopath is qualified to practice medicine he may become licensed to do so, but if he is not so licensed his qualifications alone do not permit him to invade the field. If conditions in the field of osteopathy have so changed that it is no longer limited to curing by the adjustment of misplaced parts of the body, without drugs, this can be recognized by amending the statutes. See *State v. Sawyer*, 36 Idaho 814, 214 Pac. 222 (1923). In the meantime, persons licensed to practice osteopathy and surgery may not enlarge the legal scope of their activities merely by undertaking to perform functions properly belonging to the practice of medicine alone.

WAP

Counties — County board chairman who is *ex officio* member of all committees of board is entitled to per diem and expenses for committee service under sec. 59.06, subsec. (2), Stats., notwithstanding that he has been voted additional compensation of one hundred twenty-five dollars per year under sec. 59.03 (2) (f), such additional compensation being intended to cover his statutory duties as chairman under sec. 59.05.

March 29, 1940.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

You state that the county board of Kewaunee county provided a salary of one hundred twenty-five dollars per annum for the chairman of the board, in addition to his per diem, pursuant to the authority granted to the board by sec. 59.03, subsec. (2), par. (f), Stats. By another resolution, the chairman was made an *ex officio* member of all committees of the board. The question is: May he be paid a per diem for such committee service, or is that covered by the annual salary of \$125.00?

Prior to 1935 it was ruled by this department that under sec. 59.03, as it then read, a county board could not reimburse its chairman for expenses incurred by him in performance of his extra duties as chairman, but that he was limited to the per diem and mileage for attending sessions and per diem for committee service. XXI Op. Atty. Gen. 237.

Chapter 407, Laws 1935, amended sec. 59.03 (2) (f) by adding: "and such additional compensation for the chairman as the county board by a two-thirds vote may determine." By this addition, the legislature plainly intended to permit a county board, at its discretion, to vote extra compensation to its chairman for the performance of the duties of chairman, found in sec. 59.05, Stats. Since service on the committees is not one of his prescribed duties, and is a duty for which the other members of the board are compensated under sec. 59.06, Stats., the county chairman who has been

appointed to such committees by the board is likewise entitled to such compensation. If he is required to serve in excess of the time limited by sec. 59.06 (2) (by reason of being on *all* committees), his additional salary will, perhaps console him for his overtime, but that is no reason why he should not be paid a per diem up to the statutory limit for committee service.

WAP

Corporations — Motor Vehicle Transportation — Assignability of Licenses — Contract motor carrier's license under ch. 194, Stats., is assignable with approval of public service commission.

March 29, 1940.

R. W. PETERSON, *Chairman,*
Public Service Commission.

You inquire whether contract motor carrier licenses issued by the public service commission under ch. 194, Stats., are assignable.

It is well settled that although public utility franchises are inalienable at common law, they may be made assignable by statute. *Wright and others v. The Milwaukee Railway & Light Co.*, 95 Wis. 29, 35, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47 (1897); *The State ex rel. Badger Illuminating Co. and others v. Anderson*, 97 Wis. 114, 117, 72 N. W. 386 (1897).

It has also been held that where a franchise is made assignable when granted it may not have that quality taken away by subsequent legislation without violation of the "obligation of contracts" clause of the federal constitution. *Ohio Pub. Serv. Co. v. Fritz*, 274 U. S. 12, 71 L. ed. 898, 47 Sup. Ct. 480 (1926). But this rule has little bearing upon

your question, other than as a possible rule of construction, since it has always been provided that certificates and licenses issued under ch. 194 are revocable and confer no property right. Secs. 194.25 (1) and 194.34 (1), Stats. 1933 and 1935; sec. 194.25 (1), Stats. 1937 and 1939.

The sole question, then, is one of statutory construction. Chapter 194 as it now exists had its origin in ch. 488, Laws 1933, and underwent a considerable revision in ch. 288, Laws 1937. A glance at Bill No. 303, S., which became ch. 288, Laws 1937, shows that although some substantive changes were made in the law, a prime purpose appears to have been to eliminate surplus language and consolidate sections so as to shorten the chapter without, in most cases, changing the law. In doing so, the drafters of the bill inadvertently muddled the provision as to assignment of contract carriers' licenses, but in view of the fact that with reference to that provision the amendment was merely a revision, it should not be construed as changing the prior law in the absence of clear language to that effect, under the rule applicable to revisor's bills. See *London G. & A. Co. v. Wisconsin P. S. Corp.*, 228 Wis. 441, 447, 279 N. W. 76 (1938), and cases cited.

By definition, under the original act, the authority granted to a common carrier was called a "certificate" and that granted to a contract carrier was called a "license". Stats. 1933, sec. 194.01 (9), (12). It was specifically provided that common and contract carriers must obtain certificates and licenses, respectively, before they could operate. Stats. 1933, sec. 194.04 (1) (a). All of these provisions were repealed as surplusage by the 1937 act, but it is still clear that only common carriers receive certificates and only contract carriers receive licenses. Stats. 1939, secs. 194.23 and 194.34, respectively.

Originally, sec. 194.37 provided in part as follows:

"No license issued under the authority of this chapter shall be subject to assignment or transfer, except after a hearing and a finding by the commission that the same is not against public convenience and necessity and otherwise is not against the public interest. No license issued in accordance with the terms of this chapter shall be construed

to be irrevocable or to confer any property right upon the holder thereof. * * *

The act contained a very similar provision referring to the nature and assignability of certificates, sec. 194.25. Apparently the 1937 legislature intended to consolidate these two sections, for it repealed sec. 194.37, *supra*, and amended sec. 194.25 as follows, the portion in italics being added and that enclosed in brackets being stricken:

"(1) No certificates *or license* issued in accordance with the provisions of this chapter shall be construed to be irrevocable, or to confer any property right upon the holder thereof.

"(2) No right, privilege, [or] certificate, *or license* held, owned or obtained by any common motor carrier [of property or of passengers] under the provisions of this chapter shall be sold, assigned, leased, transferred or mortgaged either by voluntary or involuntary action, except after [hearing and] a finding by the commission that the same [is not against public convenience and necessity and otherwise] is not against the public interest."

Although the legislature went to the trouble of inserting the words, "or license," in subsec. (2), just quoted, these words are meaningless if restricted to a license held by a *common* carrier, since common carriers have *certificates*, not licenses. The only *licenses* known to the act are those held by *contract* carriers. Since the legislative intent must govern and since no reason is apparent for distinguishing between common and contract carriers in this regard, the statute must be construed as applicable to licenses of contract carriers as well as to certificates held by common carriers. The word "common" must be read out of the subsection.

This construction is enforced by other sections of the chapter. Thus, sec. 194.04 (1) (c) was amended as follows by the 1937 act:

"Every application for a license [by a contract motor carrier] *or for approval of assignment thereof or for an amendment to include service at municipalities at which the carrier is not already authorized to serve* shall be accompanied by a filing fee of fifteen dollars."

But at the same time paragraph (b) of the same subsection was amended to require that every application for approval of an assignment of a *certificate* be accompanied by a filing fee of *twenty-five* dollars. •

Also, sec. 194.03 (3), created by ch. 288, Laws 1937, provides that "motor carriers operating in interstate commerce shall obtain certificates and licenses, amendments thereto, and *approval of the assignment thereof*, as provided in sections 194.18, 194.25, 194.34, and *194.37*," although by the same act sec. 194.37 was repealed. This error occurred in the original Bill No. 303, S, at p. 17, line 13. It shows that the drafters did not intend to repeal the *substance* of sec. 194.37 and is further evidence that the bill was carelessly drawn and hence cannot be too strictly construed without doing violence to the legislative intent.

WAP

Minors — Child Protection — Under provisions of sec. 48.01, subsec. (5), Stats., juvenile court of Fond du Lac county may hold Waushara county responsible for care of child temporarily living in Fond du Lac county but who is legally settled in Waushara county.

April 3, 1940.

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

You have requested an opinion of us based upon the following facts:

"X is a minor child twelve years of age. Her mother has been dead for some years. Her father has a legal settlement in the village of Wautoma, Waushara county, Wisconsin, for poor relief purposes. He now resides in the town of Marion, Waushara county, Wisconsin.

"In June, 1939, X went down to Ripon to live with her aunt, Y, of Ripon, Wisconsin, and has lived and resided with her continuously up to date. In September, 1939, Y petitioned the juvenile court of Fond du Lac county, and you will find enclosed herewith a copy of the judgment which was entered by the court by virtue of that petition. You will note that in the judgment it is ordered that Waushara county pay to Y \$12.00 per month commencing September 1, 1939 direct."

You have listed three specific questions for us to answer:

"1. Has the judge of the juvenile court of Fond du Lac county authority to order Waushara county to pay in this case?

"2. If he hasn't authority to order Waushara county to pay, is there any procedure that he could use to make Waushara county pay?

"3. Is X bound as an apprentice to Y according to section 49.02 (6) of the Wisconsin statutes?"

At the outset we may say that we can see no basis for holding that X is bound as an apprentice to Y according to sec. 49.02, subsec. (6), Stats. It cannot be said, under the

definition of "apprentice" in sec. 106.01, Stats., that X has entered "into any contract of service, express or implied, whereby he [she] is to receive from or through his [her] employer, in consideration for his [her] services in whole or in part, instruction in any trade, craft or business."

Question 2 is premised on a negative answer to question 1, and it is not necessary to answer the question, as in our opinion question 1 should be answered in the affirmative.

While the state of the law is not wholly satisfactory with respect to the matter involved, we are of the opinion on the whole that the judge of the juvenile court of Fond du Lac county was authorized to hold Waushara county responsible for the support of X.

Sec. 48.01 (1) (a), Stats., defines "neglected child". We do not understand that there is any controversy in this case with respect to the status of X as a neglected child.

Sec. 48.01 (5) (a), Stats., provides as follows:

"Except as otherwise provided in this paragraph, the juvenile court shall have exclusive original jurisdiction of proceedings under this chapter involving:

"1. Delinquency, neglect or dependency of children residing within the county;

"* * *

"(am) If in any of the cases in paragraph (a) of this subsection either the child or the parent, guardian or custodian is at the time of filing of petition present within some other county, but does not reside therein, *the juvenile court of such other county shall have concurrent jurisdiction.* * * *."

The first sentence of sec. 48.07, subsec. (6) (a), Stats., reads:

"Whenever a child is committed by the court to custody other than that of his parent and no provision is otherwise made by law for the support of such child, compensation for the care of such child, when approved by order of the court, *shall be a charge upon the county, except in counties maintaining a county home for dependent children.*
* * *"

We also call attention to sec. 48.28 (1), Stats., which reads:

"The board of trustees of any existing county home for dependent children may receive into its charge and under its control by commitment, * * * any neglected or dependent child under eighteen years of age *residing in the county*, * * *."

The solution to the problem of determining whether Waushara county may be held responsible for X's support rests upon the interpretation of the words "shall be a charge upon the county" in subsec. (6) (a) of sec. 48.07, above quoted. The remaining statutory provisions which we have quoted are pertinent in explaining the meaning of the words, "the county".

It is rather evident that the words "the county" as thus used refer to the county of legal residence. You will have noted the provision of sec. 48.07 (6) (a), Stats., that compensation for the care of a child shall be "a charge upon the county, except in counties maintaining a county home for dependent children." Now, for purposes or argument, let us assume that Fond du Lac county maintains such a home. Under the statute as quoted above, compensation for X's care would not be a charge upon Fond du Lac county since it maintains a home for dependent children.

Since, therefore, the judge could not hold Fond du Lac county responsible for the child's support, could he then commit X to the Fond du Lac county home for dependent children? This question must be answered in the negative because under sec. 48.28, Stats., as set out above, the Fond du Lac county home for dependent children may receive only such neglected or dependent children as are resident in that county.

It was therefore impossible for the court to require Fond du Lac county to care for X either by way of compensation or through institutional care.

The court might, however, have committed X to a state institution, but in such a case Waushara county, as the county of legal settlement, would have been liable for one-half of the support and the state would have been liable for

the other half. See sec. 48.20, subsec. (4), Stats. This fact alone is rather indicative of the intent of the law to place responsibility for the care of dependent children upon the county of legal settlement or the county of residence, which, as used in this chapter, amount to the same thing.

It would be doing violence to the plain intent of sec. 48.07, (1), Stats., however, to limit the court in providing for the interests of a dependent child by holding, in substance, that it would have no discretion in the case to which we have referred other than to commit the child to a state institution. Sec. 48.07 (1), Stats., permits the court to exercise a wide discretion in providing for a child. It is the obvious scheme of that section, as well as of the entire code, to make a child's welfare an extremely important consideration.

What, then, is the alternative? Obviously, if Y were to be returned to Waushara county to petition the juvenile court there, there could be no question about Waushara county's responsibility. Our next step, then, is to say that since the statute gives the juvenile court of Fond du Lac county concurrent jurisdiction, and since the juvenile court of Fond du Lac county cannot, as has been shown, provide for the child in such a way as to place financial responsibility upon Fond du Lac county, then the juvenile court of Fond du Lac county must be able to hold Waushara county financially responsible for the support of the child. Any other interpretation would make the grant of concurrent jurisdiction in subsec. (5) (am) of sec. 48.01, Stats., a nullity.

Having shown that such an interpretation is necessary, under the factual situation which has been assumed, it follows that since the concurrent jurisdiction of the juvenile court of Fond du Lac county could not be lessened by the failure of the county to maintain a home for dependent children, its jurisdiction is broad enough to permit an order imposing financial responsibility for the care of X upon Waushara county.

JWR

Bridges and Highways — Law of Road — Motor Cycles — Operators of "power cycles" as defined in sec. 85.015, subsec. (2), Stats., are required to have drivers' licenses as provided in sec. 85.08, Stats.

April 4, 1940.

GEORGE W. RICKEMAN, *Commissioner,*

Motor Vehicle Department.

Attention Hugh M. Jones, *Director Registration and Licensing.*

You inquire whether persons operating "power cycles" as defined in sec. 85.015, subsec. (2), Stats., are required to have operators' licenses under sec. 85.08, which provides in part as follows:

"(1) After January 1, 1928, no person shall operate or drive a motor vehicle upon any public highway of this state without obtaining a license for that purpose as provided in this section * * *."

The only exceptions to the operator's license requirement are stated in subsec. (1c) of sec. 85.08, as follows:

"No person shall be required to obtain a driver's license for the purpose of driving or operating a road roller, road machinery, or any farm tractor or implement of husbandry, temporarily drawn, moved or propelled upon the highway."

Power cycles are defined as follows in sec. 85.015, which provides for an annual registration fee of three dollars:

"(2) Every motor vehicle designed to travel on not more than two wheels in contact with the ground and weighing less than three hundred pounds and equipped with an engine of ten horse power or less shall be included within the term 'power cycle'."

There is no satisfactory definition of the term "motor vehicle" which is applicable to secs. 85.01 to 85.08. Section 85.10 contains the following definitions, which, however, expressly apply to the terms as used in secs. 85.10 to 85.86 and 85.91 only:

"The following words and phrases, when used in sections 85.10 to 85.86 and 85.91 shall, for the purpose of said sections, have the meaning respectively ascribed to them except in those instances where the context clearly indicates a different meaning:

"(1) Vehicle. Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting vehicles used exclusively upon stationary rails or tracks.

"(2) Motor vehicle. Every vehicle as herein defined which is self propelled.

"* * *

"(4) Motor cycle. Every motor vehicle designed to travel on not more than three wheels in contact with the ground except any such motor vehicle as may be included within the term tractor as herein defined."

As long ago as 1916, in V Op. Atty. Gen. 362, this department ruled that bicycles equipped with Smith motor wheels were motor cycles in the meaning of sec. 85.01, which provides in part as follows:

"(1) No automobile, motor truck, motor delivery wagon, passenger automobile bus, motor cycle or other similar motor vehicle or trailer or semitrailer used in connection therewith, shall be operated upon any highway unless the same shall have been registered in the office of the motor vehicle department, and the registration fee paid. * * *."

See also X Op. Atty. Gen. 798.

In our opinion, the sole purpose achieved by the enactment of sec. 85.015 (1) and (2) was to reduce the registration fee on light motor cycles from five dollars (the fee provided by sec. 85.01 (4) (b) for motor cycles) to three dollars. They have always been motor vehicles in the meaning of sec. 85.01, and in the absence of express exemption they are motor vehicles in the meaning of sec. 85.08 and were such before the enactment of sec. 85.015. Accordingly, their operators are required to have drivers' licenses.

WAP

Indigent, Insane, etc. — Poor Relief — Legal Settlement
— At least prior to enactment of ch. 16, Laws 1937, person uninterruptedly absent from his place of legal settlement for one year lost his settlement, under sec. 49.02, subsec. (7), Stats., even though enrolled in civilian conservation corps during that time.

April 5, 1940.

J. C. RAINERI,
District Attorney,
Hurley, Wisconsin.

You have given us the following statement of facts: X had a legal settlement in a town in Iron county. He was incarcerated in the reformatory for three years until March 2, 1935. From March 2 to August, 1935, he resided in Milwaukee. In August he enrolled with the civilian conservation corps and was stationed at Phillips, Wisconsin, until November, when he was transferred to a camp at Fort Sheridan, Illinois; from December 28 to January 4, 1936, he was at camps at Phillips and Independence, Wisconsin; and from the latter he went to a camp at Durand, Wisconsin, where he remained until July 2, when he deserted from the CCC, and thereafter he resided at Durand until October, 1936. We assume that during all this time he never returned to the town of settlement.

The question is: Did X lose his legal settlement in the town in Iron county because of his absence therefrom from March 2, 1935, to October, 1936?

Subsec. (4), sec. 49.02, Stats., reads in part:

"Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village or city while supported therein as a pauper or while employed on a federal works progress administration project or while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program shall operate to give such person a settlement therein.
* * *"

Subsec. (7), sec. 49.02, Stats., provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

The words "by voluntary and uninterrupted absence" were held by the supreme court to mean an absence during which the party is not a pauper needing and receiving support. *The Town of Scott v. The Town of Clayton*, 51 Wis. 185, 8 N. W. 171 (1881); *Sheboygan County v. Sheboygan Falls*, 130 Wis. 93, 109 N. W. 1030 (1906); XXII Op. Atty. Gen. 222; XXIII Op. Atty. Gen. 541; opinion to state department of public welfare, dated February 28, 1940.* Thus, subsecs. (4) and (7) were read together in this respect—so that, not only can a person not *gain* legal settlement while being supported as a pauper, but he cannot *lose* one either. At the time of the *Town of Scott* case subsec. (4) contained only the restriction that no legal settlement could be acquired while supported as a pauper.

In XXIV Op. Atty. Gen. 190, this department ruled that a person working on a federal CWA project was self-supporting and thus gained legal settlement while so employed. Thereafter the legislature, by ch. 527, Laws 1935, added, "or while employed on a federal works progress administration project," to the original restriction, "while supported therein as a pauper," in sec. 49.02, subsec. (4).

In XXV Op. Atty. Gen. 10, this department ruled that "federal works progress administration" did not include CCC, PWA, rural electrification or resettlement administration projects. Thereupon, by ch. 16, Laws 1937, the legislature added to subsec. (4); "or while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program".

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The present case involves membership in the CCC before the last statutory amendment. The question, then, is: At that time was X being supported as a poor person in need of and receiving relief?

In XXIII Op. Atty. Gen. 617, this department ruled that a person being supported by a CCC enrollee was not being supported as a pauper. It was there pointed out, after reference to pertinent sections of the federal statute making provision for the CCC, that members thereof are considered employees and not charges of the government. It was further stated, p. 619:

“* * * The people working under C. C. C. are not objects of charity—they are not being supported as paupers so as to be brought within the restriction on legal settlement set forth in sec. 49.02 (4), * * *.”

It has been pointed out above that CCC enrollees were ruled not to be included in the amendment made by ch. 527, Laws 1935, to sec. 49.02, subsec. (4), Stats. XXV Op. Atty. Gen. 10.

Thus, a year's residence while enrolled in the CCC prior to the statutory amendment of ch. 16, Laws 1937, was sufficient for the purpose of *gaining* legal settlement under subsec. (4) of sec. 49.02, Stats., and a year's absence, if voluntary and uninterrupted, while so enrolled was sufficient to *defeat* a former settlement, under subsec. (7), whether or not a new settlement was gained. From the facts stated, it appears that X did not remain in any one place long enough to gain a new settlement.

WAP

Police Regulations — Dog Licenses — Delinquent dog license taxes, payable pursuant to secs. 174.05 to 174.10, Stats., are not returnable to county treasurer as part of annual tax settlement.

April 5, 1940.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

The several questions which you have submitted relating to the dog license law, secs. 174.05 to 174.10, Stats., all revolve around the question of whether, as a result of the changes made therein by ch. 79, Laws 1939, unpaid dog license taxes are now to be included in the taxes returned by the local treasurer to the county treasurer in the annual March tax settlement. Our conclusion that such taxes are not to be so included disposes of all of them.

The essential changes made by ch. 79, Laws 1939, were: (1) the elimination of the necessity of making application for dog license, (2) the denomination and imposition of the annual dog license fee as a tax against the owner payable at the time for payment of personal property taxes, whereas previously it was a license fee paid upon procuring of the license, and (3) the providing of a means for the collection thereof through the use of summary proceedings the same as provided in sec. 74.11, Stats., for the collection of unpaid personal property taxes, whereas previously there was no provision for enforcement or collection, except through the seizure and impounding of dogs found without licenses. The other changes relate to procedure in the administration of the license tax.

In our opinion neither the fundamental change from an annual license, to be applied for and the fee therefor paid before February 1 in each year, to an annual tax imposed against the owner, payable at the time for payment of personal property taxes, upon payment of which a license shall be issued, nor the other procedural changes, made by said ch. 79, are sufficient to make unpaid dog license taxes re-

turnable to the county treasurer as a part of the annual tax settlement provided for in sec. 74.17 to 74.19, Stats.

While sec. 174.06, Stats., does provide that the local assessor shall enter the names of the persons to whom dogs are assessed in his assessment record for personal property assessments, it does not provide that the dog license taxes are to be included in the tax roll either as personal property taxes or as a special tax. Said section provides merely that the assessor shall deliver a triplicate list of the owners of dogs to the clerk of the local municipality, who shall in turn deliver one copy to the county clerk, one copy to the treasurer of the local municipality and retain one copy and thus, in effect, says that such triplicate list shall be delivered at the time of the delivery of the assessment roll and along therewith, but not as a part thereof. Had it been intended by the legislature that the dog license taxes were to be treated in all respects the same as personal property taxes, it would have said so or have provided that such dog taxes should be included in the tax roll along with other taxes.

It is of particular significance that sec. 174.06 specifically provides that the dog license taxes shall be collectible in the same manner as is provided in sec. 74.11, Stats., for the collection of personal property taxes, which procedure, by its terms, is available only to local treasurers. This procedure is the only one made available for the collection of dog license taxes. By thus specifically making applicable the collection methods prescribed in sec. 74.11 the remaining procedures prescribed for the collection of personal property taxes are excluded and not applicable to dog license taxes. Had it been intended that dog license taxes were to be treated in all respects as personal property taxes there would have been no occasion for singling out the sole remedy prescribed in sec. 74.11 but, rather, all of the provisions for the collection of personal property taxes would have been made available.

Furthermore, were the delinquent dog license taxes turned over to the county as a part of the annual tax settlement, then, in view of the fact that the only available procedure for collection is one by local treasurers, the county would have no means of effecting a collection thereof. Obviously, this could not have been intended by the legislature.

This indicates quite clearly that dog license taxes are not to be turned over to the county, but are to be retained by the local treasurer, who is given some means for collecting the same.

The amendment of sec. 174.08 as to the time of accounting for collections under the dog license law does not evidence any intention other than to eliminate the requirement of an accounting each month and provide instead thereof only one annual accounting at the same time that other accounting as to taxes is made with the county officials.

In addition the provisions of sec. 174.07, Stats., respecting the issuance of licenses, delivery of collar tags and the disposition of unused tags, license books and duplicate licenses negative any idea that dog license taxes are to be turned over to the county. Under subsec. (1) thereof, upon payment of the dog license tax a license is to be issued for the dog and a metal collar tag delivered. Subsec. (3) requires the collecting officer at the time of the issuance of the license to make a duplicate thereof in bound books which the statute provides shall be furnished. In the second sentence of subsec. (3) it is provided that the local treasurer or collecting officer shall return all unused collar tags, license books, and duplicate licenses of the preceding license year to the county clerk annually at the time for return to the county treasurer of delinquent personal property taxes. This clearly recognizes that the local officer is to keep the license books and tags all through the license year. The apparent purpose thereof is so he can issue the licenses whenever the tax for each dog is paid, otherwise the statute would prescribe that the license books and collar tags for the current year should be returned to the county treasurer at the time of tax settlement in March of that year, so that upon collection of the tax by the county treasurer he could issue the proper license. If the unpaid dog license taxes were to be turned over to the county treasurer as a part of the tax settlement in each year there would be no purpose in having the local treasurer retain the license books and metal tags until tax settlement time in the succeeding year.

In our opinion the changes effected by ch. 79, Laws 1939, were intended only to render the dog licensing law more effective by imposing the license fee as a tax and prescrib-

ing a remedy for the collection thereof through summary proceedings of the same nature as provided in sec. 74.11, Stats. It is therefore our opinion that unpaid dog license taxes payable pursuant to the provisions of secs. 174.05 to 174.10, Stats., are not to be turned over by the local treasurer as a part of the annual March tax settlement with the county treasurer but are to be retained and collected by the local officers, and that the local treasurer must each year, at the time provided by law for settlement with the county treasurer for personal property taxes, account to the county treasurer for all dog license taxes collected and not previously paid thereto, except such dog license taxes as may belong to the police pension fund under the provisions of sec. 174.07, subsec. (4), Stats.

HHP

National Guard — Armories — Where old armory building has been condemned by city authorities and unit occupying same has found other quarters and there appears to be no probability that either building or site will be used or useful for armory purposes in future, it is held:

(1) That razing of building and sale of site are matters within jurisdiction of armory board, acting pursuant to authority conferred by sec. 21.615, subsec. (9) *et seq.*;

(2) Board has no power to make long time lease of site for commercial purposes;

(3) Board might make incidental use of site by way of short term lease for commercial purposes, lease with respect to duration of term and other provisions to be such that armory board will be able to sell when advantageous sale can be made; and

(4) That rentals received from any such short term lease must be covered into general fund.

April 9, 1940.

RALPH M. IMMELL,
Adjutant General.

In your letter you state:

"In 1919 the state of Wisconsin through the armory board acquired from Company "D", first infantry, Wisconsin national guard, a tract of land located at the southeast corner of Richard and Center Streets, Milwaukee, Wisconsin. On this tract of land is located a frame armory building built about fifty years ago and presently used for armory purposes. In 1939 the city of Milwaukee through its building inspection department condemned this building because of structural weaknesses and also because of the definite fire hazard it constituted in the community. The building inspection department orders that this building be no longer used for any purpose, and that it be demolished at the earliest possible date.

"It is respectfully requested that you advise this department whether it can proceed to have this building razed upon the most favorable financial conditions.

"If the building can be razed, is it possible for the armory board to lease this vacant property for commercial pur-

poses? If the property can be leased, will the proceeds derived therefrom be available for the operation of the Wisconsin national guard?

"Can this property be sold by the armory board?"

We shall answer your first and last questions first. While your letter does not so state, we are advised through conferences with members of your staff that the unit now occupying these premises has secured other quarters and that there is no reasonable probability that the property will be needed for armory purposes or used or occupied as such in the future. Under the circumstances, we think that both the matter of the razing of the building and sale of the property are matters within the scope of the functions and authority of the armory board under sec. 21.615, subsecs. (9) *et seq.*, Stats. Also from a reading of the statutes, it is apparent that the governor is given broad powers with respect to approval and the holding of various officers of the national guard responsible for the care and custody of national guard properties. Under the circumstances, it would seem prudent to have the governor approve whatever disposition is made or contemplated by the armory board with respect to both razing of the present building and sale of the site.

Sale must be within the limits of the authority conferred by secs. 21.615 (9) *et seq.*

If there were any reasonable probability that a new armory would be constructed upon the site in question in the future or that the site would be needed or used for armory purposes in the future, we assume that the armory board, with the approval of the governor, could make an incidental use of the premises pending such construction by way of lease for commercial purposes. Such lease would have to be for a short term. We do not think that the armory board would have power to lease for a long term and thus tie the hands of the board with respect to possible sale of the property during the term of the lease. The board's present problem seems to be that of effecting a desirable sale and at as early a date as possible. Any long term lease cannot be productive of any such result but in all probability would make it impossible for the board to sell if a desirable purchase could be effected during such period.

If incidental use by way of lease of the site is made for a short period pending a satisfactory sale of the premises, the rents received must be covered into the general fund. We find no appropriation or authority for augmenting present appropriations to the department by way of such rental receipts.

NSB

Counties — County Clerk — Criminal Law — Fraud in Obtaining License — Fish and Game — Fishing Licenses — Hunting Licenses — Under sec. 59.16, subsec. (1), Stats., county clerk may direct work to be performed by deputy county clerks and may restrict such work to certain activities, such as issuance of hunting and fishing licenses.

Sec. 348.383 is confined in its application to cases of fraud by nonresidents in obtaining resident hunting licenses.

Under sec. 29.145 (2) conservation commission may issue resident fishing licenses through issuing agents of its choice.

April 9, 1940.

GEORGE A. RICHARDS,

District Attorney,

Rhineland, Wisconsin.

You have referred to our opinion of February 15, 1940,* in which it was stated that sec. 348.383, Stats., providing for a penalty in case of fraud in obtaining hunting licenses, applies only where the false statement is made to a county clerk or deputy county clerk.

In this connection you inquire whether a deputy county clerk could be appointed with the authority to issue hunting licenses only, or whether he would be in the same posi-

*Page 54 of this volume.

tion as any other deputy county clerk in fulfilling the duties of that office.

Sec. 59.16, subsec. (1), Stats., reads:

"Every county clerk shall appoint in writing one or more deputies and file such appointment in his office. Such deputy or deputies shall aid in the performance of the duties of such clerk under his direction, and in case of his absence or disability or of a vacancy in his office, unless another is appointed therefor as provided in subsection (3), shall perform all the duties of such clerk during such absence or until such vacancy is filled. The county board may in its discretion, at any meeting, provide a salary for such deputy or deputies."

It is to be noted from the wording of the statute that a deputy county clerk could have his duties restricted under the direction of the county clerk, but that the deputy in the absence or disability of the county clerk is clothed with all the statutory powers of that office and is required to perform its duties. *Gilkey v. Cook*, 60 Wis. 133. However, we assume that in the situation you suggest the deputy county clerk appointed for the purpose of issuing hunting licenses would be merely an additional deputy county clerk, and not the only deputy county clerk. In other words, most counties would have one or more deputy county clerks regularly employed at the courthouse, who could be designated to perform the duties of the county clerk in the event of his absence or disability or in case of a vacancy.

Secondly you inquire whether the opinion referred to applies to resident and nonresident fishing licenses, as well as to hunting licenses.

Sec. 348.383, Stats., provides in part:

"Any person who shall make to any county clerk authorized to issue licenses for the pursuit, hunting or killing of game a false statement concerning his citizenship or residence, and thereby obtain such a license therefor as only citizens or residents of this state are entitled to, shall be punished * * *."

It is apparent from the face of the statute that it can apply only to nonresidents; so your question narrows itself

down to whether or not the statute applies to false statements by a nonresident in obtaining a hunting license only, or whether the statute covers both hunting and fishing licenses.

The statute refers to licenses "for the pursuit, hunting or killing of game."

For purposes of the fish and game law, "game" is defined in sec. 29.01 (3) (a) to include all varieties of wild mammals or birds. A fish is neither a "wild mammal" nor a "bird" and hence is impliedly excluded from the statutory definition of game.

The very title of ch. 29—"Fish and Game"—implies that fish are not game, and the distinction is further emphasized by the fact that ch. 29 contains separate provisions for hunting and fishing licenses.

You are therefore advised that sec. 348.383 applies only to fraud by nonresidents in obtaining resident hunting licenses.

Lastly you inquire whether sec. 29.145 permits distribution of resident fishing licenses in the same manner as is provided by sec. 29.14 for nonresident fishing licenses.

In the case of nonresident fishing licenses sec. 29.14 (2) provides:

"* * * The commission may cause such licenses or coupons to be issued through agents for a compensation of ten per cent of the license fees collected therefor;
* * *"

On the other hand, sec. 29.145, relating to resident fishing licenses, provides in subsec. (2) thereof:

"Resident fishing licenses shall be issued subject to the provisions of section 29.09 by the conservation commission or by county clerks of the several counties * * *"

It is apparently contemplated that the conservation commission shall be free to issue resident fishing licenses through issuing agents of its choice in addition to issuing the same through county clerks. Note that sec. 29.145 (2)

says that such licenses shall be issued subject to the provisions of sec. 29.09. In 29.09 (1), it is provided that a fishing license shall be issued only to a person who shall present "to the county clerk or *issuing agent* definite proof of his identity and that he is a legal resident of this state." Sec. 29.09 (4), relating to the issuance of duplicate licenses in case of loss, provides, among other things:

"Whenever any such license is lost the person to whom the same was issued may present to the *authority* from whom he purchased the license an affidavit proving such loss, * * *."

The words "issuing agent" and "authority" as used in sec. 29.09 imply that the conservation commission must have the power to distribute resident fishing licenses to such "issuing agent" or authority." Sec. 29.09 (6) and (7) relate to licenses issued by county clerks and return of fees by county clerks. We do not consider that the words "issuing agent" and "authority" are limited in their application to county clerks and deputy county clerks or the legislature would have said so and would not have used the words "county clerk or issuing agent" in the alternative sense in sec. 29.09 (1) and would have used the words "county clerk or deputy county clerk" in sec. 29.09 (4) instead of the word "authority."

WHR

Intoxicating Liquors — State treasurer does not have power to make rules and regulations restricting granting of credit to retailers of liquor by manufacturers, rectifiers and wholesalers and prohibiting sale of liquor to retailers on "delinquent list."

April 9, 1940.

JOHN M. SMITH,
State Treasurer.

You have requested our opinion relative to our power to make certain rules and regulations, the proposed form of which you enclose with your letter. The proposed regulation states that it is issued pursuant to chapter 176 of the statutes and pursuant to Joint Resolution No. 178, A. (Jt. No. 105), adopted by the 1939 legislature, and relates to the control of credit in the liquor industry. It provides that it shall be unlawful for manufacturers, rectifiers or wholesalers to sell and deliver intoxicating liquor in Wisconsin to licensed retailers except for cash, provided, however, that the usual and ordinary commercial credits may be granted to retailers for a period not exceeding thirty days. It is also provided that manufacturers, rectifiers and wholesalers must report weekly to the state treasurer all delinquent retailers, a retailer being delinquent who fails to pay any invoice within thirty days after its date, and that upon receiving such reports the treasurer shall send to all manufacturers, rectifiers and wholesalers holding permits and licenses in Wisconsin a list giving the names of the delinquent retail licensees. After receipt of such notice the sale of liquor to any delinquent retailer by any manufacturer, rectifier or wholesaler is prohibited. The proposed regulation contains certain other provisions but for the purposes of this opinion we believe the foregoing summary will be sufficient.

The power of the state treasurer to prescribe rules such as those proposed here must, of course, be grounded in some affirmative grant of power by law. Under art. VI, sec. 3, of the Wisconsin constitution, it is provided that the powers,

duties and compensation of the treasurer shall be prescribed by law. A joint resolution of the legislature is not a law, since under art. V, sec. 10, of the Wisconsin constitution, the governor must approve all bills before they become a law. We thus conclude that no power is given to the treasurer by virtue of Joint Resolution 178, A., of the 1939 legislature.

In view of the foregoing, our inquiry must be directed to a consideration of whether or not, in the statutes as now enacted, the legislature has granted to the state treasurer the power to make rules of the type proposed. The legislative scheme for the control of traffic in intoxicating liquors is set forth in chapter 176 of the statutes. Ch. 139, Stats., contains the provisions of law relating to taxes on fermented malt beverages and intoxicating liquors. Subsec. (10), sec. 66.05 deals with municipal regulation of the sale of fermented malt beverages and also contains certain restrictions on brewers, bottlers and wholesalers of fermented malt beverages. In the administration of these laws the state treasurer is given certain powers and duties. A brief summary of the powers and duties of the state treasurer as found in chapter 176 is as follows:

Sec. 176.05 (1a)—Prescribe form for application and permit and issue permits to manufacturers, wholesalers and rectifiers. May suspend or revoke such permit for violation of ch. 176 or 139.

Sec. 176.05 (1d)—Shall issue public warehouse liquor permit subject to rules and regulations issued by the treasurer.

Sec. 176.05 (1f)—Shall issue winery licenses.

Sec. 176.05 (5)—Shall make out forms for application for licenses granted by municipalities and shall furnish forms to licensing bodies.

Sec. 176.05 (13)—Shall prescribe regulations under which corporations may appoint agent to have charge of business of selling intoxicating liquor in Wisconsin.

Sec. 176.18 (8)—Shall by regulation prescribe the manner in which stamps shall be affixed to containers of intoxicating liquor dispensed by a holder of a pharmacist's permit.

Sec. 176.402—May issue sacramental wine permit.

Sec. 176.403—May issue industrial alcohol permit.

Sec. 176.404—May issue medicinal alcohol permit.

Sec. 176.406—May issue wholesale alcohol permit, permitting holder to sell ethyl alcohol.

Sec. 176.42—May prescribe standards for size, form or character of containers of intoxicating liquor.

Sec. 176.43 (2) provides:

“The state treasurer in furtherance of effective control may promulgate rules and regulations consistent with chapter 66 or chapter 139. Such rules and regulations shall be published once in the official state paper and shall become effective five days after such official publication.”

Sec. 176.60—May require that samples of liquor be furnished for examination and analysis.

Sec. 176.62—May seize liquor owned, possessed, sold, etc. in violation of ch. 176, ch. 66 or ch. 139.

Sec. 176.70—May prescribe forms for and issue permits for sale of intoxicating liquor for future delivery and may inquire into the trustworthiness of applicants.

Sec. 176.71—May contract bonded wreckers to destroy illicit stills seized.

Under sec. 139.03 (11) the state treasurer is given the enforcement and administration of the provisions of ch. 139 and in various other parts of the chapter the powers and duties of the state treasurer with respect to the issuance of stamps and the collection of the tax upon liquor and fermented malt beverages are set out in detail.

Under sec. 66.05 (10) the treasurer is given certain duties in registering permit numbers of brewers and in assigning brewers a registration number.

With respect to all of the powers and duties given to and laid upon the state treasurer in connection with the administration of laws relating to intoxicating liquor and fermented malt beverages by ch. 176, ch. 139 and subsec. (10) of sec. 66.05, an examination of the particular sections involved discloses that with the exception of the provisions of subsec. (2) of sec. 176.43, the acts to be performed by the treasurer and the subjects to which those acts relate are specific. It would seem that any such rules and regulations as those proposed must derive their statutory authority

from subsec. (2) of sec. 176.43, the provisions of which have been set forth above. The pertinent words are:

"The state treasurer in furtherance of effective control may promulgate rules and regulations consistent with chapter 66 or chapter 139."

It will be noted that nowhere in the statutes is there any restriction placed upon the granting of credit to retailers by sellers of liquor, or upon the sale of liquor to a retailer who may be delinquent in his accounts with a seller. Sec. 176.17 restricts manufacturers, rectifiers or wholesalers from having any interest in any license to sell liquor for consumption on the premises or from furnishing, giving or lending money to retailers. These provisions in general condemn the so-called "tied-house", but nowhere in sec. 176.17 is there any mention of a rule-making power on the part of the treasurer to amplify or carry out the provisions of this section. It is provided in sec. 176.17 (2) :

"* * * Nothing herein contained shall affect the extension of usual and ordinary commercial credits for the products of the industry sold and delivered."

It might well be argued that if a wholesaler should be precluded from selling liquor to a retailer who, under the proposed rule had been placed upon the delinquent list, the extension of "usual and ordinary commercial credits" would, in effect, be prohibited by the rule.

While under these circumstances it is our opinion that nowhere in the statutes is there evidence of legislative intention to give the state treasurer the power to make rules and regulations governing the extension of credit in the liquor industry such as those proposed, yet, assuming for the purpose of argument that the legislature so intended by virtue of the provisions of sec. 176.43 (2), it is our opinion that the provisions of said section would be ineffective for such purposes, by reason of the fact that nowhere is there set forth even a general outline of such a law as a framework within which the treasurer might act. The situation here would seem to be within the language of *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, where it was said, pp. 505-506:

"It is considered that the constitutional aspects of administrative law have been so far developed by statute and decision as to indicate in a general way the line which separates that kind of legislative power which may not be delegated from that kind which may be delegated. The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of Chief Justice Marshall 'to fill up the details;' in the language of Chief Justice Taft 'to make public regulations interpreting the statute and directing the details of its execution.'
* * *."

It is our conclusion that the state treasurer does not have the power to make rules and regulations such as those proposed and submitted with the request for an opinion.

RHL

Trade Regulation — Real Estate Brokers' Board — Officer of corporation which holds real estate broker's license may, consistently with sec. 136.07, subsec. (2), Stats., be granted real estate salesman's license unless such officer holds real estate broker's license.

April 11, 1940.

ELLIOT N. WALSTEAD, *Secretary,*
Real Estate Brokers' Board.

You state that you have received an application for a real estate salesman's license from an applicant who is an officer of a corporation that is licensed as a real estate broker. You inquire whether he is eligible for a salesman's license in view of the language of subsec. (2), sec. 136.07, Stats.

That subsection provides that a real estate broker's license issued to a corporation entitles the president, or such other officer as may be designated, to act as a real estate broker. It provides further that if other officers desire to act as real estate brokers on behalf of the corporation, additional licenses must be obtained for them at an annual fee of one dollar. Then follows the language of which you desire a construction, to wit:

“* * * No license as a real estate salesman shall be issued to any officer of a corporation nor to a member of a copartnership *to whom* a license was issued as a real estate broker. * * *”

Then follows a provision that if a real estate broker's license is issued to a copartnership, it shall entitle one member thereof to act as a real estate broker and for each additional member who desires to act as a real estate broker, an additional license must be obtained at an annual fee of one dollar.

It is clear that members of copartnerships and officers of corporations stand in exactly the same position with reference to their right to obtain additional licenses for a fee of one dollar. This being the case, the last phrase of the sentence quoted above—“to whom a license was issued as a real estate broker”—must be construed as modifying not only the phrase “member of a copartnership,” which immediately precedes it, but also “officer of a corporation,” which is its more remote antecedent. Read in this way the statute does not unconditionally forbid the issuance of a salesman's license to an officer of a corporation, but forbids it only when the officer holds a real estate broker's license.

It follows that the applicant to whom you refer is eligible to receive a real estate salesman's license unless he is a holder of a real estate broker's license under the above statute.

WAP

Indigent, Insane, etc. — Poor Relief — Public Welfare —
As repealed and recreated by ch. 242, Laws 1939, sec. 49.03, subsec. (8a), Stats., confers jurisdiction upon industrial commission over relief claims by town, city or village against county in which it is situated, for relief furnished to transient pauper.

Industrial commission does not make orders under sec. 49.03 (8a). Its duties are restricted to making findings and certification dealt with in *Town of Holland v. Village of Cedar Grove*, 230 Wis. 177. Consequently where more than one party is before commission in proceeding no question arises as to form of order imposing liability nor as to proper party against whom order should be drawn. Law provides that certain liability shall exist upon basis of said findings. When commission makes its findings and certification its function has ceased. Secretary of state is thereupon required to exercise certain functions which are dependent upon application of law to facts as found by commission.

Under ch. 435, Laws 1939, creating secs. 58.36 and 58.37, Stats., all powers, duties and functions of industrial commission under sec. 49.03 (8a) were transferred to state department of public welfare.

April 12, 1940.

DEPARTMENT OF PUBLIC WELFARE.

You have submitted the following request for an opinion:

"We request your opinion as to who may be a proper party plaintiff to bring an action under section 49.03 (8a) of the statutes. We also request your opinion as to whether an order of the state department of public welfare, division of public assistance, as successor to the industrial commission in matters relating to said section 49.03 (8a) may be made against a town, city or village (when such county is on the local system of relief) or whether such order has to be made against a defendant county.

"We refer you to the holding of the supreme court in *Town of Holland v. Village of Cedar Grove*, 282 N. W. 111, 230 Wis. 177 and to chapters 344 and 400, laws of 1937. The amendments made by said chapters were a part of the law when *Town of Holland v. Village of Cedar Grove* was de-

cided. It might appear from said decision that the action under section 49.03 (8a) can be brought only by a county through its district attorney and that an order made by the state agency should be made against a defendant county; that the provisions of section 49.03 down to but not including (8a) set forth conditions which are jurisdictional to a proceeding brought under subsection (8a). We then find certain language employed in chapter 242, laws of 1939, as to who are proper and necessary parties to such proceedings. In your opinion, does chapter 242 modify the holding of *Town of Holland v. Village of Cedar Grove, supra*?

"In the event that you should hold that only a county may bring such an action, then is the matter jurisdictional to the extent that the state agency must itself on its own motion dismiss an action improperly brought by a town, village or city, or would this defect be waived by appearance of the parties and failure to object to the jurisdiction? We have in mind the principle that for administrative agencies and courts not of record, jurisdiction must be shown upon the face of the proceedings."

It is, of course, well understood that under the common law no obligation rests upon a municipality to care for the transient poor therein and no recovery lies against the municipality in which a poor person may be settled for relief given to that person by some other municipality.

The matter of adjusting liability between local units of government for the care of the poor has received legislative consideration covering a period beginning with the inception of statehood and extending to the past legislative session.

Prior to the 1935 legislative session, sec. 49.03, Stats., provided for certain rights and certain liabilities on the part of municipalities in connection with the care of the transient poor, leaving those rights and liabilities to be enforced by the courts in appropriate proceedings. Such rights and liabilities were provided for or imposed in sec. 49.03, subsecs. (1) to (8), inclusive.

Ch. 453, Laws 1935, established an entirely new mechanism for enforcing certain of the rights and liabilities to which we have referred. It established sec. 49.03 (8a) providing, in part, as follows:

"(a) Such action shall be commenced before the industrial commission which is hereby given the jurisdiction and

power and duty to hear, try and determine such claims and render decisions thereon between counties and between counties and other municipalities. * * *."

The act in question, however, did not purport to establish any additional rights or liabilities. It dealt only with the procedure of enforcing rights and liabilities already established by the first eight subsections of sec. 49.03.

As printed in the 1937 statutes, the relevant portions of sec. 49.03 establishing the rights and liabilities referred to were as follows:

"49.03 (1) When any person not having a legal settlement therein shall * * * be in need of relief as a poor person * * * the town board, village board or common council shall provide * * * assistance to such persons. * * *"

"(2) The expenses so incurred shall be a charge against the county. The account therefor shall be audited by the county board and paid out of the county treasury, and may be recovered by said county of the town, city or village in which such person so relieved has a legal settlement if within said county; and if not, it may be recovered from the county where such person has his legal settlement, and such county in return, except when operating under the county system of relief pursuant to section 49.04, may recover from the town, village or city of such person's legal settlement. * * *"

"(7) Upon receipt of notice of the disallowance of the claim of any county, the county clerk receiving such notice shall forthwith notify the district attorney of his county, who shall be authorized and empowered to institute an action in the name of the county, for the recovery of so much of said claim as shall have been disallowed, and in such action no county shall be required to give bond for the faithful prosecution thereof or payment of costs adjudged therein."

In *Town of Holland v. Village of Cedar Grove*, 230 Wis. 177, the supreme court considered the jurisdiction of the industrial commission under subsec. (8a) to enforce the rights and liabilities created by those portions of sec. 49.03, above set out. Certain propositions, expressly or by inference decided by the court, and certain of those reasons upon which the holdings are based may be stated as follows:

(1) The expense incurred by a town, city or village in furnishing relief to a transient pauper constitutes a charge against the county in which it is situated. The duty of the county to audit and pay the account presented in such a case is absolute and may be enforced by a mandamus proceeding. No duty is imposed upon a town, city or village in presenting such an account to file it as a claim against the county, within the meaning of those statutes relating to the filing of claims. And the law does not contemplate that an action at law shall be brought for the recovery of the amount involved, which would be the exclusive remedy in the event that the claim for reimbursement involved was a claim in the sense of those statutes relating to the filing of claims.

The industrial commission does not possess jurisdiction to adjudicate with reference to the liabilities of a county to reimburse a town, since the words "such action", as used in sec. 49.03 (8a) (a), refer only to actions brought by a county.

(2) A county having reimbursed a town, city or village situated therein for relief expenditures in behalf of a transient pauper may institute a proceeding before the industrial commission against a town, city or village in such county where the transient so relieved is legally settled for the purpose of recovering the amount so reimbursed. The industrial commission has jurisdiction over such proceedings.

(3) While the exact point was not involved in the case, it is perfectly clear that where a transient pauper has been given relief and the county has reimbursed the town, city or village giving such relief, the county may institute a proceeding before the industrial commission against any other county where such transient poor person may be legally settled. The second county, having reimbursed the first county, may then institute a proceeding before the commission against the town, city or village in such county where the person so relieved has a legal settlement.

It is, of course, understood that the various proceedings referred to in paragraphs (1), (2) and (3) above relate only to those instances in which the counties affected operate under the unit system of relief. If the county system is

in operation, then in no event is there a recovery back against a town, city or village.

The 1939 session of the legislature, through the enactment of ch. 242, Laws 1939, repealed subsec. (8a) and reenacted it to read, in part, as follows:

"All relief claims by one municipality or county against another municipality or county, which have been disallowed or which have not been acted upon as required by statute, may be prosecuted before the industrial commission which is hereby given the exclusive power and duty to hear, try and determine such controversies and to render its findings therein. In any such proceeding all municipalities or counties in any respect liable presently or ultimately, or connected with the controversy shall be deemed to be necessary parties and shall be parties to such proceeding. * * *."

It is our opinion that the legislature, in enacting ch. 242, Laws 1939, intended to vest the industrial commission with jurisdiction over the adjustment of relief claims by a town, city or village against a county in which it is situated. In other words, we think the intent of the law was to supply the jurisdiction which, in the *Town of Holland* case, the court held the industrial commission did not have.

In any case where an account for the relief of a transient pauper was to be presented by a town, city or village to the county board of the county in which it is situated, it seems rather apparent that the county board could not audit the claim if it was a sizeable one until the board had met. It may be that since the passage of ch. 348, Laws 1939, sec. 59.08 (38), Stats., claims of less than five hundred dollars could be audited by a committee of the county board, but this certainly would not be true in the cases of sums in excess of that amount. If the county board were to adjourn without auditing such a claim, then it seems to us that it could properly be said that it had not "acted upon a relief claim as required by statute." And if this be true, the industrial commission, which is vested with jurisdiction over "all relief claims by one municipality or county against another municipality or county, * * * which have not been acted upon as required by statute," could assume jurisdiction and discharge such functions as may be involved.

This conclusion necessitates considering the words "relief claim" as implying a claim in the broad sense but not in the technical sense of a claim against a county which is required to be filed. This treatment of the words, however, seems to be entirely consistent with that of the supreme court in the *Town of Holland* case, where such claims for reimbursement were spoken of as claims but were held not to constitute claims within the meaning of the statutes relating to the filing of claims against counties.

The legislative intent to include within the jurisdiction of the industrial commission claims by a town, city or village against a county in which it is situated is further evidenced by those provisions of ch. 242, Laws 1939, above quoted, requiring that in any proceedings before the commission all municipalities or counties in any respect liable, at the time or ultimately, shall be deemed to be necessary parties and shall be made parties to the proceeding. Here we have clear evidence of a legislative intent to avoid circuity of action and, where claims between different municipalities are involved, to adjust all such claims in one proceeding before one tribunal.

The next question relates to a problem which can best be illustrated by a hypothetical case. City A, located in county B, furnishes relief to a transient pauper who is settled in city D, located in county C. City A then presents its claim to county B for reimbursement. County B reimburses City A and is thereby entitled, under the provisions of sec. 49.03 (2), Stats., to recover the amount of such relief from county C. County C, under the same subsection, having reimbursed county B, is entitled to recover against city D.

Under the provisions of sec. 49.03 (8a), Stats., set out above, if county B starts a proceeding before the commission against county C, the city of legal settlement, city D, is a necessary party to the proceeding. As we understand your inquiry, you desire to be informed as to whether an order should be directed in favor of county B and against county C and another order in favor of county C against city D, or whether it is possible for you to avoid this circuity and to enter an order in favor of county B and against city D.

It seems to us that the matter can be clarified by considering the nature of the proceeding before the board in such cases. As stated by the court in the case of *Town of Holland v. Village of Cedar Grove*, *supra*, the issues before the commission are rather simple. In the suit by county B against county C, only two issues are in question, as follows: (1) Was the person relieved a poor person? (2) Was he legally settled in a town, city or village located in county C?

The commission makes findings upon these issues and if such findings are in favor of county B it sends its findings to the secretary of state. It certifies also the amount of relief furnished. Upon the basis of the certification to the secretary of state, he causes the amount of the certification to be collected as a special state charge against county C and, having collected it, remits it to county B.

Precisely the same situation would exist with respect to the issues and the form of certification in a proceeding by county C against city D.

It seems to us that where city D is made a party to the proceeding by county B against county C, the matter can be adequately dealt with by the commission by making its findings upon the issues to which we have referred and by certifying the amount of relief furnished. That is, the commission will find that the person cared for was a poor person and that he is settled in city D. Thereupon the question as to how the amount certified shall be collected and distributed can properly be determined by the secretary of state. It would not in this event be of any particular interest to the commission.

While it is true that sec. 49.03 (8a), Stats., refers rather vaguely to the entry of an order by the industrial commission in the proceedings over which it is given jurisdiction, still it is clearly evident that the only function with which it is invested by the statute is that of making the findings and certification to which we have referred. The function of the commission in exercising its jurisdiction over the proceedings involved is precisely the same today as it was at the time that the *Town of Holland* case was decided, and the holding of the court as to the proper functions of the commission in that case necessarily require that vague refer-

ences to orders of the commission be disregarded in a proper analysis of sec. 49.03 (8a) as it now stands.

While the question is not specifically raised, you have by inference raised the question of the extent of the public welfare department's jurisdiction over relief controversies under sec. 49.03 (8a) as it now stands. This question involves a consideration of certain parts of secs. 58.36 and 58.37, Wis. Stats., created by ch. 435, Laws 1939. The relevant provisions are as follows:

"The department of public welfare is charged with the execution of all powers, duties and functions vested in the following departments or divisions as they existed immediately prior to the creation of this department, namely:

"* * *

"(6) The functions, powers and duties vested in the industrial commission relative to the adjudication of claims between counties in disputes concerning the responsibility for relief under subsection (8a) of section 49.03." Sec. 58.36, Stats.

"(1) By sixty days after the effective date of this section all of the powers, functions and duties exercised by the state department of mental hygiene (as created by chapter 9, laws of special session 1937); the state department of corrections (as created by chapter 9, laws of special session 1937); * * * and all other functions, powers and duties vested in the industrial commission under subsection (8a) of section 49.03 relating to the adjudication of claims between counties in disputes concerning responsibility for relief are assigned and transferred to and vested in the state department of public welfare. Such transfer shall be at all such times prior to sixty days after the effective date of this section, and in such manner as the state board of public welfare may determine. Concurrently with each such transfer of functions, there is appropriated to the department of public welfare for its use in the performance of the functions, powers and duties so transferred, the unexpended balance of the annual appropriation presently provided for each such function, power or duty, or if not provided with a separate appropriation, then that portion of the appropriation from which such function, power or duty is presently provided, the amount thereof to be determined by the emergency board.

"(2) Annually, on July first there is appropriated to the state department of public welfare for the performance of

its duties a sum equal to the total annual appropriation now provided for the functions, powers and duties transferred to the said department, to be determined as aforesaid by the emergency board. Each board and agency is empowered and directed to turn over to the department such records, equipment, supplies and materials as may be required with the transfer of such functions, and after such transfer all such functions, powers and duties shall be vested in, exercised or performed by the department of public welfare by or through the director of public welfare and the appropriate officer, division or bureau of such department." Sec. 58.37, Stats.

If we are to interpret sec. 58.36 (6), Stats., literally, then only those functions vested in the industrial commission under sec. 49.03 (8a) which relate to the adjudication of claims *between counties* are transferred to the state department of public welfare. And if this be true, a very unfortunate situation exists. The legislative intent, as evidenced by ch. 242, Laws 1939, to adjust relief claims between contending municipalities in one proceeding before one tribunal would be completely thwarted. As a substitute for this one proceeding before one tribunal we would have several proceedings before two tribunals with all the attendant confusion that would inevitably result.

Thus, we might consider the possibilities of a case in which a town, city or village situated in another county furnishes relief to a transient legally settled in another county. The town, city or village furnishing relief, if its claim against the county in which it is situated is not acted upon as required by statute, would be required to institute proceedings before the industrial commission. If the county was held liable in such proceedings, it would then be required to institute proceedings against the county of legal settlement before the state department of public welfare. If there was a recovery in such proceedings, the county of legal settlement would then be required to go before the industrial commission and institute legal proceedings against the town, city or village of legal settlement. And we might well have a case where the first county would be successful against the second county before the department of public welfare and on the same set of facts the second

county would be denied recovery by the industrial commission in its suit against the town, city or village of legal settlement.

It might be plausibly argued that the grant of jurisdiction to the department of public welfare to decide upon conflicting claims between counties would, by implication, authorize the department to consider claims against the town, city or village ultimately liable. That is, since under sec. 49.03 (8a) the town, city or village ultimately liable is required to be joined as a necessary party in a proceeding between counties, a grant of jurisdiction to consider claims between counties might include a grant of jurisdiction to consider in such a proceeding the claim that would be involved against the town, city or village of legal settlement. This is by no means certain, however, and if the department does have such power under the provisions of sec. 58.36 (6) it has it by implication.

In any event the situation would be a rather absurd one. The proceeding by the town, city or village furnishing the relief against the county in which it was situated would in every case be required to be brought before the industrial commission. And in those cases in which the municipality of legal settlement was in the county where the relief was furnished, all claims would be required to be adjusted before the industrial commission. Thus, if the literal words of sec. 58.36 (6) are to govern, we could not possibly avoid a construction that would result in two administrative agencies exercising powers of an identical nature with respect to the adjudication of relief claims between municipalities and counties. Aside from the patent absurdity of such a situation, it seems hardly necessary to point out that this divided jurisdiction would inevitably result in different treatment of the same problems, lack of uniformity in the interpretation of the law and confusion as regards the proper jurisdiction of each body.

In at least one case the supreme court indicated that a statute which, construed literally, created an absurdity was for that reason alone ambiguous and the courts might, in substance, rewrite the statute to produce a reasonable result. *Pfingsten v. Pfingsten*, 164 Wis. 308. It is rather doubtful, however, that the court at the present time is willing to go to the extent that it did in that case.

In *State ex rel. Associated Indemnity Corp. v. Mortensen*, 224 Wis. 398, it was said, pp. 401-402:

"* * * The rule that the clear letter of a statute will be departed from where absurd results would otherwise follow must be carefully applied. The danger is that of substituting the judgment of the court for that of the legislature as to what is sound or absurd. The rule is only one of construction; the fact that absurd or unjust results follow the literal application of the language simply justifies a search of the statute for further but perhaps less obvious indications of legislative intent. * * *."

A search of those portions of secs. 58.36 and 58.37, Stats., for "less obvious indications of legislative intent" in order to avoid an absurd result requires the conclusion that the legislature in fact intended to vest the state department of public welfare with all such jurisdiction as the industrial commission exercised under sec. 49.03 (8a) prior to the passage of ch. 435, Laws 1939.

As we have pointed out above, the literal sense of sec. 58.36 (6), Stats., requires a holding that the department of public welfare may exercise jurisdiction only in the case of disputes between counties. The following language from sec. 58.37, however, is ambiguous:

"(1) By sixty days after the effective date of this section * * * all other functions, powers and duties vested in the industrial commission under subsection (8a) of section 49.03 relating to the adjudication of claims between counties in disputes concerning responsibility for relief are assigned and transferred to and vested in the state department of public welfare. * * *."

This language is subject to the interpretation that the powers and duties vested in the industrial commission under subsec. (8a) of sec. 49.03 are assigned and transferred to the state department of public welfare and that the words, "relating to the adjudication of claims between counties in disputes concerning responsibility for relief" are simply descriptive, and in this case erroneously so, of the powers exercised by the industrial commission under sec. 49.03 (8a), Stats.

Moreover, we call attention to the fact that, as above set out, sec. 58.37 (1), Stats., provides that concurrently with the transfer of functions the unexpended balance of the annual appropriation at the time provided for each such function shall be determined by the emergency board and the amount thereof is appropriated to the state department of public welfare. Sec. 58.37 (2), Stats., provides, as above set out:

“Annually, on July first there is appropriated to the state department of public welfare for the performance of its duties a sum equal to the total annual appropriation now provided for the functions, powers and duties transferred to the said department, to be determined as aforesaid by the emergency board.”

So far as we know, at the time the industrial commission exercised jurisdiction over claims between counties and municipalities under sec. 49.03 (8a), Stats., no separate appropriation was made to finance that portion of its duties which involved the determination of disputes between counties. Moreover, no separate allotment of any general appropriation was made to finance the exercise of such functions. As a matter of fact, we think it will be found that such allocation of funds as was made for financing the performance of functions under sec. 49.03 (8a) included the financing of all duties to be performed by the commission under that subsection.

And if this be true, it throws a great deal of light upon the actual intent of the legislature in transferring functions from the industrial commission to the department of public welfare. The law making the transfer contemplates that the emergency board shall determine the amount of the appropriation set aside for such functions as were exercised by the industrial commission under sec. 49.03 (8a). The amount thus found is then appropriated to the state department of public welfare for the performance of its functions. It is, therefore, contemplated that the state department of public welfare shall exercise such functions as were formerly exercised by the industrial commission, since it purports to transfer from the industrial commission to the department of public welfare moneys which were for-

merly used to finance the exercise of such functions. Thus, putting the same thing differently, a fair construction of the law seems to imply that the transfer of functions shall be made upon the basis of a transfer of appropriations to finance such functions. And since appropriations or allocations of appropriations have never been made upon the basis of distinguishing between the handling of claims between counties and the handling of other claims under sec. 49.03 (8a), Stats., the law does not contemplate that a transfer shall be made upon such a basis. Rather, it contemplates that the transfer shall be made upon the basis of appropriations or allocations as they existed at the time the law went into effect.

Thus construed, it is our opinion that secs. 58.36 and 58.37, Stats., provide for a transfer from the industrial commission to the state department of public welfare of all duties and functions that were exercised by the industrial commission pursuant to the provisions of sec. 49.03 (8a) prior to the passage of ch. 435, Laws 1939, creating secs. 58.36 and 58.37, Stats.

JWR

Public Officers — County Board Member — Malfeasance
— County board member has official duty to perform in relation to sale of lands to which county has title by tax deed and is therefore prohibited from purchasing said lands or acquiring pecuniary interest therein by express provisions of sec. 348.28, Stats. XVI Op. Atty. Gen. 633 overruled.

April 17, 1940.

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

In your letter you state:

"A question has arisen regarding the purchase of tax certificates and title to lands acquired by tax deed by the county and who is eligible to purchase such tax certificates and tax deeds.

"Section 348.30 of the Wisconsin statutes entitled 'Officers not to buy at tax sales' prohibits any county treasurer or county clerk, any of their deputies or any other person for them or any of them from purchasing tax certificates or tax titles on lands acquired by tax deeds by the county.

"No further provision is made in this section regarding such property or any other county officials or members of the county board. 348.28, 'Public officers; malfeasance', places a penalty upon any county officer acquiring any interest in personal or real property or by any action or contract or in tax sale or certificate, etc. Apparently this section means when such official acquires such interest while acting in his official capacity.

"The question I desired answered is: Can a member of the county board buy tax certificate from the county treasurer or can he buy lands from the county which the county has acquired the tax deed?

"In one instance the county authorized the county treasurer and county clerk to sell any county lands which it had acquired to any person who paid the county treasurer the amount of the delinquent taxes and penalties and later the county board provided that the county board must approve the sale to any person.

"The question is: Does the county board member violate any of the sections above referred to if he purchased tax certificate from the county treasurer or tax deed where the

only provision is the payment of the sum due the county and, second, where the county board itself must approve such sale?"

So far as this problem is concerned, the powers of a county as a body corporate may be exercised only by the county board, sec. 59.02, subsec. (1), Stats., or by a committee of the county board as provided by sec. 59.08 (19), Stats.

By sec. 59.07 (6), Stats., the county board is charged with the duty and has 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.

We cannot see how it can reasonably be argued that the county board is not charged with the duty of management, control and sale and disposition of real estate to which the county has title by tax deed. Sec. 348.28 makes it unlawful for "any officer, agent or clerk of the state or of any county, town, school district, school board or city therein" to "have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner in any purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid to any public service, or in any *tax sale, tax title*, bill of sale, *deed*, mortgage, certificate, account, order, warrant or receipt made by, to or with him in his official capacity or employment, or in any public or official service, * * *."

Nor can we see how it can reasonably be argued that the above quoted language from sec. 348.28 is not sufficiently broad in its terms to comprehend the prohibiting of a county board member from purchasing real estate to which the county has title by tax deed.

The key to the difficulty which you seem to have with the problem would appear to arise out of the observations that you make in the third paragraph of your submission as follows: "Apparently this section means when such official acquires such interest while acting in his official capacity." It would appear from the foregoing observation that you have analyzed the problem purely from the standpoint of the purchaser. Prohibited conduct under sec. 348.28 cannot be analyzed from the standpoint of only one side of the trans-

action. While the county board member as such may not act in any official capacity as purchaser, the problem must still be analyzed as to whether he acts in any official capacity as seller. It must appear from the forefront of this opinion that as a member of the county board he does have a duty to perform in his official capacity, in relation to the sale of lands to which the county has title by tax deed. Such being true, when he purchases, although he may purchase in his individual capacity, in relation to the transaction he is acting in a dual capacity as both buyer and seller, and with respect to the selling phase of the transaction he is acting in an official capacity.

It goes without saying that acting in relation to an official capacity with respect to one phase of the transaction, either buyer or seller, is all that is required. *Reetz v. Kitch*, 230 Wis. 1, 283 N. W. 348. Any other construction would completely nullify the statute, as it would be a rare instance indeed where an official acts in an official capacity in relation to both ends of such a transaction.

You are not the first one that has made this same apparent mistake in analytical approach to this problem. See XXVIII Op. Atty. Gen. 669. This office made the same mistake on this exact problem. See XVI Op. Atty. Gen. 633. In the last cited opinion, it was concluded that the legislature did not intend to prohibit county board members from making such purchases in that such members are not in the named class of officers, sec. 74.50 and sec. 348.30, who by these specific sections of the statute are prohibited from making such purchases. Such analysis does not seem at all sound. It ignores the specific language of sec. 348.28 and the only way in which that specific language was avoided was by resort to the concept that the county board member did not purchase in his official capacity, in other words, by analyzing the "official capacity" concept of the transaction only from the purchasing end of the transaction.

As was pointed out by Justice Fowler in *State v. Bennett*, 213 Wis. 456, 471, in his dissenting opinion in that case, the revisors in 1878 codified a dozen or more malfeasance statutes standing in the session laws "with additional classes standing in the same relation to the public service, and more stringent provisions (were) made." Sec. 74.50 of the stat-

utes for all practical purposes read in 1878 as it does now. See sec. 1143, Rev. Stats. 1878. The codification of the malfeasance statutes in 1878, enlarging the classes and making more stringent provisions, shows no legislative intent to treat the then sec. 1143, Rev. Stats. 1878 (now sec. 74.50) as an exclusive statute dealing with prohibited transactions in relation to county officials dealing with tax certificates and tax titles. There appears to be no reason at all why the two sections, 348.28 and 74.50, cannot stand together and supplement each other. That appears to be the plain legislative purpose and intent in increasing the classes and making more stringent provisions in the 1878 codification of the then existing malfeasance statutes.

We conclude that a member of the county board does have an official duty to perform in relation to sale of lands to which the county has tax title and that having such duty, he is prohibited from purchasing by the provisions of sec. 348.28. The conclusion reached in XVI Op. Atty. Gen. 633 must be and the same hereby is overruled.

NSB

Appropriations and Expenditures — Highway Commission — Motor Vehicle Department — State Treasurer — Unexpended unincumbered balances of appropriations made under sec. 20.05, subsecs. (4) and (9) and sec. 20.051, subsec. (1), Stats., revert to general fund and do not augment appropriation to highway commission under sec. 20.49, Stats.

April 17, 1940.

WM. E. O'BRIEN, *Chairman,*
State Highway Commission.

In your letter you state:

"Chapter 410, laws of 1939, amended the introductory paragraph of section 20.49 by deleting the words 'above cost of collection,' and by adding the words 'after deducting

the appropriations made by subsections (4) and (9) of section 20.05 and subsection (1) of section 20.051.' It is noted that the word 'surplus' as used in that paragraph was not changed.

"The appropriations to be deducted as mentioned in the foregoing paragraph are as follows:

"Section 20.05 (4)—An appropriation to the state treasurer of \$75,000 annually to pay the expense of administering the tax on motor vehicle fuels imposed by chapter 78 of the statutes.

Section 20.05 (9)—An appropriation to the state treasurer of \$1,500 for the administration of section 78.14 relating to motor fuel tax refunds.

Section 20.051 (1)—An appropriation to the motor vehicle department of \$900,000 annually for the performance of its duties under chapters 85, 110, and 194.

"We respectfully request that you render your opinions in answer to the following questions:

"1. If any of the appropriations made by subsections (4) or (9) of section 20.05, or subsection (1) of section 20.051, are not entirely expended during the fiscal year for which they are made, will the unexpended balances of such appropriations be diverted to the general fund of the state, or do such unexpended balances constitute part of the 'surplus' appropriated to the state highway commission to be apportioned and distributed as provided in the several subsections of section 20.49?

"2. Do the appropriations made by subsections (4) and (9) of section 20.05 and subsection (1) of section 20.051 constitute a first charge in total against the receipts in a fiscal year of motor vehicle registration fees, operators' license fees, and motor vehicle fuel taxes, or shall there be deducted currently from such receipts only the amounts currently expended pursuant to those three appropriations, leaving the balance of such receipts as 'surplus,' appropriated to the state highway commission on the allotment dates specified in section 20.49?"

Sec. 20.49, Stats., reads in part:

"There is appropriated from the general fund to the state highway commission on the allotment dates specified in this section the aggregate amount not previously allotted of the surplus [above costs of collection] of the motor vehicle registration fees, operator's license fees and motor vehicle fuel taxes, *after deducting the appropriations made by subsections (4) and (9) of section 20.05 and subsection (1) of section 20.051*, provided that the taxes on motor vehicle fuel

used or sold in June may with the consent of the emergency board be included in the allotments on July first. The amount appropriated herein to the commission shall be apportioned and distributed by the commission as follows:
* * *."

The words "above costs of collection," in brackets, are found in the 1937 statutes, but deleted from the section by ch. 410, sec. 3, Laws 1939, which section also added the words noted in italics.

Before the 1939 amendment, the highway commission appropriation, by sec. 20.49, was measured by "the aggregate amount not previously allotted of the surplus above costs of collection of the motor vehicle registration fees, operator's license fees and motor vehicle fuel taxes."

As a result of the 1939 amendments to which you refer, the highway appropriation is measured by "the aggregate amount not previously allotted of the surplus of the motor vehicle registration fees, operator's license fees and motor vehicle fuel taxes *after deducting the appropriations made by subsecs. (4) and (9) of section 20.05 and subsection (1) of section 20.051.*"

The appropriation to the highway commission under sec. 20.49 and the appropriations to which you refer, sec. 20.05 (4) and (9) and sec. 20.051 (1) are all appropriations from the general fund.

The appropriations made by sec. 20.05 (4) and (9) and by sec. 20.051 (1) are annual lapsable appropriations. See sec. 20.77 (1) and (2). As such, by the express provisions of sec. 20.77 (8) any unincumbered unexpended balances of the appropriation at the end of a fiscal year revert to the fund from which the appropriation is made, namely, the general fund.

No language can be found in sec. 20.49 that would change this general rule, as by the express language of that section the amount of the appropriation to the highway commission is measured by "the aggregate amount not previously allotted of the surplus of the motor vehicle registration fees, operator's license fees and motor vehicle fuel taxes after deducting the appropriations made by subsections (4) and (9) of section 20.05 and subsection (1) of section 20.051."

NSB

Fish and Game — Trapping — Navigable Waters —
Trapping is incident of navigation; no riparian owner has right to erect barrier fence in navigable waters whatever his purpose may be.

April 24, 1940.

GEORGE A. RICHARDS,
District Attorney,
Rhineland, Wisconsin.

In your letter you state:

"I would appreciate an opinion upon the following statement of facts: 'A', who is the riparian owner of lands on the Wisconsin River, desires to keep the public from trapping on the marshes that are partly submerged by water on the Wisconsin River. The public have been staking their traps on the land underneath the water in the river and the question arises whether or not it is a trespass by placing stakes and traps on the bottom of the river on the side owned by 'A'.

"I have found authorities to bear out the facts that the riparian owner of navigable water owns to the center line of the river as far as the land underneath and that the public have the right to use the navigable water for hunting and fishing (opinions of the attorney general). However, I have found no authority either in cases, statute, or opinions of the attorney general in regard to the question of trapping on marshy lands that are flooded with water when they enjoin a navigable river and will appreciate an opinion as to whether or not a trespass action could be maintained if the same marshy lands were fenced."

Although Wisconsin has adopted the rule that the riparian landowner has title to the thread of navigable streams, such a title to the bed of the stream is subordinate to, and not inconsistent with, the rights of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto. *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273; *Diana Shooting v. Husting*, 156 Wis. 261, 145 N. W. 816. Such rights of the public, incident to navigation, have been defined by the court in very broad language, extending them to hunting, fish-

ing, bathing, and other forms of recreation. *Willow River Club v. Wade, supra*; *Diana Shooting Club v. Husting, supra*; *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N. W. 144.

We can find no clear-cut expression from our own supreme court nor from the supreme court of any other state having the same doctrine with respect to riparian ownership to the center of navigable streams, where it has ever been affirmatively decided that the right to trap in navigable waters is an incident of navigation. However, this department held in XVI Op. Atty. Gen. 728 that such right is an incident of navigation.

The court in *Krenz v. Nichols*, 197 Wis. 394, 222 N. W. 300, 62 A. L. R. 466, seemed to treat trapping of muskrats, along with fishing and hunting, as an incident of navigation. It is true that the case held constitutional the provisions of sec. 29.575, Stats., providing for the licensing of muskrat farms; and thus the holder of such a license may prevent the public from trapping muskrats on a farm covered by license whether the same be submerged by waters of a navigable stream or not. If the right to trap in the navigable waters of the state were not an incident of navigation similar to that of hunting, fishing, etc., it does not seem that there would have been any real problem involved in that case. See also XXIII Op. Atty. Gen. 685. These licensed farms appear to be the excepted case and, in the absence of such license, it seems to be assumed that the public has a right to trap in the navigable waters of a stream or river, at least while the streams are in a navigable state.

Sec. 29.577, subsec. (10), Stats., provides:

"Nothing in this section shall be construed to affect any public right of hunting, trapping, fishing or navigation except as herein expressly provided."

This section seems to be a legislative recognition that trapping, as an incident of navigation, is the same as hunting and fishing. See also XXIII Op. Atty. Gen. 685.

This department, in XVI Op. Atty. Gen. 728, stated the rule that the public has a right to muskrat trapping in navigable waters "when such hunting is confined strictly to

such waters while they are in navigable stage and between boundaries of ordinary high-water marks". This opinion follows the rule for hunting on navigable waters set down by *Diana Shooting Club v. Husting, supra*, which rule is explained in *Doemel v. Jantz*, 180 Wis. 225, 236, 193 N. W. 393, 31 A. L. R. 969, as meaning:

"* * * the public right to pursue the sport of hunting to the ordinary high-water mark of a navigable river *while the waters of the river actually extended to such mark.* * * *." (Italics supplied.)

It is further held in *Diana Shooting Club v. Husting, supra*, syllabus 4:

"* * * and when so confined it is immaterial what the character of the stream or water is, whether deep or shallow, clear or covered with aquatic vegetation."

Upon the question of the navigability of the waters, it has been held in *Baker v. Voss*, 217 Wis. 415, 259 N. W. 413, syllabus 4:

"Any natural waters that are usable for rowing or canoeing, even though constituting only a shallow, muddy lake or marsh, are navigable, and as such are open to the public for fishing or hunting."

Thus, in answer to your first question, it is merely a matter of applying the rules above stated to your particular fact situation to decide if the trapping is being done on navigable waters. This being decided in the affirmative, the riparian landowner has no grounds for suit in trespass against the public carrying on trapping upon such waters.

If the trapping is done in navigable waters, no riparian owner has any right to erect any fence or any obstruction in said navigable waters. *Baker v. Voss, supra*; *Att'y Gen. ex rel. Becker v. Bay Boom W. R. & F. Co.*, 172 Wis. 363, 178 N. W. 569; *S. S. Kresge Co. v. Railroad Comm.*, 204 Wis. 479, 235 N. W. 4.

Subsec. 29.13 (5) and 348.386 (2), Stats., are obviously inapplicable if the barrier is, in fact, erected in the navigable waters of the river.

Our conclusion is that trapping is an incident of navigation, and that the incidental trespass involved is of the same nature (although perhaps more in degree) as that often involved in exercise of rights incident to navigation. See *Olson v. Merrill*, 42 Wis. 203; *Willow River Club v. Wade*, 100 Wis. 86. In any event no riparian owner has a right to erect a barrier fence in navigable waters whatever his purpose may be. The purpose may be to prevent trapping, but it necessarily interferes with the public rights of navigation, even though trapping is not an incident thereof.

NSB

Criminal Law — Gambling — Pin ball games are gambling devices within prohibition of sec. 348.07, Stats.

They are not within provisions of sec. 348.085, which prohibits devices used for betting on any "contest of skill," etc., since where only one person plays there is no "contest" in meaning of statute.

April 30, 1940.

PATRICK A. DEWANE,
District Attorney,
Manitowoc, Wisconsin.

You state that certain pin ball machines similar to those described in XXIV Op. Atty. Gen. 536 and XXIV Op. Atty. Gen. 673 have been confiscated and the persons on whose premises they were found have been charged with violation of sec. 348.07, Stats. You inquire whether machines of this character also constitute violations of sec. 348.085, as ruled in XXIV Op. Atty. Gen. 673.

(1) For the reasons stated in XXIV Op. Atty. Gen. 536, the machines are, as a matter of fact, gambling devices in violation of sec. 348.07, which provides in part as follows:

"Any person who shall set up, keep, manage or use any * * * device, scheme, contrivance or thing of any name or description adapted, suitable, devised or designed, or which can or shall be used for gambling purposes and induce, entice or permit any person to gamble, bet, or *play for gain* with, at, or upon, or by means of, such * * * device, scheme, contrivance or thing, * * * shall be punished," etc.

As pointed out in XXIV Op. Atty. Gen. at 537, even though players may acquire some degree of skill in the use of the machines, "there is still a predominance of chance in the game because the pins are so placed that it would seem impossible to predict the course of the ball even using approximately the same force as on a previous play." In Op. Atty. Gen. for 1912, 256, this department ruled that gambling devices are those in which the results of play "depend *more largely* upon chance than skill" (italics supplied), and that "a game of skill is one of which *nothing is left to chance*" (italics supplied). This is substantially in accord with the rule as stated in 24 Am. Jur. 410 (1939):

"A 'game of chance' is said to be such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, and adroitness have no office at all or are thwarted by chance. * * * The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game."

(2) In the light of the foregoing test, it is difficult to see how a conscientious jury could find that these devices are used in games of skill rather than chance. But assuming that they are found to be games of skill, the question is whether they violate sec. 348.085, which provides in part as follows:

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

This department has ruled that this section is violated by various coin operated devices in which it was claimed that the player's chance of winning a prize was determined exclusively by his skill in playing the machine. XXIV Op. Atty. Gen. 673; XXVII Op. Atty. Gen. 44. See also XXV Op. Atty. Gen. 731, 734. It is our present opinion that those rulings were in error as applied to machines in which the player's skill is not in competition with the skill of another player or players, but is directed solely toward overcoming a hazard in the machine itself, without reference to the score made by other players. Those opinions failed to give full significance to the use of the word "*contest*" in sec. 348.085, treating the statute as though it referred to "*games of skill, speed or power or endurance of man or beast.*" That a person may engage in a *game* without competition is illustrated by the numerous games of solitaire which are available to persons desiring to while away an idle moment. But the dictionaries are unanimous in defining "*contest*" in a manner which demands two or more contestants or competitors in active competition.

Thus, II Oxford Dictionary (1893) 901 gives three definitions, the third of which is applicable here:

"1. Strife in argument, keen controversy, dispute, debate, wordy war.

"2. Struggle for victory, for a desired object, or in defense; conflict, strife, contention.

"3. Amicable conflict, as between competitors for a prize or distinction; competition."

Webster's New International Dictionary (1935) 575 defines "*contest*" as follows:

"Earnest struggle for superiority, victory, defense, etc.; competition; emulation; strife or argument; also, an encounter of such a nature, as in arms."

Funk & Wagnalls, New Standard Dictionary (1923) 568, gives the following definitions:

"1. The act of contesting; the struggling for something against active opposition; as, a *contest* for freedom. 2. A struggle for supremacy, as in a game or series of games; as, an athletic *contest*." (Italics in original.)

It is significant that in the wealth of examples quoted in these three dictionaries, not a single instance is cited where the word is used in the sense of a single participant pitting his efforts against passive or inanimate opposition.

Where there is no opponent there is no contest. Thus, it is said of an election in which but one candidate is running for an office, that there is "no contest," or that the candidate was elected "without a contest."

Aside from its use in connection with litigation, the word "contest" has no technical meaning in law. See all series of Words & Phrases. Therefore it must be construed "according to the common and approved usage of the language." Sec. 370.01 (1), Stats. Moreover, anti-gambling laws, being penal statutes, are subject to the rule of strict construction in the absence of a provision to the contrary. 27 C. J. 997; 24 Am. Jur. 400.

It is therefore considered that pin ball machines are not *per se* in violation of sec. 348.085. The situation would be otherwise, however, if the keeper were to offer a prize for the highest daily or weekly score made on the machine, since this would introduce the element of competition necessary to the existence of a contest.

WAP

Courts — Statutes of Limitations — Taxation — Tax Collection — Delinquent Taxes — County is prevented by statute of limitations from enforcing claim against town for excess delinquent tax roll payments which it made to town in cash in years 1918 to 1926.

May 4, 1940.

HUGH F. GWIN,
District Attorney,
Neillsville, Wisconsin.

For the years 1918 to 1926 Clark county paid cash to the various towns in the county for their respective excess delinquent real estate tax rolls. Proceedings of the county board for 1927 and 1928 indicate that at that time the county board suspected or knew the impropriety of such practice. In XXII Op. Atty. Gen. 548 this office held that a county treasurer, either with or without action of the county board, has no authority to pay municipalities in cash for their excess delinquent real estate taxes before the same are collected by the county.

See also Op. Atty. Gen. for 1912 page 988, and III Op. Atty. Gen. 862.

A short while ago the Wisconsin tax commission made an audit of the accounts between Clark county and the various towns thereof and concluded that, as a result of said practice, six towns owed to the county various amounts aggregating over \$34,000.00. Some of the members of the county board are in favor of making an attempt to collect from each town the amount which the tax commission audit indicates is owing to the county from said town by virtue of these payments for the years 1918 to 1926.

You raise three questions of which the following is the first:

“Is the county now barred by the statute of limitations from maintaining actions to recover the funds improperly disbursed?”

In view of our conclusion, it is deemed unnecessary to state or discuss the other two questions.

It appears that no claims have been filed by the county against any of the towns. Sec. 60.36, Stats., provides in part:

"No action upon any claim or cause of action for which a money judgment only is demandable, * * * shall be maintained against any town unless a statement or bill of such claim shall have been filed with the town clerk to be laid before the town board of audit, nor until five days after the adjournment of the next regular meeting of the board of audit thereafter. * * *."

This section applies to claims on implied contract and quasi-contract. *State ex rel. Board of School Directors v. Nelson*, 105 Wis. 111, 80 N. W. 1105.

You have referred to an authority which indicates that where a statute requires that a claim be filed against a municipality before an action can be commenced thereon, the statute of limitations commences to run only after the claim has been presented and disallowed. However, this doctrine was repudiated by our court in the cases of *Baxter v. State*, 17 Wis. 588, *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705 and *Schriber v. The Town of Richmond*, 73 Wis. 5, 40 N. W. 644. The theory of these cases is that the filing of a claim is merely a condition precedent to the bringing of a suit but that, if a debt existed, it existed entirely independent of the presentation of the claim. Again in *Bishop v. Genz*, 212 Wis. 30, 248 N. W. 771, it was held that the statute of limitations begins to run against a remedy when the cause of action accrues, and the cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party having a present right to enforce it.

The running of the statute destroys the right as well as the remedy. In re *Will of Weidig*, 207 Wis. 107, 240 N. W. 832; In re *Estate of Kuplen*, 209 Wis. 178, 244 N. W. 623; *Long v. Mates*, 219 Wis. 414, 263 N. W. 371. It does not destroy the debt, but prevents the judicial enforcement of the debt against the will of the debtor. *Banking Commission v. Buchanan*, 227 Wis. 544, 279 N. W. 71.

The statute of limitations applies to actions brought by a governmental unit. *State v. Chicago & Northwestern Railway Company*, 132 Wis. 345, 112 N. W. 515; *Milwaukee v. Drew*, 220 Wis. 511, 265 N. W. 683. It applies to such actions on demands due it in its governmental as well as its proprietary capacity. *State v. Milwaukee*, 152 Wis. 228, 138 N. W. 1006.

The statute of limitations may be invoked by a municipal or quasi-municipal corporation as a defense. *Pelton v. Supervisors of Crawford County*, 10 Wis. 69; XXVI Op. Atty. Gen. 8; *Schriber v. The Town of Richmond*, *supra*; *State v. Milwaukee*, *supra*.

Assuming that an action could at one time have been maintained by the county against each town for the sums improperly paid to that town for its excess delinquent real estate taxes, such an action would have been fundamentally an action at law for money had and received. It would have been an action which would have been enforced at common law in an action of *assumpsit*. See *Milwaukee v. Drew*, *supra*.

This would have been true whether the theory of the action was implied contract, or quasi-contract, which is sometimes known as unjust enrichment. *Shulse v. Mayville*, 223 Wis. 624, 271 N. W. 643; I Restatement of the Law of Contracts, sec. 5, Comment a.

Sec. 330.19, subsec. (3), Wis. Stats., provides a six year statute of limitations for

“An action upon any other contract, obligation or liability, express or implied, except those mentioned in sections 330.16 and 330.18.”

This statute would be applicable to such an action. See *Milwaukee v. Drew*, *supra*.

Since the county had a claim against the towns for approximately fourteen years, during all of which time the county was authorized to sue (sec. 59.01, Stats.,) and the towns were subject to suit (sec. 60.01), it is our opinion that Clark county is now barred by the statute of limitations from enforcing its claim against the towns for cash paid to them for excess delinquent real estate taxes for the years 1918 to 1926.

JRW

Constitutional Law — Public Lands — Commissioners of public lands have no authority to execute federal "Land Purchase Option and Contract" form by which they would agree to and vest in United States or its assigns title to state trust fund lands without payment of purchase price or receipt of mortgage as security therefor.

May 6, 1940.

T. H. BAKKEN, *Chief Clerk,*
Land Commission.

You have submitted a federal form entitled "Land Purchase Option and Contract", which relates to the sale of state trust fund lands under the control of the commissioners of the public lands created by art. X, sec. 7, Wisconsin constitution. You inquire whether said commissioners could properly sign this instrument, which will be referred to as an agreement, and which, in substance, provides:

1. The commissioners of the public lands will sell to the United States, under the conditions therein provided, a certain amount of land if, within twelve months from the date of the agreement, the offer is accepted in writing and notice thereof communicated to said commissioners.

2. The commissioners agree, after acceptance of the option and upon request of the secretary of agriculture of the United States, or one of his representatives "to execute and deliver, without payment or tender of the purchase price, a good and sufficient general warranty deed * * * conveying to the United States of America * * * the land herein optioned."

3. The commissioners agree that during the life of the agreement the officers and agents of the United States, at all necessary and reasonable times, shall have the right to enter upon the lands described in the agreement for all national-forest purposes.

4. The commissioners agree that upon acceptance of the option the United States shall have the right, after written notice from the regional forester to said commissioners, to

use, occupy and administer the lands therein described for national-forest purposes, subject only to the limitations and restrictions provided in the agreement.

5. The commissioners will convey the lands, reserving until September 12, 1943, the right to cut and remove from said lands all dead and down timber and certain other timber as marked or otherwise designated by the United States forest service. The removal of the timber and the disposal of slash is subject to a somewhat extensive list of rules and regulations established by the secretary of agriculture.

6. The commissioners agree not to do or permit any act by which the value of said lands may be diminished or the title encumbered, and that any loss or damage occurring prior to the vesting of satisfactory title in the United States by reason of unauthorized cutting or removal of products or because of fire shall be borne by said commissioners and that, in the event of such loss or damage, the United States may refuse, without liability, to accept conveyance or may elect to accept conveyance upon an equitable adjustment of the purchase price.

7. The commissioners agree that, if they cannot convey satisfactory title to the land described or if they do not promptly convey said land to the United States upon request of an authorized representative of the secretary of agriculture, the land may be acquired by judicial proceedings and, if so acquired, payment at the rate per acre specified in the agreement for so much as is taken from said commissioners will be accepted as full settlement for all damages caused to the commissioners by reason of the taking of said lands. The commissioners also consent that the agreement may be introduced in the condemnation proceedings as evidence of the value of the land described in the agreement.

8. The secretary of agriculture, for and in behalf of the United States, agrees, *subject to approval by the national forest reservation commission*, to acquire the land described in the agreement at the price per acre therein set forth, and further agrees that "after the approval of the title by the attorney general, as vested in the United States" to cause the purchase price to be paid to the commissioners.

The agreement then provides space for execution by the commissioners. The consideration for said execution is re-

cited as being "the appraisal by the officials of the United States of the land herein described and other good and valuable considerations."

Below the place for execution by the commissioners appears the following:

"NATIONAL FOREST RESERVATION COMMISSION, at its meeting on this date, having approved the purchase by the Secretary of Agriculture, of the land as offered and described above, the offer of the vendor as contained in this option is hereby accepted for and on behalf of the United States of America * * *.

SECRETARY OF AGRICULTURE

By _____
19 . Assistant Chief, Forest Service."

The provisions of the agreement immediately raise a number of questions concerning:

(a) The power of the commissioners to partially alienate their control over some of the state trust fund lands for a period of twelve months by giving an option thereon without the certainty of selling them.

(b) The authority of the commissioners to agree to accept a specified amount per acre on a sale which may be consummated at a time when the lands have materially increased in value;

(c) The right of the commissioners to reserve timber rights and to remove timber pursuant to the secretary of agriculture's regulations, which may result in claims against said commissioners.

(d) The power of the commissioners to agree that state trust fund lands may be taken by condemnation and that when so taken the price fixed in the agreement will be accepted as full payment therefor regardless of what the fair market value of said lands may be at the time of the taking.

In view of our conclusion, however, it is unnecessary to discuss the above questions. Art. X, sec. 8 of the Wisconsin constitution provides in part:

"Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase money shall not be paid at the time of the sale, the

commissioners shall take security by mortgage upon the lands sold for the sum remaining unpaid, * * *. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. * * *"

In speaking of the word "sale" as used in art. X, sec. 8, Wisconsin constitution, our court said:

"* * * It is here used to denote a transaction, where the fee to the land sold passes out of the state, and becomes absolutely vested in the purchaser. That this is the nature of the sale here spoken of, is apparent from the context. For it provides, that when such a sale is made upon credit—that is, a sale within the purview of its provisions—the commissioner shall take security by mortgage upon the lands sold, for the sum remaining unpaid. Now, the giving of a mortgage, in its general acceptation, implies the conveyance of the legal estate, as security for the payment of a debt. The sale then contemplated by the constitution, and intended to be regulated by it, was a sale, in the absolute sense of the term, where and by which the purchaser becomes completely vested with the legal title to the land sold. And when that took place, and the money was not all paid at the time, then the commissioners were to take security by way of mortgage. * * *" *Smith v. Mariner*, 5 Wis. 551, at 581.

The agreement stipulates that the commissioners will sell the land at a certain price per acre and will execute and deliver "without payment or tender of the purchase price" a good and sufficient general warranty deed or deeds, "conveying to the United States of America and/or its assigns" the land optioned.

It is clear that by the agreement the commissioners would contract to pass title from the state to the United States or its assigns and vest title absolutely in the grantee without payment or tender of the purchase price and without security by mortgage or otherwise for the payment of said purchase price. That portion of the agreement hereinbefore referred to as paragraph 8 specifically states that payment shall be made only "after the approval of the title by the attorney general, as vested in the United States."

In view of art. X, sec. 8, of the Wisconsin constitution, the commissioners of the public lands could not legally comply with the terms of the agreement in this respect and hence have no authority to execute such agreement.

Although the conclusion reached in this opinion would have been the same if the agreement had provided for a conveyance by quitclaim deed or patent, it is deemed advisable to raise a further question concerning the power of the commissioners, in any case, to execute a deed which purports to warrant title. It is not our intention, in this opinion, to hold or imply that the commissioners have such power.
JRW

Appropriations and Expenditures — Conservation Commission — Under sec. 29.21, Stats., state conservation commission may issue monthly bulletins of educational nature covering activities of commission and discussions of conservation problems. Expense of publication may be borne out of general appropriation provided by sec. 20.20 of moneys in conservation fund to commission for execution of its functions. However, any publication or magazine issued by commission on commercial basis must sustain itself through subscriptions, advertising, etc., and may not be paid for out of commission funds.

May 6, 1940.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Director*.

You have called our attention to sec. 29.21, Stats., which provides:

“The state conservation commission may issue pamphlets and bulletins from time to time, and may also issue a publication or magazine at such stated intervals as they may determine, all pertaining to fish and game, forests, parks and

other kindred subjects of general information and may sell subscriptions thereto. Provided, however, that in case a publication or magazine is issued under the authority thereof, the same must be self-sustaining, and no moneys, except from the receipts therefrom, shall ever be used therefor; and provided further that in case said publication or magazine shall not be so self-sustaining, or shall cease so to be, the same shall thereupon cease to be issued."

In this connection you state that the commission has been issuing a monthly bulletin for about four years. This bulletin includes reports of commission meetings, orders issued by the commission, reports on forestry activities, fish culture, state parks and recreational areas, articles on fur production and trapping, and a detailed report on game law violations. The bulletins contain no advertising and no editorial comment but are confined to educational and informational purposes. They are issued to interested residents of the state who request copies and are also sent to schools in the state, where the material contained in the bulletins is used for reference as well as class room work in the teaching of conservation of natural resources as required by sec. 40.22, Stats.

You state further that back in 1920 and 1921 the conservation commission issued a magazine which carried considerable resort advertising and also advertising of sporting goods. This magazine was sold on a subscription basis, and it ceased publication when the income was insufficient to sustain it.

In view of the foregoing we are asked whether the expenses of publishing the monthly bulletin which you have described may lawfully be paid out of the conservation funds.

Sec. 29.21 divides the printed material issued by the conservation department into two classes. That which falls within the first group is apparently chargeable to conservation department funds under the appropriation made by sec. 20.20 of moneys in the conservation fund to the commission for the execution of its functions, while that which falls within the second classification must be self-sustaining, either through the sale of subscriptions, or the sale of advertising, or both.

The terminology employed in the statute is of scant assistance in answering your question. The words "pamphlets and bulletins" are used to characterize the first classification, and the words "publication or magazine" to describe the second classification. However, the commonly accepted meaning of the word "publication" used in the second group is "that which is published." Webster's New International Dictionary. "Pamphlets and bulletins" mentioned in the first group, when issued, become "publication" and, therefore, can be said to fall within the second classification, with the result that we have destroyed the distinction which the legislature must have had in mind in setting up the two classifications.

It is our duty to give full effect to all parts of the statute and every word therein, if possible, and in order to do this, we must conclude, as we believe rightfully, that the varying terminology employed in the two portions of the statute was used to indicate the inconsequentiality of the use of any one word, and that the legislature was concerned with substance or function rather than with nomenclature or any refined instinct for exactitude of expression.

In order for a "publication" or "magazine" to be self-sustaining within the scope of the second part of the statute, it is obvious that it would have to be supported by subscriptions or advertising, or both, and that it would necessarily be something along the line of the magazine issued back in 1920 and 1921, which carried resort and sporting goods advertising as well as articles not confined to departmental activities of the conservation commission. It appears, from the description of the monthly bulletin contained in your letter as well as from copies of it which have come to our attention from time to time, that it is not the type of commercial undertaking contemplated in the second part of sec. 29.21 and is not intended to be, since no attempt has been made to commercialize it and to thereby make it self-sustaining.

Furthermore, we believe that the conservation commission must be deemed to have some discretion as to the choice of a medium to be employed by it in discharging its statutory duties relating to the teaching of conservation of natural resources in the schools. Sec. 40.22 (11) (b) pro-

vides that every high school and vocational school shall offer adequate instruction in conservation of natural resources. Sec. 40.22 (12) (b) imposes the same duty upon the governing boards of the university, state teachers' colleges and county normal schools, and sec. 40.22 (13) (b) provides that the state superintendent of public instruction and the conservation commission shall cooperate in the preparation of material to be used in the courses offered under subsecs. (11) (b) and (12) (b) of sec. 40.22. One of the problems which has confronted the schools in the teaching of conservation has been the lack of suitable text material relating particularly to the subject of conservation in Wisconsin, and the bulletins have played an important part in filling this need, as we are informed, considerable space being devoted directly to problems and technique in the teaching of conservation, although the bulletin as a whole, even without this special section is, generally speaking, suitable for teaching purposes.

It is true that the answer to your question is by no means free from doubt because of the looseness of the terminology employed in sec. 29.21, as already explained, and because of the fact that the first part of the statute refers to pamphlets and bulletins issued "from time to time," whereas the second part refers to a publication or magazine issued at "stated intervals." However, we would be reluctant to say that the legality of the publication of the bulletin depends upon the regularity of its issuance. If this were true, you could readily comply with the letter of the statute by introducing the element of irregularity in the publication of the bulletin, and instead of publishing it monthly, you could vary the dates, so that the intervals between issues might be six weeks one time, three weeks another, four weeks a third, etc., although the total number for the year might be about the same as now.

This could only lead to confusion and would serve no useful or reasonable purpose that we can discover in the statute. In fact, the mere statement of the proposition demonstrates the weakness of drawing any distinction based upon the mere item of regularity of issuance, and we must not convict the legislature of having had any such unreasonable intention as such a distinction would apparently give

rise to, if it is at all possible to construe the statute so that it will not result in the absurdity just mentioned.

We therefore conclude that what the legislature intended to avoid was the subsidizing of any commercial or semi-commercial publication launched by the conservation commission and that a non-commercial bulletin of the character herein described may be published out of conservation funds appropriated to the conservation commission for the execution of its functions under sec. 20.20, and that the same is within the scope of the first classification set up by sec. 29.21.

WHR

Indigent, Insane, etc. — Poor Relief — Social Security Act — Old-age Assistance — Under sec. 49.26, subsec. (4), Stats., old-age assistance administrator has power to release pension lien where facts are such or where he imposes such conditions upon administrator that collection of lien will not be jeopardized. Such lien is not and may not be subordinated to administration expenses.

May 9, 1940.

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

We quote the following from your request for our opinion:

"In the present case a piece of property in the process of probate has been sold by the executor for \$300. There are delinquent taxes in the amount of \$150; administration expenses of, at least, \$100; and a funeral bill of \$200. The pension department has a lien in excess of \$400.

"The question now comes up as to whether this property would now have to be sold subject to the lien of the pension

department, and if such is the case, it apparently could not be sold at all. There would be no funds from which to pay administration or funeral expenses.

"Could the pension department, under such a situation, waive the provision for selling real estate subject to the lien and let it be sold free and clear of all liens, and the proceeds applied upon the administration and funeral expenses, as far as possible, after paying the taxes?"

It is our opinion that the pension department could waive the lien but this waiver should be conditioned upon the payment of residue to the pension department after prior liens have been paid.

Sec. 49.26, subsec. (4), Stats., provides:

"* * * whenever the county judge of the county in whose favor such lien exists is satisfied that the collection of the amount paid as old-age assistance will not thereby be jeopardized * * * he may release the lien hereby imposed with respect to all or any part of the real property of the beneficiary, * * *."

It seems to us to be a reasonable interpretation of this provision that if the county judge may release the lien whenever he is satisfied that the collection of the amount paid as old-age assistance will not thereby be jeopardized, *he may do so in such a way or on such condition that the collection of the amount paid will not be jeopardized.*

Of course the county pension department would be the appropriate agency to release the lien in those cases where it has been designated to render old-age assistance. See sec. 49.51 (5), Stats.

A stipulation by the executor in open court by which he would agree to turn over the residue after paying such claims as are prior to the pension department's lien would justify a waiver of the lien by the department.

In our opinion, only tax liens are prior to the claim of the pension department. It is provided in sec. 49.26 (4), Stats., that such liens (pension department) shall take priority over any other lien subsequently acquired or recorded except tax liens.

Sec. 49.25, Stats., provides in part:

"On the death of a person who has been assisted under sections 49.20 to 49.51, the total amount of assistance paid, including medical and funeral expense paid as old-age assistance, but without any interest, shall be allowed as a claim against the estate of such person by the court having jurisdiction to settle the estate; provided, however, that such claim shall not take precedence over the allowances under section 313.15, and provided, also, that such court may disallow such claim or any part thereof if it is satisfied that the amount of such disallowance is necessary to provide for the maintenance or support of a surviving spouse or surviving minor children, and thereupon the claim shall be deemed waived to the extent of the amount thus disallowed and assigned to such spouse or minor children for maintenance or support. * * *"

Allowances under sec. 313.15, Stats., can be made only from personalty or net income from real estate and are therefore not applicable here.

In XXVII Op. Atty. Gen. 751, 754, we analyzed the situation with respect to personalty to which the county has title, as follows:

"* * * Thus, while the county is entitled to satisfy its claim out of the personalty to which it has title and prior to the satisfaction of any other claim against the estate entitled to priority under sec. 313.16, Stats., except expenses of administration, it is not entitled to priority as against allowances made under sec. 313.15, Stats."

It is apparent that an old-age pension lien on real estate presents a different problem. We find no language in secs. 49.25 and 49.26 that would justify a conclusion that an old-age pension lien is to be treated differently in an administration proceeding than any other lien against real estate—with the exceptions noted above, which exceptions do not involve subordinating the lien to that of administration expenses.

It is elementary that liens upon real estate are not subordinate to administration expenses in the course of administration or probate proceedings. It seems to us that it would be going beyond the province of construction for us

to so construe secs. 49.25 and 49.26, Stats., as to hold that old-age pension liens upon real estate may be or are subordinated to administration expenses.

If these prior claims were to be paid under the set of facts you have presented, a remainder of about \$150 would go by stipulation to the pension department. The pension department would in turn use the money toward the funeral expenses of the deceased under sec. 49.30, which provides:

"On the death of a beneficiary such reasonable funeral expenses for burial shall be paid to such persons as the county judge may direct; provided, that these expenses do not exceed one hundred dollars and provided further that the estate of the deceased is insufficient to defray these expenses."

It is apparent from the foregoing analysis that if this real estate constitutes the only asset of the estate, no useful purpose is served by the administrator administering the particular asset. Administration may be desirable from the standpoint of having an administrator to serve as well as heirs in proceedings to foreclose the lien, but when the administrator undertakes liquidation of the property and disposal of the proceeds, it seems to us that he is undertaking a job that properly belongs to the pension administrator. There appear to be no assets in the estate out of which he may be compensated for such undertaking.

JWR

NSB

Newspapers — Taxation — Words and Phrases — Term “printed” is not used in restricted sense in secs. 74.33 and 75.07, Stats., which must be read in connection with sec. 331.19 and other sections of statutes.

Newspaper having fixed place of business at certain place within county from which business of publishing is conducted and from which newspaper is issued to subscribers, which otherwise answers calls of various sections of statutes cited, is qualified to publish notices involved in secs. 74.33 and 75.07 even though manual act of printing takes place in whole or in part outside county.

May 9, 1940.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

In your letter you state:

“Section 74.33 and section 75.07 of the Wisconsin statutes provide for the printing of notices preparatory to the taking of tax deeds of or on delinquent taxes. These notices provide, as you will see, that the county treasurer is to have these notices published in a newspaper printed in the county.

“We have a newspaper at Siren, Wisconsin, which is in this county, but the actual printing, folding and bundling of the papers is done by the Inter-County Leader, a paper with headquarters at Frederic, in Polk county, Wisconsin. After the papers are printed, addressed and folded and put in bundles for the mail, they are taken to Siren, in this county, and mailed. This paper at Siren has its own building in Siren, and does its job work and all other work in Siren, with the exception of the actual printing of the paper.

“Would this paper at Siren, under such circumstances, constitute a paper printed in Burnett county, so that the treasurer would be protected in publishing these tax notices in same.”

This question was answered in an opinion rendered to you under date of March 18, 1940 (XXIX Op. Atty. Gen. 138). Since that time we have received an able and compre-

hensive brief supporting a view contrary to the view expressed in said opinion. Upon the basis of said brief, we have been requested to review the prior opinion referred to. This opinion will set forth what we conceive to be the proper test for determining whether the paper in question is qualified to print the notices in question.

In determining what is meant by the term "printed" as used in secs. 74.33 and 75.07, it is material to examine secs. 74.34, 75.09, as well as secs. 331.19, 331.20 and 331.21, Stats.

We are not unmindful of the cardinal rule of statutory construction which is expressed in sec. 370.01 (1) Stats., as follows:

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

However, it seems apparent from a reading of the cases upon the subject as to what is meant by the term "printed" or what is meant by the term "published" that such terms have no ordinary and accepted meaning, likewise that they have not acquired a definitely accepted technical sense in law. See *Hart v. Smith*, 44 Wis. 213 (1878); *State ex rel. Newman v. Pagels*, 212 Wis. 475 (1933); *State v. Bass*, 97 Me. 484, 54 A. 1113; *Syndicate Printing Co. v. Cashman*, 115 Minn. 446, 132 N. W. 915; *State ex rel. Vickers v. Board of Commrs.*, 77 Mont. 316, 250 P. 606; *Neb. Land S.-G. & I. Co. v. McKinley-Lanning L. & T. Co.*, 52 Neb. 410, 72 N. W. 357 (1897); *In re McDonald*, 187 Cal. 158, 201 Pac. 110 (1921); *Bayer v. Hoboken*, 44 N. J. L. 131 (1882); *Amos Brown's Estate v. City of West Seattle*, 43 Wash. 26, 85 Pac. 854 (1906); *Bebermeyer v. Board of County Com'rs.*, (S. D. 1935) 262 N. W. 175; *Bragdon v. Hatch*, 1 A. 140; *In re Monrovia Evening Post*, 199 Cal. 263, 248 Pac. 1017; *Daly v. Beery*, (N. D. 1920) 178 N. W. 104; *In re Hoyle*, (Cal.) 258 Pac. 726; *Cox v. First Mortgage Loan Co.*, 48 Pac. (2) 1060 (Okla. 1935); *Wolfe County Liquor Dispensary v. Ingram*, 113 S. W. (2) 839 (Ky. 1938);

Palmer v. McCormick, 30 F. 82 (1887); *Carter v. Land*, 164 S. E. 205 (Ga. 1932).

In *In re McDonald*, 187 Cal. 158, 201 Pac. 110, 111 (1921), the court cites various dictionary definitions of the term "print" as follows:

"The Standard Dictionary gives one definition of 'print' as follows:

"To put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish; as, the newspaper *printed* the story.

"The Century Dictionary defines it thus:

"To cause to be printed; obtain the printing or publication of; publish."

"And in Webster's Dictionary this definition is given: 'To publish a book, article, music, or the like.'"

We may add that another definition found in Webster is as follows:

"To strike off an impression or impressions of, from type, or from stereotype, electrotype, or engraved plates, or the like; in a wider sense, to do the typesetting, presswork, etc., of (a book, edition, etc.); as, to *print* books, newspapers, pictures; also, to *cause this to be done*; to publish in print; as, to *print* the disclosures."

There is no question but that this term may be used in a variety of senses, all of which are common and approved usages. Likewise, it is apparent that the word has acquired no definite technical meaning in law. In the last analysis, the problem before the courts in all of the cases cited above was that of determining in what sense the term was used in the particular statute under analysis. The historical development of the sections under analysis, the primary object sought to be accomplished by the statute, the use of other language in the same or analogous statutes, examination of other statutes *in pari materia* are, of course, all material and proper if not essential guides in determining the sense in which such term is used in a particular statute.

The sections in question may be traced back to the statutes of 1858 (we have made no effort to trace them back any further than that). Sec. 116, ch. 18, Rev. Stats. 1858,

used the term "printed" exactly as it is used in secs. 74.33 and 75.07, Stats. 1939. The provisions that the newspaper must have been "regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice" (see sec. 74.33 (1) (b), Stats. 1939), were not in the law at that time.

Sec. 117 of the same chapter, Rev. Stats. 1858, provided:

"If no newspaper be *published* in such county, the county treasurer shall, at least twelve weeks previous to the time fixed for the sale of any lands for taxes, cause to be posted up copies of the list and notice specified in the preceding section, in at least four public places in his county, one of which copies shall be posted up in some conspicuous place in his office."

The above cited section is the historical counterpart of sec. 75.09, Stats. 1939.

By 1898, the requirement that the list be published in a newspaper in the county that has been "regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice" (sec. 74.33 (1) (b), Stats.) had become part of the requirement although such requirement was not found in a separate subsection. See sec. 1130, Stats. 1898. It will be noted that the requirements that have been added since the original enactment have all placed the emphasis upon publication.

There is no counterpart of sec. 74.34, Stats. 1939, all of which is with reference to publication, in the statutes of 1858. The counterpart of said section is found in the statutes of 1898. See sec. 1131, Stats. 1898.

Many sections of the statutes can be found with reference to either service by publication or giving notice by publication which refer only to a newspaper "published in the county" or other municipality and which do not use the term "print" at all. A few such statutes, cited at random, are as follows: sec. 324.20 (notice by publication in county court); sec. 272.31 (notice of sale of real estate upon execution); sec. 59.09 (1) (publication of county ordinances) and sec. 59.83 (publication of county financial reports).

Sec. 331.19, Stats., provides in part as follows:

"Whenever a legal notice is required by law to be published in a newspaper in any county and no public newspaper shall be printed therein, or when there shall be but one such newspaper and the publisher thereof shall refuse to publish such notice, such notice shall, unless otherwise specially provided, be deemed required by law to be published in a newspaper printed in an adjoining county, if there be any such; and proof by affidavit of the reason why such publication was made in an adjoining county shall accompany the proof of publication or the order for publication, when any is necessary, may be made or amended by the court or judge so as to designate a newspaper in an adjoining county, upon affidavit showing the necessity therefor.
* * *"

This statute may likewise be traced back to the statutes of 1858. See sec. 23, ch. 140, Rev. Stats. 1858. By 1898, this statute had taken the same form as now appears in the 1939 statutes. See sec. 4270, Stats. 1898. Use of the term "printed" appears in the statutes of 1858 and has been carried on down through the years. Sec. 331.21 has its counterpart in sec. 4271, Stats. 1898.

It will be noted that sec. 331.19 is comprehensive in scope and appears to include within such scope all sections of the statutes such as secs. 324.20, 272.31, 59.09 (1), 59.83, etc., statutes with respect to which no reference is made to "printed" in the county as a requirement. But when said sections are read in connection with sec. 331.19, Stats. 1939, "printed in the county" would seem to become a requirement—would seem to become a requirement in whatever sense the term "printed" is used in sec. 331.19.

Sec. 328.19 (2) provides the requirements for proof of publication. The accepted form for such proof in use may be found in Winslow's Forms of Pleading and Practice, 3d ed., sec. 402. This form is an exact form of the form originally recommended by Chief Justice Winslow in the first edition of his work on forms published in 1906. See sec. 160 of that work. It will be noted that the form is silent with respect to the newspaper having been "printed" in the county. The jurisdictional requirements set forth in the form are those of publishing a local newspaper published at a certain place within a certain county. If, by use of the

term "printed" in secs. 74.33, 75.07 and 331.19 the legislature intended to add any requirement other than that of a local newspaper published at a certain place within a county, then the accepted form for proof of publication is lacking in essential requirements. Further, if "printed" in any restricted sense is a necessary requirement, it would seem that the legislature would have so provided in sec. 328.19 (2) and (3), Stats.

Does any of the foregoing indicate that the term "printed" as used in secs. 74.33, 75.07 and 331.19 is used in any restricted sense, that is, in the sense of requiring the manual act of printing a newspaper. *Bayer v. Hoboken*, 44 Once it is concluded that the term is used in any restricted sense, then we are immediately confronted with problems arising out of such concept, such as, what constitutes the manual act of printing a newspaper. *Bayer v. Hoboken*, 44 N. J. L. 131 (1882) is a case in point. In that case, the office of the advertiser was in Hoboken. The entire matter for the paper was composed, set up and placed in forms in Hoboken. The forms were then sent to New York City and the entire presswork was done in New York City. The papers were then brought back to Hoboken, whence they were issued to subscribers. The court held that this paper was printed in Hoboken. *Hart v. Smith*, 44 Wis. 213 (1878); *Bebermeyer v. Board of County Com'rs.*, (S. D. 1935), 262 N. W. 175, are other cases in point. Did the legislature, by use of the term "printed" in secs. 74.33, 75.07 and 331.19, intend to involve the question of legal publication of notices with questions of such nicety and refinements? The question of legal publication of either service or notice is a matter of considerable importance. The question may well be asked: What purpose could the legislature have had in mind in involving questions of such importance with such technical refinements? It seems inescapable to us that the dominant purpose of the sections involved is that of getting notice to the public and it likewise seems inconceivable to us that, having in mind such dominant purpose, the legislature intended any restricted or highly technical interpretation to be placed upon the use of the term "printed" or that the legislature was even remotely interested in the mechanics of how a local newspaper publisher conducted his business.

We conclude that the use of the term "printed" and "publication" as used in the sections in question is meant to comprehend a local newspaper with an established place of business at a certain place within a county from which the business of publishing a local newspaper is conducted and from which place publication (issuance) takes place, and that if such newspaper otherwise answers the calls of the various sections of the statutes cited, it is qualified to publish the notices involved in secs. 74.33 and 75.07, Stats., even though the manual act of printing takes place in whole or in part outside of the county.

This construction does not ignore the use of the term "printed" in the sections in question. Such term, it seems to us, has the necessary effect of narrowing the construction to be placed upon the term "publication" so as to make such term mean something more than that of "circulation."

This interpretation seems to be the uniform interpretation that has been placed upon these sections of the statutes by both bench and bar throughout the years. It is apparent from a reading of *Hart v. Smith*, 44 Wis. 213 (1878), that the court was in no sense primarily concerned with the mechanics of how the newspaper publisher conducted his business. See also XIX Op. Atty. Gen. 409. This opinion of the attorney general was rendered in 1930. Several legislatures have come and gone since that time. Legislative acquiescence in the attorney general's construction of the statute, while not controlling, is persuasive upon the question of legislative intent. *Union Free High School Dist. v. Union Free High School Dist.*, 216 Wis. 102, 106. We always hesitate to overrule prior opinions of this department. We do so only when we can say that the prior opinion is clearly wrong. We cannot say that the prior opinion is clearly wrong; in fact, we think it is right.

California similarly construed a publication statute which likewise used the term "printed." *In re McDonald*, 187 Cal. 158, 201 Pac. 110 (1921). It is true that the California court now places a restricted sense upon use of the term "printed" but such interpretation is the result of specific legislative amendment of the statute after the *McDonald* case was decided, from which the court concluded that the

legislature deliberately intended to use the term "printed" in a restricted sense. *In re Monrovia Evening Post*, 199 Cal. 263, 248 Pac. 1017.

We do not think the case of *State ex rel. Newman v. Pagels*, 212 Wis. 475 (1933), an authority against the conclusion herein reached. In that case, the court dealt with a specific statute which was not *in pari materia* with sec. 331.19, Stats., and upon the basis of the specific language used in the statute, the court concluded that the term "printed" as used in said section of the statutes was used in a restricted sense, namely, the sense of requiring the manual act of printing to be done within the village. So far as appears, the paper in question was not "published" within the village in any sense other than being circulated in the village. Such circulation would not meet the requirements of "print" and "publish" as we have herein construed the use of such terms in the statutes in question. We have examined the briefs submitted in the *Pagels* case. The possibility of concluding that the paper in question in the *Pagels* case was not "printed" and "published" within the meaning of the statute by a bare circulation of the paper was not presented to the court. It is apparent that the *Pagels* case could have been decided upon such ground without resort to an analysis of the question of whether the term "printed" was or was not used in a restricted sense of requiring actual manual printing to be done within the village in question. In any event, the court dealt with a section of the statutes so wholly dissimilar in phraseology from those with respect to which we are concerned that the case must be deemed far from controlling the interpretation to be placed upon the term "printed" as used in the sections in question.

NSB

Bridges and Highways — Town Highways — Public Officers — Town Supervisor — Chairman or other member of town board of supervisors may be appointed by town board to supervise construction and repair of town highways and may receive per diem as supervisor for such work.

May 10, 1940.

CLARENCE W. WIRTH,
District Attorney,
Berlin, Wisconsin.

You ask whether a member of a town board may be appointed by such board as a committee of one to supervise the construction and repair of town highways and receive per diem compensation as a supervisor for such work.

Sec. 81.01, Stats., provides:

“The town boards shall have the care and supervision of all highways and bridges in their respective towns, except as otherwise provided. It shall be the duty of each town board and it is given the power:

“(1) To appoint in writing if it deems advisable a superintendent of highways to supervise, under the direction of the board, the construction and repair of said highways and bridges and fix the compensation and the amount of the bond of such superintendent. Where no superintendent of highways is appointed, it shall be the duty of the town board to perform all the duties that are prescribed by law for the superintendent of highways to perform.”

It is clear that, under the decisions and opinions you cite, a member of the town board may not be employed in highway construction and maintenance work under an ordinary contract of employment. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437; *Henry v. Dolen*, 186 Wis. 622; XIX Op. Atty. Gen. 264; XX Op. Atty. Gen. 934; XXIV Op. Atty. Gen. 203.

However, under sec. 81.01, it is the duty of the town board to supervise the construction and maintenance of highways when no superintendent of highways is appointed, and it is obvious that individual members of the board when

engaged in the exercise of such duties are entitled to their regular per diem compensation. It remains to determine whether the bulk of such duties may be delegated to and performed by a single member of the board pursuant to the direction of the board as a whole.

While the town board is given no specific authority to function by means of committees, it is obvious that as a practical matter the board will find it extremely inconvenient if not impossible to conduct its business if it must function in every instance as a body. The duties imposed upon the town board are such that they entail largely ministerial and executive rather than legislative action, and it can not be supposed that the legislature intended that the town supervisors, in performing duties of this nature, should be hampered by the necessity of acting only as a board and by means of formal resolutions.

The use of committees by municipal governing bodies to carry on their functions is a practice which has long been sanctioned by courts and legislatures. McQuillin, *Munic. Corps.* (2 ed.) Rev. Vol. 2, pp. 613-614.

Our court, in holding that a member of a town board engaged in supervising highway construction acts not as an employee but as an official, said:

"That it is within the power of the town board to charge one of their number with the duty of carrying out the directions of the board would seem to be plain." *Werner v. Industrial Comm.*, 212 Wis. 76, 79.

It should be remembered, however, that any supervisory work done by any single member of the board must be pursuant to the direction and instructions of the board. Thus, the duties of the member acting as a committee of one to supervise highway construction and maintenance must be confined to those ministerial and executive functions which do not require the action of the entire board.

In accordance with the above comments, you are advised that a town board may charge one of its members with the duty of supervising highway construction and maintenance under the direction of the board as a whole.

NSB

RGK

Bridges and Highways — Taxation — Refunds — Property in city which received state and county aid for construction of bridge under sec. 87.02 or 87.03, Stats., is thereafter subject to levy of county tax for construction of town bridges pursuant to sec. 87.01, under provisions of 87.06 (3).

Such city is not thereafter entitled to county aid provided by sec. 87.01 for construction of its bridges, since such aid is clearly only to towns.

Petition by town for aid under sec. 87.01 must be filed with county board before bridge is constructed and not afterward.

Cities and villages upon whose inhabitants' property county has illegally levied taxes for county aid for town bridges under sec. 87.01 are not real parties in interest in claiming refund from county, but claims must be brought by taxpayers pursuant to sec. 74.73.

May 11, 1940.

HAROLD W. KRUEGER,

District Attorney,

Oconto, Wisconsin.

You state that in 1929 the city of Oconto participated with the state highway commission in the construction of a bridge forming part of a state and federal highway under sec. 87.02, Stats. In 1939 the city erected another bridge, which, however, did not meet the requirements for state and county aid under sec. 87.02, of which fact you advised the county board.

You further state that during the past thirty years when county aid has been granted for the construction of town bridges under sec. 87.01, a tax for that purpose has been levied upon all taxable property in the county without exempting property in cities and villages which have maintained their own bridges, contrary to the express provisions of sec. 87.01, subsec. (6). Since your ruling on the city of Oconto's bridge erected in 1939, the cities and villages in the county claim a refund of the amounts of taxes illegally levied upon property within their limits in the manner just described.

Based upon these facts, you submit three questions:

(1) Has property in the city of Oconto been subject to county taxes for the construction of town bridges under sec. 87.01 since the city received state aid for the construction of a bridge in 1929?

(2) If the first question is answered in the affirmative, then is the county obligated under sec. 87.01 to pay one-half the cost of the bridge built by the city of Oconto in 1939?

(3) Are the other cities and villages in the county which have never received state aid for bridge construction under sec. 87.02 or 87.03, entitled to a refund of the county taxes illegally levied for town bridge aid purposes and, if so, what period of limitation applies?

The questions will be answered in the order stated:

(1) The first question is answered in the affirmative. Sec. 87.06 (3) is perfectly clear upon this point. It provides as follows:

"Whenever any municipality shall have participated in the cost of the construction, reconstruction, or purchase of a bridge under the provisions of sections 87.02 and 87.03, the property in such municipality shall *thereafter* be subject to taxation by the county for the construction and repair of bridges within such county under section 87.01."

See also XXVI Op. Atty. Gen. 485.

(2) The second question is answered in the negative. In the first place, it is well established that county aid provided by sec. 87.01 is available only to towns, not to cities and villages. XXVI Op. Atty. Gen. 485.

In the second place, even if the statute applied to cities under the circumstances, it would be too late now for the city to petition the county for aid. This must be done before the bridge is constructed, not afterward. *State ex rel. Hamburg v. Vernon County*, (1911) 145 Wis. 191, 130 N. W. 104.

(3) The third question is answered in the negative. Only the taxpayers paying the illegal tax under protest have a claim for refund subject to the provisions of sec. 74.73. This

point is thoroughly discussed in XXVII Op. Atty. Gen. 80 and nothing need be added here to the authorities and arguments there set forth.

WAP

Education — Teachers' Retirement — Words and Phrases — "School year," within meaning of sec. 42.55, subsec. (12), par. (k), Stats., is coextensive with words "teaching year" as used in sec. 42.20 and means fiscal year during which school is taught required number of days.

May 14, 1940.

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

You request our opinion concerning the operation of sec. 42.55, subsec. (12), par. (k), Stats., which relates to retirement of school teachers in cities of the first class. Your request relates to the question of whether a teacher who reaches the age of seventy years after June 30, 1940, and before September, 1940, must be retired under the terms of the act as of June 30, 1940, or whether the managing body of the schools may enter into a contract with such teacher for the next year.

Sec. 42.55 contains numerous provisions as to the manner in which teachers may become eligible upon having taught school for the required period of time to participate in the teachers' retirement fund. Subsec. (12) (k) thereof provides as follows:

"Any teacher coming under the provisions of this section who has attained or shall attain the age of seventy years shall be retired by the managing body of the schools at the end of the school year in which the said teacher has reached the age of seventy. * * *"

As we understand your request, the sole question for determination is whether or not these words of the statute would prevent the managing body of the schools from rehiring a teacher who had not reached the age of seventy as of June 30, 1940, such teacher's seventieth birthday being in July, 1940.

The term "school year" is defined in sec. 42.20 as meaning one hundred twenty teaching days or, in case of service in this state prior to the taking effect of the act, not less than seventy-five per cent of the then legal school year. This definition, however, does not assist us in arriving at the meaning of the term "school year" as used in the above quoted provision.

The term "fiscal year" is defined in sec. 42.20 as the year beginning July 1 and ending June 30.

The same section provides that the "'year of teaching experience'" means a fiscal year during which a teacher has been employed as a teacher not less than a full school year.

There are several instances in the statute where reference is made to the word "year" in connection with the period of service of a teacher. Such references may be found in sec. 42.55, subsec. (12), pars. (b), (c), (d), (e), (g) and (h).

It is obviously the intent of the chapter, in view of the definition of the term "year of teaching experience", that a teaching year shall be computed upon the basis of a fiscal year during which school is taught not less than one hundred and twenty days. And, since the teaching year is necessarily related to the conduct of a school, it seems to be necessarily implied that the words "school year", as used in sec. 42.55 (12) (k), are coextensive with the words "teaching year".

A year of teaching experience is gained by teaching a school year. And since the teaching year is designed to cover a fiscal year during which school is taught a required number of days, it is evident that a school year as here used covers the same period. A school year, then, is a fiscal year during which school is taught one hundred twenty days.

The foregoing analysis seems to achieve the only result that would be consistent with the plain intent of ch. 42 to

base teachers' contributions and their eligibility and retirement benefits upon a fiscal year basis.

Approaching the problem from a somewhat different angle, we may assume for purposes of argument that a school year might cover some other period. Schools are normally taught over a period from the month of September in one year to the month of June in the following year. We might then call this period a school year.

Such a definition of the words, however, could hardly be applied in construing sec. 42.55 (12) (k), Stats. If it were applied, the result would be that a teacher who attained the age of seventy following the expiration of one school year and prior to the beginning of the next would not be provided for. Thus, the teacher could not be retired at the end of the expired school year because she would not have attained the age of seventy during that school year. For the same reason, if the statute were to be applied literally, she could not be retired at the end of the following school year. The fact that we would have such a situation if the words "school year" were to be given their popular meaning, indicates very clearly that the legislature had no such use of the term in mind when it enacted sec. 42.55 (12) (k), Stats.

In view of the foregoing it is our opinion that a teacher who reaches the age of seventy following July 1 in any year is not subject to retirement under the provisions of sec. 42.55 (12) (k), Stats., until the 30th of June next.

JWR

Appropriations and Expenditures — Counties — Soldiers' Relief Commission — Sec. 45.10, Stats., makes it mandatory upon county board to make reasonable and not arbitrary estimate of amount required to carry out provisions of secs. 45.10 to 45.19 and to make tax levy sufficient therefor.

Upon inadequate appropriation being made to carry out provisions of secs. 45.10 to 45.19, inclusive, soldiers' relief commission would necessarily cease to function.

Members of soldiers' relief commission are to be compensated at same rate as members of county board but there is no limitation upon number of days for which members of such commission may be so compensated.

May 18, 1940.

FULTON H. LEBERMAN,

District Attorney,

Sheboygan, Wisconsin.

You request our opinion relative to secs. 45.10 to 45.19, inclusive, of the statutes, relating to the relief of needy soldiers, sailors and marines by counties. You state that up to the year 1939 the amount to be appropriated for the purpose of complying with section 45.10 was not determined in accordance with the provisions of section 45.11 but that the amount to be appropriated was determined by the soldiers' relief commission, which annually requested the amount it thought necessary for the purpose of providing relief under sec. 45.10. Up to the fall session of the county board of 1939, the appropriation never exceeded five thousand dollars. Prior to the November, 1939, session of the county board, the city of Sheboygan and other municipalities within Sheboygan county made report through the chairman of each town board, the board of trustees of each village and the supervisors of each ward of the city of Sheboygan in accordance with sec. 45.11, the total estimate of the appropriation necessary amounting in such report to forty thousand dollars. On one day during the November, 1939, session, the county board passed an appropriation sufficient

to cover this estimate, but on the following day this action was rescinded and a new appropriation, which had been recommended by members of the soldiers' relief commission, in the sum of eight thousand dollars was passed. You further state that as of January 1 of this year the city of Sheboygan has been refusing aid under ch. 49 of the statutes to such persons as qualify under sec. 45.10 and has been sending such persons to the soldiers' relief commission. You ask the following questions:

(1) Is it mandatory upon the county board to levy a tax sufficient to carry out the provisions of sec. 45.10?

(2) In view of the inadequate appropriation made, what procedure may be followed by the soldiers' relief commission?

(3) Is there a statutory limitation placed on the amount that may be expended by the soldiers' relief commission for administration purposes?

In answer to the first question, it is our opinion that the provisions of sec. 45.10 are mandatory and that it is the duty of the county board to make a reasonable and not arbitrary estimate of the amount which is required and to levy a tax for that amount. This conclusion was reached in XXI Op. Atty. Gen. 1035. A comparison of secs. 45.10 to 45.19, inclusive, with ch. 49, relating generally to relief of the poor by municipalities, indicates clearly that needy soldiers, sailors and marines are to be provided for under sec. 45.10 *et seq.* rather than under ch. 49. That the relief granted under sec. 45.10 was to be something more than temporary relief is indicated by sec. 45.20, providing for temporary aid to soldiers, sailors and marines and their dependents under the provisions of ch. 49. However, it is clear that the permanent care of such persons is compulsory on the county. XXI Op. Atty. Gen. 522. Of course, under ch. 49 the municipalities are bound to support all poor and indigent persons having a legal settlement therein regardless of whether or not such persons are eligible for relief under sec. 45.10. XXI Op. Atty. Gen. 522. Should the county fail to reasonably exercise its duties to carry out the purpose of sec. 45.10 it would appear that a municipality which has suffered loss through being compelled under ch. 49 to support indigent persons eligible for relief under sec. 45.10, or a taxpayer

thereof, might secure redress against the county in an action commenced to compel the county to levy the taxes necessary under sec. 45.10. However, we do not attempt to determine any questions relating to the rights of the municipalities affected against the county.

In answer to the second question, relating to the procedure to be followed by the soldiers' relief commission under the circumstances described, it would appear that if said commission is not provided with funds to furnish the relief provided for in sec. 45.10 such commission would no longer be able to function. The burden of complying with sec. 45.10 is, of course, on the county board and not on the soldiers' relief commission, that body having only administrative duties in connection with the relief provided under secs. 45.10 to 45.19, inclusive.

In answer to the third question, as to whether there is a statutory limitation placed on the amount that may be expended by the commission for administrative purposes, the provisions of sec. 45.15 will be controlling. There is nothing in sec. 45.15 which limits the total compensation to be received by the members of the soldiers' relief commission, it merely being specified that the members of such commission shall be compensated at the same *rate* as is fixed by law for the compensation of the county board members. The rate of compensation for county board members of counties having less than two hundred fifty thousand population is fixed by sec. 59.03, subsec. (2), par. (f). Since, as we have said, it is only the rate of compensation which is fixed by sec. 45.15, we do not believe that the limitations upon the number of days for which the county board members may receive compensation provided in sec. 59.03 (2) (f) will apply to members of the soldiers' relief commission. Obviously the time required for the members of such commission to adequately perform their duties could not be fixed arbitrarily.

RHL

Appropriations and Expenditures — Motor Vehicle Department — Refunds — Corporations — Motor Transportation — Motor vehicle tax voluntarily paid under sec. 194.48 or 194.49, Stats., cannot be recovered back on ground that operation of vehicle was exempt from tax, since neither sec. 14.68, subsec. (5), nor sec. 20.06 applies to such cases.

May 18, 1940.

MOTOR VEHICLE DEPARTMENT.

You state that the Middleton Lumber & Fuel Co. has voluntarily paid motor vehicle taxes under sec. 194.48 or 194.49, Stats. (you do not specify which), covering the period January 1, 1938, to June 30, 1940. The company has now requested a refund of these taxes on the ground that the operations of the vehicles in question were restricted to Ripon and contiguous municipalities and hence were exempt from the tax by virtue of subsec. (2) of sec. 194.47. You inquire whether, since the taxes were paid without protest, you have any authority to make the refund as requested.

As a general proposition, a tax voluntarily paid without protest or compulsion cannot be recovered back on the ground that the tax was illegal. *State ex rel. Marshall & Ilsley Bank v. Leuch*, (1914) 155 Wis. 499, 144 N. W. 1121; XXVIII Op. Atty. Gen. 459. But this rule has been modified in certain instances by statute, and the question is whether any such statute applies here.

Another general proposition which must be remembered is that no money may be paid out of the state treasury except pursuant to an appropriation by law. Wis. Const., art. VIII, sec. 2.

Under subsec. (5) of sec. 14.68, Stats., any overpayment of "motor vehicle license fees" shall be refunded by the state treasurer on the certificate and audit of your department, and an appropriation for that purpose is provided by subsec. (2), sec. 20.051. Being in derogation of the state's sovereignty, this provision must be strictly construed, and this department has ruled that it applies only to the *fees* provided by ch. 85, Stats., not to the *taxes* provided by secs. 194.48 and 194.49. XXVIII Op. Atty. Gen. 296.

Another statute which should be considered is sec. 20.06 which provides in part as follows:

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

"* * *

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

Subsecs. (3), (4), and (8) of sec. 20.06 provide for refunds of certain taxes. Under the familiar rule of construction that the enumeration of one is the exclusion of the other, this department has ruled that since the statute specifically provides for the refund of certain taxes, subsec. (2) does not cover any taxes whatsoever, but its effect is restricted to other moneys paid into the treasury by mistake. The reason for this construction is that if taxes were included in subsec. (2), then subsecs. (3), (4) and (8) would be surplusage. XXV Op. Atty. Gen. 125, 499; XXVII Op. Atty. Gen. 269.

In any event, even if sec. 20.06 (2) applied to this situation, your department would have no authority to authorize the refund, since that statute requires the written approval of the governor, secretary of state, state treasurer and attorney general.

Accordingly, you are advised that there is no authority for granting the requested refund. This may appear to be a hardship, but it is one which the taxpayer brought upon itself. It paid a tax by which it was authorized to operate trucks outside its home municipality and then failed to exercise the privilege. The legislature might well hesitate to provide a refund procedure covering such situations, and there is no reason why either of the above mentioned statutes should be given a loose construction to achieve that result.

WAP

Public Officers — District Attorney — Real Estate — Platting Lands — District attorney, while he need handle only such applications to vacate plats as county may legally prosecute, has duty to represent county board in such proceedings and is not entitled to extra compensation therefor.

May 20, 1940.

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

You state that the county board of your county has appropriated money to carry into effect a resolution providing for the vacation of certain plats located therein. The purpose of this action, according to the enclosed resolution, is "to eliminate illegal tax deeds by reason of incorrect descriptions" and "to insure proper and correct descriptions for tax purposes".

You ask whether the handling of such vacation proceedings is a part of the district attorney's duties and, if so, whether the district attorney could make an additional charge for such additional work.

In the first place, it should be pointed out that the power of the county board to take the initiative in vacating plats is limited.

Sec. 236.17, Stats., provides generally for the vacation of plats by the circuit court, but the initiative is to be taken by the *proprietors* of such plat or parts thereof.

Sec. 236.19, Stats., makes provision for the institution of such action by the county board. The section reads:

"The circuit court of the proper county may, in like manner and upon like notice, vacate any such plat or part thereof, upon the application of the county board of the county in which the same is situated, *whenever the county has acquired an interest therein by tax deeds or tax certificates.*"

From this provision it seems clear that the resolution of the county board of your county is void in so far as it at-

tempts to provide for the vacation of plats in which the county has not acquired an interest in the manner above stated.

In cases where the county board is authorized to institute the vacation of plats (where the county has acquired tax deeds or tax certificates), it is the duty of the district attorney, in our opinion, to handle the proceedings. You will notice that the county board makes *application* to the circuit court to vacate the plat. That term is important in view of the wording of sec. 59.47, Stats., which prescribes the duties of the district attorney. Subsec. (1) of that section 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; * * *.”

Since the district attorney, according to the above provision, has the duty of prosecuting the application to vacate the plats in which the county has acquired an interest, it follows from sec. 59.15, Stats., that he is not entitled to any compensation in addition to his salary. That section reads in part:

“(1) 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: [none here material.]”

In III Op. Atty. Gen. 684, construing the forerunner of this section, it was held that the district attorney was not entitled to extra compensation for services rendered to the county board.

JWR

Public Officers — Sheriff — Deputy Sheriff — Offices of sheriff and deputy sheriff are incompatible both under provisions of art. VI, sec. 4, Wis. Const., and at common law. Deputy sheriff, by accepting office of sheriff, abandons office of deputy sheriff.

May 20, 1940.

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

You have stated the following facts in connection with a request for our opinion upon certain questions arising out of those facts. Prior to his election and qualification as sheriff of Kenosha county, the present sheriff was a deputy sheriff duly appointed pursuant to the provisions of sec. 59.21, Stats. He held civil service tenure pursuant to the provisions of sec. 59.21, (8), Stats. After his election as sheriff and prior to taking office he requested a leave of absence from his position as deputy sheriff. This request was never acted upon. The sheriff was reelected to a second term and after the beginning of that term renewed his request for a leave. This request, likewise, has not been acted upon. The question now arises as to whether the county board or the civil service commission created pursuant to the provisions of sec. 59.21 (8) (a), Stats., can grant the requested leave.

We do not find it necessary to answer the question as to whether, in the event that a leave could now be granted, the county board or the civil service commission would be the proper authority to grant it. We may say, however, that it is extremely doubtful in our judgment that either of these bodies has the authority to grant leaves of absence to deputy sheriffs. Such power probably lies with the sheriff.

Article VI, section 4 of the Wisconsin constitution provides, in part, as follows:

“* * * Sheriffs shall hold no other office, and shall not serve more than two terms or parts thereof in succession; * * *.”

In our opinion the position of deputy sheriff is an office and as such cannot be held by the sheriff.

The question as to whether public employment is an office as distinguished from a mere employment is generally recognized as a very troublesome one. No hard and fast rule can be laid down in determining the question. Generally speaking, it is recognized that where a position denominated an office is created by statute with important duties defined by statute, and where the incumbent is required to take an oath of office, the position is a public office as distinguished from a mere employment. See 46 C. J. 927, *et seq.*

The position of deputy sheriff is created by statute (sec. 59.21) and is there referred to as an office. The duties of a deputy sheriff are prescribed by law. See secs. 59.23 and 59.24, Stats. A deputy sheriff is required to take an oath of office. Sec. 59.13, Stats. A deputy sheriff may execute process presumably in his own name in the case of a vacancy in the office of sheriff. See sec. 59.33 (3), Stats. So far as Kenosha county is concerned, deputy sheriffs appointed pursuant to the provisions of sec. 59.21 (8) (a), Stats., hold their offices during good behavior and are not removable by the sheriff. Applying the test referred to above, it is at once apparent that the position of deputy sheriff has the characteristics of an office, as that word is understood in the law and must be regarded as an office.

Judicial authority generally support this conclusion. See *State ex rel. Walker v. Bus*, 135 Mo. 325, 36 S. W. 636; *Wells v. State ex rel. Peden*, (Ind.) 94 N. E. 321; *Murray et al. v. State*, (Tex. Crim. App.) 67 S. W. (2d) 274; Amer. Digest System, Sheriffs and Constables, No. 17. We likewise call attention to *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 177 N. W. 781, in which the position of deputy sheriff is denominated an office.

Aside from the constitutional incompatibility referred to, there is a common law incompatibility between the offices of sheriff and deputy sheriff. It is well established that where one office is subordinate to another in the sense that the incumbent of one office may be subject to selection by the other or subject to the other's direction, the two offices are incompatible. *State v. Jones*, 130 Wis. 572, 110 N. W. 431; 22 R. C. L. 414.

An annotation in L. R. A. 1917A 216 contains many cases on the subject.

It is likewise well established that an officer, by accepting an incompatible office, automatically vacates his first office. *The State ex rel. Wheeler v. Nobles*, 109 Wis. 202, 85 N. W. 367; *State ex rel. Stark v. Hines*, 194 Wis. 34, 215 N. W. 447; *Wonewoc v. Industrial Commission*, 178 Wis. 656, 190 N. W. 469; *State ex rel. Johnson v. Nye*, 148 Wis. 659, 135 N. W. 126.

In view of what has been said we are of the opinion that the sheriff of Kenosha county cannot at the same time hold the office of deputy sheriff and that by accepting the office of sheriff he abandoned the office of deputy sheriff. Since he has abandoned the office it is evident that he could not be granted leave.

The fact that if a leave were to be granted it would necessarily be granted by the sheriff, demonstrates the soundness of the rule relating to incompatibility of offices. For the officer in his superior position to deal with himself in an inferior position would necessarily tax his good faith to the utmost. Thus, there would be every incentive to grant himself a leave purely upon the basis of selfish reasons. We do not imply for a moment that the incumbent sheriff would do this. We are using it simply as an illustration of the reason for the rule relating to incompatibility.

There are other questions that arise in the case such as, for example, the question of granting a leave of absence from a position which has not been occupied for some three years. We do not find it necessary, however, to answer these other questions in view of the conclusion at which we have arrived.

JWR

Taxation — Exemption from Taxes — Salvation Army
— Dwelling of officer of Salvation Army not ordained as minister is not exempt as parsonage under provisions of sec. 70.11, Stats.

May 20, 1940.

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

You have submitted the following statement of facts and request our opinion as to whether the property mentioned therein is exempt from taxation:

"In the city of Janesville the Salvation Army owns its own buildings where it carries on religious and charitable work. In addition, the Salvation Army as an organization has leased for a year from an individual a residence for the use of the local commanding officer. The lease in question provides for a certain amount of rent and for a lesser sum in case the real estate is made tax exempt during its use by the Salvation Army. The question which has been submitted to me is as to the propriety of treating this residential property as tax exempt under section 70.11 (4) of the statutes. I assume that any matter involving taxable property in Rock county is a concern of Rock county and, hence, of mine and one that may be properly submitted to you for an opinion.

"I believe it is unnecessary to describe the work of the Salvation Army in this community which is similar to that of the organization elsewhere. The activities fall into two general classifications, namely, social or charitable and religious. A general campaign of the community is carried on annually to sustain the organization, much in the same manner as is done by the YMCA and YWCA and other similar enterprises. In addition thereto, regular religious services are held in the army hall three or four times a week presided over by the commanding officer in question. On occasions he performs marriage ceremonies and otherwise fulfills the functions of a minister or priest. He is not ordained but is 'commissioned' by the Salvation Army. He is commissioned only after a course of schooling, including considerable theological training. The question seems to be whether or not for the purposes of this statute the Salvation

Army officer falls in the classification of a pastor or should be treated like the paid executives of our other social and welfare agencies whose residences have never been tax exempt."

It is our opinion that the residence leased for the occupation of the local commanding officer is not exempt from taxation.

The following excerpts from sec. 70.11, Stats., are pertinent to this opinion:

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

"* * *

"(4) Personal property owned by * * * any religious, scientific, literary, or benevolent association, * * * which is used exclusively for the purposes of such association, and the real property necessary for the location and convenience of the buildings of such institution or association and embracing the same, * * * and parsonages, whether of local churches or districts, and whether occupied by the pastor permanently or rented for his benefit * * *."

Churches and other religious institutions enjoy no inherent exemption from taxation and their property is taxable except so far as it is specifically exempted by constitutional or statutory enactment. See cases in Note, 22 Ann. Cas. 354. In keeping with this requirement of specific exemption, the rule is, according to the vast weight of authority, that the exemption of property used for religious purposes does not include a parsonage or other building owned by the church and occupied by the minister or priest, even if some religious functions are exercised therein and the building is erected upon the same piece of land as the church and the land would be exempt if not built thereon. *Watterson v. Halliday*, (1907) 77 Ohio St. 150, 11 Ann. Cas. 1096, and cases cited in note thereto. 26 R. C. L. 325. This is in keeping with the rule stated in Cooley on Taxation (2d ed.) pp. 204-205 and generally accepted (see 22 Ann. Cas. 354), that taxation is the rule, exemption is the exception, and statutes granting exemption from taxation are strictly construed. The burden is on the claimant to establish clearly his right

to exemption. *St. Joseph's Church v. City of Detroit*, (Mich.) 155 N. W. 588, 590.

In view of what has been said, if exemption from taxation is to be granted in this case, it must be shown that the residence of the local commander of the Salvation Army is a "parsonage" within the meaning of sec. 70.11 (4), Stats. This we do not believe it to be. In order to be a "parsonage", the residence, from the term itself, as well as from the statute (the statute reads, "occupied by the pastor") must be the residence of a "parson" or "pastor". Funk & Wagnalls New Standard Dictionary defines a parsonage as "A clergyman's dwelling, especially a free official residence provided for a parson or pastor." Its modern general significance, according to *In re Wells' Estate*, (1891, Vt.) 21 Atl. 270, is in the sense of its being the residence of the parson.

A "parson", according to Webster's New International Dictionary is "any clergyman", while the Funk & Wagnalls New Standard Dictionary definition is "The clergyman of a parish or congregation."

A "pastor" is defined in the former source as "the minister or priest *in charge of a church or parish*," and in the latter dictionary as "A Christian minister who has a church or congregation under his official charge; a clergyman * * *."

"Holy orders, presentation, institution, and induction are necessary for a parson." Bouv. Law Dictionary.

Enough has been said to indicate that one must be a clergyman in order to be a pastor or parson under the common usage of the terms. There is nothing to indicate that the terms were intended in any other than their common usage. The term "clergy", according to every source we have examined, connotes *ordination* into its membership.

It follows from what has been said that since exemption from taxation can be obtained only through specific statutory provision, and since a Salvation Army commander, lacking ordination, does not come within the statute as a parson or pastor, the residence of said commander is not exempt from taxation under the present law.

JWR

Peddlers — Disabled United States war veteran is subject to municipal peddlers' license ordinance, notwithstanding sec. 129.07, Stats., until he has obtained state license under sec. 129.02, subsec. (2).

State peddlers' license issued to United States war veteran pursuant to sec. 129.02 (2), Stats., is valid as to such veteran only, not to members of his family, under sec. 129.06.

Sec. 129.07 is valid limitation on municipalities' power to license peddlers, notwithstanding home-rule amendment.

Secs. 129.02 (2) and 129.07 must be regarded as creating valid classification under equality provisions of Amendment XIV, U. S. Const., and art. I, sec. 1, Wis. Const., in absence of supreme court decision to contrary.

May 20, 1940.

COLONEL JOHN F. MULLEN,

Adjutant General's Office.

You submit the case of a war veteran who, with his son, engaged in peddling smelt without obtaining a city peddler's license, for which he was arrested by the local police. He had with him an application for a state peddler's license under sec. 129.02, subsec. (2), Stats., and a letter from the United States veterans' administration showing a disability of twenty-five per cent or more, but did not have a state license. You inquire generally as to the right of veterans to peddle without obtaining municipal licenses.

The controlling statutes are the following:

"129.02 (2). Any ex-soldier of the United States in any war who has a twenty-five per cent disability or more or has a cardiac disability recognized by the United States veterans' bureau, and any person declared blind under section 47.08 (4), shall upon presenting proof to the department that he satisfies these conditions be granted a special license without payment of any fee. Such soldier or blind person must have been a bona fide resident of this state for at least five years preceding the application, and shall while engaged in such business carry on his person his license and the proof required for its issuance, and such blind person shall also carry a picture of himself which is not more than three years old. Such special license shall not entitle a blind person to peddle for hire for another person."

"129.07. This chapter does not in any way limit or interfere with the rights of any town, city or village to further license truckers, hawkers, peddlers, or transient merchants to trade within the corporate limits thereof except in the case of ex-soldiers, as provided in section 129.02."

In the first place, in order to obtain the exemption from municipal licenses provided by sec. 129.07, the veteran must comply with all requirements of sec. 129.02 (2) with reference to obtaining a state license. Until the state license has been granted, the veteran cannot peddle without violating the state law, and he does not come within the description of "ex-soldiers, as provided in section 129.02" so as to be exempt from municipal license laws under sec. 129.07. The veteran to whom you refer was therefore subject to the municipal ordinance.

Secondly, even if the veteran had a state license, this would not entitle his son to engage in peddling, under sec. 129.06, which provides as follows:

"But one person shall carry on business under the terms of any license provided for in this chapter and no person shall conduct business under the same license as copartners, agents or otherwise. Any person licensed as herein provided, upon the demand of department or any of its deputies, or of any sheriff, constable or police officer shall exhibit his license and make affidavit that he is the person named therein. Any person failing to exhibit his license when so requested shall forfeit not less than ten dollars nor more than fifty dollars for each such offense."

On the other hand, if a veteran has obtained a state license under sec. 129.02 (2), it is then plain that he is not subject to requirements of any municipal ordinance requiring a similar license from the municipality. Where the state has entered a field of regulation, municipalities may not make regulations inconsistent with the state law. *Hack v. Mineral Point*, (1931) 203 Wis. 215, 221, 233 N. W. 82. The state can limit the powers of municipalities in that regard only by "express language". *Fox v. Racine*, (1937) 225 Wis. 542, 275 N. W. 513; *La Crosse Rendering Works v. La Crosse*, (1939) 231 Wis. 438, 285 N. W. 393. It appears, moreover, that the issuing of licenses to carry on oc-

cupations, where the state has enacted general legislation establishing the public policy for the whole state, is not a matter of local concern within the meaning of the home-rule amendment to art. XI, sec. 3, Wis. constitution. *State ex rel. Torres v. Krawczak*, (1935) 217 Wis. 593, 259 N. W. 607.

It follows that the right of municipalities to regulate and license hawkers and peddlers depends upon the grace of the state in allowing them to do so, and they must accept that right with any limitations which the state has seen fit, by "express language", to attach thereto. Sec. 129.07 contains express language denying to municipalities the right to license veterans described in sec. 129.02.

There is a possible question as to the constitutionality of the above mentioned provisions exempting war veterans from payment of license fees to the state and from regulation by municipalities, under the "equal protection" clause of the 14th Amendment to the constitution of the United States and the equality provision (art. I, sec. 1) of the Wisconsin constitution. See *State v. Whitcom*, (1904) 122 Wis. 110, 99 N. W. 468. But, since municipalities are not affected by the classification, they are not in a position to raise the constitutional question. See *In re Application of Racine*, (1928) 196 Wis. 604, 220 N. W. 398, 221 N. W. 109. Moreover, the law must be presumed to be constitutional, and in view of certain essential differences between the present statutes and the one held invalid in *State v. Whitcom*, *supra*, the present law must be regarded as a valid enactment in the absence of a decision of the supreme court to the contrary.

WAP

Elections — Absent Voting — Secs. 11.62 and 11.57, Stats., are not in conflict and latter section does not impliedly repeal former section.

Absent voter is not to be disfranchised merely because ballot clerk fails to initial his ballot at time of voting as required by sec. 11.62.

May 20, 1940.

FRED R. ZIMMERMAN,

Secretary of State.

In your letter you state:

"1. When the absent voter's law was enacted (chapter 461/15), section 11.62 required inspectors to indorse the ballots before depositing them.

"2. Twelve years later, chapter 239 of 1927 amended said section 11.62 to read: 'The inspectors . . . shall . . . after having . . . the ballots indorsed by the ballot clerks . . . deposit the same.'

"3. Such indorsement by ballot clerks appears to have continued for the succeeding ten years, or until chapter 187 of 1937 amended section 11.57 to require the clerk, issuing any such ballot, to '*write on the back and outside the official ballot*, in the space for the official indorsement of the ballot clerks, his initials or name and his official title.'

"4. Unfortunately, the provision of 11.62, that ballot clerks shall indorse absent voters' ballots, was not amended to harmonize with 11.57 as so amended. We seem, therefore, to have two contradictory provisions.

"Will you please advise which of these provisions is now controlling? Does the later law repeal by implication the ballot clerk indorsement provision?

"If for this, or any other reason, you hold that the city clerk indorsement provision is now controlling, does it not follow that recount boards (6.66, 6.60 (4)) may not throw out any such ballot duly indorsed by any town, city, village or county clerk merely for the reason that it was not also indorsed by the ballot clerks?

"We hope to use your interpretation in our forthcoming revision of *Citizenship and Election Methods*."

We are unable to agree that there is any conflict between secs. 11.62 and 11.57, as amended by ch. 187, Laws 1937. Sec. 11.62 relates to initialing the ballot at the time of *vot-*

ing the ballot, whereas sec. 11.57, Stats. 1937, relates to initialing the ballot at the time of *issuance* of the ballot. Both sections of the statutes can stand together,—neither conflicts with the other.

It does not follow from the foregoing that recount boards may throw out an absent voter's ballot because it does not have endorsed thereon the initials of the ballot clerks, as provided by sec. 11.62, Stats. A voter is not to be disfranchised merely because some ministerial officer fails to perform his duty and under circumstances where the voter himself cannot be charged with negligence. Obviously, an absentee voter cannot be charged with negligence where the ballot clerks fail to initial his ballot at the time that it is voted by the inspectors of election as the absentee voter is not even present at such time. *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 132 (1923) and *In re Burke*, 229 Wis. 545, 555 (1938), are cases squarely in point.

NSB

Elections — Nominations — Sec. 5.05, subsec. (6), par. (c), Stats., requires at least three per cent of party vote in at least each of one-sixth of election precincts of county, where county officers are involved. Statute is not satisfied by circulation of nomination papers and obtaining signers to extent of three per cent of party vote in one-sixth of election districts, as defined by sec. 6.017, Stats.

XV Op. Atty. Gen. 352 and XXI Op. Atty. Gen. 805 followed.

May 22, 1940.

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

In your letter you state:

"We request an official opinion of your office on the following question:

"Section 5.05 (6) (c) reads:

"Such nomination papers (pertaining to fall primary) shall be signed:

"If for an office representing less than a congressional district in area, or a county office, by at least three per cent of the party vote in at least one-sixth of the election precincts of such district and in the aggregate not less than three per cent nor more than ten per cent of the total vote of his party in such district."

"Milwaukee county has 549 election precincts.

"In the light of the above-quoted statute, it is our opinion that a candidate for party nomination for the office of county clerk in Milwaukee county must circulate nomination papers in at least 92 precincts, and the aggregate of legal signers on all such papers must total 3% of the total party vote in all of said 92 precincts.

"We do not interpret the statute to mean that the candidate must obtain 3% of the total party vote in each of the 92 precincts. The total of the signatures thus obtained in the 92 precincts must equal not less than 3% of the total party vote in the county. The basis of our opinion is that the statute is intended to require two things:

"(a) a certain minimum total of support in the whole district;

"(b) a certain geographical spread of such support.

"We have been cited to section 6.017, Stats. This statute, passed in 1923, reads:

"As to any county having a population of three hundred thousand or more, the term "election district" shall mean a town, village or ward of any city therein, and the terms "election precinct" or "precinct" shall mean one of the parts into which an election district in said county is divided for the convenience of the voters."

"It appears that our county election commission is of the impression that this statute is to be used in connection with section 5.05 (6) (c). Counting the city wards and villages and towns as election districts, we have a total of about 59. It is claimed that nomination papers for county officers need be circulated in but ten such units to insure compliance with section 5.05 (6) (c).

"This office is unable to agree with such contention and can read no such authority out of section 6.017, Stats.

"Since the same problem will be applicable on a smaller scale to candidates for the office of assemblyman and state senator, we feel it desirable to have an opinion from your office. * * *

As to your first question, we held in XV Op. Atty. Gen. 352 (1926) and XXI Op. Atty. Gen. 805 (1932) that sec.

5.05, subsec (6), par. (c), Stats., requires three per cent of the party vote in at least *each* of one-sixth of the election precincts in the county, where county offices are involved. We cannot say that such construction is clearly wrong. Legislative acquiescence in the attorney general's construction of the statute, while not controlling, is persuasive upon the question of legislative intent. *Union Free High School District v. Union Free High School District*, 216 Wis. 102, 106. Under the circumstances we feel that we must adhere to the prior rulings of this office.

We agree with your position upon the second question submitted. Sec. 5.05 (6) (c), Stats., requires "at least three per cent of the party vote in at least one-sixth of the election precincts of such district." We cannot see where such requirement would be satisfied by three per cent of the party vote in at least one-sixth of the election *districts*. The term "precinct", as used in sec. 5.05, (6) (c), Stats., is defined by sec. 5.01 (5), Stats., as follows:

"The word 'precinct,' a district established by law within which all qualified electors vote at one polling place."

The term "district" as used in sec. 6.017, Stats., could hardly answer the calls of a precinct as used in sec. 5.05, (6) (c), and as defined in sec. 5.01 (5).

The term "district", as used in sec. 5.05 (6) (c), obviously refers to the entire area or territory from which the candidate for nomination is to be elected. Thus the term "district", as applied to a candidate for nomination for county office, means "county".

NSB

Bridges and Highways — Electric Lines on Highways —
As town permit is condition precedent to highway commission issuing transmission line order under authority conferred by sec. 86.16, Stats., applicant for such order to commission should furnish commission with best available evidence as to terms of permit issued by town board. If such permit is conditioned, application should show that conditions have been complied with.

May 22, 1940.

WM. E. O'BRIEN, *Chairman,*
Highway Commission.

In your letter you state:

"The commission recently received a request from the Wisconsin Michigan Power Company for a transmission line order in accordance with the provisions of section 86.16 to extend certain lines in the town of Menasha, Winnebago county. The 'written consent of the town board' or permit refers to certain lines indicated on a certain map referred to as exhibit 'A.' The map is not attached to the permit as presented to the commission. The consent of the town board stipulates that the construction was to be completed January 30, 1926, and that if such construction was not completed, the permit was to be considered void.

"The highway commission herewith respectfully requests your opinion as to whether the written consent of the town board, conditioned as it is and issued some 15 years ago, can be considered and accepted for the purpose of issuing a transmission line order as required by section 86.16."

We ruled in XXVIII Op. Atty. Gen. 126 that a permit from the town board is a condition precedent to issuance of construction of transmission line orders by the highway commission acting under authority conferred by sec. 86.16, subsec. (1), Stats. It is apparent that the present submission and request from the Wisconsin Michigan Power Company is inadequate upon the basis of such holding, as the commission has no means of determining from the submission whether the condition precedent has ever been complied with, whether there has ever been any effective permit issued by the town.

The applicant should furnish the commission with the best evidence available as to what the permit was, including a map, if such map or a copy of it is available, and that the company or its predecessor complied with the conditions of the permit.

NSB

Elections — Nominations — Possible modifications of form now in use for nominating candidates for county offices and legislators in view of amendment of sec. 5.05, subsec. (5), par. (a), Stats., by ch. 452, Laws 1939, discussed.

May 22, 1940.

FRED R. ZIMMERMAN,
Secretary of State.

In your letter you state:

"In view of the provision of law requiring the secretary of state to prepare election forms, this department is interested in the effect of chapter 452, laws of 1939, which amended section 5.05 (5) (a) without at the same time amending 5.05 (6) (c) to correspond.

"County nomination papers are now circulated by precinct under 5.05 (6) (c) and require three per cent of party vote from not less than one-sixth of the precincts. Circulation by precinct, therefore, appears to be mandatory notwithstanding the amendment to 5.05 (5) (a).

"Will not circulation by precinct, in harmony with 5.05 (6) (c) be a substantial compliance with 5.05 (5) (a), as amended, since if all signatures on any one nomination paper are from the same precinct, the signers thereon must necessarily reside in the same county?

"If so, may not county candidates continue to use the same nomination blanks as formerly and have them circulated and sworn to by 'precinct' instead of by 'county'? This appears to be a simple and workable solution.

"County clerks are now requesting the correct forms to be filed in July of the present year. Hence our request."

The form now in use for nomination of county officers and legislators is as follows:

SAMPLE

Nomination Paper
For County Officer and Legislators

I, the undersigned, a qualified elector of the _____
of _____ County of¹
(Insert Town, Village or Precinct and City)
_____, and State of Wisconsin, and a
member of the _____ party, hereby nominate†
_____, who resides
(Show Given Name in Full and Other Initials)

(at No. _____, on _____ street, city of _____ (or))
(in the town or village of _____)
in the county of _____, and whose P. O. Address is _____,
as a candidate for the office of _____ in the _____ District,
to be voted for at the primary to be held on the third Tues-
day of September, 19____, as representing the principles of
said party, and I further declare that I intend to support the
candidate named herein.

Signature of Voters	*Town, City or Village of Residence	Street and Number or Rural Route and P. O.	Date of Signing
1			19____
2			19____
3			19____
	* * *		

Affidavit of
CIRCULATOR

STATE OF WISCONSIN)
County of _____) ss.

_____, being duly sworn, on oath says
that he is a qualified elector of the above named county;
that he is personally acquainted with all the persons who
have signed the above nomination paper, and that he knows
them to be electors of the *voting precinct* named therein;
that he knows that they signed the same with full knowl-
edge of the contents thereof; that their respective resi-

¹ These two lines appear as one line on printed form.

† Full given name by which generally known and other initials must be shown.

* Residence should always be given. Post Office alone is not enough.

dences are stated therein, and that each signer signed the same on the date stated opposite his name; and that he, the affiant, intends to support the candidate named therein.

Signature of Circulator _____

Residence _____

Street Number and City, Village or Town,
Rural Rt. and P. O.††

Subscribed and sworn to before me this _____ day of

_____ A. D. 19____.

As a result of the passage of ch. 452, Laws 1939, amending sec. 5.05, subsec. (5), par. (a), Stats., the previous requirement that all signers of a nomination paper for county offices must reside in the same precinct no longer seems to be necessary. However, because of the provisions of sec. 5.05 (6) (c), Stats., the qualifications of a signer as a precinct elector may not be entirely ignored with respect to nomination papers for county offices.

It would seem, therefore, that in any suggested form for nomination papers for county offices there are three possible alternatives, as follows:

(1) Eliminate the reference to precinct in the first line of the present form and add a column to the present form whereby the signer is to designate his precinct in said column;

(2) Amend the present form by inserting therein provisions and directions shown as underscored:

SAMPLE

Nomination Paper

For County Officer and Legislators

I, the undersigned, a qualified elector of the _____ of _____ (unless otherwise

(Insert Town, Village or Precinct and City) _____,² and

specified in column 3)¹ County of _____, State of Wisconsin, and a member of the _____ party, hereby nominate† _____, who resides

(Show Given Name in Full and Other Initials)

†† Chapter 36, Laws of 1935.

¹ Circulation must be by precinct. Signers must be county electors but are not required to be from the same precinct. Where precinct is different than that specified in line 1, the signer must write in the precinct (column 3).

² These two lines appear as one line on printed form.

† Full given name by which generally known and other initials must be shown.

(at No. _____, on _____ street, city of _____ (or))
 (in the town or village of _____)
 in the county of _____, and whose P. O. Address is _____,
 as a candidate for the office of _____ in the _____ District,
 to be voted for at the primary to be held on the third Tues-
 day of September, 19____, as representing the principles of
 said party, and I further declare that I intend to support
 the candidate named herein.

Signature of Voters	*Town, City or Village of Residence	Street and Number or Rural Route and P. O. <i>Precinct if different than the one named in line 1 above</i>	Date of Signing
			19____
1			19____
2			19____
3	* * *		

Affidavit of CIRCULATOR

STATE OF WISCONSIN)
 County of _____) ss.

_____, being duly sworn, on oath says
 that he is a qualified elector of the above named county;
 that he is personally acquainted with all the persons who
 have signed the above nomination paper, and that he knows
 them to be electors of the *voting precinct* named therein;
 that he knows that they signed the same with full knowl-
 edge of the contents thereof; that their respective resi-
 dences are stated therein, and that each signer signed the
 same on the date stated opposite his name; and that he, the
 affiant, intends to support the candidate named therein.

Signature of Circulator _____

Residence _____

Street Number and City, Village or Town,
 Rural Rt. and P. O.††

Subscribed and sworn to before me this _____ day of
 _____ A. D. 19____.

(3) Use the present form without modification but in the
 citizenship and election methods manual which your depart-
 ment sends out, send out an instruction to the effect that

* Residence should always be given. Post Office alone is not enough.

†† Chapter 36, Laws of 1935.

signers of county nomination forms are not required to be from the same precinct; that where the precinct of a particular signer is different than the precinct specified in the first line of the nomination paper, both the candidate for nomination and the signer are entitled to have such signer's signature counted as a qualified signature in the precinct in which the signer does vote, and that such odd signatures from different precincts are not to be entirely discarded and thrown out as heretofore.

The first alternative involves such a tremendous amount of clerical work that we would be inclined to discard it as entirely impracticable. The clerical work in determining if the candidate is properly nominated and has sufficient precinct signatures under sec. 5.05 (6) (c), Stats., if such alternative were followed, would require individual check and computation with respect to every individual signature on all nomination papers filed.

We would be inclined to recommend the second alternative as the one most adapted to giving effect to the change made by the 1939 legislature and at the same time providing a minimum amount of clerical work to meet the change. If the papers are circulated by precinct there will be only some odd signers who are not electors of the precinct in which the nomination paper is circulated. It will be a relatively simple clerical matter to tabulate such odd signatures and add them as qualified signatures to nomination papers circulated in the precinct where such odd signers are qualified electors. The form does not appear to be too involved to be fairly readily understood.

The difficulty with alternative (3) is that such odd signers will have no warning that they must state separately the precinct in which they do reside, and as a consequence both the candidate for nomination and the signer will be deprived of such signatures—they will not be counted in the precinct where they should be counted. It would be very exceptional when a candidate for nomination would need such odd signatures to qualify pursuant to the provisions of sec. 5.05 (6) (c), Stats., but in those instances where the candidate for nomination does need such signatures he is entitled to them under the law as it now reads.

It will be seen from the foregoing that if any modification is to be made of the form now in use, the modified form will be applicable only to candidates for nomination for county offices.

NSB

Civil Service — Public Officers — State Employees —
Rule-making power of state personnel board under sec. 16.05, subsec. (1), Stats., extends to vacations, despite sec. 16.275 (2), provided that such rules are incidental to administration of statutory provisions relating to vacations and not in conflict therewith.

May 23, 1940.

BUREAU OF PERSONNEL.

You have inquired whether the bureau of personnel has authority to make rules respecting vacation allowances.

The general rule-making power of the bureau of personnel is derived from sec. 16.05, subsec. (1), Stats., which provides that the personnel board may, as therein set forth, prescribe and amend rules for carrying into effect the provisions of secs. 16.01 to 16.30.

Sec. 16.275 (2), Stats., provides that 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.

Other pertinent statutes are secs. 16.275 (1) and 14.59. Sec. 16.275 (1) provides that appointing officers may in their discretion grant to subordinate employees a noncumulative vacation at the rate of three weeks for a full year's service. While this section has not been repealed or amended, it has, in effect, been largely superseded by sec. 14.59, as amended in 1937, which makes it mandatory that the heads of departments grant employees noncumulative vacations at the rate of three weeks for a full year's service.

It is quite clear that the personnel board may not prescribe any rule regarding vacations which is contrary to any statute on the subject. Accordingly, the bureau may not adopt any rule which would change the mandatory effect of sec. 14.59, or which would prescribe a basis for vacations other than the "three weeks for a full year's service" set forth therein.

We do not believe, however, that the provisions of sec. 16.275 (2), relating to regulation of leaves of absence by rules of the bureau "other than vacation," nor the failure to grant any express power to prescribe rules as to vacations, necessarily excludes entirely the power of the personnel board to make incidental rules relating to the vacations of state employees, so long as such rules are not in conflict with any statute. The general rule-making power granted the personnel board by sec. 16.05 (1) seems sufficiently broad to include this power so long as the rule which the board seeks to prescribe is one which may reasonably be deemed as designed "for carrying into effect the provisions of sections 16.01 to 16.30."

Subsec. (2) of sec. 16.275, Stats., must be read in connection with subsec. (1) of sec. 16.275 and sec. 14.59. As above stated, subsec. (1) of sec. 16.275 gives appointing officers the authority to grant vacations at the rate of three weeks for a full year's service, and sec. 14.59 makes the granting of such vacations mandatory. It is evident that the legislature, in providing in sec. 16.275 (2) that leaves of absence with pay owing to sickness and leaves of absence other than vacation should be regulated by rules of the board of personnel, intended thereby to expressly authorize the bureau of personnel to prescribe time allowances for sick leave and leaves of absence without pay. The exception of vacations from such time allowances in subsec. (2) of sec. 16.275 was necessary by reason of the express grant to appointing officers in subsec. (1) of sec. 16.275 to grant vacations at the rate of three weeks for a full year's service. That the legislature had the time element in mind in its express authorization to the bureau under sec. 16.275 (2), Stats., is further evidenced by the fact that the only restriction there placed upon the rule-making power of the board deals with the time element of sick leave allowances.

The foregoing interpretation is apparently in accord with the practical construction or interpretation which has heretofore been applied to the statutes by the personnel board, and it is to be noted that the practical construction given a statute by the officers charged with its administration is of great weight and is often decisive. *State v. Johnson*, 186 Wis. 59. For purposes of illustration attention is called to rule XII of the board relating to leaves of absence.

Par. 3 of rule XII, among other things, provides that records of vacation credits and vacation taken for each employee shall be kept by the bureau, and that whenever an employing officer fails to accord an employee the noncumulative vacation to which he is entitled within one year from the time at which it was earned and prior to separation from the service in the department where it was earned, and the employee fails within such period to make demand therefor in writing, such vacation rights shall be deemed to have been waived and no claim therefor shall thereafter be allowable.

Par. 4 of rule XXII provides that vacations shall not be granted to employees for service in emergency, provisional, and temporary positions. It is also provided here that all such leaves may be granted to seasonal employees after they have acquired permanent status in such positions only if they have served a minimum total of six months to equal the probationary service period in nonseasonal positions.

This paragraph further places permanent employees in permanent nonseasonal positions after the completion of the probationary service period, and permanent employees in seasonal positions upon the same footing where the latter have served a minimum of six months.

These rules, taken from the 1938 edition of "Civil Service law and rules," published by the bureau of personnel, as well as earlier rules which have since been superseded, clearly demonstrate the practical interpretation given the statutes by the board of personnel, and also show that the statutes relating to vacations are not self-executing and do not answer the many and detailed questions which may arise in administering said statutes. In filling in these details we consider that the board of personnel is properly

acting within the scope of its general rule-making power under sec. 16.05 (1), where its rules respecting vacations are in furtherance of administering the vacation statutes and not in conflict therewith.

It is, of course, neither possible nor practicable for us to define abstractly the exact nature of such rule-making power without a more specific question before us.

WHR

JWR

Fish and Game — Bounties — Under sec. 29.60, subsec. (2), Stats., relating to bounties on wild animals, carcass of animal must be exhibited to nearest conservation warden or county clerk within five days after killing of animal and no bounty may be paid for wolf which was caught in trap, dragged same away and was not found until he had been dead for more than five days.

June 3, 1940.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

You have called our attention to sec. 29.60, Stats., relating to bounties on wild animals, and particularly to that portion of subsec. (2) thereof which provides:

“Any person claiming such reward shall exhibit the carcass entire with hide attached to the nearest conservation warden or county clerk *within five days after the killing thereof*. * * *

In this connection you state that a licensed trapper operating in a legal manner captured a wolf in one of his traps which was attached to a drag. The wolf, after being caught in the trap, pulled the drag a considerable distance from where the trap was set. A heavy snowfall obliterated all signs which might have indicated the direction in which the wolf traveled after having been captured, and a thorough search for the carcass was unsuccessful. Approximately three weeks later the carcass of the wolf was found in the trap, and without question the five day period after the killing of the wolf had elapsed before the carcass was discovered and presented for bounty. Payment was denied on the grounds that the animal had not been presented within the specified five-day period, although the claim appears to have been legitimate in all other respects. You have inquired whether a bounty may be paid under these circumstances.

The matter of bounty on wild animals is purely statutory, and unless the claimant can satisfy all of the statutory prerequisites for such a bounty, his claim must be denied. Otherwise there is no authority for expenditure of the public

funds involved. Sec. 29.60 (1) provides for the payment of such bounties out of the state treasury under the appropriation from the general fund provided by sec. 20.205 (1).

The appropriation statutes are strictly construed and it would be apparent from the certificate which the conservation warden or county clerk is required to furnish the state conservation commission under sec. 29.60 (3) that more than five days had elapsed between the killing of the wolf and the exhibition of its carcass to the conservation warden or county clerk, since the form of the certificate set up in subsec. (3) requires that both dates be furnished.

The statutes involved are so clear and unambiguous that no further comment on our part is necessary and you are therefore advised that the claim in question, however equitable it may seem, must be denied because it does not come within the plain wording of the bounty statute.

WHR

Appropriations and Expenditures — Refunds — Public Health — Embalmers — License fees required of applicants for embalmers' and funeral directors' licenses under sec. 156.04, subsec. (2), and sec. 156.05, subsec. (3), Stats., are not deposits or advance payments in meaning of sec. 20.06 (1) so as to be refundable if applicant fails to appear for examination.

June 3, 1940.

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

You request an opinion upon the following problem:

Sec. 156.04, subsec. (2), Stats., requires that every application to the state board of health for license as a funeral director shall be accompanied by a fee of ten dollars. Sec. 156.05 (3) requires that a similar fee accompany every application for an embalmer's license. A minor part of this

fee covers the expense of going over the application, determining the qualifications of the applicant, and notifying him of his eligibility for the examination provided by secs. 156.04 (4) and 156.05 (4), respectively. A major part of the fee covers the expense of giving the examination and issuing the license. Occasionally applicants fail to appear for the examination and then ask for a refund of the fee theretofore paid. You inquire whether you have authority to approve such refund under the provisions of sec. 20.06, Stats., which provides in part as follows:

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

"(1) Moneys paid into any fund of the treasury as a deposit or advance payment; and if such moneys have been credited to an appropriation, such appropriation shall, at the time of making such refunds, be charged therewith.

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

"* * *

At common law, a license fee paid voluntarily cannot be recovered back even if the law under which it is exacted is later declared unconstitutional. *Neumann v. City of La Crosse*, (1896) 94 Wis. 103, 106, 68 N. W. 654. *A fortiori*, such a fee paid under a valid law cannot be recovered back merely because the applicant changes his mind about becoming licensed. The question is whether the above statute in any way affects this rule.

Sec. 20.06 (2), quoted above, may be dismissed from consideration; there is no question of these fees having been paid "in error." Likewise, other subsections, not quoted, have no possible bearing on the question. It remains to determine whether the fees represent moneys paid "as a deposit or advance payment," in the meaning of subsec. (1).

Subsec. (1) is derived from Stats. 1913, sec. 157 (14), created by Laws 1913, ch. 760, sec. 5, which authorized the secretary of state to audit and the state treasurer to pay "all just claims against the state for moneys paid into any

fund of the state treasury as a deposit or advance payment." By Laws 1917, ch. 14, sec. 11, this provision, together with a number of others, was "consolidated and re-numbered to be section 20.06 and revised to read" as in subsec. (1) of the present statute. Although the reference to "just claims" was omitted, yet, being a revision, this should not be construed as changing the prior law in the absence of clear language to that effect, under the rule applicable to revisor's bills. See *London G. & A. Co. v. Wisconsin P. S. Corp.*, (1938) 228 Wis. 441, 447, 279 N. W. 76. Accordingly, sec. 20.06 (1) appropriates money to refund deposits and advance payments only if a "just claim" therefor exists. A "just claim" implies a legal obligation whereby the state is a debtor of the claimant, arising independently of the appropriation statute. *Houston v. The State*, (1898) 98 Wis. 481, 487, 74 N. W. 111, 42 L. R. A. 39.

It is considered that in order to constitute a just claim it must appear that the money was paid into the treasury under an express or implied understanding that upon the happening of some contingency it would be returned. An example of such an express understanding is the case where a taxpayer deposits the amount of contested income taxes with the state treasurer pending hearing thereon by the board of tax appeals, pursuant to sec. 71.10 (6) (a). We do not now express any opinion as to when, in the absence of an express statute, there might be an implied liability to refund a deposit or advance payment in certain equitable circumstances. No such circumstances exist here.

The statute does not describe the fee in question as a deposit or advance payment. It is a *fee* and is due at the time the application is filed. On the strength thereof the board incurs certain expenses and makes ready to subject the applicant to an examination. If it had been intended to make the liability for payment of the fee either wholly or partially dependent upon the actual taking of the examination, the legislature would be expected to have provided either that all or part of the fee should be paid at the time of the examination, or that all or part of the fee should be returned if the applicant failed to appear for examination. The fee has, on the contrary, been treated by the legislature as an entirety, and no provision has been made for its re-

turn even in case the board should decline to examine the applicant on the ground that he is not qualified to take the examination.

In view of the foregoing, it is considered that the claims for refunds are not within the provisions of sec. 20.06.
WAP

Corporations — Motor Vehicle Transportation — Special motor carrier permits issued under sec. 194.49, subsec. (1), Stats., expire on first day of January following their issuance and sec. 194.04, subsec. (2), relating to expiration dates of other types of motor carrier permits, does not apply.

June 3, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Director,*
Registration and Licensing.

You have called our attention to sec. 194.04, subsec. (2) and sec. 194.49, subsec. (1), Stats., relating to motor carrier permits, and you ask whether the date mentioned in sec. 194.04 (2), or the date mentioned in 194.49 (1) is to be considered as the expiration date of special permits issued pursuant to the provisions of sec. 194.49.

Sec. 194.04 (2) reads in part, as follows:

“After June 30, 1939, every permit, except the quarterly permits issued pursuant to paragraphs (bd) and (cb) of subsection (1) of this section, for operation of a motor vehicle shall expire on June thirtieth of each year. * * *.”

Sec. 194.49 (1) reads:

“Any motor carrier may elect to operate any motor vehicle in taxable operations under a mileage tax on the operations of any such vehicle in lieu of the taxes provided in section 194.48. A motor vehicle may be operated under such

mileage permit while at the same time holding a regular permit to engage in tax-exempt operations described in section 194.47. The mileage permit issued shall expire on completion of one thousand miles of operation thereunder; provided that all such permits shall lapse and become null and void on the first day of January following their issuance."

It is apparent that the foregoing statutes are in conflict as to expiration dates of permits. Sec. 194.04 (2) sets up the date of June 30 as the expiration date for "every permit," with certain exceptions not material here. On the other hand, sec. 194.49 (1) provides that all special permits shall expire on January first.

Where such a conflict exists it gives occasion for the application of a well known rule of statutory construction to the effect that special provisions in a statute are controlling over general provisions and constitute an exception thereto. *Fox v. Milwaukee Mechanics' Ins. Co.*, 210 Wis. 213.

Applying that rule here it would mean that as to special permits, sec. 194.49 (1) is controlling because this is a special provision relating to one type of permit only, whereas sec. 194.04 (2) is general, since, with some exceptions, it applies to "every permit."

This conclusion is further fortified by application of the rule that where statutes conflict in terms, ordinarily the later prevails over the earlier. *Jones v. Broadway Roller Rink Co.*, 136 Wis. 595.

The provisions as to expiration dates of permits in both of the sections above discussed were enacted by the 1939 legislature, but the date provided in sec. 194.49 (1) was later in point of time, since it was contained in ch. 427, effective September 12, 1939, whereas the date specified in sec. 194.04 (2) was provided by ch. 410, effective September 2, 1939.

In view of the foregoing you are advised that the provisions of sec. 194.49 (1) are controlling as to the expiration date of special motor carrier permits issued under sec. 194.49.

WHR

*Loans from Trust Funds — Municipal Corporations —
Municipal Borrowing — School Districts — State trust
fund loan*

(1) May not be made to county for purpose of paying town therein excess delinquent taxes collected by county in previous years and spent for county purposes.

(2) May not be made to town for purpose of paying tuition claim which school district has against town.

(3) May be made to municipalities for purpose of refunding current and ordinary expense obligations created by such municipalities pursuant to secs. 67.12 and 67.125, Stats.

(4) May not be made to refund municipal obligation unless same was legally created.

(5) May not be made to enable one school district to pay another school district sum due latter as result of adjustment of assets and liabilities made under sec. 66.03, Stats.

June 11, 1940.

T. H. BAKKEN, *Chief Clerk,*
Commissioners of Public Lands.

In connection with the making of loans from the state trust funds pursuant to the provisions of chapter 25 of the Wisconsin statutes, you have requested our opinion on the following five questions:

(1) May a county borrow to pay a town therein sums which were collected by said county in past years on excess delinquent tax rolls of said town but spent for purposes for which the county was authorized to expend money?

(2) May a town borrow for the purpose of paying a school district amounts due to the school district for tuition when a sum sufficient to pay said tuition was inserted in the tax roll but was not paid to the district?

(3) May the municipalities referred to in ch. 25 borrow to refund an obligation created pursuant to secs. 67.12 and 67.125, Wis. Stats., for the payment of current and ordinary expenses?

(4) May a school district and other municipalities borrow to refund an obligation incurred for a lawful purpose

when proper legal steps were not taken in creating said obligation?

(5) May a school district borrow to pay another school district a sum due such second district pursuant to an adjustment of assets and liabilities made under sec. 66.03 of the Wisconsin statutes?

In XVIII Op. Atty. Gen. 528 it was ruled that trust funds may be loaned to municipalities mentioned in sec. 25.01 (3), Stats., for purposes there specified and for other purposes for which those municipalities are authorized by law to borrow money. The opinion further held that ch. 67 of the Wisconsin statutes should be referred to in order to determine the purposes for which municipalities may borrow money, in addition to the purposes specifically mentioned in sec. 25.01 (3). At the time that said opinion was rendered secs. 67.04 and 67.12 were in existence, although sec. 67.04 has been amended since that opinion was given. Sec. 67.125 was created since the opinion in XVIII Op. Atty. Gen. 528 was rendered, but in XXV Op. Atty. Gen. 31 it was held that secs. 67.12 and 67.125, when read in conjunction with ch. 25, authorize loans from the state trust funds for the purpose of enabling the municipalities mentioned in secs. 67.12 and 67.125 to pay their current and ordinary expenses.

Question (1). Sec. 67.04 (1) (p) provides that a county is authorized to borrow

“To refund a prior indebtedness of any county in any case whether or not such indebtedness was created for a purpose for which county bonds might have been issued in the original instance; provided, the time for payment shall not be extended beyond the period authorized in this chapter.” This statute was created by ch. 24, Laws 1939.

For some years prior to the creation of this paragraph of the statutes sec. 67.04 (8) had authorized a county “to refund a prior indebtedness in any case where such indebtedness was created for a purpose for which general municipal bonds might have been issued in the original instance; provided, the time for payment shall not be extended beyond the period authorized in this chapter.”

Sec. 67.04 (5) (p) is almost identical to other statutory provisions relating to borrowing by cities (67.04 (2) (r), villages (67.04 (4) (g) and towns (67.04 (5) (p)). Sec. 67.04 (2) (r), which was the earliest of the similar provisions, was created by chapter 430, Laws 1931. It was enacted at a time when municipalities were encountering financial difficulties, and undoubtedly was passed for the purpose of liberalizing the statutes concerning municipal borrowing. It was intended to permit a city to spread over a period of years the payment of obligations which theretofore could not be refunded. In XXII Op. Atty. Gen. 100 it was held that sec. 67.04 (2) (r) "does not cover cases where bonds were issued but * * * it covers only cases where bonds were not issued". No reason is perceived why the same interpretation should not be given to sec. 67.04 (1) (p).

Sec. 74.19 places a statutory obligation upon the part of a county to return excess delinquent taxes to the town when they are collected. The answer to your question then depends upon whether this statutory obligation is included in "indebtedness" as that word is used in sec. 67.04 (1) (p). By reference to Words and Phrases it will be seen that the word "indebtedness" has been held to include many things. Our court has stated that "indebtedness" is merely the state of being in debt and that debt means a sum of money due by a certain and express agreement. *Sharpe v. First National Bank*, 220 Wis. 506, 264 N. W. 245.

In *Trask v. Livingston County*, 210 Mo. 582, 109 S. W. 656, it was held that the word "indebtedness" is one having a wide meaning and must in every case be construed in accordance with its context. Its meaning in any particular statute or constitution is to be determined by construction, decisions upon one statute or constitution often tending to confuse rather than aid in ascertaining its significance in another relating to an entirely different subject. *McNeal v. City of Waco*, 89 Texas 83, 33 S. W. 322.

By referring to the context of sec. 67.04 (1) (p) we find that "indebtedness" is used in connection with the word "refund" and in connection with the provision to the effect that "the time for payment shall not be extended beyond the period authorized in this chapter."

A debt cannot be refunded until it has been funded. *Lee et al. v. Hancock County*, 178 So. 790.

Ordinarily a debt is said to be funded when it is placed in the form of a regular interest bearing obligation and provision made for ultimate payment of the principal and interest of said obligation. See *City of Long Beach v. Lisenby*, 180 Cal. 52, 179 Pac. 198; *Merrill v. Town of Monticello*, 22 Fed. 589.

The statutory obligation of the county to pay to the town therein excess delinquent taxes belonging to said town and collected by the county cannot be said to have been funded; that is, no interest bearing obligation either in the form of notes or bonds has been issued by the county for the purpose of paying the amount due to the town. In view of the fact that said obligation has never been funded it cannot be refunded under the provisions of ch. 25 and sec. 67.04 (1) (p). Consequently your first question must be answered in the negative.

Question (2). Under sec. 40.47, Stats., at the end of each school year the clerk of a school district in which a nonresident pupil has attended school, computes the amount of tuition chargeable to the town in which the pupil resides. On behalf of the school district, the clerk thereof then files a claim against the town for the amount of such tuition. Sec. 40.47 (6) then provides that the town clerk

“* * * shall enter upon the next tax roll such sums as may be due for such tuition from his municipality and the amount so entered shall be collected when and as other taxes are collected, and shall have the same priority as is accorded to school taxes under the provisions of subsection (2) of section 74.15, and shall be paid by the municipal treasurer to the treasurer of the high school district.
* * * When the amount of taxes collected by any tuition paying municipality is insufficient to meet the tuition claims filed with the municipal clerk, the difference between the amount collected and the amount of said claims shall be certified to the state superintendent of public instruction by the municipal treasurer responsible for the collection of such claims. Immediately upon determining the correctness of said certification the state superintendent of public instruction shall certify to the secretary of state and to the

state treasurer the amount thereof which each school district is to receive. Upon receipt of such certification by the state superintendent of public instruction, the secretary of state shall draw his warrants covering the amounts due the school districts and the state treasurer shall pay to the school district treasurers the amounts due. * * *

It will be seen that the liability of a town to pay tuition to a school district is an obligation created by statute and to that extent is similar to the obligation discussed in question (1). Because of the reasoning set forth above in answering question (1) and because of the further fact that sec. 40.47 provides a definite, and, we believe exclusive, method of paying tuition obligations, it is our opinion that your second question also must be answered in the negative.

Question (3). Upon the authority of XXII Op. Atty. Gen. 100 this question is answered in the affirmative. That opinion held that sec. 67.04 (2) (r) authorized a city to refund the principal and interest on city notes given to a bank. While the opinion did not so state, these notes must have been issued for current and ordinary expense, undoubtedly under the provisions of sec. 67.12, inasmuch as sec. 67.125 was not in existence at the time said notes were given. Sec. 67.04 (4) (g), relating to village borrowing, sec. 67.04 (5) (p), relating to town borrowing, and 67.04 (1) (p), relating to county borrowing, as heretofore stated, follow very closely the wording of sec. 67.04 (2) (r) and authorize those municipalities to refund obligations created under sec. 67.12 and sec. 67.125 for current and ordinary expense. The result of that opinion and of this affirmation of the holding therein, is to permit municipalities to spread over a period of years the repayment of an obligation which was created for current and ordinary expense and which ordinarily would be repaid from the proceeds of the succeeding tax levy. Whatever our opinion might be as to the wisdom of this financial policy, it appears that the legislature intended this result.

Question (4). You have not specified the exact nature of the defect in the proceedings creating the so-called indebtedness which it is proposed to refund. It is deemed advis-

able not to render a blanket opinion on this question, but to pass on each defect when the application is submitted to this office for examination as prescribed by sec. 14.53 (5). However, your attention is directed to V Op. Atty. Gen. 158 and 246. In the first of these opinions it was pointed out that under art. XI, sec. 3 of the Wisconsin constitution when a municipality incurs an indebtedness it must levy a tax sufficient in amount to pay the principal and interest of such debt, and that where the municipality fails to levy such a tax, the indebtedness is not lawfully incurred and a loan may not be made by your department to refund such so-called indebtedness. It was stated in the opinion, page 160:

"It has been repeatedly held by this department that, before the commissioners of public lands are authorized to make loans to a school district for the purpose of refunding its indebtedness, it must affirmatively appear that the indebtedness so to be refunded is an existing lawful indebtedness, and that the same has been legally incurred. In view of what has been said, it is clear that a portion of the existing indebtedness of this school district is not a lawful indebtedness. It is also clear that the whole indebtedness has not been legally incurred by reason of the failure to levy a tax."

Question (5). Sec. 25.01, subsec. (3), Stats., provides that state trust funds "may be loaned to school districts * * * to be used * * * in refunding their indebtedness, and for other purposes authorized by law; * * *" and sec. 67.04, subsec. (6), provides that school districts may borrow "to refund indebtedness heretofore contracted."

Sec. 66.03 provides for an adjustment of assets and liabilities after a division of territory between municipalities; which includes school districts, towns, villages and cities. After an order has been entered under that section adjusting assets and liabilities, subsec. (7) provides in part:

"* * * If a proportionate share of any indebtedness existing by reason of municipal bonds or other obligations outstanding shall be assigned to any municipality it shall cause to be levied and collected upon all the taxable prop-

erty in such municipality in one sum or in annual instalments the amount necessary to pay the principal and interest thereon when the same shall become due, and shall pay the amount so collected to the treasurer of the municipality which issued said bonds or incurred such other obligations, who shall apply the moneys so received strictly to the payment of such principal or interest."

Sec. 66.03 thus imposes another statutory liability upon a municipality to which has been assigned a proportionate share of the obligations originally created by another municipality. For the reasons advanced in answering questions (1) and (3), that is, the obligation cannot be refunded because it has never been funded, and the statute provides a specific and, we believe, exclusive method for discharging the obligation, it is our opinion that a loan may not be made from your department to enable one school district to pay another district any sum which is to be paid to such second district under an adjustment of assets and liabilities made pursuant to sec. 66.03, Stats.

This opinion, of course, involves questions concerning the disbursement of constitutional trust funds which it is the duty of your department, as well as ours, to protect. If the legislature intended that the statutes discussed in this opinion should be given a broader and more liberal construction than they have received herein, such intention can be manifested at the next legislative session by appropriate changes in the statutes.

JRW

Trade Regulation — Cigarette tax imposed by sec. 139.50, Stats., as created by chs. 443 and 518, Laws 1939, is applicable to sales of cigarettes on boats on Great Lakes while within territorial boundaries of Wisconsin.

June 11, 1940.

JOHN M. SMITH,
State Treasurer.

You have requested an opinion as to the extent retail sales of cigarettes on boats while plying on Lakes Michigan and Superior in and out of ports in Wisconsin are subject to the tax imposed by sec. 139.50, Stats., as enacted by chs. 443 and 518, Laws 1939.

This section imposes an occupational tax "upon the sale, exchange, offering or exposing for sale, having in possession with intent to sell, or removal for consumption or sale of tobacco products, or other disposition for any purpose whatsoever other than for shipment in interstate or foreign commerce." Sec. 139.50 (2). It prohibits any person, which by express definition includes "individuals, firms, corporations, associations, joint stock companies, copartnerships, trustees, receivers or other legal representatives", from selling cigarettes within the state of Wisconsin, either at wholesale or retail, unless the tax imposed has been paid thereon and proper stamps evidencing the same are affixed thereto. The jurisdiction of the state of Wisconsin to impose taxes extends to its territorial limits, and, by the terms of this taxing statute, any sale of cigarettes taking place within the same is subject to the tax.

The eastern boundary of the state of Wisconsin is described in art. II, sec. 1 of the Wisconsin constitution, which accepted the provisions in respect thereto contained in the enabling act passed by congress on August 6, 1846, (9 Stats. at Large 56), as follows:

"* * * Beginning at the north-east corner of the state of Illinois—that is to say, at a point in the center of Lake Michigan where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running with the boundary line of the State of Michigan, through

Lake Michigan, Green Bay, to the mouth of the Menomonie River; * * * thence in a direct line to the head-waters of the Montreal River, * * *; thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same, * * * thence down the center of the main channel of that river [Mississippi] to the north-west corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning, * * *"

The Michigan boundary in Lake Michigan, along which the Wisconsin boundary runs, is drawn through the center of the said lake and is described in the act of congress adopted June 23, 1836, providing for the entrance of the state of Michigan into the Union, as follows (5 Stats. at Large 49-50) :

"* * * thence, through the centre of the most usual ship channel of the said bay [Green Bay] to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary of the State of Indiana, * * *."

As all retail sales of cigarettes upon boats while on the waters of the Great Lakes within the above boundaries of Wisconsin are sales within the state the cigarettes so sold must, under sec. 139.50, Stats., bear the stamps evidencing the payment of the tax thereby imposed. It is clear that a state may impose a tax upon the selling or holding for sale of cigarettes anywhere within its territorial confines, except as such tax is violative of the commerce clause of the federal constitution. Thus, the imposition of the tax by sec. 139.50 upon the selling or holding for sale of cigarettes upon boats while on waters within the limits of the state is valid unless such tax constitutes a burden upon interstate commerce.

It seems clear that retail sales of cigarettes to persons on lake boats on an interstate journey, whether effected by an over-the-counter delivery or through a vending machine, are not interstate sales. They are local sales occurring in the state within whose territorial boundaries the sale is actu-

ally consummated. It is well established that where goods or merchandise are brought into a state from the outside and sold by the person having the same in possession, the sale is not one made in interstate commerce but is a local sale and subject to tax and regulation as such. *Robbins v. Shelby Taxing Dist.*, (1887) 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 592; *Emert v. Missouri*, (1895) 156 U. S. 296, 39 L. ed. 430, 15 S. Ct. 367; *Crenshaw v. Arkansas*, (1913) 227 U. S. 389, 57 L. ed. 565, 33 S. Ct. 294; *Dalton Adding Machine Co. v. Virginia*, (1918) 246 U. S. 498, 62 L. ed. 851, 38 S. Ct. 361; *Wagner v. City of Covington*, (1919) 251 U. S. 95, 64 L. ed. 157, 40 S. Ct. 93; *Real Silk Hosiery Mills v. City of Portland*, (1925) 268 U. S. 325, 69 L. ed. 982; *City of Newport v. French Bros. Bauer Co.*, (1916) 169 Ky. 174, 183 S. W. 532; *Ballard v. Russell*, (1919) 145 La. 636, 82 So. 730. Thus the sales of cigarettes at retail on boats while within the territorial limits of the state of Wisconsin are local sales and may be validly taxed as such by the state of Wisconsin.

An analysis of the effect upon interstate commerce of such enforcement of the cigarette tax shows that it falls far short of imposing any prohibited burdens upon interstate commerce.

Such sales have only the incidental relationship to interstate commerce which comes from selling to persons embarked on an interstate journey. The holding of cigarettes for sale on said boats, which sec. 139.50 (2), Stats., permits only if the cigarettes are properly stamped, in fact is nothing more than the furnishing of an incidental and personal accommodation to passengers, local in its nature and entirely aside from and independent of the principal service rendered. Such an accommodation is no part of the interstate contract entered into between the carrier and its passengers, nor could it ever become so intimately a part of interstate commerce that it would be immune from local taxation. This result is clearly implied from the federal decisions which have dealt with the question of whether state taxes in a variety of situations have imposed unlawful burdens on interstate commerce.

The tax as applied in the situations presented is clearly upon activities which are carried on within the territorial

jurisdiction of Wisconsin, which is the first essential to the validity of the tax. *James v. Dravo Contracting Co.*, (1937) 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155. That the activities of offering for sale and the actual selling of cigarettes on boats engaged in interstate commerce is a local taxable event which is not rendered invalid by reason of the said activities being occasioned by interstate transportation is apparent from the decision in *Eastern Air Transport v. South Carolina Tax Comm.*, (1932) 285 U. S. 147, 52 S. Ct. 340, 76 L. ed. 673. The taxpayer therein purchased gasoline in South Carolina for fueling its planes for use solely in interstate commerce. South Carolina had imposed a six cent tax per gallon upon gasoline, which was described as a license tax. The claim by the taxpayer that this was an unlawful burden upon interstate commerce was rejected by the court. At pages 151-153 it said:

"The tax is described in the statute as a license tax, which, as applied in the instant case against the dealer, is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. * * * If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. * * * Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. * * * A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

The situations in question would certainly effect a much less substantial burden upon interstate transportation than the tax involved in the *Eastern Air Transport* case. The tax there added materially to the cost of conducting said commerce while the cigarette tax does not have any such re-

sult whatever, yet both taxes are similar in that in legal effect they are to be regarded as taxes upon local sales. The whole burden of the cigarette tax falls upon the passenger, who, of course, is not discriminated against so no impediment whatever is placed upon interstate commerce.

The constitutional prohibition against taxation of interstate commerce and its instrumentalities by the states does not encompass taxes which are both non-discriminatory and incidental in effect. In *Western Livestock v. Bur. of Revenue*, (1938) 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, the state of New Mexico had imposed a tax of two per cent of amounts received from the sale of advertising space of one engaged in the business of publishing newspapers and magazines. The taxpayers were engaged in publishing a monthly magazine, for which advertising was solicited from without the state, and the circulation of the magazine was largely outside the state. In sustaining the tax as not unlawful interference with interstate commerce, the court took occasion to discuss the constitutional prohibition in general. At pages 253-256 the court said:

“* * * Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business.
* * *

“* * *
“It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. ‘Even interstate business must pay its way,’ *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259; * * *

“* * * The vice characteristic of those [state taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed [citing cases] with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * *

In the recent case of *McGoldrick v. Berwind-White Coal Mining Co.*, (1940) 309 U. S. 33, 84 L. ed. 343, 60 S. Ct. 388,

this case was cited for the proposition that taxation of a local business or occupation separate and distinct from interstate transportation is permissible even though such interstate transportation is prerequisite to it.

It is obvious that whatever slight burden the cigarette tax upon cigarettes sold to passengers on an interstate journey may be assumed to be upon interstate transportation, it would not be a burden that could cumulatively be imposed by other states since Wisconsin alone can impose a tax upon sales within her own boundaries. Nor is it discriminatorily applied to interstate transportation since the tax is imposed as well upon intrastate transportation. There is, in fact, no objection that can be raised against the tax, either as to the amount of the burden, that it may have a cumulative effect, or that it is discriminatory in any way whatever. In fact, subsec. (2) of the section specifically excepts the sale, possession or disposition of cigarettes for shipment in interstate commerce from the tax.

If it were to be assumed that the sale of cigarettes to interstate passengers constituted an instrumentality of interstate commerce, which it is not in any real sense, the tax would not be an invalid interference with interstate transportation. This is patent from the recent decision in *Southern Pacific Co. v. Gallagher*, (1939) 306 U. S. 167, 59 S. Ct. 389, 83 L. ed. 586. The California use tax, it was claimed, was invalid as applied to equipment installed in California for use in interstate commerce. Mr. Justice Reed, in discussing the constitutional prohibition, stated at pages 177-178:

“* * * The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.”

When it is remembered that the tax under consideration is really upon intrastate business, which the carriers engage

in as an accommodation to their passengers, the tax thereon is clearly valid under the rule of the decision in *Cooney v. Mountain States Telephone and Telegraph Co.*, (1935), 294 U. S. 384, 55 S. Ct. 477, 79 L. ed. 934. There the court speaking through Chief Justice Hughes said at page 393:

“* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is improper solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. * * *”

It is our opinion that under the rule of these cases the cigarette tax as applied to operators of boats upon an interstate journey, while on waters of the Great Lakes within the territorial boundaries of Wisconsin, is valid. The tax clearly conforms to all of the tests set out.

Other decisions which impel to the conclusion reached herein are: *New York ex rel. Pennsylvania R. Co. v. Knight*, (1904) 192 U. S. 21, 24 S. Ct. 202, 48 L. ed. 325; *United States Fidelity & Guaranty Co. v. Kentucky*, (1913) 231 U. S. 394, 34 S. Ct. 122, 58 L. ed. 283; *Williams v. Fears*, (1900) 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186; *Boston & M. R. R. Co. v. Armburg*, (1932) 285 U. S. 234, 52 S. Ct. 336, 76 L. ed. 729; *Hunneford v. Silas Mason Co.*, (1937) 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 815; and *Stone v. Interstate Natural Gas Co.*, (CCA 5th, 1939) 103 Fed. (2) 544.

HHP

Prisons — Prisoners — "Good" Time — Paroled prisoner returned to prison for violation of parole and with new sentence for offense committed while on parole to run concurrently with remainder of original sentence, is entitled to have both sentences treated as one for purpose of calculating credit for good behavior under sec. 53.11, Stats.

Escaped prisoner returned to prison with additional sentence for escape, pursuant to sec. 359.07, Stats., to run concurrently with remainder of original sentence, is entitled to have both sentences treated as one for purpose of calculating credit for good behavior under sec. 53.11, Stats.

June 12, 1940.

A. W. BAYLEY, *Executive Secretary*,
Department of Public Welfare.

You request an opinion as to whether the rule announced as to good time earned by prisoners serving subsequent, consecutive or concurrent sentences imposed during the time of the original sentence, in XXVIII Op. Atty. Gen. 12 and XXIX Op. Atty. Gen. 135, applies to the following two types of cases:

(1) A paroled convict commits a new offense and returns to the prison for violation of parole and with a new sentence for the new offense, to be served concurrently with the balance of the old one.

(2) An escaped convict is returned to the prison to finish his original sentence and also to serve an additional concurrent sentence imposed for the escape, pursuant to sec. 346.40, subsec. (1), Stats.

In neither case is there any reason not to apply the rule stated in the above mentioned opinions.

The return of the paroled convict is pursuant to the original sentence, and the time when he was out on parole is counted as time served on that sentence. *Application of McDonald*, (1922) 178 Wis. 167, 189 N. W. 1029. Accordingly, the prisoner earns good time while he is on parole. XXV Op. Atty. Gen. 154. But for violation of parole, he may be deprived of all good time theretofore earned, by action of the warden with the consent of the department, pur-

suant to sec. 53.11 (2). VII Op. Atty. Gen. 432; XVI Op. Atty. Gen. 502.

The return of the escaped convict is also pursuant to the original sentence. In his case, however, the time when he was at large does not count as part of the sentence, under sec. 359.07, and of course he earns no good time during that period. Clearly, he also may be deprived of all good time theretofore earned, pursuant to sec. 53.11 (2).

In both cases the convict is returned to serve the *remainder* of his original sentence, that is, the last part of it, and it is immaterial that the incarceration was interrupted. The rate at which good time is to be computed depends upon which sentence year he is serving. Thus, if he is serving the fifth sentence year, the good time rate will be five months. And, for the reasons stated in our former opinions, the same rate must apply to the new sentence which is being served concurrently with the old one.

WAP

Automobiles — Law of Road — Transportation of Inflammable Liquids — Under sec. 85.45, subsec. (5), Stats., it is unlawful to transport in trailers on highways of state gasoline and other highly inflammable products.

June 12, 1940.

INSPECTION BUREAU.

You inquire whether sec. 85.45, subsec. (5), Stats., does not prohibit the transportation on our highways of gasoline and other highly inflammable products in trailers attached to automobiles or other motor vehicles. You construe said section as prohibiting such transportation. You state that it has been suggested to you that such products may be transported on our highways in trailers if such trailers are distinctly marked.

Sec. 85.45 (5) provides as follows:

"It shall be unlawful to transport in any motor vehicle, trailer or semitrailer upon the public highways any gasoline, naphtha, benzine, fuel, crude oil, kerosene or other inflammable liquids, which are herein defined as any liquid which gives off inflammable vapors as determined by flash point Tagliabue's open cup tester, as used for tests of burning oils at or below a temperature of eighty degrees Fahrenheit, except in a single motor vehicle or semitrailer attached to a motor tractor, or to transport in any such motor vehicle or semitrailer any quantity of any such article exceeding two thousand gallons, and any motor vehicle or semitrailer employed in the transportation of such articles shall be plainly marked so as to show that inflammable substances or liquids are being transported therein."

This section clearly makes unlawful the transportation of such products upon highways of this state in a trailer, whether or not such trailer has plainly marked thereon the fact that inflammable substances or liquids are being transported therein.

The section in question, (1) makes it unlawful to transport such inflammable liquids (products within the calls of the statute) in any motor vehicle, trailer or semitrailer except (2) in a single motor vehicle or semitrailer attached to a motor tractor and as to these two exceptions (3) the quantity transported must not exceed two thousand gallons and there must plainly be marked thereon the fact that such inflammable substances or liquids are being transported therein.

Trailers do not come within the two exceptions noted. It seems clear that the practice of transporting such substances in trailers is unlawful under said section of the statutes.

NSB

Indigent, Insane, etc. — Poor relief granted to wife of minor is not constructively pauper support to minor's father, there being no obligation on father to support his daughter-in-law, and will not prevent father from losing his legal settlement by year's absence under sec. 49.02, subsec. (7), Stats., nor from gaining new one by year's residence under sec. 49.02 (4).

June 12, 1940.

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

You state that in 1936 Raymond Feldman's parents, who had a legal settlement in the town of Rhine, were divorced and the mother thereafter acquired a settlement in the city of Plymouth. In March of 1938 the father left the town of Rhine and has not since established a new settlement. Raymond Feldman was a minor who became of age on December 31, 1939. His wife, Doris Feldman, applied for and received relief from the city of Sheboygan on January 6, 1939, for which the city was reimbursed by the town of Rhine. In July, 1939, Doris and Raymond Feldman became separated. Commencing in January, 1940, Doris has again been granted relief by the city of Sheboygan, and the question arises as to what municipality is responsible therefor.

It is conceded that if Raymond's father lost his settlement in the town of Rhine without gaining a new one, Raymond would then take the settlement of his mother at Plymouth, under sec. 49.02 (2), Stats.; and that under sec. 49.02 (1) the settlement of Doris follows that of Raymond. The only question presented is whether relief granted to Doris in January, 1939, and again within a year in January, 1940, prevented Raymond's father from losing his settlement in the town of Rhine at the expiration of one year's absence commencing in March, 1938.

As a general rule, relief granted to a child is constructively pauper support of a parent responsible for such child's support, and will prevent the parent from gaining a new or losing an established settlement. *La Crosse County v. Vernon County*, (1940) 233 Wis. 664, 290 N. W. 279.

The circuit court for Dane county has held in two cases that this rule is not absolute, but presents a question of fact as to whether the parent is actually unable to support the child, and that if the parent is in fact well able to support the child but merely refuses to do so, the receipt of pauper support by the child will not pauperize the parent. *Winnebago County v. Outagamie County*, decided Dec. 17, 1938; *Kenosha County v. Jefferson County*, decided Dec. 11, 1939. But this theory was rejected *sub silentio* by the supreme court in the *La Crosse County* case, *supra*, since in that case there was no evidence that the parent was unable to support his minor son and counsel for respondent advanced the above argument in their brief, but the court nevertheless categorically held that support to the child prevented the parent from gaining a new settlement or losing the old one.

The basis for the rule is that under sec. 49.11 the father is liable to support his indigent children if he is financially able to do so, and constructively he is benefited if the municipality performs this duty for him. Under the same statute, as well as under sec. 351.30 in some cases, a husband is liable for the support of his indigent wife, so that by the same reasoning relief granted his wife is constructively granted to him. Can it be said that such relief also constitutes pauper support to the father-in-law? It is considered that such a proposition is too tenuous to maintain.

As a general rule, a parent is not required by statutes similar to sec. 49.11 to support the husband or wife of the child. 46 C. J. 1270. Conversely, a son-in-law is not liable to support his mother-in-law or father-in-law. Note, 9 Ann. Cas. 1019, 1020.

In Vermont it has been held under facts similar to those stated by you that pauper relief to the daughter-in-law does not interrupt the residence period of the father-in-law required to gain a new settlement under a statute which required that during such residence he should "maintain himself, or herself *and family*, and not become chargeable to either of said towns." *Manchester v. Rupert*, (1834) 6 Vt. 291.

Since there is no direct obligation running from the father to the daughter-in-law, it would be unjustifiable to

carry the doctrine of imputed pauperism to the extent suggested, and thereby render a parent subject to a removal order under sec. 49.03 (9) notwithstanding the fact that he is neither unable nor unwilling to support himself and all persons whom he is required by law to support, simply because he refuses to support a son- or daughter-in-law to whom he owes no obligation.

Upon the facts stated Doris Feldman's settlement was in the city of Plymouth.

WAP

Intoxicating Liquors — "Class B" retail liquor licenses issued in excess of number allowed by sec. 176.05, subsec. (21), Stats., are void and persons operating thereunder are subject to prosecution for selling without license, under sec. 176.04.

Where excessive number of "Class B" retail liquor licenses are issued at one meeting of license body, validity of individual licenses depends upon order in which voted on, if voted individually, but if all are voted simultaneously in one resolution, all are void, since such resolution is beyond jurisdiction of licensing body.

June 13, 1940.

HERBERT W. JOHNSON,

District Attorney,

Sturgeon Bay, Wisconsin.

You inquire (1) whether "Class B" retail liquor licenses issued in excess of the number permitted by subsec. (21) of sec. 176.05, Stats., created by Laws 1939, ch. 397, are void so as to subject persons operating thereunder to prosecution for selling without a license under sec. 176.04 and, (2) if so, how one can determine which of several licenses issued on the same day are void when the whole number so issued exceeds the statutory limit.

(1) Subsec. (5) of sec. 176.05, Stats., provides in part as follows:

“* * * No license shall be issued to any person in violation of any provision of this chapter, and any license so issued shall be null and void. * * *.”

Subsec. (21) of the same section in effect prohibits licensing bodies from issuing more than one “Class B” retail liquor license for every five hundred inhabitants unless more than that number of licenses were in effect on August 27, 1939, in which case the number in force on that day shall constitute the limit until such time as it is less than the statutory proportion to population.

You point out that the prohibition contained in subsec. (21) is directed to the licensing body rather than to the licensees. Nevertheless it is clear that licenses issued in violation thereof are null and void under subsec. (5), above quoted, and as a general proposition even independently of subsec. (5). *State ex rel. Marvin v. Larson*, (1913) 153 Wis. 488, 140 N. W. 285. This being true, any person operating under such a void license is subject to prosecution under sec. 176.04. *Zodrow v. State*, (1913) 154 Wis. 551, 143 N. W. 693; *Koch v. State*, (1914) 157 Wis. 437, 147 N. W. 366. See *State v. Moore*, (1910), 67 W. Va. 559, 68 S. E. 177; 33 C. J. 532.

(2) In answer to your second question, you are advised that investigation must be made as to the action taken by the licensing body in granting the licenses. If applications are taken up and passed upon individually, then the first ones voted, up to the statutory limit, would be valid and those voted after the limit is reached would be void, notwithstanding that all are voted on at the same meeting. See *Bjordal v. Town Board*, (1939) 230 Wis. 543, 284 N. W. 534.

On the other hand, if licenses to a number in excess of the statutory limit are voted in a single resolution, there is no way to separate the sheep from the goats and, since all cannot be valid, it follows that all are void. No priority can be claimed by reason of the order in which applications are

filed, *Bjordal v. Town Board*, (1939) 230 Wis. 543, 284 N. W. 534; nor can the order in which they are attested and delivered by the clerk have any effect, since his duties are purely ministerial and the violation takes place when the licensing body votes to issue the excessive licenses, not when the clerk prepares and delivers the documents evidencing them.

The test is whether the licensing board has jurisdiction. After it has exhausted its quota, it has no jurisdiction to issue additional licenses and, if it does so, its act is a nullity and subject to collateral attack. (Authorities *supra*.) But even if it has not yet exhausted its quota, it never has jurisdiction to grant an excessive number of licenses and, if, for example, it has eight more licenses to grant, a resolution granting ten is beyond its jurisdiction and wholly void. WAP

Public Health — Basic Science Law — Massage — Graduate registered nurse desiring to open massage parlor exclusively for women for reducing purposes only is not exempt from requirements of sec. 147.185, Stats., relating to massage licenses.

June 24, 1940.

E. C. MURPHY, D. O., *Secretary*,
Board of Medical Examiners,
Eau Claire, Wisconsin.

You have referred to us for an opinion an inquiry from Hon. O. L. O'Boyle, corporation counsel, Milwaukee county, as to whether a graduate registered nurse who plans to open a massage parlor exclusively for women, for reducing purposes only, is required to have a massage license under sec. 147.185, Stats.

XXVI Op. Atty. Gen. 61 is mentioned as having some bearing on the question. In that opinion it was ruled that sec. 147.185, Stats., is applicable to practice of massage for

therapeutic purposes, but does not extend to athletic rubs given by clubs in connection with athletics or physical exercise. In that opinion it was pointed out that sec. 147.185 is a part of ch. 147, which is entitled "Treatment of the sick," and should, therefore, be construed as a part of that chapter, which has never been considered as relating to the conditioning of athletics by trainers so far as we had been able to determine. The applicability of sec. 147.185 was considered to depend upon whether the club was operated for therapeutic as distinguished from athletic purposes.

I am frank to say that I have serious doubts as to whether the interpretation given to sec. 147.185 in the opinion mentioned is justified. The words of the statute itself give no basis for such an interpretation, and the fact that the chapter is entitled "Treating the sick" hardly seems to justify the interpretation.

In any event, I do not feel that the exemption, if one may call it that, could be broadened to include the case to which you refer. I therefore am of the opinion that a license is required.

Inquiry is also made by Mr. O'Boyle as to what constitutes "the completion in a scientific or professional school of an adequate course in physiology, descriptive anatomy, pathology, and hygiene" within the meaning of the massage law, sec. 147.185, Stats.

This language was doubtless intended to place a rather broad discretion in the board of medical examiners, since it is the body which, under the statutes, passes upon the qualifications of applicants and issues the licenses.

You have informed us as to the requirements at present required by the board and, for the benefit of others who may read this opinion, we will take the liberty of repeating them here.

"200 hours of anatomy	280 hours of Massage
200 hours of physiology	200 hours of hydrotherapy
200 hours of pathology	80 hours of hygiene

The course must cover two years of nine months each, five days a week, four hours a day with no night school work accepted."

It may well be that the training of a graduate registered nurse would, to some extent at least, overlap the foregoing requirements, and the board would consequently be justified in allowing appropriate credit therefor towards fulfillment of the training requirements for a massage license.

JWR

Courts — Minors — Child Protection — Prisons — Prisoners — Parole — Words and Phrases — Conviction — Criminal and juvenile courts have concurrent jurisdiction over offenders who are over sixteen and under eighteen years of age.

Person arrested on felony charge who purported to plead guilty to warrant or complaint in Rock county municipal court was not "convicted" where court ordered payment of costs and restitution and deferred sentence for one year, without ordering that information be filed and defendant plead thereto as required by sec. 357.25, Stats., and no further disposition was made of case.

"Conviction" in meaning of penal statutes signifies judicial determination of guilt, upon defendant's admission or plea or upon verdict, by court having jurisdiction to try or to sentence defendant.

Person convicted of felony is "first offender" in meaning of parole law, sec. 57.06, subsec. (1), Stats., unless he has previously been convicted of another felony.

June 26, 1940.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You state that a prisoner was sentenced to the state prison on April 18, 1939, to serve three to fifteen years for a violation of sec. 340.55, Stats. The warden has ascertained that on September 11, 1936, a warrant was issued for the arrest of this man on a charge of breaking and entering in

the nighttime on May 9, 1935, and you submit a certified copy of the docket entries of the municipal court for Rock county showing the following proceedings upon the return of said warrant:

"September 11 2 P. M. Case called. Hon. Charles H. Lange, municipal judge presiding. Warrant returned. State appears by John H. Matheson, district attorney. Defendants in court in custody of Sheriff Croake. *Warrant read to defendants to which they plead guilty.* Sentence deferred to September 10, 1937. Defendants to make restitution of \$21.00 and pay costs taxed at \$12.20." (Italics supplied.)

The docket further shows that on December 2, 1937, restitution was made and the costs paid, but does not show any other disposition of the case. Your department has no record that this man was placed on probation at any time.

It appears further that the accused was seventeen years of age at the time of the alleged offense on May 9, 1935, but was eighteen years old at the time of the purported plea of guilty on September 11, 1936.

You inquire whether he is to be regarded as a first or a second offender for parole purposes under sec. 57.06, subsec. (1), Stats.

If an information had been filed and defendant had been found guilty by the court on the 1936 charge, he would unquestionably be a second offender at this time. The jurisdiction of the municipal court was not affected by the fact that the accused was seventeen years of age at the time of the alleged offense, since juvenile offenders over sixteen and under eighteen are subject to the jurisdiction of the criminal as well as the juvenile courts. Secs. 48.01 (5) (am), 48.11, Stats.; XX Op. Atty. Gen. 978; XXIV Op. Atty. Gen. 754.

But the municipal court docket reveals that the proceedings therein were informal and quite irregular. Under the act creating the municipal court for Rock county, all provisions of law relating to the trial of cases in the circuit court apply to circuit court cases tried in municipal court. Laws 1935, ch. 548, sec. 4 (2). The defendants were charged with a felony punishable by imprisonment in the state prison for

not less than one nor more than ten years, or in the county jail not more than one year. Sec. 343.11, Stats. Yet no information was filed and no proper arraignment had. In circuit court cases there is no such thing as pleading guilty to the warrant or complaint. The proper procedure is provided by sec. 357.25, as follows:

“When any person shall be committed for trial and is in actual confinement or in jail by virtue of any indictment or information pending against him the court having trial jurisdiction may, at any law or special term thereof, upon the application of the prisoner in writing, stating that he desires to plead guilty to the charge made against him by the complaint, indictment or information, direct an information to be filed, if indictment or information has not been filed, and upon the filing thereof and of such application may receive and record a plea of guilty and award sentence thereon.”

Thus, the plea of guilty is to the indictment or information, not to the warrant or complaint. See also secs. 355.07, 357.20-357.23; 16 C. J. 386-387. The magistrate's jurisdiction upon the return of the warrant charging a felony is limited to binding the defendant over for trial, either after a preliminary hearing or upon waiver thereof, or discharging the defendant. If the defendant indicates an intention to plead guilty, the procedure set out in sec. 357.25, *supra*, must be followed. That is, in order to obtain jurisdiction to receive the plea and award sentence (assuming that the magistrate has trial jurisdiction of the offense), the court must order that an information be filed. The proper procedure then is to arraign the defendant, receive his plea and find him guilty thereon, although such finding is not absolutely required. *In re Carlson*, (1922) 176 Wis. 538, 556, 186 N. W. 722.

Sec. 353.01 and 353.04 provide as follows:

“353.01. No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict accepted and recorded in court.”

"353.04. No person who is charged with an offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person or jurisdiction to award sentence upon a plea of guilty."

It is an essential prerequisite to a conviction of felony that the accused have been indicted or informed against and his guilt established by one of the methods provided by sec. 353.01 in a court having jurisdiction. The record shows that the municipal court failed to obtain jurisdiction in the manner provided by law, and it follows that the defendants were not convicted.

Nor did the court apparently intend that they should be regarded as having been convicted, for they were not placed on probation as required by sec. 57.01. Doubtless the court and the prosecutor considered that in view of the youth of the offenders, and perhaps other factors militating in their favor not disclosed by the record, justice would be served adequately by requiring payment of costs and restitution, meanwhile holding the charge open. Such methods may be effective in many cases—although it would be better to follow the probation law in order that the youthful offenders might have proper supervision—but where justice is thus informally administered the defendant cannot be considered as having been convicted of a felony, notwithstanding his admission of guilt.

For the purpose of penal statutes, a conviction means an adjudication of guilt by the court, upon the defendant's admission or plea or upon the verdict. Note, Ann. Cas. 1915 B, 287-289. Thus, in holding that a plea of *nolo contendere* without a finding of guilt by the court was not a conviction which might be used to impeach a witness, the court said in *Remington v. Judd*, (1925) 186 Wis. 338, 341, 202 N. W. 679:

"The word 'conviction,' as here found in the statute, means that the criminal proceedings must have reached the stage of a judicial determination that the person charged with the offense was guilty, and nothing short of that meets the statutory requirement. *Davis v. State*, 134 Wis. 632, 638, 115 N. W. 150; Jones, Evidence (3d ed.) sec. 716."

Sec. 57.06 (1) does not define the term "first offender" as therein used, but this office has ruled that it means one who has not previously been *convicted of a felony*. XVIII Op. Atty. Gen. 211; XXI Op. Atty. Gen. 506. And see *Faull v. State*, (1922) 178 Wis. 66, 71, 189 N. W. 274.

It follows that since this prisoner has not been previously convicted of a felony he is now a first offender and will be eligible for parole after serving two years without deduction for good behavior.

WAP

Public Health — Funeral Directors — Sec. 156.03, subsec. (2), Stats., authorizing state board of health and committee of examiners in funeral directing to make and enforce reasonable rules and regulations establishing professional and business ethics for funeral directors, does not justify making of rule prohibiting all price advertising.

July 2, 1940.

BOARD OF HEALTH.

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

You have called our attention to sec. 156.03, subsec. (2), Stats., which authorizes the state board of health and committee of examiners in funeral directing:

“To make and enforce reasonable rules and regulations, not inconsistent with this chapter, covering sanitary and health regulations in the preparation, transportation and disposition of dead human bodies, establishing professional and business ethics for the profession of funeral directors and embalmers and for the general conduct of the business of funeral directing and embalming. * * *.”

We are asked whether the foregoing statute is sufficiently comprehensive to justify the following rule recently adopted and known as rule 6:

“Publishing or causing to be published any advertisement quoting a price for service or merchandise or for a combination of both to be furnished in connection with a funeral, shall be considered unethical and is therefore prohibited.”

It is contended by counsel for a funeral director who resorts to price advertising that the board and committee exceeded their authority in adopting rule 6; that such rule bears no reasonable relation to public health, safety, or morals and violates constitutional guaranties respecting property and contract rights as well as the constitutional rights of freedom of speech and the press.

Unquestionably the regulation of funeral directing and embalming is a legitimate subject for the exercise of the state's police power and the power to administer such reg-

ulation and to adopt rules for the conduct of the business of funeral directing may properly be delegated to a board of health or other administrative body as has been done in Wisconsin by ch. 156 of the statutes. Jackson, *Law of Cadavers*, 443 *et seq.*; 23 A. L. R. 71, note.

However, the regulations adopted, if they are to be sustained, must bear a reasonable relationship to public health, safety or morals, since the right to regulate under the state's police power is rested entirely upon these factors, and the extent of regulation must bear a reasonable relation to the public purpose sought to be accomplished. Jackson, *Law of Cadavers*, ch. XV; 23 A. L. R. 403, note; *State ex rel. Kempinger v. Whyte*, 177 Wis. 541.

It is not necessary here to consider all of the various types of regulations of funeral directors and embalmers that have been held valid by the courts. We might note, however, that some have been upheld which are more closely related to the prevention of frauds and the elimination of business practices which are detrimental to the public in general than they are related to the protection of public health. Thus, for instance, the Rhode Island court, while invalidating portions of the Rhode Island act for uncertainty, upheld provisions which denied licenses to those who promoted or participated in any burial association plan containing an element of fraud, and further upheld the provision forbidding the payment of money to any person for the securing of business for the undertaker or embalmer. *Prata Undertaking Co. v. State Board of Embalming*, (R. I.) (1936) 182 Atl. 808, 104 A. L. R. 389.

In view of the foregoing, it is obvious that the authority of the board and committee to enact rule 6, forbidding the advertising of prices by a funeral director, can be sustained only if the rule is shown to have some reasonable relation to the protection of public health, safety or morals, or at least to the prevention of commonly practiced frauds. See, *Prata case, supra*. Although the board and committee now have powers phrased in very broad language to regulate matters relating to "professional and business ethics" and to the "general conduct of the business of funeral directing and embalming" these powers must, of course, be construed in the light of the fact that they are based upon the right

to protect the public and not on any right to regulate the funeral director's business *per se*.

The board and committee have not been granted any general power to regulate competition among funeral directors, and probably possess no such power except within the limits indicated above, for the protection of the public. Nor have the board and committee been granted any power to regulate prices which may be charged by funeral directors, and they have not attempted to do so. Hence the cases dealing with price fixing are not in point.

The only case found which deals with an attempt to limit the advertising of prices is the case of *People v. Osborne*, (a California case) 59 Pac. (2d) 1083, in which the court held invalid an ordinance that attempted to place such a restriction upon barbers. The ordinance prohibited the advertising of barbering prices in any publication, handbill, or notice, or the display of any price list on the outside of any shop, or so as to be visible from the outside of any barber shop. This ordinance was held invalid on various grounds. It was considered to be an unreasonable discrimination against barbers, even though the majority of barbers in the city favored it. It was held that this constituted an arbitrary and unreasonable exercise of the police powers, since it was not shown that the health, safety or morals of barber patrons required that they be kept in ignorance of the price list until after they had entered the barber shop. The ordinance was therefore condemned as a mere attempt to restrict competition without the existence of any need justifying such an attempted exercise of the police power, and it was further concluded by the court that since there was no justification in the police power for the enactment of such an ordinance, it constituted an invalid encroachment upon the rights of property and contract and the freedom of speech and press.

It is true that the business of funeral directing is one in which the opportunity for fraud and imposition is considerably greater than it is in the barber business. However, it is not a "profession" in the ordinary sense of the word. *Building Comm'r of Brookline v. McManus*, 263 Mass. 270, 160 N. E. 887; *O'Reilly v. Erlanger*, 108 App. Div. 318, 95 N. Y. S. 760.

Chapter 156 in various places does refer to the business of funeral directing as a "profession." This, however, is not necessarily controlling.

In the recent case of *State ex rel. Harris v. Kindy Optical Company*, 292 N. W. 283, our supreme court, in holding the practice of optometry not to be a profession, despite references in the statute to "unprofessional conduct", said, p. 286:

"* * * Phrases work themselves into statutes and literature upon a subject because they become convenient in the meeting of situations requiring description, but they cannot be considered of such strength or importance as to carry a meaning contrary to the general import of the statute."

It was considered in the *Harris* case that the legislature had dealt with optometry as a skilled calling and not as a profession involving a relation of special confidence.

The same might equally be said of funeral directing, and consequently cases relating to price advertising by members of a profession, such as the law, have no application.

Generally speaking, unless there is some evil to the public which is reasonably sought to be remedied by prohibiting funeral directors from advertising their prices as distinguished from general advertising, which is not prohibited, we must conclude that the board and committee were not authorized to enact such a sweeping prohibition against price advertising as is contained in rule 6.

Conceivably the public interest might be even better served by honest price advertising than by no price advertising at all, since people who are in need of undertaking services are seldom in the frame of mind for shopping around to find funeral services within the reach of their finances. Ordinarily they have had no opportunity to compare prices and services, and are consequently in no position to judge whether prices quoted by undertakers who do not advertise prices are fair and comparable with those generally charged for like services. Under such circumstances they are in a poor position to exercise any sales resistance and may easily fall prey to the impositions of unscrupulous undertakers who are not held in check by their own adver-

tised prices, although, fortunately, this type of impropriety is rapidly disappearing.

You are therefore advised that, in our opinion, rule 6 does not fall within the scope of the authority granted the board and committee by sec. 156.03 (2), Stats.

In conclusion we wish to state that it is unnecessary here to express any opinion upon the power of the board and committee to enact rules designed to prevent fraudulent or misleading advertisements, since the rule in question is not so limited in its application and prohibits all price advertising however wholesome the same may be.

WHR

Public Health — Barber who discontinues operation of barber shop and opens shop upon other premises must pay three dollar shop manager's license fee covering license for new premises.

Barber who, in interim between closing one shop and opening other, failed to renew his shop manager's license is not, by virtue of that fact, required to pay restoration fee of ten dollars when he opens new shop.

Barber who continues to do business on premises previously covered by manager's license following expiration of barber's license for such premises must pay restoration fee of ten dollars if his license is to be restored.

July 12, 1940.

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

You have submitted the following questions to us for opinion:

"If a barber discontinues operating a barber shop and does not renew his shop manager's license is he required to pay a restoration fee of \$10.00 if he should open a barber shop in a different location?

"If a barber does not renew his shop manager's license on June first and continues operating a barber shop in the same location must he pay a fee of \$10.00 in order that his shop manager's license may be restored?

"If a barber moves from one location to another is he required to pay \$3.00 for a shop manager's license for the new location?"

The answer to the questions submitted must, as you have stated in your request, be governed by the provisions of secs. 158.12 and 158.13 of the Wisconsin statutes. Sec. 158.12 provides in part as follows:

"(1) * * * The state board of health shall issue a separate shop manager's license for each shop, which license is valid only in the place specified in said license, and which is not transferable.

"* * *

"(3) The fee to be paid upon application for the issuance of a shop manager's license shall be three dollars. When application is made by more than one qualified person for a license covering the same shop such license may be issued in the name of all applicants. In case of a change in ownership of said shop or in the persons having an interest therein, notice of said change shall be given the state board of health within ten days. Any person seeking a shop manager's license for more than one shop shall pay a separate fee for each shop.

"(4) All shop managers' licenses shall expire on June first next succeeding issuance and be renewed on application on or before the expiration date at a renewal fee of three dollars. For the restoration of an expired shop manager's license the renewal fee shall be ten dollars."

Sec. 158.13, subsec. (3), Stats., reads in part as follows:

"Every master barber who continues in active practice or service and every shop manager who continues as an active manager shall, annually, on or before the first day of June, make application for a renewal of his license and pay the required fee. A master barber or shop manager whose license has expired may have his license restored upon the payment of the required fee. Any expired master barber's or shop manager's license which is not restored within a period of three years from the date of expiration, shall be annulled. * * *"

In view of the provisions quoted, it seems perfectly evident that your first question must be answered in the negative. The law contemplates that a shop manager's license shall cover particular premises; that it shall be nontransferable and that if a barber operates several shops he must obtain a license for each premises upon which he operates. Under these circumstances, if a barber closes one shop and opens another, he must obtain a new license for the newly opened shop. If, in the interim, his license covering the old shop has expired, the situation is in no wise changed. The old license covering the old premises is not restored. A new license covering new premises is obtained. The fee for such a license is three dollars.

Your second question is answered in the affirmative. If a barber continues to operate a shop upon premises which have been covered by an existing license and fails to renew the license as required by law, then he obviously must pay a restoration fee of ten dollars in accordance with the provisions of sec. 158.12 (4), Stats.

Your third question is answered in the affirmative. By the plain provisions of sec. 158.12 (3), Stats., a license is not transferable from one place to another.

JWR

Criminal Law — Aiding Escape from Officer — Where prisoner has effected escape, one who removes handcuff from escaped prisoner is not guilty of violating sec. 346.34, Stats.

July 17, 1940.

JAMES P. CULLEN,

District Attorney,

Prairie du Chien, Wisconsin.

You have submitted the following with the request that we express our opinion thereon.

The Crawford county traffic officer attempted to arrest a drunken driver. The driver resisted arrest and after the

officer had placed a handcuff on one of his wrists, the driver managed to get his car in motion and drove away. The handcuff was placed on the wrist tighter than it was necessary to place it. Several hours after the attempted arrest the driver stopped at a filling station, awakened the operator of the filling station, and induced him to remove the handcuff from his wrist which was then swollen. The operator filed the handcuff off without thought of the legal consequences to relieve the suffering of the individual.

Was the filling station operator guilty of violating sec. 346.34, Wis. Stats.?

In our opinion the operator was not guilty of violating the section to which you refer. To come under this section the defendant must "aid or assist any prisoner in escaping * * * from any officer or person who shall have the lawful custody of such prisoner * * *." While there is no Wisconsin case in point, the courts of other jurisdictions having similar statutes have interpreted the term "escaping" very narrowly. In *Orth v. United States*, 252 Fed. 566, 568, the court said:

"* * * The evidence furnished no foundation for conviction of the charge of aiding Fay to escape from lawful custody. When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete. After that aid to the fugitive is no longer aiding his escape. * * *"

See also *Smith v. State*, 8 Ga. App. 297, 68 S. E. 1071; 10 R. C. L. 579; 21 C. J. 837.

The question in this case therefore is whether the pursuit was so warm that it could not be said to be a complete escape. Here the driver had eluded the officer for several hours. The cases seem to lend some foundation for the rule that by merely getting out of sight one has escaped. Certainly several hours of freedom out of sight of police officers would be an escape. At the time of the removal of the handcuff the traffic officer was no longer attempting to prevent the escape of the drunken driver here in question but, if he was in pursuit at all, was trying to effect a recapture.

This opinion is not to be interpreted as expressing the view that no statute of this state was violated. As to that

we express no opinion. We are of the belief, however, that the statute referred to was not violated.

JWR

Civil Service — Counties — Public Officers — Deputy Sheriff — County adopting civil service system for deputy sheriffs, may make existing deputies eligible for appointment without examination by virtue of sec. 59.21, subsec. (8), par. (c), Stats. However, when once adopted, ordinance must apply to all future appointments and system may not be part civil service and part not civil service.

County board may not by ordinance establish qualifications for position of deputy sheriff.

July 20, 1940.

WILLIAM LEITSCH,
District Attorney,
Portage, Wisconsin.

You state that your county has enacted an ordinance reorganizing the sheriff's department on a civil service basis as provided in sec. 59.21, subsec. (8), Stats. The ordinance provides for four deputy sheriffs over and above the minimum number required under sec. 59.21 (1) (a) and (b), Stats., and the provisions of the ordinance relate entirely to these four additional deputy sheriffs. The reason for not placing all deputies on a civil service basis was that difficulty was anticipated in finding deputies from outlying villages who would be willing to take the trouble of writing a civil service examination.

Also the ordinance provides that the four deputies on civil service shall, in addition to being qualified in the duties required of them by law, be qualified in certain other particulars. For instance, one is to be qualified in the science of criminal detection, one in the elements of bookkeeping, and the third in the management of highway traffic control and safety.

You state that you have been unable to find any authority one way or the other on the foregoing provisions, and you ask to be advised as to their legality.

With respect to the first provision you mention, it is, of course, possible under sec. 59.21 (8) (c) for the county board to provide that any deputy sheriff acting as such at the time of the adoption of the ordinance shall be eligible to appointment without examination.

However, there is no warrant of authority in sec. 59.21 (8), as we read it, for any permanent operation of the sheriff's office on a basis of half civil service and half not civil service. The county is free to adopt or not to adopt civil service for deputy sheriffs under sec. 59.21 (8) (a) as it sees fit, but the statute does not authorize anything in between the one system and the other. Counties have only such powers as are expressly granted or are necessarily implied from the statutes. *Spaulding v. Wood County*, 218 Wis. 224. Here there is clearly no express grant of power to adopt what might be termed a hybrid system of civil service for deputy sheriffs, and we are unable to see that such power is necessarily implied in sec. 59.21. If the selection of deputy sheriffs is placed on a civil service basis, it must apply to all future appointments.

Sec. 59.21 (8) also provides that if the examinations are conducted by the state bureau of personnel, the method used in examinations for the state civil service shall be followed. Sec. 16.11 (1) provides that such examinations shall be practical in character, and shall relate to those matters which will fairly test the capacity and fitness of the persons examined to discharge the duties of the employment sought by them. Sec. 16.05 (1) directs the personnel board to prescribe rules for carrying into effect the civil service statutes. Since your ordinance provides that the examinations are to be conducted by the state bureau of personnel, rather than under the optional provision in sec. 59.21 (8) (a) for examination by a county civil service commission, it seems apparent in answering your second question that the sole authority for determining the scope of the examination rests with the bureau of personnel, and that the county board is necessarily precluded from setting up any additional requirements.

It would seem, however, that the state bureau of personnel would have a wide latitude in the selection of questions to be asked and the tests to be imposed, and that when the county desires to appoint a deputy sheriff especially skilled in some particular type of work falling in the line of duties usually performed by such officer, there is no good reason why the county board could not at least request the personnel bureau to so prepare the examination as to insure the selection of applicants having the desired qualifications.

WHR

Education — Vocational Education — Public Health — Beauty Parlors — Public vocational schools in Wisconsin are not required to pay annual license fee provided by sec. 159.02, subsec. (7), Stats., for certificate of registration to teach cosmetic art.

July 22, 1940.

BOARD OF HEALTH.

Attention C. A. Harper, M. D., *State Health Officer*.

You have inquired whether vocational schools giving courses in cosmetology are required to pay the license fee provided by sec. 159.02, subsec. (7), Stats., which reads:

"The annual fee for a certificate of registration for a school to teach cosmetic art shall be not less than one hundred dollars for all schools now holding a certificate of registration. Applicants for a certificate of registration who do not at the time of the passage of this section hold a certificate of registration shall accompany their application with a fee of three hundred dollars. Said application fee shall include the fee for the first certificate of registration provided said application be granted. The annual fee for a certificate of registration shall be paid on or before the thirtieth day of November, annually; after that date an additional fee of twenty-five dollars shall be paid."

We have been able to find but very little authority directly bearing on this problem.

The attorney general of Ohio was called upon to answer a similar question arising under the Ohio statute in 1934, and concluded that the public high schools, public junior high schools, and public trade schools were not required to pay the one hundred dollars license fee provided in sec. 1082-16, General Code, in order to be approved by the state board of cosmetology. See Opinion No. 2715 of the attorney general of Ohio, 1934. It was said there:

"I am unable to find any provision of law authorizing such public schools through their boards of education to pay such one hundred dollars (\$100.00) license fee to the State Board of Cosmetology. There being no such provision they have no power to pay such license fee. However, in my opinion, the State Board of Cosmetology could approve such schools as bona fide schools of cosmetology without the payment of such fee assuming that they meet all the other requirements of the Cosmetology Act. The maintenance of public schools is a state function. *Miller vs. Korns, Auditor*, 107 O. S. 287. The state should not be required to pay a license fee for the prosecution of its business unless such license statute expressly includes the public schools within its provisions.

"It might be argued that because of the lack of such power by the boards of education to pay the required fee the legislative intent was not to embrace such public schools as eligible to be approved by the State Board of Cosmetology. This contention is not wholly meritorious in that the whole object of the Cosmetology Act in requiring students to have a certain amount of training in particular subjects in an approved school of cosmetology is to insure adequate training before such students are eligible to take the state board examination. If the public schools in question meet all the requirements laid down in Section 1082-17, General Code, supra, they can evidently train the students with the same degree of competence as private schools of cosmetology and thus the primary object of the legislature is adequately met."

A somewhat related situation arose in the case of *Marin Municipal Water Dist. v. Chenu*, 188 Cal. 734, 207 Pac. 251, where the court held that a municipal water district was exempt from the payment of license fees on its automobiles under the well established rule "that words in a statute providing for the payment of fees or imposing burdens on property shall not be deemed to apply to public agencies or

public property, unless such intent is clearly expressed." (P. 252.) See also *Balthasar v. Pac. Elec. Ry. Co.*, 187 Cal. 302, 202 Pac. 37, and 37 C. J. 217.

There can be no question as to the public character of vocational schools in Wisconsin. Sec. 41.16 makes provision for maintenance of such schools by local taxation and state aid for vocational schools is furnished under sec. 41.21. Federal aid is also received under the so-called "Smith-Hughes act" 20 USCA sec. 11, also known as the United States vocational education act, the benefits of which Wisconsin has elected to accept by sec. 41.13 (4), Stats. The local board of vocational and adult education under sec. 41.15 (2) consists of the city superintendent of schools and four other members appointed by the local school board. The state board of vocational and adult education under sec. 41.13 (1) consists of the state superintendent of public instruction, a member of the industrial commission and nine other members appointed by the governor.

Thus, a local vocational school is an agency of the state, the municipality, and indirectly of the federal government in the training and education of citizens in "trades and industries, commerce and household arts" as stated in sec. 41.15 (1) Stats., and under the rule above stated, we conclude that it is not subject to the license fee imposed by sec. 159.02 (7), Stats., for a certificate of registration to teach cosmetic art.

WHR

Prisons — Prisoners — Parole — Rule stated for determination parole eligibility with respect to both indeterminate and determinate sentences imposed to run consecutively. XXII Op. Atty. Gen. 19 overruled.

Rule is that prisoner must serve minimum period of incarceration required under each separate sentence before he becomes eligible for parole and, for purposes of computing service of said required minimum periods, prisoner will be deemed to be serving his second required minimum period of incarceration at expiration of having served required minimum period of incarceration upon first, and so on.

Where prisoner receives additional consecutive sentence while incarcerated on prior conviction, same rule applies and after serving minimum required term on original sentence he will be deemed to commence serving minimum required term on second sentence, for parole purposes.

July 22, 1940.

DEPARTMENT OF PUBLIC WELFARE.

In your letter you inquire as to the proper method of computing parole eligibility under indeterminate sentences imposed by the court where the judgment of the court is that the sentences shall run consecutively rather than concurrently. You refer us to a letter from the warden at Waupun in which it is stated:

“* * * Under present existing rulings and the method of figuring parole eligibility under consecutive sentences we find the following situation which we will try to give you by stating an example.

“Prisoner X was sentenced to this institution by the county court of Oneida county on November 12, 1936 to serve, 1-3, 1-2 and 1-5 years, consecutively, for breaking and entering—night time; received here November 14, 1936. Under the present method of figuring parole eligibility prisoner X would be required to serve his first sentence of 1-3 years, less good time, or two years and six months, plus the second sentence of 1-2 years, less good time, or one year and nine months, plus the minimum under the third sentence, or one year, making a total of five years and three months, before he would be eligible to apply for parole. Under the recent attorney general's ruling [XXVIII Op. Atty. Gen. 12,

XXIX Op. Atty. Gen. 135], figuring discharge dates under consecutive sentences, these three sentences would be treated as one maximum sentence of ten years and he would, thereby, be subject to discharge by expiration of sentence in six years and three months. Now, if this prisoner had been employed outside the institution walls for two years earning five days a month extra good time, it would mean that his discharge date would be practically the same as his parole date. Now, if this man were a second offender he never would be eligible for parole as he would have to serve two years and six months under his last sentence.

"* * * Going to the other extreme in not allowing Prisoner X any good time in considering his parole eligibility he could be required to serve his complete sentence of 1-3 and 1-2 years without any allowance for good time, plus the full one year on the last sentence, thereby making him serve actually six full years before becoming eligible for parole consideration at all. Certain judges from time to time have expressed the opinion in giving consecutive sentences that they should be eligible for parole after they have served their combined minimum sentence. Prisoner X, under that interpretation of the parole law, would be eligible for parole after he had served three calendar years, or the minimums, one year, plus one year, plus one year without any deduction for good time, making the total three years.

"It has of late become apparent that our method of figuring eligibility for parole under consecutive sentences is not in accord with the liberal procedure used in figuring discharge dates. * * *"

The warden further expresses dissatisfaction with the existing method of computing parole eligibility where sentences are to run consecutively in that there seems to be no proper relation between the method in use for computing parole eligibility and the method in use for computing discharge dates.

It may be stated at the outset that the question is a troublesome one in that the parole eligibility statute gives no express guide to the proper application of said statute to sentences which are imposed to run consecutively. Prior opinions from this department have perhaps confused the subject rather than clarified it.

While your present method of computation is probably strictly logical from the standpoint that consecutive sentences do not begin to run until the prior sentence has com-

pletely expired—and any prior sentence is not completely expired until the maximum has been served, minus time off for good behavior—it seems to us that such method of computation completely defeats the purpose of the indeterminate sentence section of the statutes. Sentences are individualized to a point where the prisoner is incarcerated for the maximum of all but the last sentence (with time off for good behavior as to all but the last) and parole rights with respect to all but the last sentence are completely denied. Indeterminate sentences under such circumstances and under such method of computation have the effect of maximizing the period of incarceration of a prisoner, whereas it seems that the intent and purpose of the indeterminate sentence law was that of a possible minimizing of the required period of incarceration in the state prison or other penal institution.

We find nothing in the statutes warranting a conclusion that because indeterminate sentences are to be served consecutively rather than concurrently parole eligibility or parole statutes are to be completely suspended as to all sentences save the last one served. On the other hand, it obviously would not make sense for a prisoner to serve the minimum of his first sentence, then be paroled until the expiration of said sentence, then be incarcerated for the minimum of the second sentence and then paroled and so on *ad infinitum* until the last sentence has fully expired.

A very practical construction of indeterminate sentences to run consecutively is that the effect of such sentences is that of one sentence which is arrived at by adding the minimum of each sentence and the maximum of each sentence. Thus, if a prisoner is sentenced for an indeterminate term of from not less than two nor more than four years with respect to one offense and a similar sentence is given with respect to another offense, the said sentences to run consecutively, it would seem that the effect of such sentences is that of a term to be served of from four to eight years. It seems that our court in *Siegel v. State*, 201 Wis. 12, placed this very practical result or effect upon the consecutive sentences involved in that case.

While the language is not as clear as it might be, it would seem that said practical effect was likewise meant to be

placed upon such sentences in the ruling of this department in XVI Op. Atty. Gen. 83, 84, where it was said:

“* * * The man has three sentences imposed upon him and he must have served the minimum in all three before he is eligible for parole. In other words, he is not eligible for parole until he has served the minimum sentence of the sentence which begins to run after the first two have been served.”

It may well be that there is an inconsistency between the concept of consecutive sentences the latter of which does not begin to run until the prior one has fully and completely expired and that of two sentences, each for an indeterminate term of from two to four years to run consecutively rather than concurrently, having the ultimate result of a sentence from four to eight years. Logically, if the second sentence does not begin to run until the first has fully and completely expired, the ultimate result will not be a four to eight year sentence but rather a sentence arrived at by taking the maximum of the first minus time off for good behavior plus minimum of the second. However, if there is any lack of consistency or logic, the lack of same seems to be entirely justified under the very practical interpretation which our court placed upon like sentences in *Siegel v. State, supra*.

Two sentences of a minimum of two years and a maximum of four years to run consecutively construed as resulting in a term of from four to eight actually results in separating and individualizing each sentence so far as serving the minimum period of required incarceration for each sentence is concerned before becoming eligible for parole. But the parole statutes obviously cannot be so applied without some yielding with respect to the concept that the second does not begin to run until the first has fully and completely expired. The prisoner obviously starts serving his minimum required period of incarceration on the second at the time that his minimum required period of incarceration has been served upon the first. To this extent, there is a merging and an overlapping of the two sentences.

While the foregoing concept is not strictly in harmony with the concept of consecutive sentences and the time at which the sentences thus imposed begin to run, such con-

cept does seem to harmonize and to be consistent with the obvious legislative intent in enacting the indeterminate sentence and parole eligibility sections of the statutes. After all, the question is one of applying sec. 57.06 (the parole eligibility section of the statutes) to indeterminate sentences imposed to run consecutively. Did the legislature intend, under such circumstances, to maximize the period of required incarceration of a prisoner or did it intend to make possible a minimizing of the required period of incarceration? The legislative intent as to a possible minimizing of the required period of incarceration seems obvious, as that was the very purpose and intent of the law. Such being true, that intent should be given effect even though in order to give such effect to consecutive indeterminate sentences a merging or overlapping of the two sentences necessarily results in that the prisoner commences to serve the required minimum period of incarceration on the second after the expiration of having served the required minimum period of incarceration upon the first.

The warden states that the present method of computation is based upon an opinion from this department, XXII Op. Atty. Gen. 19. It may be observed that the opinion does not deal with indeterminate sentences. It may further be observed that said opinion relies upon the opinion in XVI Op. Atty. Gen. 83, from which we have quoted above, and follows the language of the last sentence of that opinion, entirely ignoring the language of the preceding sentence which would have necessitated an opposite conclusion—would have necessitated a conclusion consistent with the one herein reached. *Siegel v. State, supra*, was handed down intermediate the two opinions of this department. The *Siegel* case can certainly be cited as an authority to the effect that, for purposes of determining the effect or practical results of two indeterminate sentences to run consecutively, the result is arrived at by adding the minimums and maximums of the various sentences. It seems to us that if such is the result of such sentences, then it must necessarily follow that the prisoner becomes eligible for parole on the basis of such result. Thus, if the result of two sentences to run consecutively, each for a term of not less than two nor more than four years, is as the supreme court says it is in *Siegel v.*

State "so the sentence he is to serve will be from four to eight years" (p. 16), the prisoner in such case would be eligible for parole at the expiration of four years by the application of sec. 57.06 to such result.

While this result is a merger or aggregation of the two sentences to a certain extent, it would seem that the sentences may not be aggregated or merged to the extent that the consecutive aspect of the two sentences is completely lost sight of. Thus, in the case cited of two indeterminate sentences of not less than two years nor more than four years to run consecutively, while the result may be a term of from four to eight years for purposes of the parole law, we do not think that such sentences can be treated as the equivalent of one sentence to the extent that the following provisions of sec. 57.06 would be applicable: "* * * who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, or one-half the maximum, whichever shall be less, not deducting any allowance of time for good behavior."

The above quoted portion of said statute obviously refers to a separate sentence for a separate offense under a statute imposing a minimum in excess of two years and can have no application to sentences separately imposed to run consecutively, where neither sentence is imposed under a statute that falls within the above quoted language.

The net result of the above analysis is that in determining eligibility for parole under sec. 57.06, Stats., where the judgment provides for indeterminate sentences to run consecutively, a prisoner becomes eligible for parole when he has served a total of the minimum required period of incarceration required by sec. 57.06 under each separate sentence and this without regard to when one sentence expires and the other begins. For purposes of such computation when the prisoner has served the minimum of the required period of incarceration upon his first sentence, he may be considered to be commencing to serve the minimum of the required period of incarceration upon the second at the expiration of the service of such minimum upon the first and so on until all minimum required periods have been served.

"Minimum required period of incarceration" as above used means the minimum period of incarceration required by the statute for the particular sentence although it may not be the minimum as fixed in the sentence. Thus when the statute says "or who if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum, or one-half the maximum, whichever shall be the less, for which he was sentenced" the minimum required period of incarceration as above used refers to either the minimum of the sentence or one-half the maximum, whichever is the lesser of the two as applied to that particular provision.

Likewise, if a prisoner were a first offender and the following were applicable to any of the sentences imposed to run consecutively "who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, or one-half the maximum, whichever shall be less, not deducting any allowance of time for good behavior", the minimum required period of incarceration for such sentence would be two years or one-half the maximum, whichever would be the lesser of the two and regardless of the minimum imposed by the sentence.

The ruling of this department in XXII Op. Atty. Gen. 19 has been referred to. As already noted, said opinion does not deal with indeterminate sentences. However, it would seem that the logic of this opinion in large measure requires an overruling of said opinion. With respect to determinate as well as indeterminate sentences, we find nothing in the statutes warranting a conclusion that the parole statutes are to be completely suspended and of no force or effect whatsoever with respect to all sentences which are imposed to run consecutively save only the last of said sentences. While the result of such a construction does not present quite such an absurd result as that presented by such concept as applied to the indeterminate sentences, the result does seem quite at variance with such legislative intent as may be gleaned from sec. 57.06, Stats. That section, as well as the indeterminate sentence sections of the statute, seems to be directed at a possible minimizing or required periods of incarceration served under sentences.

Thus, in the specific case cited in the opinion XXII Op. Atty. Gen. 19, which is a case of a first offender sentenced to serve five definite terms of one year each to run consecutively, which total a period of five years, it was held that the prisoner was not eligible for parole until he had served four and one-half years and without any credit for good time. If the same party had been a habitual offender and had been sentenced as a repeater for the same crimes for an indeterminate term of from one to five years, he would clearly be eligible for parole in two and one-half years: It does not seem to make any sense at all to conclude that the legislature intended that a first offender sentenced to definite terms totaling five years to run consecutively must be incarcerated for two years longer than a habitual offender who has been sentenced for the same maximum period.

We are of the opinion that the same rule should be applied to the determinate sentence to run consecutively as we have herein determined should be applied to the indeterminate sentences imposed to run consecutively. The holding in XXII Op. Atty. Gen. 19 must be and hereby is overruled.

Although not raised by your letter, the question naturally arises as to the application of the foregoing principles to the case of a prisoner who, during his incarceration, is tried for another offense and returned to prison with an additional sentence to be served consecutively to the one then being served. As to the second sentence he is, of course, a second offender and must serve half the maximum term without deduction for good behavior, under sec. 57.06 (1). In such case, he will be deemed to commence serving the latter sentence, *for parole purposes only*, as soon as he has reached the date on which he becomes eligible for parole as regards the former sentence.

Thus, assume that a first offender is serving a term of two to seven years and after one year in prison receives an additional consecutive sentence of one to five years. Under sec. 57.06 (1) he is eligible for parole on the first sentence in one more year (having served two years in all). At the expiration of that year he is deemed to commence serving his second sentence, and two and one half years later will be eligible for parole on the second sentence. Thus, he is

eligible for parole three and one-half years after his return to prison.

On the other hand, if he was already a second offender at the time of his original sentence, he would not be eligible for parole with regard to that sentence until he had served three and one-half years (one-half the maximum of seven years), so that he would still have two and one-half years to serve at the time he received his second sentence. Adding the period of two and one-half years which he must serve of his new sentence, he becomes eligible at the expiration of five years after his return to prison, having served six years in all. Thus, his situation is the same as it would be if he had received both sentences at the same time, to run consecutively.

NSB

Banks and Banking — Education — Teachers' Retirement — Bank deposits of teachers' retirement fund made by state annuity and investment board under ch. 42, Stats., are not to be added to general deposits of state of Wisconsin in same banks for purpose of computing five thousand dollar insurance coverage by FDIC, since such deposits by virtue of vested rights of teachers therein are not made by state in same capacity as are general state deposits.

July 22, 1940.

GERALD C. MALONEY, *Executive Secretary*,

Board of Deposits of Wisconsin.

You have inquired whether deposits of the teachers' retirement fund made by the state annuity and investment board in the form of certificates of deposit maturing in twelve months and payable to the state annuity and investment board are to be added to other deposits of the state of Wisconsin for purposes of computing insurance coverage by the Federal Deposit Insurance Corporation or whether such deposits are entitled to separate coverage.

The Federal Deposit Insurance Corporation insures up to five thousand dollars of each individual's deposit. Par. (13) of subsec. (c), sec. 264, ch. 3 of the FDIC act, defines the term "insured deposit" as follows:

"The term 'insured deposit' means the net amount due to any deposit or deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of \$5,000. Such net amount shall be determined according to such regulations as the board of directors may prescribe, and in determining the amount due to any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others, except trust funds which shall be insured as provided in paragraph (9) of subsection (h) of this section." 12 USCA sec. 264, p. 498.

You state that the FDIC, in accordance with the foregoing statute, adopted the following resolution:

"The owner of any portion of a deposit appearing on the records of a closed bank under the name of a public official, state, county, city, or other political subdivision will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records maintained by such public official, state, county, city or other political subdivision and, Provided further, That such records have been maintained in good faith and in the regular course of business."

As stated in the statutory definition of the term "insured deposit" the test is whether or not the deposits are maintained in the same capacity and the same right for the depositor's benefit. If the money of the teachers' retirement fund is held by the state in a different capacity than its other deposits, such money would be insured separately from the general deposits of the state. The FDIC prefers not to rule on this question and has suggested that you refer the matter to this office, since the answer depends upon the Wisconsin statutes and decisions rather than upon any interpretation of the federal deposit insurance act.

Sec. 42.40, Wis. Stats., provides in part:

"* * * All amounts deposited by or on behalf of any teacher shall be held for the benefit of the individual teacher

in the retirement deposit fund for the purpose of providing an annuity or other benefit as provided in this act."

It would seem clear from this that at least with reference to the amounts contributed by the teacher or deducted from the pay roll by the employer and paid direct to the retirement fund on behalf of the teacher as required by sec. 42.41, subsec. (1), the state acts as custodian only.

The same conclusion is warranted as to that portion of the fund contributed by the state. Sec. 42.45 refers to deposits by the state "on behalf of each teacher." Sec. 42.46 provides that such contributions by the state are "to be credited to the individual accounts of the members," and sec. 42.47 provides:

"As of June thirtieth of each year the annuity board shall credit the account of each member of the several associations in the retirement deposit fund with interest at the actual rate earned during the preceding year as determined by the annuity board."

In *State ex rel. Stafford v. State Annuity and Investment Board*, 219 Wis. 31, it was held that the teachers retirement act created contractual relations between the teachers and the state, and gave the teachers a vested right in the fund. The court held invalid a special act of the legislature, ch. 417, Laws 1933, which directed that a certain sum of money be paid from the fund to the widow of a teacher who died prior to the creation of the fund. The court said at p. 34:

"* * * It is an attempt by the legislature to appropriate to a stranger to the fund money belonging to those teachers who are presently members of the teachers' retirement system. Their interest exists by virtue of their contract with the state as evidenced by the provisions and requirements of ch. 459, Laws of 1921. To interfere with such rights acquired by virtue of that contract is to take something of value from the rightful owner in an unlawful way. * * *"

In *State ex rel. O'Neil v. Blued*, 188 Wis. 442, the repeal of statutes giving additional benefits to a teacher who had taught at least twenty-five years was held ineffective

although such additional benefits were to be paid solely out of public funds as distinguished from the contributions by the teachers. The court said, at p. 445:

“* * * Evidently, therefore, when the State by the law of 1921 expressly required (although undoubtedly the same effect would have been reached by its other provisions were such precise provision omitted) that the State on the one hand and the teachers complying with the law on the other should come under certain fixed contractual obligations, the State cannot now lawfully withdraw or be relieved from such obligations by subsequent legislation.”

The court distinguished this situation from that in the case of *State ex rel. Risch v. Trustees*, 121 Wis. 44, where it was held that a police officer has no vested right in a pension fund, by declaring that a teacher stands in a contractual relationship as distinguished from the tenure or holding of a public office. It was pointed out that there are no contractual relations between a municipality and its officers that may come within the constitutional safeguards against legislative impairment.

The federal case of *In re Goodwin*, 57 F. (2d) 31, mentioned in your letter and which cited the *Risch* case in support of its decision, may be distinguished on the same grounds.

The court in *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, said, p. 335:

“* * * Sec. 42.50, which provides that the death benefit shall be the full amount of the accumulation in the retirement deposit fund to the credit of the member from all members' deposits and all state deposits and interest thereon, plainly reveals a legislative purpose to clothe a member with rather complete title to the state's contributions—a title which passes to his estate upon his death.”

It is true that the Wisconsin statutes do not attempt to define with precision the exact legal status existing between the teachers, the retirement fund and the state, yet it is clear from the decisions above referred to and the reference to “vested rights” and “contractual obligations” that the state holds the funds in question as a custodian and in a

different right or capacity than it holds the general funds of the state and that the same are therefore not to be added to deposits of the general fund in computing the five thousand dollar insurance coverage of the FDIC.

WHR

Appropriations and Expenditures — Motor Vehicle Department — Refunds — Corporations — Motor Transportation — Motor vehicle taxes may be refunded under provisions of sec. 20.06, subsec. (2), Stats. Prior opinions holding that taxes may not be refunded under provisions of this subsection are overruled.

July 27, 1940.

MOTOR VEHICLE DEPARTMENT.

On May 18, pursuant to a previously requested opinion, page 243 of this volume, we advised you that the Middleton Lumber and Fuel Company was not entitled to a refund of certain motor vehicle taxes paid pursuant to sec. 194.48, Wis. Stats. The facts upon which the claim for refund is based are to some extent set out in the opinion.

Since the opinion was given two questions have been raised with respect to it. First, it has been clearly shown that the facts as related to us and upon which the opinion was based differ in several important particulars from the true facts of the case. Second, it has been suggested that an erroneous interpretation was made of sec. 20.06 based upon prior attorney general opinions. We shall discuss the foregoing in the order above set out.

The facts of the case are related to be as follows: Under sec. 194.48, Stats., certain taxes are assessed upon the operation of motor vehicles transporting property and passengers for compensation. In the case of motor vehicles transporting property, the tax is based upon the weight of the vehicles. It is provided that the tax shall be payable quarterly in advance and that each vehicle subject to the tax

shall bear such evidence of payment of the tax as the motor vehicle department may require. The motor vehicle department has, in fact, required that vehicles subject to a tax shall carry a steel plate appropriately identifying the tax to which it is subject.

It is provided in sec. 194.47, Stats., that certain operators are exempt from the tax imposed in sec. 194.48, and it is the practice of the motor vehicle department to issue steel plates covering vehicles engaged in such exempt operations. These steel plates evidence the fact that no tax is required. Such plates are presumably for the purpose of assisting the enforcement officers of the motor vehicle department in determining whether a particular vehicle has paid a tax and are also for the purpose of assisting such officers in determining whether or not the tax paid is in accordance with the amount of the tax due under the provisions of sec. 194.48, Stats.

In connection with the administration of these sections, the motor vehicle department has prepared a certain form of application which is required to be filled in and submitted by the operators of motor vehicles coming within the provisions of secs. 194.47 and 194.48, Stats. A claim for exemption under sec. 194.47 is made upon the same blank that an application for a plate under the provisions of sec. 194.48 is made. And even if exemption is claimed, it is necessary to fill in a certain portion of the application which relates to an application for a plate evidencing payment of the tax.

In the case in question the company filled in the application in several instances and enclosed an amount sufficient to obtain a plate evidencing payment of such a tax as would be required were the vehicles operated by the company not engaged in an exempt operation. The application, however, contained a claim for exemption from the tax and set forth facts which entitled the company to a plate showing that no tax was due.

Through some oversight the motor vehicle department accepted the money enclosed and issued a plate evidencing payment of the tax. The department ignored the statement showing that no tax was due.

No claim is made that any controversy existed at the time the application was made as to the facts bearing upon the

operation of the vehicles covered by the application. It seems to be admitted that, had the matter been investigated, a plate showing that no tax was due would have been issued. These applications have been submitted in the same form for several quarters and in each instance the fee has been accepted. Notwithstanding this fact, the company has not used the vehicles involved in the applications for any purpose which would require the payment of a tax.

It seems rather evident under these circumstances that there has been a mistake in the collection of the taxes and that the taxes in question have been paid into the state treasury in error. It cannot be said that the company intended to pay a tax. It caused the application to be filled out presumably upon the theory that the money enclosed for payment of the taxes would be returned if it was entitled to a tax exempt plate under its claim for exemption. The administrative body handling the application in the ordinary course of events would have returned the tax moneys enclosed with the application and would have issued a tax exempt plate, and its failure to do so seems to constitute an oversight or error which resulted in the payment of moneys into the state treasury to which the state was not entitled and which would not have been paid in had those involved in the collection been fully advised.

Under such circumstances it seems to us that the tax moneys involved were paid into the state treasury in error within the meaning of sec. 20.06, (2), Stats.

We have spoken of these applications as having been made to the motor vehicle department. We have done this for the purpose of simplifying the treatment of the subject. It must, of course, be borne in mind that prior to the passage of ch. 410, Laws 1939, the tax laws in question were administered by the public service commission.

In our opinion of May 18 we followed certain prior opinions of the attorney general and held that the provisions of sec. 20.06 (2) did not contemplate the refund of tax moneys paid into the state treasury in error. The opinions on which reliance may be found in XXV Op. Atty. Gen. 125, 499; XXVII Op. Atty. Gen. 269. These opinions were based upon the theory that the provisions of secs.

20.06, (3), (4) and (8) deal specially with the matter of tax refunds and that the legislature, having thus treated the matter with particularity in these subsections, evidenced an intent that the same subject was not to be included within the broader language of sec. 20.06 (2), dealing generally with moneys paid into the state treasury in error.

It might be helpful to those who may have occasion to read this opinion to set down the provisions of these subsections. These are as follows:

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

"* * *

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

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

"(4) The proportionate parts of taxes paid into the state treasury and due to municipalities as provided in sections 76.28 and 76.29.

"* * *

"(8) Inheritance taxes paid into the state treasury in excess of lawful taxation when claims therefor have been established in the manner provided in section 72.26 of the statutes."

Thus, by applying the rule of construction that the specific treatment of the refund of taxes in certain subsections impliedly removes them from the provisions of another in which refunds are dealt with generally, the conclusion has been reached that no taxes paid into the state treasury may be recovered except such as may be recovered pursuant to the provisions of secs. 71.23, 71.27, 72.08, 74.73, 76.28, 76.29 and 72.26.

We think this interpretation of sec. 20.06, Stats., is unjustified by any fair analysis of the history of that section. It is, in fact, composed of several subsections which came into the statutes at different times. Sec. 20.06 (2) was cre-

ated as sec. 172-38 by ch. 609, sec. 14, Laws 1915. The record of the hearing before the joint committee on finance with reference to the purpose of the provision contains the following statements:

"Section 14 of the bill provides for repayment from the treasury of moneys paid into it in error. It often happens that a county treasurer or some other person pays money into the state treasury erroneously. While it may be ever so clear that in all justice such moneys should be repaid, nevertheless under the constitution they cannot be paid until the legislature, by an act, authorizes such payment. This is the reason why this committee and the legislature is constantly bothered with a lot of small bills which provide for just such repayments. To adequately protect the interests of the public, this section provides that no refund shall be made except with the written approval of the Governor, Secretary of State and State Treasurer. By Senator Bichler: Would it not be well to also include the Attorney General, because legal points may be involved? By Draftsman: Yes, I think the suggestion is a good one and I will also include the Attorney General in this list of state officials."

The legislature, in enacting what is now sec. 20.06 (2), intended not only to appropriate money for the purpose of making refunds but intended as well to provide for a body which would pass upon the question as to whether refunds were or were not due under the standard prescribed for the refunding of moneys paid into the state treasury. In other words, the legislature provided for the refund of moneys paid into the state treasury in error, it provided for a board to pass upon the question as to whether any particular moneys were paid in erroneously, and it appropriated an amount sufficient to cover refunds allowed by the body it had thus created.

At the time that sec. 20.06 (2) was originally enacted, secs. 71.23, 72.08 and 74.73 were a part of the statutes in substantially the same form as they are now found except that they were numbered sections 1087m-30, 1087-8 and 1164. Sec. 71.27 was inserted in the statutes at a later date but for the purposes of this opinion that fact may be treated as immaterial.

There was nothing in the 1915 statutes (the time when sec. 172-38, now sec. 20.06 (2), was created) corresponding to what is now sec. 20.06. There were no provisions of any kind, moreover, corresponding to what is now sec. 20.06 (3). Sec. 20.06 (2) was, as we have seen, provided for in a separate section and provisions corresponding to what are now secs. 71.23, 72.08 and 74.73 were contained in separate sections. It apparently was not felt to be necessary to have an appropriation covering the payment of claims provided for under the provisions of what are now secs. 71.23, 72.08 and 74.73, Stats.

As a result of the foregoing, it seems perfectly clear that at the time sec. 20.06 (2) was originally enacted there was nothing in the legislative treatment of refunds under what are now secs. 71.23, 72.08 and 74.73 which suggested even by implication that taxes other than those enumerated were not intended to be included within the refund provisions of sec. 20.06 (2).

If we concede this, and we can see no way in which the conclusion is open to attack, there is nothing in the subsequent legislative treatment of the matter which justifies a different conclusion. Various provisions relating to the refunding of state moneys were collected together under what is now sec. 20.06 by the revisor of statutes and were enacted into law as a revision measure by ch. 14, Laws 1917. It is well understood that revisor's bills are not to be construed as intending a change in the substantive law unless the plain language of such change requires a different construction. Thus, in gathering these different provisions together into sec. 20.06, there is nothing to justify any conclusion that the legislature thereby intended to effect any substantial change with respect to the scope of sec. 20.06 (2).

Sec. 20.06 (3) was apparently created because the revisor felt it necessary to provide for some appropriation to cover refunds authorized by the provisions of what are now secs. 71.23, 72.08 and 74.73. The fact that such an appropriation was provided for by sec. 20.06 (3) certainly fails to justify any conclusion that it was intended by that provision to prevent the body provided for in sec. 20.06 (2) from considering tax refund claims.

So far as sec. 20.06 (4), Stats., is concerned, aside from the fact that the same argument could be made with respect to legislative treatment as has been made with respect to sec. 20.06 (3), it is evident for another reason that it is not subject to the interpretation given in the opinions referred to. Sec. 20.06 (4) is in no sense of the word a statute dealing with a refund of taxes. It provides for an appropriation for paying to municipalities "The proportionate parts of taxes paid into the state treasury and due to municipalities as provided in sections 76.28 and 76.29." The sections in question, 76.28 and 76.29, provide for the collection of certain taxes by the state and the distribution of a proportionate part of the taxes collected to the municipalities. Sec. 20.06 (4) simply provides an appropriation to cover the moneys so distributed.

It is apparent without argument that in view of these facts sec. 20.06 (4) cannot be said to constitute such a treatment of the subject matter of refunding taxes as would remove that subject matter from the general provisions of sec. 20.06 (2), relating to the refund of moneys paid in error. The two sections do not even deal with the same subject matter.

So far as sec. 20.06 (8) is concerned, this subsection, which is above set out, deals with the matter of refunding of inheritance taxes. In substance it provides for an appropriation to refund "Inheritance taxes paid into the state treasury in excess of lawful taxation when claims therefor have been established in the manner provided in section 72.26 of the statutes." It might be interesting to note that sec. 72.26 has been repealed and that consequently sec. 20.06, (8), is no longer operative.

Sec. 72.26 and 20.06 (8) were created by ch. 365, Laws 1929. They were created for the specific purpose of providing for the refund of certain inheritance taxes which had been paid into the state treasury under a law which was declared unconstitutional by the United States supreme court. As bearing on the question here at issue, it may be said that if no legislative intent had been exhibited prior to the passage of ch. 365, Laws 1929, to remove the matter of tax refunds from the general provisions of sec. 20.06 (2), it can hardly be said that the passage of ch. 365 can be given the

effect of so amending sec. 20.06 (2) as to remove tax refunds from its provisions. The most that could be said would be that since the matter of refunding inheritance tax payments under the law declared unconstitutional was specifically covered by sec. 20.06 (8), the subject matter of such refunds was thereby withdrawn from the provisions of sec. 20.06 (2), if it had in fact ever been included in the provisions of that subsection. We make this latter qualification since it is not at all certain that taxes paid in under an unconstitutional statute are paid in error within the meaning of sec. 20.06 (2). As to this, however, we express no opinion, since it is not necessary to do so in order to answer the question submitted.

As a result of the foregoing, we are of the belief that the opinion heretofore rendered in this matter and reported in XXIX Op. Atty. Gen. 243 is erroneous. That part of the opinion construing sec. 20.06 (2) in accordance with the interpretation laid down in the opinions reported in XXV Op. Atty. Gen. 125, 499 and XXVII Op. Atty. Gen. 269 will not be followed in our future opinions.

JWR

Fish and Game — Conservation commission order No. F-448, relating to commercial fishing in outlying waters of Wisconsin, did not modify provisions of order F-405, restricting size of gill nets in northern Green Bay and Lake Michigan to two and one-half inch mesh on and after November 1, 1939.

July 31, 1940.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

You have called our attention to the fact that order No. F-448 modifies certain provisions of order No. F-405, relating to commercial fishing on the outlying waters of the state, and that some confusion has arisen among fishermen

and district attorneys as to the construction to be given to the order as modified, it being contended by some of the fishermen that order No. F-448 authorizes the use of gill nets with a $2\frac{3}{8}$ inch mesh in Lake Michigan and the northern part of Green Bay, although we are informed that this was not the intention of the commission in making the modifications.

In view of this situation you have asked for our opinion as to the legal effect of the modification of order No. F-405 by order F-448 in so far as the mesh size of gill nets on Lake Michigan and northern Green Bay is concerned.

Section 5, subsec. (8), par. (a) of order No. F-405 provided for a $2\frac{1}{2}$ inch mesh for gill nets in the waters of Lake Michigan and the northern part of Green Bay for the taking of herring, bluefin, chubs, perch, menominees, and smelt on and after November 21, 1939. Section 3 of order F-448 reads:

"NOW, THEREFORE, IT IS HEREBY ORDERED AND DECLARED by the State Conservation Commission of Wisconsin by virtue of and pursuant to the provisions of section 29.085 of the Wisconsin statutes that paragraph (h) of subsection (6), paragraph (a) of subsection (8), and paragraph (b) of subsection (12) of section 5 of Conservation Commission Order No. F-405 be and the same are hereby modified as set forth herein, *all other provisions of said order F-405 pertaining to Lake Michigan and Green Bay to remain in full force and effect.*" (Italics ours.)

Thus the provisions of order F-405 remain in full force and effect, except as modified by order F-448.

Turning to order No. F-448, we note that par. (a) of subsection (8) of section 5 of order F-405 was modified. However, this paragraph was in no way modified as to the waters of Lake Michigan, and the only change made in this paragraph as to northern Green Bay has to do with the taking of herring during the period in each year from December 1 until the ice goes out.

Par. (b) of subsection (8), relating to pound nets, was modified as to all Green Bay waters and Lake Michigan, but we do not understand that there is any dispute as to pound nets.

It would seem clear from the foregoing that order F-405 as to the use of $2\frac{1}{2}$ inch mesh gill nets in northern Green Bay and Lake Michigan is still effective. However, the fishermen rely upon certain language in par. (b) of subsection (12) as modified by order No. F-448 for their contention that the use of a $2\frac{3}{8}$ th inch mesh gill net is now permissible.

The modified portion of this paragraph reads:

“* * * Gill nets having meshes not less than four inches shall be *not more than twenty meshes deep* and gill nets having meshes not more than $2\frac{3}{4}$ inches and not less than $2\frac{3}{8}$ inches shall be *not more than thirty meshes deep*; provided, however, that gill nets with meshes not less than 4 inches and *not to exceed 11 feet in width or depth* and gill nets with meshes of not more than $2\frac{3}{4}$ inches and not less than $2\frac{3}{8}$ inches and *not to exceed thirty-five meshes in depth* may be used until the states of Michigan, Indiana, and Illinois require that large mesh gill nets of 4 inches or more and small mesh gill nets not more than $2\frac{3}{4}$ inches or less than $2\frac{3}{8}$ inches *do not exceed twenty and thirty meshes in depth* respectively. And it shall also be unlawful to possess, use, or set any gill net fastened together from top and bottom, by means of maitre, leader, lead lines, or in any other similar manner *to decrease the depth or width* of the net or nets as hung. The foregoing shall not apply in the taking of suckers and carp in southern Green Bay waters.” (Italics ours.)

It is apparent from the italicized wording that the above paragraph is directed towards regulation of the width or depth of nets and not towards size of mesh and is tantamount to saying that nets of the mesh size therein specified whenever their use is legal, must, nevertheless, comply with the width or depth specifications therein indicated. This construction is borne out by the fact that mesh size has already been taken care of in subsection (8) of section 5, as previously pointed out, and that if the contention of the fishermen were to be followed, there would be a direct conflict between subsection (8) and subsection (12).

The validity of order No. F-405 and of sec. 29.085, Stats., under which it was promulgated, were sustained by the Wisconsin supreme court in the case of *Oscar Olson, et al. v. State Conservation Commission of Wisconsin*, 235 Wis. 473. Since the legislature has properly delegated to the conser-

vation commission the power to regulate commercial fishing on outlying waters, such regulations have the same effect as if enacted directly in the form of statutes by the legislature itself, and we should resort to general rules of statutory construction in the interpretation of such orders. One of these rules is that if a statute admits of two constructions, one of which would make it valid and the other would make it void for repugnancy, the former should be adopted. *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478, or, putting it another way,—conflicts by implication or otherwise, between different provisions of a statute, or between two statutes, are not favored, and will not be held to exist if they may otherwise be reasonably construed. *Mason v. City of Ashland*, 98 Wis. 540.

You are therefore advised that, in our opinion, the provisions of order F-405 respecting the mesh size of gill nets in northern Green Bay and Lake Michigan are not modified by order No. F-448.

WHR

Minors — Child Protection — Foster Homes — Under sec. 48.38, subsec. (1), Stats., foster home is one operated primarily for control, care and maintenance of children on more or less permanent basis or for indefinite periods of time, whereas summer camp operated during vacation period primarily for recreation purposes is not subject to provisions of said section.

August 1, 1940.

DEPARTMENT OF PUBLIC WELFARE.

Attention Miss Ethel C. Brubaker, *Consultant*,
Child Welfare Agencies and Foster Homes.

You state that there is some confusion as to the distinction between a foster home, defined by sec. 48.38, subsec. (1), Stats., and a summer camp, which is not defined by statute. For purposes of illustration you mention a case of a family summer home where children are taken for summer vacation purposes. Two tents have been set up on the lawn to supplement sleeping quarters, but in all other respects the situation resembles that of a foster home, although the operator insists that she is running a summer camp.

We are asked for an opinion as to the definition of a summer camp and the difference between a summer camp and a foster home where the physical characteristics are similar.

We do not believe that it is necessary for us to define a summer camp, since your problem is merely to determine whether or not the situation falls within the statutory definition of a foster home, so as to require a permit from your department or from a licensed child welfare agency as provided in sec. 48.38 (2).

Sec. 48.38 (1) defines the term "foster home" to mean: "The place of residence of any person or persons who receive therein a child or children under fourteen years of age for *control, care and maintenance*, with or without transfer of custody", provided that the children are not related to such person or persons and that the parents or guardians are not resident in the same home and that not

more than four children may be placed in a foster home unless all are in the relationship to each other of brother or sister.

Thus the statutory definition is in line with the commonly understood meaning of the word "foster" as affording, receiving, or sharing nourishment or nurture, though not related by blood. Webster's New International Dictionary.

It is obvious from the statutory definition that your question cannot be answered on the basis of physical characteristics of the home or camp. We deem it quite immaterial whether there is one tent, two tents, or no tent on the lawn. The question is whether the children have been sent there primarily for purposes of *control, care and maintenance*. If the children are received for purposes of rest, recreation, and education,—both physical and of the character-building sort generally associated with summer camps for young people, it would seem that the matter of control, care and maintenance would be secondary in nature and that no permit would be required. There are many cases of that sort where the parents want their children to have instruction in swimming, horseback riding, archery, woodcraft, organized play, and the like, and perhaps religious instruction, and so far as mere care and maintenance is concerned, would just as soon have the children at home. It is also clear from the prices charged in many cases that the item of maintenance constitutes but a small part of the problem. We are unable to read into the statute any intention on the part of the legislature to subject a summer camp operated for recreational purposes to the supervision of the state department of public welfare.

Sec. 48.38 is a part of ch. 48, which is entitled "Child protection and reformation" and for the most part deals with neglected, dependent or delinquent children whose circumstances, particularly with reference to necessities of life, are such as to call forth the protecting arm of the state. The average summer camp caters to people of substance who would resent the implications which attach to a foster home licensed under sec. 48.38 and subject to the rules and regulations prescribed by the state department of public welfare. A summer camp naturally cannot hope to secure

the type of patronage desired without first satisfying the parents that its physical and moral atmosphere is of the best, the children are ordinarily there for but a short time during the summer, and there is no occasion for enlisting the safeguards entailed by supervision of a licensed child welfare agency or the state department of public welfare required of licensed foster homes by sec. 48.38 (4), such homes usually undertaking the care and maintenance of children on a more or less permanent basis or for indefinite periods of time.

It is not easy to draw any sharp line of demarcation between a foster home and a summer camp which will satisfactorily meet all situations as they arise, and there may be cases where it will be extremely difficult to determine whether a particular place is being operated primarily for control, care and maintenance so as to come under the statutory definition of a foster home, or whether it is operated primarily for recreational and vacation purposes and hence not subject to sec. 48.38. Each case must be carefully considered on the basis of its own particular facts, circumstances, and objects sought to be accomplished.

WHR

Criminal Law — Crime Prevention — Trial by Jury —
Sec. 362.04, Stats., does not contemplate trial by jury.

August 3, 1940.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You have requested an opinion on whether a defendant in a proceeding to prevent crime under ch. 362, Wis. Stats., is entitled to a jury trial.

Art. I, sec. 7 of the Wisconsin constitution provides:

"In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law."

It is my opinion that such defendant is not entitled to a jury trial by virtue of this section.

In *Weisselman v. The State*, (1897) 95 Wis. 274, it was held that a proceeding under ch. 362 did not constitute the trial of a criminal offense and that an order binding one over to keep the peace did not constitute a judgment in a criminal case. It was the view of the court that the proceeding was purely a proceeding before a magistrate, as distinguished from a court action or proceeding.

In view of this case it is perfectly evident that a proceeding under ch. 362 is not a criminal proceeding within the provisions of art. I, sec. 7 of the Wisconsin constitution, and obviously by the plain wording of the constitutional provision in question it is not a prosecution by indictment or information. See further upon this point: *Arnold v. The State*, 92 Ind. 187; 11 C. J. S. pp. 826 *et seq.*, Blackstone's Commentaries, Vol. IV, ch. 18.

Art. I, sec. 5, Wis. Const., provides:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixth thereof."

The primary test whether a defendant in a proceeding under ch. 362 has a right to a trial by jury by virtue of this provision is whether such right existed at the time of adoption of our constitution. *Cf. Mead v. Walker*, 17 Wis. 189; *Stockhausen v. Oehler*, 186 Wis. 277. At that time the de-

fendant in such a proceeding had no such right. See *R. v. Tregarthen*, (1833) 5 B. & Ad. (K. B.) 678; Burn's Justice of the Peace, 30th ed., Vol. V, p. 743 (1869); Hawkins' Pleas of the Crown, Vol. I, pp. 479-480.

It is apparent that there is no constitutional right to a trial by jury under the provisions of sec. 362.04, Stats. It is, moreover, apparent, in view of the case of *Weisselman v. The State*, *supra*, that such a proceeding, being one before a magistrate, does not contemplate a jury trial. This is made even clearer by the provisions of sec. 362.13, Stats., relating to proceedings on appeal, in which it is stated that such proceedings shall be had without a jury in the same manner as proceedings before the examining magistrate.
JWR

Social Security Act — Old-age Assistance — Funeral Expenses — Doubt expressed as to power of county board to control discretion of administrative officer when such officer acts within limitations of sec. 49.30, Stats. Resolution of county board attempting to control such discretion must express such intent by clear, express and compelling language. No such attempt manifested by resolution submitted.

August 6, 1940.

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

In your letter you state:

"Mrs. Anderson, director of old-age assistance for Sawyer county, has requested an official opinion from your office. I will state the facts briefly as follows:

"Under date of June 18, 1940, the county board of Sawyer county passed the following resolution:

"It was moved by Supervisor Ingersoll, seconded by Supervisor Quinn that Chairman Wilson act in Mr. Alexan-

der's place on the finance committee for a meeting to be held in receiving bids for county burials.' Motion carried.

"On July 10, 1940, the finance committee received bids. It developed that there was only one bid, that of James Ray Alexander, and his bid for the whole funeral costs, including casket and transportation of body wherever found within the county was \$49.00 for adults and \$30.25 for minors under 12 yrs. of age.

"The question now comes up whether or not old-age pensioners upon their death are to be governed by these prices and funeral arrangements.

"I advised Mrs. Anderson that in my opinion the funeral arrangements for old-age pensioners are controlled by section 49.30 of the Wis. statutes and that within the limitations provided by this section is in charge of the old-age administrative agency of the county and that only pauper and relief cases would come within the arrangement above named. XXV Op. Atty. Gen. 270.

"I wish to inquire whether or not Mrs. Anderson is restricted to the undertaker and bids as above stated or may the old-age pensioners before decease or their families after decease choose the undertaker and the cost of funeral paid under the order of the old-age assistance administration at a price within the limitations of section 49.30."

Sec. 49.30, Stats., provides:

"On the death of a beneficiary such reasonable funeral expenses for burial shall be paid to such persons as the county judge may direct; provided, that these expenses do not exceed one hundred dollars and provided further that the estate of the deceased is insufficient to defray these expenses."

It is extremely doubtful whether the county board can by resolution control the discretion vested in the county judge or other administrative officer (see sec. 49.51, subsec. (5), Stats.) with respect to the amount to be allowed and to whom it shall be paid by any such resolution. We have held that the proviso provision in sec. 49.28, Stats., was impliedly repealed by ch. 554, Laws 1935. See XXV Op. Atty. Gen. 386.

In view of the extreme doubt as to county board authority to control the discretion of the administrative officer in relation to the problem in question, the resolution of the

county board would have to indicate by clear and express language that the board intended such result. There is no clear, express or compelling language in any resolution that you submit indicating that the county board intended to control the discretion of the administrative officer acting within the limitations imposed by sec. 49.30, Stats. We conclude, therefore, that the discretion of the director of old-age assistance for your county when acting pursuant to and under the limitations imposed by sec. 49.30, Stats., is not controlled or limited by the county board resolution in question and that the resolution must be construed to cover situations other than funeral expenses of the beneficiary of an old-age pension.

While the director of old-age assistance has discretion in the matter, that does not mean that the discretion may be arbitrarily exercised. If funerals furnished under this resolution in cases other than pension cases are reasonably adequate and appear to reasonably meet the needs of a humane administration of the old-age assistance laws there would appear to be no reason why the pension director should look elsewhere for the furnishing of such services. The director rather than the relatives of the deceased pensioner is the one to exercise discretion as to whom the amount allowed for funeral expenses shall be paid. This, of course, means that the director controls who shall act as the undertaker. Subject to the limitation that discretion granted to an administrative officer may never be arbitrarily exercised, the director of old-age assistance within the limitations imposed by sec. 49.30, Stats., controls both who shall act as undertaker and the amount to be paid for such services.

NSB

Automobiles — Law of Road — Accidents on Highways
— Total damage referred to in sec. 85.141, subsec. (6), par. (a), Stats., may embrace damage to one or more cars in accident.

Reports made by police officer are not confidential unless officer makes report in name of participant in accident as his agent under sec. 85.141 (10), Stats.

August 13, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention R. G. Salisbury, *Director Highway
Safety Promotion.*

On July 18 you inquired as follows:

"Section 85.141 (6) (a) requires the driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to on apparent extent of \$50 or more to forward a written report to the motor vehicle department. We are construing this to mean a combined accident involving \$50, i. e., \$30 to one vehicle and \$20 to another requires that both operators report. Is this correct?

"Section 85.141 (10) states that all required accident reports and supplemental reports shall be held entirely confidential in the motor vehicle department. Are we to construe this as meaning the report is confidential if a traffic officer, sheriff, or other law enforcement officer complete reports for persons involved in traffic accidents?"

We agree in your construction of sec. 85.141, subsec. (6), par. (a), Stats. It provides for a report of an accident where there is total property damage to the extent of fifty dollars or more. Under the literal meaning of the words any accident where the total damage was fifty dollars or more should be reported irrespective of how the damage might be divided between the cars involved in the accident.

So far as we can see there is no reason why the literal language of the section should not be given effect. It certainly produces no absurd result.

From the report of the Wisconsin legislative interim traffic committee submitted to the legislature in 1931 and

the hearings of that committee, the probable purpose of compulsory accident reports is to obtain an accurate collection of facts upon which to base future traffic safety legislation (e. g., Report of the Wisconsin Legislative Interim Traffic Committee, pp. 5 and 13 and Hearings, pp. 59, 152). Reading sec. 85.141 in the light of this expression of legislative purpose, one concludes that sec. 85.141 (10), providing that all required reports be kept confidential, was intended to encourage frank and accurate statements of the facts surrounding the accident by removing the temptation of certain persons involved to color the facts in their favor.

On the other hand, where a report is made by an officer on his own behalf following the questioning of those involved in an accident, there seems to be no requirement that the report be held in confidence. Thus the situation where a participant in an accident responds to the questioning of an officer supposedly on the theory that the officer is required to make a report and the situation where he voluntarily submits a report to the state department pursuant to a requirement that he shall make such a report, fall into entirely different categories. In the first instance the person involved in the accident has no reason to believe that his information will be kept secret, whereas in the second case any report he makes according to the law requiring him to report is, as he knows, to be held in confidence.

Sec. 85.141 (10), Stats., provides that all required accident reports shall be for the confidential use of the department except that certain things may be disclosed. There is no requirement in the section that an officer making a report and such a report not being required does not come within the provisions as to holding reports confidential.

There seems to be no reason why officers may not request participants in accidents to sign such reports as the officers may prepare. In such cases the reports will be those of the participants and would be required, of course, to be held in confidence under the provisions of sec. 85.141 (10), Stats. A police officer might, of course, at the request of any individual make a report in that individual's name as his agent. In such a case the report should be considered as that of the individual himself.

JWR

Automobiles — Law of Road — Auto Registration —
That portion of sec. 85.01, subsec. (5), Stats., providing that applications for motor truck registration made after May 31 shall be given registration numbers of succeeding fiscal year, which shall serve as registration for balance of current fiscal year, applies only to those vehicles registered under provisions for annual registration and not to those registered on quarterly basis.

August 14, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention George W. Rickeman, *Commissioner*.

You have requested an opinion as to whether or not additional registration fees are owing when a trailer is put into service during the month of June and only the quarterly registration fee for the succeeding months of July, August and September is paid.

The provisions of the law providing for quarterly registration of certain vehicles were enacted in ch. 499, Laws 1939. This chapter originated from Bill No. 845, A., and its amendments. This bill (p. 3, lines 45 to 49) originally provided:

"No such quarterly plate shall be issued by the public service commission except it appear by affidavit that such vehicle was not operated on the highways of this state during the previous quarter of the license year without the payment of the annual or quarterly registration fee due for such previous quarter."

Under such language the fee for the entire quarter preceding July 1 would be collectible when a vehicle was operated in that quarter.

However, Amendment No. 4, A., to Bill No. 845, A., was adopted providing (lines 19 to 25):

"If such vehicle is new or has not previously been registered in this state, and the time of registration falls within any such quarter, the owner thereof may at his option pay

for the remainder of the quarter during which he desires to so operate which fee shall be computed on the basis of one-twelfth of the annual fee multiplied by the number of months within the quarter which have not fully expired." See sec. 85.01, subsec. (1).

In our opinion this amendment was designed to cover the situation in question and thus give the owner the option of paying less than the fee for a whole quarter, if the computation so works out, when he puts a new or unregistered trailer into operation within any quarter of the year.

In light of the above legislative history of the quarterly registration provisions of our statutes and upon a careful reading of sec. 85.01 (5), we conclude that that portion of sec. 85.01 (5) providing "After May thirty-first any application for registration of a motor truck, tractor truck, tractor, trailer or semitrailer shall be given a registration number of the succeeding fiscal year which shall serve as a registration for the balance of the current fiscal year" applies to only those vehicles registered under the provisions for annual registration and not to those registered under the new quarterly system.

WHR

Appropriations and Expenditures — Department of Public Welfare — Funds appropriated to department of public welfare by sec. 58.37, subsec. (2), Stats., constituting sum of all appropriations to other departments for performance of functions transferred to department of public welfare by ch. 58, Stats., are to be kept segregated and used only for purposes for which they were originally appropriated, not lumped and used indiscriminately for all functions of new department. Where administration expenses cannot be allocated exclusively to any one such appropriation approximate proration of such expenses among various administration accounts is permissible.

August 16, 1940.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You request an interpretation of subsec. (2) of sec. 58.37, Stats., which reads in part as follows:

“Annually, on July first there is appropriated to the state department of public welfare for the performance of its duties a sum equal to the total annual appropriation now provided for the functions, powers and duties transferred to the said department, to be determined as aforesaid by the emergency board. * * *”

By the first subsection of the same section there are transferred to the department of public welfare certain enumerated functions and duties formerly vested in other departments, notably the board of control, the industrial commission and the pension department. You inquire whether the annual appropriations to each of said departments—which appropriations are still in their original form in ch. 20, Stats.—are to be lumped together as a single appropriation to the new department and be available for all of its functions, or whether they are to be kept separate and each used only to finance the functions formerly vested in the department to which the moneys were originally appropriated.

Reading only the above quoted portion of sec. 58.37 (2), it seems to indicate an intention that the appropriations be lumped. But further study leads to the conclusion that the legislative intent was that the several appropriations involved be kept segregated and devoted only to the purposes for which they were originally enacted.

In the first place, the latter interpretation is clearly evidenced in the last sentence of subsec. (1) of the same section, which provides for a transfer of funds covering the balance of the fiscal year in which the functions and duties were first transferred to the new department:

“* * * Concurrently with each such transfer of functions, there is appropriated to the department of public welfare *for its use in the performance of the functions, powers and duties so transferred*, the unexpended balance of the annual appropriation presently provided for *each* such function, power or duty, or if not provided with a separate appropriation, then that portion of the appropriation from which such function, power or duty is presently provided, the amount thereof to be determined by the emergency board.”

If it was intended that the respective funds be kept segregated during the first several months of the department's existence, it seems probable that it was also intended that they should continue to be segregated thereafter, although that intention is not very well expressed.

But there is a more conclusive reason for the construction here advanced. It cannot be ignored that the legislature did not repeal the original appropriations to the old departments covering functions transferred to the new one. They remain in the statutes and must be examined in order to understand the effect of sec. 58.37. They are *in pari materia* with the latter section, which accordingly must be construed with reference to them. *Waisbren v. Blink*, (1932) 207 Wis. 619, 621, 242 N. W. 169.

Without considering all of these old appropriation statutes, it will suffice to examine sec. 20.17, which contains the appropriations to the board of control. That contains, among others, an annual appropriation for collections and

deportations, one for the operation of state institutions, one for maintenance of such institutions, one for permanent improvements at institutions, and other like appropriations from the general fund for specific purposes. It also contains provisions for a number of revolving funds and a number of annual appropriations of federal moneys received by the state for certain specific purposes and under specific agreements between the state and federal governments. Lumping all these specific appropriations together and making the funds therein contained available indiscriminately for any and all functions of the new department would result in junking an elaborate system of financing evolved by the legislature and would almost certainly endanger federal grants in aid which are made only pursuant to a distinct understanding that the moneys are to be used only for the purposes for which they are granted. Such an intention should not be attributed to the legislature in the absence of plain language to that effect.

Nor can these old appropriation statutes be regarded as repealed by implication. Implied repeals are not favored, and the presumption is that a new statute is to be so construed as to harmonize with others formerly enacted on the same subject, if that is possible. See *Joyce v. Sauk County*, 206 Wis. 202, 208, 239 N. W. 439, and cases cited. It is considered that in this case such a harmonizing construction is not only possible but is well-nigh imperative, in view of the serious consequences to be apprehended from a contrary interpretation.

You are therefore advised that moneys appropriated to the department of public welfare by sec. 58.37 (2) are to be used only for the purposes for which they were originally appropriated, not lumped into a general account and used indiscriminately.

However, because of the consolidation of administration brought about by the reorganization, it is probable that certain salaries and expense items cannot be allocated exclusively to one administration account rather than to another. In such cases it is suggested that the department arrive at an approximate proration of such items among the various accounts to which they are chargeable.

It is to be hoped that the present makeshift system of appropriations to your department will be remedied by the 1941 legislature.

WAP

Marriage — Wisconsin Statutes — Secs. 245.10 and 245.11, Stats., are in pari materia and must be construed together. Under such construction state health officer is authorized by sec. 245.11, subsec. (4), to issue certificate that individual is not in infective or communicable stage of syphilis only if such individual has complied with sec. 245.10 (5) by submitting to blood test for syphilis within fifteen days before applying for marriage license, which test resulted positively.

August 16, 1940.

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

You request an interpretation of subsec. (4) of sec. 245.11, Stats., which reads as follows:

“In the case of an individual whose laboratory test for syphilis results in a positive finding, when in the opinion of his attending physician the individual no longer has syphilis in an infective or communicable stage, the state board of health may review the findings and clinical evidence through a deputy state health officer and thereafter the state health officer is empowered to grant a certificate to the county clerk that the individual is not in the infective or communicable stage of syphilis if such be his best judgment.”

You inquire specifically whether a person who complies with the foregoing must also submit to a Wassermann or other blood test for syphilis within fifteen days before applying for a marriage license, as required by subsec. (5)

of sec. 245.10, or whether compliance with subsec. (4) of sec. 245.11 is in lieu of the requirements of subsec. (5) of sec. 245.10. The answer to this question requires a review of the history of secs. 245.10 and 245.11.

The first four subsections of sec. 245.10, which require a *male* person to be examined as to the existence of venereal disease within fifteen days before applying for a marriage license, and obtain a physician's certificate that he "is *free from* venereal diseases so nearly as can be determined," etc., are derived from ch. 738, Laws 1913, as amended.

Subsecs. (1), (2), (3) and (5) of sec. 245.11, which forbid the granting of a marriage license to *any* person who has ever had venereal disease until such person shall furnish a laboratory certificate showing that microscopical examinations have been made and that the individual "is not in the *infective or communicable stage of*" gonorrhea or syphilis, are derived from ch. 483, Laws 1917.

Subsec. (5) of sec. 245.10, which requires both parties to a proposed marriage to submit to a Wassermann or other blood test for syphilis within fifteen days before applying for a marriage license and procure a physician's certificate that the result of such test was negative, was first enacted by ch. 311, Laws 1937. Subsec. (4) of sec. 245.11, above quoted, was enacted by ch. 252, Laws 1939.

Although sec. 245.10 requires the examinations and blood tests to be made within fifteen days before application for a license, no such time limit is expressed in sec. 245.11, but the latter section requires certificates as to what the condition of the applicant "is", thus implying that the test must be reasonably contemporaneous with the application. There is no provision excepting male persons who comply with subsecs. (1), (2) and (3) of sec. 245.11 (by furnishing a certificate that they are not in the *infective or communicable stage* of a venereal disease) from the requirement of subsecs. (1) to (4) of sec. 245.10 (requiring a certificate that the applicant is *free from* venereal disease). This apparent conflict can be resolved only by regarding the later statute (sec. 245.11, enacted in 1917) as an implied amendment of the earlier one (sec. 245.10, enacted in 1913), they being *in pari materia*. Thus construed, a male person who

has had a venereal disease must supply a certificate of recent date under sec. 245.11 showing that he is not *in the infective or communicable stage* thereof, and another certificate dated within fifteen days under sec. 245.10 (1) to (4) showing that he is *free from* other venereal disease. Obviously, if such a person had to show that he was *free from* all venereal disease under sec. 245.10, then sec. 245.11 (1) to (3) would be available only to females, contrary to its express language and obvious intent.

But the legislature itself has resolved a similar apparent conflict between sec. 245.10 (5) and sec. 245.11 (4), by the following amendment (in italics) to sec. 245.10 (5), enacted by ch. 252, Laws 1939:

“(5) * * *

“Such certificate of negative finding as to each of the parties to a proposed marriage shall be filed with the county clerk at the time application for a license to marry is made, and it shall be unlawful for any county clerk to issue a license to marry if such certificates of negative finding as to both parties to the proposed marriage are not so filed, *except as provided in subsection (4) of section 245.11.*”

In view of that amendment, the two statutes, being *in pari materia*, can and must be construed together without conflict—and in that construction lies the answer to your question.

Under sec. 245.10 (5), then, all persons must submit to a Wasserman or other blood test within fifteen days before applying for a marriage license. If the result is negative, a certificate to that effect is all that is required. But a county clerk may not issue the license if the result of *that* test *i. e.*, the one performed within fifteen days—is positive, *except as provided in sec. 245.11 (4)*. Under that section, “an individual whose laboratory test for syphilis”—*i. e.*, the one required by sec. 245.10 (5)—“results in a positive finding,” may obtain the certificate of the state health officer that he is not in the infective or communicable stage, as therein provided. Such a certificate permits the county clerk to issue the license notwithstanding the lack of a negative Wassermann result, but it does not excuse the applicant from having the test made within the time fixed by sec. 245.10

(5). On the contrary, sec. 245.11 (4) assumes that such test was made and resulted positively.

Accordingly, you are advised that only persons who have submitted to a blood test for syphilis within fifteen days before applying for a marriage license, which test resulted positively, may avail themselves of the procedure provided by sec. 245.11 (4). This insures that the certificate of the health officer will show the condition of the applicant at the time of application, not some remote time in the past.

WAP

Police Regulations — Dogs — Fish and Game — Pheasants — Since passage of ch. 79, Laws 1939, counties are no longer liable under sec. 174.11, Stats., for loss of game birds kept in captivity which have been killed or injured by dogs. But they continue to be liable for such damage to pheasants raised as poultry on farms licensed for that purpose under sec. 29.574, although not liable for loss of pheasants raised for hunting on farms licensed under sec. 29.573. XXII Op. Atty. Gen. 47 modified.

August 16, 1940.

RICHARD G. HARVEY, JR.,

District Attorney,

Racine, Wisconsin.

You state that a claim has been filed with Racine county under sec. 174.11, Stats., for the loss of certain pheasants killed by unknown dogs. You point out that sec. 174.11, subsec. (1), was amended in 1939 (Laws 1939, ch. 79) so that whereas it formerly covered the loss of "any domestic animals (including poultry and game birds kept in captivity)" it now reads "any domestic animals (including poultry)". You state that in your opinion this amendment excludes game birds from the operation of the law and that the county is not liable for the loss of the pheasants.

You are correct in your interpretation that "game birds kept in captivity" are no longer covered by the law. But it does not follow that all pheasants are excluded, since under certain circumstances they fall within the definition of "poultry" rather than "game birds."

"Poultry" is defined as follows in Webster's New International Dictionary (2d ed., 1935) :

"Any domesticated birds which serve as a source of food, either eggs or meat. In the order of their importance to man, *poultry* includes chickens, turkeys, ducks, geese, guinea fowl, pigeons and pheasants."

The same dictionary defines "domesticate" as follows:

"To tame; to reclaim (an animal or plant) from a wild state;—usually implying also the bringing of its growth and propagation under control, and the conversion of its products or services to the advantage and purposes of man."

So far as it has acquired any meaning in law, "poultry" means domestic fowls reared for the table and excludes wild birds. See 3 Words & Phrases (2d series) 1105.

"Domestic", when used to describe animals, is equivalent to "domesticated", according to all the dictionaries we have examined.

For the purposes of the fish and game laws, pheasants are defined as "game birds" by sec. 29.01 (3) (d), but this would not determine their character for other purposes. In common speech, they may be poultry if they are domesticated.

Under sec. 29.574 owners or lessees of suitable lands may be licensed to operate farms for the purpose of raising pheasants and other game birds. They are required to purchase the birds from the state (which has title to wild animals under sec. 29.02) and to enclose the farm in a suitable fence. They may kill and sell the birds, or sell them alive, in or out of season. They commonly erect shelters for the birds, and feed and water them the same as chickens. They gather the eggs and supervise their incubation either in artificial incubators or under hens. They place devices on

the wings which prevent the birds from flying. The birds are caught and slaughtered in the same manner as chickens. Under such circumstances the pheasants must be regarded as domesticated and hence fall within the definition of poultry above set out.

It is true that some such pheasants may be released for hunting purposes, in which case they revert to their wild state and again become game birds rather than poultry. But so long as they are ostensibly being raised for the table by one who is licensed to do so, and many are in fact slaughtered and sold as poultry, their character as such is not altered by the fact that some few of them may later be used for other purposes.

The foregoing does not apply to pheasant farms licensed under sec. 29.573. Birds raised on such farms may not be slaughtered and sold as poultry, but are kept solely for hunting purposes and title to them remains in the state. They are clearly "game birds kept in captivity" rather than "poultry" and are excluded from the operation of sec. 174.11 by the 1939 amendment.

The liability of the county for loss of the pheasants in question therefor depends upon whether they were raised as poultry on a farm licensed under sec. 29.574 or as game on a farm licensed under sec. 29.573.

So far as the opinion in XXII Op. Atty. Gen. 47 conflicts with what is said herein, it must be modified.

WAP

Corporations — Small Loans — Trade Regulation — Money and Interest — Usury — Subsecs. (3), (3a), (4) and (4a), sec. 115.07, Stats., are not repealed by subsec. (13) of sec. 115.09 and are in force and effect.

Subsecs. (3), (3a) and (4a), sec. 115.07, sec. 115.09 and ch. 214, Stats., constitute distinct legislative schemes for regulation of loan transactions described in each, and single individual, firm or corporation may hold licenses under either or all of these three provisions of law.

August 20, 1940.

BANKING DEPARTMENT.

You request our opinion on the following questions:

(1) Whether subsection (13) of section 115.09, Wisconsin statutes, repeals subsections (3), (3a), (4) and (4a) of sec. 115.07 of the statutes.

(2) Whether the provisions of section 115.09 preclude permit holders under section 115.07, subsec. (3a) and under chapter 214, Stats., from obtaining licenses under the provisions of section 115.09.

I

Section 115.09 was enacted by ch. 408, Laws 1929, and its substantive provisions remain as originally enacted. Section 115.09 sets up a scheme for the licensing and regulation of the business of making so-called discount loans in sums not to exceed one thousand dollars, granting to licensees thereunder the privilege of charging more than the maximum rate of interest of ten per cent as specified in section 115.05. Section 115.09 was enacted in 1929 subsequent to the enactment of the original small loans act, being chapter 214 of the statutes, which was enacted in 1927. The provisions of subsections (6) to (13), inclusive, of section 115.09 were apparently taken verbatim from similar provisions in the original small loans act. It would appear that the only provisions of section 115.09 which might be held so inconsistent with the provisions of subsections (3), (3a), (4) and (4a)

of section 115.07 as to repeal such subsections of 115.07 would be subsection (9) of section 115.09 which reads as follows:

“No person, copartnership or corporation, except as authorized by this section and chapter 214 of the statutes, shall directly or indirectly charge, contract for or receive any interest or consideration greater than ten per centum per annum upon the loan, use or forbearance of money, goods or things in action, or upon the loan, use or sale of credit. The foregoing prohibition shall apply to any person who as security for any such loan, use or forbearance of money, goods or things in action, or for any such loan, use or sale of credit, makes a pretended purchase of property from any person and permits the owner or pledger to retain the possession thereof, or who by any device or pretense of charging for his services or otherwise seeks to obtain a greater compensation than is authorized by this section. No loan for which a greater rate of interest or charge than is allowed by this section has been contracted for or received, wherever made, shall be enforced in this state, and every person in anywise participating therein in this state shall be subject to the provisions of this section.”

Before discussing the possible effect of the foregoing upon the aforesaid subsections of sec. 115.07, we may examine the nature and scope of these subsections. Subsec. (3), sec. 115.07 provides that when a loan is secured by a chattel mortgage, bill of sale, pledge, receipt or other evidence of debt upon chattel goods or property or by assignment of wages in addition to the legal contract rate of interest of ten per cent per annum no amount may be charged for examinations, views, fees and the like in excess of seven per cent of the first one hundred dollars loaned and four per cent of sums loaned in excess of one hundred dollars upon certain terms and conditions. This subsection, being a part of the general usury law, would appear to be prohibitory as placing a limitation upon charges which lenders might make in addition to interest. This subsection was enacted in substantially its present form by ch. 327, Laws 1895. Subsec. (4), sec. 115.07 was added to the usury law then existing as section 1691 of the statutes by ch. 412, Laws 1907. This subsection relates to *prima facie* proof of the commission of of-

fenses against the usury statutes and there would seem to be no question but that section 115.09 does not repeal subsec. (4), sec. 115.07. This leaves for consideration subsecs. (3), (3a) and (4a). Subsecs. (3a) and (4a) of sec. 115.07 as presently constituted were enacted by ch. 450, Laws 1915, with the purpose in mind that anyone doing business of the nature mentioned in subsec. (3), sec. 115.07 and charging in addition to interest certain sums for inspections, views, appraisals and the like must have a permit from the banking department. The banking department has thus had jurisdiction to grant permits to operate as described in subsec. (3), sec. 115.07 since 1915, and has, as we understand it, continued to issue such permits upon application being made therefor up to the present time. We must now decide whether subsec. (9), sec. 115.09, quoted above, operates as a repeal of these subsections of section 115.07 under the provisions of subsection (13) of section 115.09 providing that "any section of the Wisconsin statutes inconsistent with the provisions of this section is hereby repealed." In this connection we note that subsec. (9), sec. 115.09 is taken practically verbatim from section 214.18 of the original small loans act, enacted in 1927. Sec. 214.18 of the small loans act of 1927 in turn came verbatim from the uniform small loans law as drafted under the auspices of the Russell Sage Foundation. See Hubachek, Annotations on Small Loan Laws, 111. The small loans act of 1927 also contained in sec. 214.22 thereof a repeal clause identical with the aforesaid provisions of sec. 115.09 (13). This repeal clause also comes from the uniform small loans act and is found in all six of the drafts of that act as promulgated by the Russell Sage Foundation. Hubachek, Annotations on Small Loan Laws, 137. However, it will be noted that in the Wisconsin small loans law, chapter 214, enacted in 1933, which repealed the 1927 act, no such provision is found. This is persuasive of recognition by the legislature of the continued existence of other loan licensing laws which, within their respective fields, continued operative. Had the repeal clause remained there would still have been doubts and questions as to its scope (see Hubachek, Annotations on Small Loan Laws, 137 *et seq.*) but the effect of its removal seems reasonably clear. Subsecs. (9) and (13), sec. 115.09, being de-

rived directly from the small loans act, are subject to similar construction. The small loans act and section 115.09 and subsection (3) of section 115.07 relate in their express terms to distinct types of loans and loan transactions as specified in each. It will be noted that in subsection (9) of section 115.09 there is no express mention made of anything except interest although in the first sentence the words "interest or consideration" and in the last sentence the words "interest or charge" are used. The context of the subsection, however, would not appear to be persuasive that the legislature by the use of the words "consideration" and "charge" in addition to the word "interest" meant charges for views, fees, examinations and the like as expressly specified in subsec. (3), sec. 115.07. A service charge would not appear to be a "consideration * * * upon the loan." It will also be noted that the only mention in subsec. (9), sec. 115.09 made of service charges is of "any device or pretense of charging for services." Further examination of the statutes relating to money and rates of interest reveals that when the legislature is dealing with service charges it specifically says so. For example, sec. 214.13, Stats. 1927, sec. 214.14 (6), Stats. 1939, sec. 115.07 (3), Stats. 1939, and subsec. (1), sec. 115.09, Stats. 1939. It would appear that subsec. (9), sec. 115.09 as regards the question of whether it was intended thereby to prohibit *bona fide* charges for expenses of the lender in connection with the making of the loan must be construed in the same way as usury statutes in general. In the absence of statute a lender may properly exact from a borrower, in addition to interest at the highest lawful rate upon the money loaned, reasonable fees or compensation for services rendered or reimbursement of expenses incurred in good faith by the lender or his agent in connection with the loan without thereby rendering the loan usurious. 66 C. J. 230. *McFarland v. Carr*, 16 Wis. 259, *State ex rel. Ornstine v. Cary*, 126 Wis. 135. There is nothing to indicate that subsec. (9), sec. 115.09 or the section from which it was derived, section 214.18 of the small loans act of 1927, in any way changes this rule. Subsec. (3), sec. 115.07 fixes a limit upon these charges. Thus, under subsec. (9), sec. 115.09 such charges

are permitted while under subsec. (3), sec. 115.07 such charges are limited. There can be no possible inconsistency in this.

Should any doubt remain as to the meaning of subsec. (9), sec. 115.09, we believe a reference to the general rules of statutory construction will overcome any such doubt. Repeals by implication are not favored and an earlier act is not to be regarded as repealed by a later one unless the two are so manifestly and materially in conflict that the two cannot reasonably stand together. *Madison v. Southern Wisconsin Railway Co.*, 156 Wis. 352; *Milwaukee County v. Milwaukee Western Fuel Co.*, 204 Wis. 107; *Joyce v. Sauk County*, 206 Wis. 202. The inclusion of such a phrase as "any section of the Wisconsin statutes inconsistent with the provisions of this section is hereby repealed" does not alter this rule. *Milwaukee County v. Halsey*, 149 Wis. 82. If a supposed incongruity between statutes can be avoided by reasonable construction, such construction should be adopted. *Hite v. Keene*, 137 Wis. 625. Another rule is that the general understanding and practical construction of a law by administrative officers having to do with its enforcement and application is strong evidence of its true meaning. *Mauel v. Wisconsin Automobile Insurance Co.*, 211 Wis. 230; *State v. Johnson*, 186 Wis. 59; *State ex rel. Time Ins. Co. v. Smith*, 184 Wis. 455. It will also be noted that subsec. (9), sec. 115.09 is penal in nature and that penalties are established for violation thereof. Penal statutes are, of course, subject to the rule of strict construction. *State v. Peterson*, 201 Wis. 20. The banking commission having, since the enactment of sec. 115.09, continued to issue permits and in all other respects to treat subsecs. (3), (3a) and (4a) of section 115.07 as in full force and effect up to the present time, and numerous individuals and firms having founded and maintained businesses on the assumption that these subsections were still in effect, it is our belief that the courts would necessarily resolve any possible ambiguities in favor of the continuation of these subsections of section 115.07 in force and effect. A further evidence of administrative interpretation of subsection (9) of section 115.09 is found in the fact that the banking commission had intro-

duced at its request in the 1937 session of the legislature, Bill No. 345, S., granting it the power to fix the charges arising out of transactions had under sec. 115.07 (3), the commission, of course, assuming subsec. (3), sec. 115.07 to be in full force and effect.

One further consideration is presented. Subsec. (12), sec. 115.09 provides as follows:

"This section shall not apply to any person, copartnership or corporation doing business under chapter 214 of the statutes, or under any law of this state or of the United States relating to banks, trust companies, credit unions, building and loan associations, or licensed pawnbrokers."

At the time of the enactment of this subsection there was nothing in the statutes expressly relating to pawnbrokers. Prior to 1921 in the enumeration of powers of common councils of incorporated cities the power to license and regulate pawnbrokers was granted. However, such mention of pawnbrokers disappeared from the statutes by the enactment of ch. 242, Laws 1921, and such powers are, according to the revisor, now included in the general powers specified in sec. 62.11 (5). However, there is no question but that subsec. (3) sec. 115.07 "relates" to "licensed" pawnbrokers as well as to other lenders operating in the manner therein specified. In view of the foregoing considerations, it is our opinion that subsections. (3), (3a), (4) and (4a), sec. 115.07 are not repealed by sec. 115.09 (13).

II

Holding as we do that subsections (3), (3a), (4) and (4a) of section 115.07 are not repealed and are now in force and effect, it will follow that there is nothing to prevent a permit holder under sec. (3a), sec. 115.07 from obtaining a license under the provisions of sec. 115.09. As to whether a license holder under sec. 115.09 may also have a license under chapter 214, it is likewise our opinion that this may be done. Subsec. (12), sec. 115.09, as has been noted, specifies:

"This section shall not apply to any person, copartnership or corporation doing business under chapter 214 of the statutes, * * *"

Sec. 214.23 provides as follows:

"This chapter shall not apply to any person doing business (1) under section 115.09 nor (2) under and as permitted by any law of this state or of the United States relating to banks, saving banks, trust companies, building and loan associations, credit unions, or licensed pawnbrokers, or investment associations governed by chapter 216."

It will be noted that sec. 214.23 is entitled "Exemptions" and immediately follows the penalty provisions of the small loans law and that the section was entitled "Exemptions" by the legislature itself. Chapter 347, Laws 1933. Section 214.23 was taken verbatim from section 20 of the uniform small loans law as promulgated by the Russell Sage Foundation. Hubachek, Annotations on Small Loan Laws, 126. According to the discussion in the aforementioned Annotations, it would appear that the classes exempted by this section are those which are commonly subject to separate and distinct schemes of state or federal regulation, the validity of such exemptions being generally sustained. It is further stated in connection with the discussion of this section in said Annotations that the decisions establish the general principle that a state may deal with different classes of dealers, borrowers or loan transactions in different ways provided that there is nothing apparently unreasonable in the distinctions made between the different classes. Hubachek, Annotations on Small Loan Laws, 126 *et seq.*, *Griffith v. Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 54 L. ed. 1151. It is not suggested in the discussion of the exemption clause of the uniform small loan act that the purpose of this clause was to preclude license holders under other provisions of the statutes from obtaining a small loan license if otherwise properly qualified. Subsec. (5), sec. 214.14 provides that no amounts whatsoever shall be received by any licensee in advance. Taken literally, this would of course preclude a licensee under ch. 214 from making discount loans under sec. 115.09. However, this effect is avoided by sec. 214.23, which has just been discussed. We understand that the banking commission has administered the small loans law since its adoption and up to the present time side by side with sec. 115.09 and subsecs. (3), (3a), and (4a), sec.

115.07 and in this respect the comments made in answer to your first question will be pertinent. In the light of the foregoing considerations, it is our opinion that subsecs. (3), (3a) and (4a), sec. 115.07, sec. 115.09 and ch. 214 constitute distinct legislative schemes for the regulation of the loan transactions described in each and that a single individual, firm or corporation may hold licenses under either or all of these three provisions of the law.

RHL

Prisons — Prisoners — Parole — Rule stated in opinion dated July 22, 1940, applied to case of prisoner removed from state prison while serving sentence upon which he has already sometime previously become eligible for parole and convicted of another offense upon which he receives additional sentence to run concurrently with original sentence.

In such case time previously served in excess of minimum term of original sentence may not be counted toward minimum required to be served on subsequent sentence, for parole purposes, since under sec. 359.07, Stats., all sentences begin to run at noon on day they are imposed.

August 26, 1940.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You have requested an opinion with reference to the application of our opinion dated July 22, 1940,* to the case of a prisoner who was convicted as a first offender and incarcerated with several concurrent indeterminate terms, who became eligible for parole at the expiration of two years but was not paroled, and several years later was taken from the prison, tried on another charge, and upon conviction was given a further sentence to run concurrently with the original sentences then being served.

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Your question is whether the time which such a prisoner served on his original sentences after becoming eligible for parole as to those sentences may be counted toward the minimum requirement on the later sentence in order to advance the date on which he will be eligible for parole as to the later sentence or whether the date of the later sentence is controlling.

Sec. 359.07, Stats., provides in part as follows:

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

This office has repeatedly ruled that under the foregoing statute, time served prior to the imposition of a sentence can in no case be counted toward such sentence. See XXIV Op. Atty. Gen. 720; XXVII Op. Atty. Gen. 329.

It necessarily follows that time served on the earlier sentences cannot be counted toward the minimum time required to be served on the latter sentence in computing parole eligibility. In the cases you state the minimum term on the later sentence will commence to run at noon on the day of the sentence and not before. Otherwise a prisoner who receives his later sentence while still serving the original sentences would be allowed to count time previously served on the earlier sentence toward his parole eligibility on the later sentence, while a person convicted for a second time after the expiration of his first term of imprisonment would not have that privilege. Such a result would be not only contrary to the language of the statute but would be inherently unjust.

WAP

Building and Loan Associations — Fees provided for in subsecs. (1) and (2), sec. 215.312, Stats., apply to federal savings and loan associations chartered under federal home loan bank act and carrying on business in this state.

August 26, 1940.

ALLEN G. PFLUGRADT,

Commissioner of Banking.

You request our opinion relative to sec. 215.312, Stats., your question being whether the fees therein provided to be paid by building and loan associations carrying on business in this state are intended to apply to savings and loan associations chartered under the federal home loan bank act and doing business in this state.

Sec. 215.312, Stats., as created by ch. 402, Laws 1935 (which repealed the previous section 215.312), in its opening phrase provides:

“On or before the fifteenth day of July of each year every building and loan association carrying on business in this state shall pay to the banking commission an annual fee as hereinafter provided.”

Following this, it is provided that the associations specified shall pay a capital fee of fifteen dollars and in addition thereto an annual fee as determined by the banking review board and the building and loan advisory committee, but not exceeding certain specified maximum percentages of their assets. In subsec. (4), sec. 215.312, it is provided that each association shall be assessed the costs of examinations including the salary and expenses of any commissioner, supervisor and others whose services are required in connection with such examinations and any reports thereof and any other expenses which may be directly apportioned.

Prior to the enactment of the present sec. 215.312 by ch. 402, Laws 1935, the opening phrase of section 215.312, as originally enacted by ch. 382, Laws 1925, read as follows.

“* * * every building and loan association carrying on business in this state shall be required to pay to the commissioner of banking *for supervision and examination as hereinafter provided.*” (Italics ours.)

The elimination of the italicized phrase “for supervision and examination” by ch. 402, Laws 1935, and the addition of the present subsec. (4) of sec. 215.312 providing for the assessment of the actual cost of examinations and supervision would seem to indicate clearly that the fees provided for in subsecs. (1) and (2) of sec. 215.312 as at present constituted are in the nature of a fee or tax imposed for the privilege of doing business in this state and have no direct relationship to the cost of examination and supervision of the particular associations. This being true, under the express provision of sec. 215.312 which levies the fees on “every building and loan association carrying on business in this state,” it would appear that savings and loan associations chartered under the federal home loan bank act are subject to these fees. Federal savings and loan associations were provided for by the act of April 27, 1934, of the federal congress prior to the enactment of ch. 402, Laws 1935, which created the present section 215.312. It is provided in the federal home loan bank act as amended August 10, 1939, Title 12 USCA, sec. 1464 (h) :

“* * * no State, Territorial, county, municipal or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.”

Thus congress removed any restrictions which might otherwise be implied upon the imposition of such fees as specified in sec. 215.312, Wis. Stats., the only condition being that there should be no discrimination in favor of local associations.

It is our opinion that the fees provided for in subsecs. (1) and (2) of sec. 215.312, Stats., will apply to federal savings and loan associations chartered under the federal home loan bank act and carrying on business in this state.

RHL

Courts — Criminal Law — Public Officers — Justice of Peace — Magistrate who unlawfully remits fine paid by convicted defendant and for that reason fails to pay said fine to county treasurer as required by sec. 360.34, subsec. (1), Stats., is liable on his bond for amount of said fine as well as being subject to criminal prosecution under sec. 360.34 (2).

Justice of peace or other court not of record has no authority to suspend execution of sentence except in case of minors covered by sec. 57.05, Stats.

August 26, 1940.

CHAS. M. PORS,

District Attorney,

Marshfield, Wisconsin.

You state that some time ago a warrant was issued and a tavern keeper arrested on a charge of selling liquor to minors under seventeen. He pleaded guilty in the municipal court of Marshfield, which is not a court of record, and was sentenced to pay a fine of two hundred dollars and costs, which he immediately paid. Two or three weeks later the municipal judge remitted the fine to the defendant. You inquire (1) whether the municipal judge is personally liable to the county for the amount of the fine which was remitted and (2) whether a justice of the peace or other court not of record has the right to suspend execution of a sentence, by which we understand you to mean, in the absence of a recognizance pending appeal pursuant to secs. 358.01 and 360.23, Stats.

(1) Sec. 360.34, Stats., provides as follows:

“(1) All fines imposed by any such court, any police justice, municipal judge or other magistrate, if paid before the accused was committed, shall be received by the magistrate before whom the accused was convicted, the amount thereof, the date when, and the title of the case in which received, shall be entered upon the docket or other record required by law to be kept by such magistrate and be by him paid over to the county treasurer within thirty days after the receipt thereof, to be disposed of according to law. And such mag-

istrate shall, at the same time, report in writing to the said treasurer the date of conviction, the title of the case and the offense for which such fine was imposed.

"(2) Any magistrate who shall fail or neglect to make the entries, report or payment herein required or who shall refuse to submit his docket or other record for inspection as required by law shall be punished by a fine of not more than fifty dollars for each offense. The county boards may direct the proper district attorney to prosecute any magistrate who shall fail to comply with the provisions of this or any other section relating to the payment of such fines to the county treasurer or the inspection of his docket or other record."

Subsec. (1) requires the magistrate to account for and pay to the county treasurer all fines within thirty days of the receipt thereof, and subsec. (2) makes it a criminal offense for him to fail to do so. Since he had no authority to remit the fine (as will appear by the answer to your second question), the judge has no valid excuse for failing to comply with sec. 360.34, and his failure to pay the fine over to the treasurer within the time fixed by that section is unquestionably a breach of his official bond. Compare: *Schnur v. Hickcox and others*, (1878) 45 Wis. 200, 204. This civil liability is of course in addition to the criminal liability under sec. 360.34 (2).

(2) In the absence of statutory authority courts generally have no authority to suspend execution of sentences once imposed, although they may defer pronouncing sentence where legal cause therefor exists and within the exercise of reasonable discretion. *In re Webb*, (1895) 89 Wis. 354, 356, 62 N. W. 177. This rule originally applied to all courts in this state, but has been modified by sec. 57.01 (permitting court to suspend sentence of adult convicted of certain felonies), sec. 57.04 (permitting courts of record to suspend sentence of adult convicted of misdemeanor or abandonment) and sec. 57.05 (permitting court to suspend sentence of certain minors convicted of misdemeanor or certain felonies). Since a justice of the peace has no jurisdiction of felonies (except to bind over for trial) and is not a court of record, neither sec. 57.01 nor sec. 57.04 applies. Moreover, it is clear that under all these sections sentence

must be suspended before the defendant is committed to prison or the sentence has otherwise been executed, as by the payment of the fine. See XXIV Op. Atty. Gen. 648; XVII Op. Atty. Gen. 99; XII Op. Atty. Gen. 532. In all cases, the defendant must be placed on probation if sentence is suspended.

That a justice of the peace has no authority to suspend the execution of a sentence was held on the authority of *In re Webb, supra, in Hack v. Mineral Point*, (1931) 203 Wis. 215, 221-222, 233 N. W. 82. But this is undoubtedly subject to an exception in the case of minors covered by sec. 57.05, which was not involved in that case. Other authorities on the point are collected in a scholarly opinion by Attorney General Owen in V Op. Atty. Gen. 46, which involved the question of remitting a fine. See also XXIV Op. Atty. Gen. 440, which involved the question of staying a jail sentence.

The answer to your second question is, therefore, that except in the cases covered by sec. 57.05, a justice has no authority to suspend execution of a sentence, although he may upon proper cause postpone pronouncing sentence, as for example if it were made to appear that restitution would be made and sec. 355.06 invoked.

WAP

Building and Loan Associations — Insurance — Deduction of agents' commissions upon sale of insurance on property of delinquent building and loan associations by insurance agencies constitutes violation of sec. 201.53, Stats., prohibiting rebates.

August 28, 1940.

ALLEN G. PFLUGRADT, *Commissioner,*
Banking Department.

You have requested our opinion relative to the application of sec. 201.53 of the statutes to building and loan associations which are in process of liquidation by the banking commission. You inquire as to the legality of a plan whereby the insurance of properties owned by a delinquent building and loan association may be effected without the payment of the agent's commission by such delinquent association. We understand that the plan contemplates the purchase of insurance from so-called "general agencies" who, in billing the various liquidations, deduct from such billing the amount of commission which ordinarily would be paid by such agency to the agent actually soliciting the business. The question arises as to whether this practice constitutes a violation of the so-called anti-rebate provisions of the statutes relating to insurance companies and agents. Subsecs. (2) and (3), sec. 201.53, Stats., provide as follows:

"(2) No insurance company, nor any officer, agent or employe thereof, shall pay, allow or give or offer to pay, allow or give, nor shall any person receive, any rebate of premium, or any special favor or advantage whatever in the dividends or other benefits to accrue, or any valuable consideration or inducement whatever not specified in the policy.

"(3) No agent shall receive any compensation for effecting insurance upon his own property, life or other risk, unless during the twelve months preceding, as agent for the company assuming such risk, he shall have effected other insurance therein, the premium on which shall exceed the premium on the insurance on his own risk."

Subsec. (4), sec. 201.53, which modifies to some extent the provision of subssecs. (2) and (3) above quoted, provides as follows:

"It is not unlawful to pay the whole or any part of any commission to a domestic corporation, of which the agent writing the insurance shall be an officer or salaried employe, but no commission shall be so paid where any officer or stockholder of such corporation shall be interested in the property or risk insured, otherwise than as an agent authorized under section 209.04, nor unlawful for the corporation of which such agent is an officer or salaried employe to collect and remit premiums and keep account thereof; provided, that every such corporation other than those required to report to some other state department shall on or before the twentieth day of February of each year report in writing to the commissioner the amount of insurance premiums on which such commission is based, and the names of the officers and employes licensed as insurance agents."

Analysis of this subsection and a study of its legislative history demonstrates that it is intended only to permit officers or salaried employees of corporations doing an insurance agency business to remit their commissions to such incorporated insurance agency. The provisions of subsec. (4), sec. 201.53 were added to the anti-rebating laws, in substantially their present form, by ch. 311, Laws 1911, which was entitled by the legislature "An act to amend section 19550 of the statutes, by adding a paragraph to subsection 2 relating to discrimination and rebating by agents in distributing commissions to agency corporations." This is a clear indication that the legislature had in mind only agency corporations in relaxing the anti-rebating laws to permit such corporations to engage in the insurance agency business through their employees and officers who might be licensed agents.

Thus an officer of an incorporated insurance agency writing insurance on property owned by a delinquent building and loan association would be permitted to turn over to such agency the commission to which he would be entitled upon the sale of the insurance. However, under subsec. (2) of sec. 201.53 neither such officer nor any agent employed by

such agency corporation is authorized to rebate commissions to the purchaser of the insurance. Since an agency corporation can act only through its officers and agents, it is, of course, under a similar prohibition.

It is thus our opinion that the sale of insurance and deduction of commissions in the manner described above is prohibited by law.

RHL

Industry Regulation — Painters' Licenses — Under provisions of sec. 101.40, subsec. (6), Stats., painter contracting to do work with materials to be furnished by other party to contract need not be licensed if contract price is twenty-five dollars or less.

August 29, 1940.

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

You have requested our opinion on the following:

"Our question is: Does the \$25 limit include both labor and materials, or does it only refer to labor. For example, if the labor on a job is \$24 and the material involved \$20 does the painter come under subsection (6) so that a license is not required, or should it be interpreted so that the total job is \$44 and a license would be required."

The provisions of the section in question read as follows:

"No person, firm or corporation shall engage in the business or occupation of, or advertise or hold himself out as master and contracting painter or journeyman painter, without obtaining the license therefor as provided in this section. Provided that any licensed journeyman painter

may engage in the business or occupation of painting in his own behalf in the event that he is involved in a strike or lockout and any licensed journeyman of the age of sixty years or more or any disabled war veteran may, upon application to the commission, be permitted to engage in the business of painting in his own behalf, or this shall not impair the right of any unlicensed person to engage in said business or occupation without complying with any of the provisions of this section or any of the rules or regulations pertaining thereto with respect to contracts of painting for the amount of twenty-five dollars or less." Sec. 101.40, subsec. (6), Stats.

It occurs to us that the contract price referred to is the price stipulated in the contract. If a painter stipulates to do a job for the sum of twenty-five dollars including the cost of furnishing the material, the contract price is twenty-five dollars. If a painter contracts to paint a house for twenty-five dollars with the material to be furnished by the owner of the house, the contract price is twenty-five dollars.

We do not consider that a painter must paint upon a job upon the basis of furnishing material. He may contract to furnish nothing but the labor and in this event the contract price would cover only that subject matter.

JWR

Bridges and Highways — County does not have power to correct defects in state trunk highway constructed by state.

Neither county, town nor state is liable for damages resulting from faulty drainage of surface water, where road was reconstructed by state.

September 12, 1940.

J. HENRY BENNETT,
District Attorney,
Viroqua, Wisconsin.

You state that a former town road has now been designated a state trunk highway. In widening and improving the old road, several culverts which were used to drain the water from the land of A were covered up and rendered useless. Although at the time of reconstruction A requested that adequate culverts be installed, only one was placed, and that one was so installed that the road is not drained. Due to the lack of drainage, the water is accumulating and backing up on the land of A, rendering it unfit for agricultural purposes. The road in question was reconstructed by the state and, although the county does the work of maintaining the same, it is reimbursed by the state.

You ask whether there is any statutory provision authorizing the expenditure of money by the county to remedy the situation.

Sec. 83.03, subsec. (6), Stats., provides:

“The county board may construct or improve or repair or aid in constructing or improving or repairing any road or bridge in the county. * * *.”

Under this broad language, it would seem that the county has the power to make the expenditure. However, in *Schaettle v. State Highway Comm.*, 223 Wis. 528, 271 N. W. 63 (1937), our court had occasion to construe this statute. The question was whether or not a county could construct a large, intrastate bridge on a state trunk highway and United States highway. The court, in referring to sec. 83.03 (6), stated, (p. 538).

“* * * That section obviously authorizes a county board on its own motion to construct or aid in constructing any bridge in the county, but that section, in our opinion, authorizes a county board to construct a minor bridge with county funds alone or with the aid of the town, village or city in which the bridge is to be located, but without state aid. The amount which a county may assess against a town, village or city is so small as clearly to indicate that the legislature had in mind the construction under that section of comparatively small and inexpensive bridges *not located on state trunk or federal highways*. There is no language in that section which authorizes state aid for such bridges, and, consequently, the legislature did not intend that that sentence should apply to state or federal highways.” (Italics ours.)

It is quite possible that the court in making such a broad statement did not contemplate a situation like that presented here, where the project would be comparatively small. Nevertheless, the language used would clearly exclude any expenditure, however small, when made on a state trunk or federal highway, and we do not feel at liberty to advise that it be disregarded.

You also ask whether the county is liable for such damage.

This precise question was presented in *Leininger v. Pierce County*, 226 Wis. 515, 277 N. W. 187 (1938), and answered in the negative. Although sec. 88.38, Stats., places liability upon a county in constructing and maintaining a highway in such manner that the flow of surface water is stopped, to the damage of landowners, the court held that the county was not liable since under secs. 84.06 (1) and 84.07 (1), Stats., the duty of constructing and maintaining a state trunk highway, as in the present instance, is placed upon the state.

You further ask whether the town is exonerated from all damage to adjoining landowners.

By analogy to the position of the county, it is our opinion that the town is under no liability whatsoever. The situation seems even more clear here, since the town not only lacks the duty of construction and maintenance but, in ad-

dition, did not perform even a nominal part of the work of reconstruction and maintenance.

You ask finally whether the effect upon A is that of *damnum absque injuria*.

This, of course, calls for an inquiry into the possible liability of the state, since it is the only remaining party involved.

This question was considered in XXIII Op. Atty. Gen. 325. At p. 333 it is said:

"It is to be noted that the state is not included among those liable for damages where the construction or maintenance of a highway has caused the flooding of private land. The rule, of course, is that general statutes are not to be given such construction as will operate to the detriment of the state. It would appear further that the state was intentionally omitted from this section, inasmuch as the original statute referred to towns, cities, villages and railways. The legislature later included the counties but did not include the state. The improvement made * * * was undertaken and completed by the state. Under sec. 84.07 it is the state rather than any subdivision thereof which is responsible for the maintenance of the state trunk highway system. There would, therefore, be no liability upon the state under sec. 88.38."

In *Knapp v. Deer Creek*, 162 Wis. 168, 155 N. W. 940 (1916), the court, in referring to sec. 88.38, said at p. 170:

"It is very apparent that this statute creates a duty to refrain from obstructing by a roadbed the flow or percolation of surface water and that in the absence of this statute no such duty existed."

The court then pointed out a cardinal rule in the construction of statutes, that where a new right has been given, and a specific remedy provided by statute, the right can be vindicated in no other way than by that prescribed by the statute. Since the duty mentioned in sec. 88.38 by its express terms applies only to counties, towns, cities, villages or railway companies no such duty is to be enforced upon the part of the state.

It is our opinion, therefore, that A has been placed in the unfortunate position of having suffered damage without having an adequate remedy at law therefor.

WHR

Appropriations and Expenditures — Public Lands — Public Officers — Conservation Commission — Director of Division of Departmental Research — Director of Purchases — Under sec. 1.056, Stats., conservation commission is charged with administration of area known as Central Wisconsin Conservation Area, which is owned by federal government and leased to state on long term lease.

Income from area must be deposited in state treasury under sec. 25.29 and may be expended under sec. 20.20.

Secs. 15.17 and 15.28, relating to powers and duties of director of division of departmental research and director of purchases, do not grant any powers of reviewing discretion of conservation commission in making expenditures of income from area in accordance with terms of lease.

September 12, 1940.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

You have referred to us a long term lease or agreement entered into by the state through its conservation commission with the United States whereby certain lands situated in Juneau, Jackson and Monroe counties and designated as "The Central Wisconsin Conservation Area" are leased by the United States to the state under the provisions of sec. 1.056, Stats.

Sec. 10 of the lease, among other things, provides that income and revenue which the state may receive from the use of the property is impressed with a trust for the making of repairs and replacements on the property and for the administration of the property in effectuating the forestry,

wild life and recreational purposes of the lease. Also certain provisions are made for disposition of income in excess of the cost of operation by mutual agreement.

It is the desire of the conservation commission, which is charged with administration of the area by sec. 1.056, that all receipts be placed in a special fund to be used by the commission in carrying out the provisions of the lease without interference in any manner from any other state authority.

In this connection you call attention to secs. 15.17 and 15.28, referring to the powers and duties of the director of the division of departmental research and the director of purchases, respectively, and inquire as to the effect of these statutes on the authority of the conservation commission to make expenditures which will be required under the lease.

Sec. 25.29, Stats., provides in part:

"All moneys, except fines, accruing to the state by reason of any provision of chapter 29, or otherwise received or collected by each and every person for or in behalf of the state conservation commission, if not payable into the forest reserve fund, shall constitute the 'Conservation Fund' and shall be paid, within one week after receipt, into the state treasury and credited to said fund. * * *"

This statute is controlling as to the deposit and crediting of the revenues in question rather than the general receipt and deposit section 14.68 (1), Stats.

Once the money has been deposited in the state treasury it cannot be paid out except in pursuance of an appropriation by law. Art. VIII, sec. 2, Wisconsin constitution. This same limitation applying specifically to the conservation fund is found in sec. 25.29.

The next step in our inquiry is to find the appropriation statute pursuant to which the funds may be paid out when needed. This statute is section 20.20, which provides in part:

"All moneys in the conservation fund are appropriated to the state conservation commission for the execution of its functions, to be allotted for administration and operation, property repairs and maintenance, and permanent property and improvements, including the purchase of land, as

the commission may determine, * * *." (Subject to certain special allotments not material to our discussion here.)

This appropriation is very broad in character and would clearly cover the situation we are now considering.

Sec. 15.28 provides in part:

"The director of purchases shall have the full power and authority and is hereby directed to purchase and may, subject to the approval of the executive council, delegate to special designated agents the authority to purchase:

"(1) All necessary materials, supplies, paper, coal, fuel, stationery, apparatus, furniture, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature for all state offices. * * *."

The purpose of this statute is to obtain for the state the benefits of centralized and expert purchasing, but, so far as we know, no attempt has ever been made by the director of purchases to veto any purchases requested by any department within the limits of its appropriation, and there should, consequently, be no occasion for any difficulty here because of the operation of sec. 15.28.

Sec. 15.17, relating to the duties and powers of the director of the division of departmental research, has no direct bearing on the situation, as we see it. Subsec. (1) thereof authorizes him to make investigations of irregularities, and of all phases of operating costs of administrative departments so as to determine the feasibility of consolidating, creating or rearranging departments for the purpose of effecting the elimination of unnecessary state functions, avoiding duplication, reducing the cost of administration and increasing efficiency. He may hold hearings, subpoena witnesses, interrogate employees, and examine departmental books, and under subsec. (3) is to make his report and recommendations to the governor and when directed by the governor also to the legislature.

Thus the functions of the director of the division of departmental research are limited to investigating, reporting and recommending and no authority is given to pass upon requisitions for purchases submitted by any department to

the director of purchases. Consequently, so far as sec. 15.17 is concerned, there should be no reason for any conflicts arising out of expenditures deemed necessary by the conservation commission in its administration of the area in question under the lease with the United States.

The conservation commission is charged with the responsibility of administering the area by sec. 1.056 and is bound to observe the terms of the lease with the United States. It is not contemplated that any other state department, board, officer or agency is to review its discretion on any of the matters intrusted to it, including the expenditure of income from the area in accordance with the terms of the lease.

WHR

Public Officers — School District Clerk — Town Clerk — Village Clerk — XXVII Op. Atty. Gen. 549 reanalyzed and followed.

September 23, 1940.

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

In your letter of September 7 you request that we review the opinion of this office dated August 15, 1938, XXVII Op. Atty. Gen. 549. You cite us to the following sections of the statutes: Sec. 17.26, subsec. (2), 40.16 (10), 40.11 (4), (8), (9), 40.47 (6), 40.21 (2) and 41.01 (5), and state that you feel that these sections establish duties, the performance of which makes the offices of school district clerk and municipal clerk incompatible.

The cited sections of the statutes all relate to ministerial duties. This office held in V Op. Atty. Gen. 852 in an opinion by Attorney General Owen, later justice of the supreme court, that the mere fact that a person has to render a ministerial duty with respect to a certain subject in one office

and has to render a ministerial duty with respect to the same subject in another office does not render those duties incompatible. The authorities were examined and it was concluded that if incompatibility were to be established out of any such situation, it should be established by the legislature. So far as we can determine, this office has consistently adhered to such interpretation except in the one opinion, XXII Op. Atty. Gen. 43, cited in the opinion which you now wish to have reanalyzed.

In the opinion XXVII Op. Atty. Gen. 549 we found the opinion XXII Op. Atty. Gen. 43 at variance in reason and logic with all of our prior and subsequent holdings. We considered the reason and logic of the other opinions to be sound and overruled the opinion in XXII Op. Atty. Gen. 43.

You apparently feel that a ministerial duty in one office with respect to which a ministerial duty is involved in another office relating to the same subject spells incompatibility. The question is not one which is free from doubt but at an early date, V Op. Atty. Gen. 852 (1916), this office ruled that such a situation did not spell incompatibility at common law and that if incompatibility were to be established out of such a situation, the field was one for legislative action. Many legislatures have come and gone since that and subsequent opinions to the same effect were rendered. The various legislatures have failed to spell incompatibility out of such a situation. It is a simple matter for the legislature to establish incompatibility if it desires to do so. The various legislatures have not done so and we do not feel that it is within our province at this time to now assume what we have throughout the years consistently declared to be a legislative function. We must adhere to the conclusion reached in XXVII Op. Atty. Gen. 549.

NSB

Automobiles — Law of Road — Auto Registration — Corporations — Motor Transportation — Compliance with provisions of sec. 85.01, subsec. (1), Stats., is prerequisite to issuance of permits under sec. 194.04 (5) and sec. 194.49, Stats.

September 23, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Director, Registration & Licensing.*

You request our opinion on the following questions:

1. "Is compliance with the provisions of subsection (1) of section 85.01 a prerequisite to the issuance of a special permit under the provisions of subsection (5) of section 194.04 and a mileage permit under the provisions of section 194.49 for foreign registered common and/or contract carrier vehicles performing more than one round trip of interstate transportation in Wisconsin during any one year?"

2. "If you are of the opinion that such vehicles are not required to comply with the provisions of section 85.01, is the enforcement of subsection (2) of section 85.05 left to the discretion of the commissioner of motor vehicles for such vehicles?"

Your first question must be answered in the affirmative. Sec. 85.01, subsec. (1), Stats., provides in part:

"No automobile, motor truck, motor delivery wagon, passenger automobile bus, motor cycle or other similar motor vehicle or trailer or semitrailer used in connection therewith, shall be operated upon any highway unless the same shall have been registered in the office of the motor vehicle department, and the registration fee paid. * * *."

Sec. 85.05, subsec. (2), par. (a), states:

"No motor vehicle, trailer or semitrailer engaged in commercial transportation over regular routes or between fixed termini, or making more than one trip into Wisconsin during any year, whether for direct or indirect hire, and no mo-

tor vehicle, trailer or semitrailer used regularly for the delivery or distribution of merchandise within this state or for interstate hauling, shall be operated on the public highways of Wisconsin, unless said motor vehicle shall have paid the full registration fee provided in section 85.01 of the statutes, and shall display Wisconsin number plates. The penalty applying to violations of section 85.01 shall apply to this subsection."

Sec. 194.04 provides for various certificates, licenses and permits required for operating motor vehicles within the state. Subsec. (2) of that section states:

"No permit shall be issued or renewed for any motor vehicle unless the registration required by section 85.01 shall be paid in this state."

In view of these provisions it is clear that no permits, including those provided for in sec. 194.49, shall be issued unless vehicles are registered under sec. 85.01. No exception is made with respect to foreign registered common or contract carrier vehicles which perform more than one round trip of interstate transportation in Wisconsin during any one year.

Sec. 85.05 (2) (b) provides the only possible exception:

"Provided, that notwithstanding the provisions of paragraph (a) of this subsection the motor vehicle department shall have authority to enter into reciprocal agreements with the responsible officers of other states, under which motor vehicles, trailers or semitrailers owned by citizens of such states and engaged in commercial transportation may be operated in this state without a Wisconsin registration, provided like privileges are accorded to vehicles owned by Wisconsin citizens in such other states, but the motor vehicle department shall have no authority to enter into such reciprocal agreements covering motor vehicles, trailers or semitrailers engaged in commercial transportation over regular routes or between fixed termini, or those operating for direct or indirect hire."

This statute is interpreted in *Interstate Trucking Co. v. Dammann*, (1932) 208 Wis. 116, 241 N. W. 625. The court stated therein that no vehicles engaged over regular routes and transporting goods for hire, i. e., contract car-

riers, were included in the exception. However, persons who carry their own goods and are, therefore, not using the highway as their principal place for conducting business, are within the exemption. For further discussion of types of vehicles within the exception of the statute, see the following: XXIV Op. Atty. Gen. 743, XXI Op. Atty. Gen. 832, XVIII Op. Atty. Gen. 182, XIV Op. Atty. Gen. 429.

Since we have answered your first question in the affirmative, it is not necessary to consider the second question. However, even where a reciprocal agreement is entered into between two states, the enforcement of sec. 85.05 (2) is not left to the discretion of the commissioner of motor vehicles, since it is to be determined by the reciprocal agreement, which must be in writing, and on file in the office of the secretary of state. See XXII Op. Atty. Gen. 822.

WHR

Automobiles — Law of Road — Trailers — Corporations — Motor Transportation — Ton Mile Tax — Sec. 194.47, subsec. (6), Stats., exempting from taxes imposed by secs. 194.48 and 194.49, trailers or other similar equipment of such size and weight as to require special permits under sec. 85.53, applies only where conditions are such as to necessitate operation under special permit, and where operation of combination unloaded is such as not to require special permit exemption does not apply even though special permit has been obtained.

Where trailer not required to be registered under sec. 85.01 (4) (e) is propelled by truck, gross weight of combination for tax purposes under secs. 194.48 and 194.49 is gross weight of propelling vehicle only.

September 23, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Director, Registration and Licensing.*

You ask whether a trailer used for carrying poles and operated in conjunction with a truck which exceeds three thousand pounds gross weight, but which is exempt from taxation when loaded, by virtue of sec. 194.47, subsec. (6), Stats., because the combination exceeds the physical limits set up by sec. 85.45, and hence requires a special permit under sec. 85.53, is exempt from taxation only when loaded, or whether under sec. 85.53, when a yearly special permit is obtained, the combination is always tax-exempt whether loaded or unloaded.

Sec. 194.01 (16) states that the term "gross weight" when applied to a motor vehicle shall mean the actual weight of such motor vehicle unloaded, plus the licensed carrying capacity of such motor vehicle. The term "motor vehicle" is defined by sec. 194.01 (1) so as to include a trailer. Sec. 85.01 (4) (e) prescribes the method of ascertaining the licensed carrying capacity of trailers. This section exempts from registration those trailers of three thousand pounds gross weight or under operated by private carriers.

Under this section gross weight is determined by adding the weight of the vehicle to the maximum load to be carried and dividing this sum by two thousand. Consequently a trailer has a definite stated gross weight whether loaded or unloaded.

If a private carrier operates a trailer of gross weight in excess of three thousand pounds under conditions requiring a special permit, pursuant to sec. 85.53, and is, therefore, tax-exempt under sec. 194.47 (6), the trailer is tax-exempt when so loaded, but is subject to tax when the combination of trailer and propelling vehicle, loaded or unloaded, is properly within the size and weight limits specified in sec. 85.45, since the exemption provided by sec. 194.74 (6) applies only where the size and weight are such "as to require special permits under section 85.53." In other words, it is not the possession of the special permit which affords the exemption, but rather the exemption is based upon the existence of the conditions which necessitate operation under such a special permit.

You also ask whether a trailer which is exempt from registration under sec. 85.01 (4) (e) and drawn by a vehicle of eight thousand pounds or less, is taxable as a unit under sec. 194.48 or whether the unit is tax exempt by virtue of sec. 194.47 (1).

The weight tax imposed by secs. 194.48 and 194.49 is computed on the basis of gross weight. "Gross weight" is defined by sec. 194.01, subsec. (16), as follows:

"The term 'gross weight' when applied to a motor vehicle used for the transportation of property shall mean the actual weight of such motor vehicle unloaded plus the licensed carrying capacity of such motor vehicle."

Trailers having a gross weight of three thousand pounds or less are exempt from registration by virtue of sec. 85.01, subsec. (4), par. (e), and hence have no "licensed carrying capacity" upon which the weight tax imposed by secs. 194.48 and 194.49 can be based.

Sec. 194.47, subsec. (1), exempts truck-trailer combinations from the tax provisions of secs. 194.48 and 194.49,

provided the gross weight of the combination does not exceed eight thousand pounds.

Consequently, since the trailer in question has no "licensed carrying capacity" upon which to base a tax under secs. 194.48 and 194.49, the only weight in the combination which may be considered for taxing purposes is that of the propelling vehicle, and since this is eight thousand pounds or less, the combination is exempted from the tax provisions of said sections.

WHR

Automobiles — Law of Road — Trucks — Trailers — Corporations — Motor Transportation — Motor vehicle department can collect registration fees in case of trucks and trailers based upon gross weights in excess of maximum permissible gross weights prescribed by secs. 85.47, 85.48 and 85.49, Stats., where such trucks and trailers operate under special permits as provided by sec. 85.53.

When physical characteristics of vehicle or combination are such that it may be operated without special permit under 85.53, just that mileage which does not require special permit is taxable under secs. 194.48 and 194.49.

When trailer is subject to sec. 85.53 but truck operated in connection therewith is not, truck is not exempt from taxation under secs. 194.48 and 194.49.

September 23, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Director, Registration & Licensing.*

You inquire whether the motor vehicle department can collect registration fees in the case of trucks under sec. 85.01, subsec. (4), par. (c), Stats., and in the case of trailers under sec. 85.01 (4) (e), Stats., based upon gross weights in excess of the maximum permissible gross weights as prescribed in secs. 85.47, 85.48 and 85.49, Stats., or whether the department is limited to only that fee for the

maximum gross weight which such vehicle can have without requiring a special permit under sec. 85.53, Stats.

You also ask in the case where the physical characteristics of the vehicle or combination are such that it may be operated without a special permit under sec. 85.53 whether all of its mileage is taxable or just that mileage which does not require a special permit.

Sec. 85.47 prescribes the maximum gross weight limits of vehicles on class "A" highways, and sec. 85.48 prescribes the maximum gross limitations on class "B" highways.

Sec. 85.53 authorizes the state highway commission to issue special permits for vehicles or combinations of vehicles having a gross weight in excess of the maximums provided by secs. 85.47 and 85.48, or dimensions in excess of the maximums provided by sec. 85.48.

Under sec. 85.01 (4) (c) and (e) the fee for any truck or trailer sought to be registered is determined by the gross weight of such vehicle. No maximum fee is prescribed and unless there is a further limitation in the statutes this section should govern.

It will be noted that "gross weight" in tons of both trucks, under sec. 85.01 (4) (c), and trailers, under sec. 85.01 (4) (e), is arrived at by adding together the weight in pounds of the motor truck or trailer 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 2,000.

The above statutory method of determining gross weight obviously fixes no gross weight ceiling for registration purposes without regard to the actual maximum load to be carried.

Secs. 85.47 and 85.48 indirectly limit the maximum which might be paid in registration fees by declaring weight limitations. Although directed at protection of the highways, the weight limitations standing alone have the incidental effect of limiting registration fees. However, when sec. 85.53 was enacted allowing exceptions to the weight limitations in special cases, it also had an incidental effect upon registration fees. Since greater gross weights are permitted in certain instances, correspondingly greater fees may be required under sec. 85.01 (4). There is no implication in

sec. 85.53 that vehicles given special permits should not be subject to additional fees for their additional weight.

Sec. 85.50 provides as follows:

"No motor truck, truck tractor, tractor or bus, or trailer or semitrailer used in connection therewith, shall be operated upon any highway unless it shall have attached to or lettered upon each side thereof a sign giving its net weight, the tare weight and the gross weight of vehicle and load. The weights indicated on any such vehicles shall correspond with the weights for which said vehicle is registered under paragraph (c) of subsection (4) of section 85.01."

Sec. 85.51 provides as follows:

"In case any motor truck, truck tractor, tractor, bus, trailer or semitrailer shall be registered with the motor vehicle department at a lower net carrying capacity or gross weight than is indicated thereon, as required in section 85.50, the owner thereof shall be required to register the same in conformity with the actual load carrying capacity for which the vehicle is equipped, and pay only the additional fee required for the increased carrying capacity of the vehicle; and such additional load shall in no case be so large as to be the direct cause of mechanical failure of the vehicle. In addition thereto the penalties provided for the violation of this section may also be imposed."

It might seem from a reading of these sections that a maximum gross weight ceiling for registration purposes is fixed, namely that of gross weight of the vehicle as determined by the manufacturer. However, a reading of the registration laws makes it apparent that gross weights or carrying capacity of a vehicle as established by the manufacturer have nothing at all to do with fees to be paid under our registration laws. See the gross weight definition, sec. 85.01 (4) (c) and (e) hereinbefore referred to. See also sec. 85.01 (4) (j), Stats., and XXVIII Op. Atty. Gen. 296. It has been the uninterrupted practice, and properly so under our statutes, for the owner to declare the carrying capacity, gross weight, etc., of the vehicle to be registered. Sec. 85.50 has reference to the net weight, tare weight, and gross weight as so declared by the owner in the application for registration. Obviously, an owner may not declare a

gross weight lower than the gross weight to be determined by application of sec. 85.01 (4) (c) and (e) (which weight must be based upon actual maximum loads to be carried) and thus escape payment of registration fees which are meant to be based upon maximum loads which are to be carried.

Secs. 85.50 and 85.51, when read in the light of the fact that the owner declares the tare weight, net weight, and gross weight which appear upon the vehicle, obviously establish no ceiling for registration fees based upon gross weight different than the gross weight to be determined by the maximum load actually to be carried and by virtue of the formula provided in sec. 85.01 (4) (c) and (e), Stats.

We are of the opinion, therefore, that since there is no express or implied maximum fee, fees correlative to tonnage should be assessed in all instances under sec. 85.01 (4). Since weight greater than the maximum provided by secs. 85.47 and 85.48 is allowed by special permit under 85.53, there is no reason why the additional tonnage should be exempt from the registration fee.

In your second question you refer to the instance in which the vehicle is not by its dimensions required to be licensed under sec. 85.53 but where, at certain times, because of the load carried, it is required to have the special permit under sec. 85.53.

Subsec. (6) of sec. 194.47, which enumerates the exemptions from taxes imposed by secs. 194.48 and 194.49, exempts,

“Trailers or other similar equipment of such size and weight as to require special permits under section 85.53.”

This subsection was apparently intended to apply to all vehicles and loads licensed by special permit under sec. 85.53. We are of the opinion, therefore, that only the mileage not requiring such special permit is taxable. Where, however, a trailer is subject to the provisions of sec. 85.53, and the truck operated in connection therewith is not, it is our opinion that the truck is not exempt from taxation. It is the trailer and not the truck which requires the special

permit, and sec. 194.47 (6) affords exemption only to trailers and other equipment requiring special permits. It follows that such a truck not requiring a special permit is not exempt from the tax, since it must be remembered that it is not the possession of the special permit which affords the exemption, but rather the exemption is based upon the existence of the conditions which necessitate operation under such a special permit.

WHR

NSB

Indigent, Insane, etc. — Poor Relief — Legal Settlement
— Person voluntarily absent from his place of legal settlement for one year for purpose of obtaining medical aid at state expense at Lake Tomahawk State Camp would lose such settlement under sec. 49.02, subsec. (7), Stats. Therefore, construing subsecs. (4) and (7) of sec. 49.02 together, such absence is sufficient to interrupt year's residence required to gain legal settlement under subsec. (4).

Rule is that while physical presence in municipality of residence is not required to be continuous for year in order to obtain legal settlement, nevertheless substantial voluntary and uninterrupted absence during year of residence is sufficient to prevent gaining of settlement.

Year's voluntary absence from place of settlement will defeat settlement under sec. 49.02 (7) even though such settlement was acquired during such year.

September 24, 1940.

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

You state that X was admitted to the Muirdale Sanatorium, Milwaukee county, on December 4, 1935, and remained there until February 3, 1937. Thereafter, on May 20, 1937, he entered a sectarian tuberculosis sanatorium in

Colorado and remained there until March 21, 1939. He then returned to Milwaukee, where he lived with his parents until August 4, 1939. On the latter date he was admitted to Lake Tomahawk Camp as a state-at-large case, by order of the county court of Milwaukee county. He is now to be transferred to the Wisconsin state sanatorium. You inquire whether he now has a legal settlement in Milwaukee or whether he is still to be regarded as a state-at-large patient.

Sec. 49.02, subsecs. (4) and (7), Stats., provide as follows:

“(4) Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village or city while supported therein as a pauper or while employed on a federal works progress administration project or while enrolled in the civilian conservation corps or while residing in a transient camp or while employed on any state or federal work relief program shall operate to give such person a settlement therein. * * *”

“(7) Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost.”

Under the foregoing statement of facts, X lost his legal settlement in Milwaukee (if he had one) by his absence for more than one year in Colorado, under sec. 49.02, subsec. (7), Stats. After his return to Milwaukee, he remained there less than one full year so that at the time of his admission to the Lake Tomahawk Camp he had not yet regained a legal settlement in Milwaukee.

It may be assumed that during the time he spent at Lake Tomahawk he maintained his legal residence in Milwaukee, since his presence at the camp was for a temporary purpose only and not with an intention to make it his permanent home. Compare XXVII Op. Atty. Gen. 294. It therefore appears that on March 21, 1940, he had resided in Milwaukee for one full year and *by considering only subsec. (4) he*

would *seem* to have gained a legal settlement in Milwaukee. (The fact that he received medical aid at state expense at the Lake Tomahawk Camp would not constitute pauper support in the meaning of subsec. (4), under the reasoning in XXVII Op. Atty. Gen. 198, XXII Op. Atty. Gen. 665, XVIII Op. Atty. Gen. 379 and XIV Op. Atty. Gen. 294.)

However, subssecs. (4) and (7) must be construed together. Compare: *The Town of Scott v. The Town of Clayton*, (1881) 51 Wis. 185, 192. Under subsec. (7) voluntary absence from the place of legal settlement for a year or more, even if for the purpose of getting medical treatment at state expense, is sufficient to defeat such settlement. XXVII Op. Atty. Gen. 198. It seems clear that a substantial voluntary and uninterrupted absence from the place of residence for such purpose would also be sufficient to prevent the *gaining* of a legal settlement under subsec. (4) although short or temporary absences do not. XXII Op. Atty. Gen. 665. Otherwise this anomalous situation could occur: a person maintaining a legal residence in a municipality in this state but continuously and voluntarily absent therefrom over a period of years would gain a legal settlement in alternate years, under subsec. (4), and would then lose such settlement, by reason of his absence, in the intervening alternate years, under subsec. (7). Such an absurd construction should be avoided if possible. Accordingly, it is reasonable to construe subsec. (4) as requiring that a person be physically present in the municipality of his residence from time to time during the year in which legal settlement is to be gained, or at least that his absence be involuntary. Any substantial absence which is of such a character that if it were continued for a year it would cause the loss of a legal settlement under subsec. (7) must also be regarded as sufficient to prevent the gaining of a legal settlement under subsec. (4).

In close cases it will be a question of fact, to be decided by a court or other tribunal having jurisdiction, whether the absence was "substantial." But this is not a close case. Since X was voluntarily and uninterruptedly absent from Milwaukee from August 4, 1939 until and after March 21, 1940, a period of nearly eight months of the year of residence, he cannot be regarded as having gained a legal settle-

ment there on the latter date although he would have gained such settlement had he returned to Milwaukee from time to time during that period.

But even assuming that the foregoing construction is incorrect and that X did in fact regain his settlement in Milwaukee on March 21, 1940, nevertheless, on August 4, 1940, he had been voluntarily and uninterruptedly absent from such place of legal settlement for one full year, with the result that he lost his settlement on the latter date pursuant to subsec. (7).

Accordingly, you are advised that, on the facts submitted, X does not have a legal settlement in Milwaukee at the present time. This opinion is based on the assumption that X was an adult at least since the time he left the state in 1937.
WAP

Automobiles — Law of Road — School Busses — To be entitled to one dollar registration fee provided by sec. 85.01, subsec. (4), par. (g), Stats., school bus must be both owned and operated by school district. Statute does not apply to privately owned bus leased by school district.

September 24, 1940.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Director, Registration and Licensing.*

You have inquired whether sec. 85.01, subsec. (4), par. (g), Stats., relating to the registration of state and municipal vehicles, applies to a privately owned bus which is leased to a school district for the purpose of transporting pupils. Sec. 85.01 (4) (g) provides in part:

“Automobiles, motor trucks, motor delivery wagons, trailers or semitrailers owned and operated exclusively in the public service by the state of Wisconsin, or by any county

or municipality thereof, and motor busses owned and operated by a private school or college and used exclusively for transportation of students to and from such school or college and not used for hire shall be registered by the motor vehicle department upon receipt of a properly filled out application blank accompanied by the payment of a registration fee of one dollar for each of said vehicles or trailers."

We understand that the bus is operated exclusively in the public service, and the question narrows down to whether the word "and" as used in the phrase "owned and operated" is construable as "or," or whether it was used by the legislature in its conjunctive sense only so as not to be interchangeable with the word "or."

There are cases holding that the word "and" may be construed as "or" when necessary to effectuate the intention of the legislature, but in the absence of any discoverable legislative intent requiring such construction, the word "and" in its usual and commonly accepted meaning is a connective and not a disjunctive; it is not correctly or generally used to express an alternative unless used in connection with words clearly indicating that intent. See 1 Words & Phrases (5th Series), p. 391 and following.

The statute in question is clear and unambiguous. The words "owned and operated" appear twice in the portion quoted. There is nothing to indicate that such wording was employed carelessly or loosely. The selection of phraseology appears to have been made advisedly, and we can see no reason to depart from the general rule of statutory construction supplied by the legislature itself and which is to the effect that all words and phrases in the statutes are to be construed and understood according to the common and approved usage of the language. See 370.01 (1), Stats.

Furthermore, since the motor vehicle registration fees required by ch. 85 are in the nature of a tax imposed upon users of the highways as a contribution to their cost and upkeep, and since sec. 85.01 (4) (g) provides an exemption from the major portion of such tax, such exemption is to be strictly construed. It is not to be made out by inference or implication but must be conferred in terms too clear and plain to be mistaken, and in fact admitting of no reasonable doubt. 61 C. J. 394.

You are therefore advised that the bus in question must be both owned and operated exclusively for the public service by the school district to be entitled to the one dollar registration fee provided by sec. 85.01 (4) (g), Stats.

WHR

Criminal Law — Arrest and Examination — John Doe Proceedings — In John Doe proceedings under sec. 361.02, Stats., it is improper for magistrate to issue warrant for apprehension of John Doe and then take evidence, but such evidence should be taken without issuing any warrant. For this purpose magistrate may subpoena witnesses and may continue hearing from time to time until identity of offender has been discovered.

September 24, 1940.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You request an opinion on the following question:

“When what we call a John Doe proceeding is commenced in justice court to get information as to who committed the offense, and a witness is subpoenaed to appear before the justice court and give evidence in the matter at a certain time, has the justice jurisdiction to take this evidence when the warrant for arrest is still outstanding in the hands of the sheriff, or should the sheriff, before the evidence is to be taken, have made his return on the warrant showing that he could not find the offender?”

Sec. 361.02, Stats. provides as follows:

“Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him,

and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate, or before some other magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."

John Doe proceedings are held under the first clause of the above statute. The proper procedure is for the informant to complain orally to the magistrate that an offense has been committed but that he does not know the identity of the offender. The magistrate then has jurisdiction to subpoena any number of witnesses necessary to be examined in order to learn the identity of the person guilty and may continue the hearing from time to time. No warrant should be issued during the course of these proceedings, since there is no basis for the issuing of the warrant until the identity of the offender is known. Issuing the warrant for the apprehension of John Doe and then having the sheriff's return on such warrant stating that he cannot find the accused is not only an idle ceremony but is contrary to the intent of the statute.

After the warrant has been issued, the magistrate has jurisdiction only to proceed in a summary manner.

For a complete discussion of the procedure to be followed under the foregoing statute see, *The State ex rel. Long and another v. Keyes*, (1889) 75 Wis. 288, 44 N. W. 13.

WAP

Civil Service — Public Officers — State Employees — Vacations — Ch. 535, Laws 1939, sec. 1, does not exclude employees engaged in skilled trades and employed on hourly basis and employees engaged in labor or clerical work and employed on per diem or hourly basis from mandatory vacation-with-pay provisions of sec. 14.59, Stats., as it now reads after said amendment.

September 28, 1940.

A. J. OPSTEDAL, *Acting Director,*
Bureau of Personnel.

In your letter of September 20 you state as follows:

"Prior to 1937, that part of section 14.59 of the statutes material to this inquiry read:

'14.59 * * * Heads of departments, may, in their discretion, grant to each clerk or other person in their employ noncumulative leave of absence without loss of pay at the rate of three weeks for a full year's service.'

"Chapter 218, laws of 1937, amended the provision in question by making the granting of vacation leaves mandatory and by inserting the clause: 'including any employe engaged in the skilled trades and employed on an hourly basis.'

"The provision, as amended, read as follows: (The stricken matter indicating deletion and the underscored words indicating the new matter)

'Heads of departments may in their discretion *shall* grant to each clerk or other person in their employ, *including any employe engaged in the skilled trades and employed on an hourly basis*, noncumulative leave of absence without loss of pay at the rate of three weeks for a full years' service.'

"Chapter 535, laws of 1939, section 1, further amended the provision in question by striking out the clause inserted in 1937 which read: 'including any employe engaged in the skilled trades and employed on an hourly basis.'

"We have received, and are now receiving, numerous inquiries from interested persons who are being denied vacation as to the application of the present provision and the effect of the 1939 amendment.

"We respectfully request your opinion as to whether employees engaged in the skilled trades and employed on an hourly basis, and employees engaged in labor and clerical

work and employed on a per diem or hourly basis are entitled to vacation leave under section 14.59 the same as other persons who may be employed on a monthly basis."

Prior to the enactment of ch. 218, Laws 1937, making it mandatory upon heads of the departments to grant vacations, the term employee was defined by sec. 16.02 (4), Stats. 1935, as follows:

" 'Subordinate' or 'employee' means any person holding a subordinate position subject to appointment, removal, promotion or reduction by any appointing officer."

This definition remains the same today. See sec. 16.02 (4), Stats. 1939.

The board's rule with respect to vacations with pay in 1935 was brief and to the point, as follows:

"3. Leaves of absence with pay to serve as vacation, at the rate of not more than three weeks for a full calendar year's service, shall be granted only to employees who are rendering satisfactory service." Rule XII, sec. 3, civil service law and rules, 1935.

We are advised that prior to 1937, when it was optional with department heads with respect to granting of vacations with pay, the university authorities customarily granted vacations with pay except to those employed in the skilled trades and on an hourly basis. When the legislature met in 1937 and enacted ch. 218, laws of that year, making it mandatory upon the various departmental heads to grant vacations to "each clerk or other person in their employ" it would seem that no valid argument could be made to the effect that those engaged in the skilled trades and employed on an hourly basis were not employees as defined by sec. 16.02 (4) Stats., or "clerk or other person in their employ" within the language of the 1937 amendment. The group involved undoubtedly wished to have the question nailed and riveted, and hence the utterly superfluous language "including any employees engaged in the skilled trades and employed on an hourly basis" which appears in the 1937 amendment. That language certainly could add nothing to

the all-inclusive language "clerk or other person in their employ" which immediately precedes.

After the 1937 amendment the board adopted a much more comprehensive set of rules. Rule I of the board sets forth a number of definitions in the various subsections as follows:

"13. Employee. Employee means a person who is legally in the service of the state."

"21. Permanent Employee. Permanent employee means an employee who has permanent status."

"22. Permanent Status. Permanent status means the status of an employee after the successful completion of his probationary period."

"24. Probation. Probation means the term of employment or trial service period in which an employee works before receiving permanent appointment."

The rule with respect to vacations with pay was modified and enlarged as follows:

"3. Leaves of absence with pay to serve as vacation, at the rate of three weeks for a full year's service or one and one-half days for a full month's service on a full time basis, shall be granted to all permanent employees. Records of vacation credits and vacation taken for each employee shall be kept by the bureau. Whenever an employing officer fails to accord an employee the noncumulative vacation to which he is entitled within one year from the time at which it was earned and prior to separation from the service in the department where it was earned and the employee fails within such period to make demand therefor in writing, such vacation rights shall be deemed to have been waived and no claim therefor shall thereafter be allowable.

"4. Leave of absence without pay, leave of absence with pay as sick leave, and leave of absence with pay as vacation shall not be granted to employees for service in emergency, provisional, and temporary positions. All such leaves may be granted to seasonal employees after they have acquired permanent status in such positions only if they have served a minimum total of six months to equal the probationary service period in non-seasonal positions."

There is certainly nothing new or revolutionary about the definition of the term employee, rule I, section 13. It does not appear to enlarge in any respect the definition of an employee, sec. 16.02 (4), Stats.

It will be noted under rule XII, sections 3 and 4, that it is the permanent status of the employee that determines the right to vacation, and that such right is in no respect determined upon any question of whether the employee is employed in the skilled trades and on an hourly basis. Method of payment is immaterial, as is the question of whether the employee is or is not engaged in the skilled trades.

When the legislature by ch. 535, Laws 1939, sec. 1, struck the following, "including any employee engaged in the skilled trades and employed on an hourly basis" from sec. 14.59 did it by so doing manifest a legislative intent to exclude employees in this class from the mandatory vacation provisions of the statutes? We are unable to find any rational basis upon which an affirmative answer to that question can be predicated. The language was entirely superfluous in the 1937 amendment. The striking of a superfluity cannot result in restricting the all-inclusive and comprehensive language which is left. That is especially true when it is considered that the term employee has been defined by statute for years, that it was defined by the rules of the board when ch. 535, Laws 1939, was enacted and that all such definitions and rules are sufficiently comprehensive to include "employees engaged in the skilled trades and employed on an hourly basis" within the term employee as defined by statute and as defined by the rules of the board.

Likewise, the rules of the board, rule XII, secs. 3 and 4, with respect to mandatory vacations, which rules were in force when ch. 535, Laws 1939, was enacted, made the permanent status of an employee the test rather than any test of whether the employee was engaged in the skilled trades and employed on an hourly basis. If the legislature intended to restrict the all-inclusive terminology that was left, "clerk or other person in their employ," beyond the statutory definition and board definition of the term employee and otherwise intended to modify board rule XII, secs. 3 and 4, it certainly would have adopted a more appropriate means of ac-

complishing that result than that of striking superfluous language. If the legislature intended to exclude "employee engaged in the skilled trades and employed on an hourly basis" from the all-inclusive and comprehensive language "clerk or other person in their employ" it would have been a simple matter for the legislature to so state by excepting this class from the all-inclusive and comprehensive class that was left after the 1939 amendment. A superfluity or nothing added to an all-inclusive and comprehensive class results in just what is started with, namely, an all-inclusive and comprehensive class. Striking a superfluity from an all-inclusive and comprehensive class leaves just what was started with, namely, an all-inclusive and comprehensive class. $x + 0$ equals x , and $x + 0 - 0$ still equals x .

We conclude that employees engaged in the skilled trades and employed on an hourly basis and employees engaged in labor and clerical work and employed on a per diem or hourly basis are entitled to vacation leave under sec. 14.59 the same as other persons, who may be employed on a monthly basis.

NSB

Banks and Banking — Federal Deposit Insurance Corporation — Municipal Corporations — Municipal Law — Public Utilities — (1) Municipal utility funds are separate and distinct from general funds of municipality and are held by municipality in separate capacity and right within meaning of par. (13), subsec. (c), sec. 264, ch. 3, title 12, USCA (FDIC act). Utility's fund and general fund are entitled to be treated as insured funds under FDIC act and each to full extent of \$5,000.

(2) State board of public deposits, having proceeded on opposite theory, is under no obligation to return assessments made to municipalities upon such basis, as FDIC has not to this date recognized validity of conclusion (1) above. Board of public deposits should not change present method of assessment until such time as FDIC acknowledges validity of conclusion (1) above and agrees to treat utility funds and other municipal funds as separate funds, each entitled to coverage to full extent of \$5,000 under FDIC act.

October 7, 1940.

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

You state that on June 1, 1939, the board of deposits adopted a rule exempting that part of each public deposit which is insured by the Federal Deposit Insurance Corporation from payments required to be made into the state deposit fund.

Title 12 USCA, ch. 3, sec. 264, subsec. (c), par. (13), defines the term "insured deposit" as follows:

"The term 'insured deposit' means the net amount due to any deposit or deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of \$5,000. Such net amount shall be determined according to such regulations as the board of directors may prescribe, and in determining the amount due to any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others, except trust funds which shall be insured as provided in paragraph (9) of subsection (h) of this section."

The resolution of the board of directors of the FDIC relating to recognition of ownership of deposits in the hands of public officials approved May 3, 1939, (which is a restatement of the rule previously recognized) is as follows:

“The owner of any portion of a deposit appearing on the records of a closed bank under the name of a public official, state, county, city, or other political subdivision will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records of the bank: Provided, That the interest of such owner in the deposit is disclosed on the records maintained by such public official, state, county, city or other political subdivision and, Provided further, That such records have been maintained in good faith and in the regular course of business.”

There are numerous villages and cities which own and operate municipal water plants and municipal public utilities and which deposit funds in accounts separate from the general funds of such municipalities. Since January 1, 1939, the board of deposits of Wisconsin insures that part of each public deposit which is not insured by the Federal Deposit Insurance Corporation and in turn collects a premium from that part of each public deposit which is not insured by the FDIC. You have had considerable correspondence with the FDIC (the correspondence is enclosed with your request for an opinion) to obtain a ruling from that agency whether municipal utility funds so deposited in separate accounts are funds of the municipality “maintained in the same capacity and in the same right.” If maintained in the same capacity and in the same right, the municipal account is insured by the FDIC to the extent of \$5,000. If maintained in a different capacity or right, the utility’s fund would be insured to the extent of \$5,000 and the general funds of the municipality insured to the extent of \$5,000.

You have been unable to obtain a definite ruling on the problem from FDIC and in this agency’s last letter to you the FDIC states:

“ * * * As this question involves the interpretation of your State law governing the acquisition and operation of water plants by municipalities, it is suggested that

the question be referred to the State's Attorney General for his consideration.' "

In practice, FDIC's handling of the problem does not appear to have been uniform. The Bank of Hartland case is cited by you as an example. In that case funds of the municipal water department were on deposit in an amount approximating \$3,000, and other village funds approximating \$4,000 were on deposit with the Bank of Hartland, an FDIC insured bank at the time of its failure. FDIC paid the deposits 100 per cent. It appears that such 100 per cent payments were made in that case largely upon the basis of a legal opinion which the clerk of the village received from the legal counsel for the public service commission of Wisconsin advising that the funds of the village and the funds of the utility were separate and distinct funds. That opinion is grounded upon sec. 66.06, subsec. (10), par. (d), Stats., and two prior opinions of this office, XI Op. Atty. Gen. 935, and IV Op. Atty. Gen. 589.

Heretofore, your board has considered that deposits of a municipal water plant or public utility were to be added to other deposits of the municipality in determining the total deposits of such municipality for the purpose of determining what part of such deposits are insured by FDIC—in short that the FDIC insurance covers only \$5,000 of the municipal deposit, without regard to whether the deposit is one in the general fund of the municipality or one in a separate utilities account. The board of deposits has been assessing the various municipalities accordingly and on the assumption that only \$5,000 of the municipal funds, however deposited in the banks, were insured by FDIC.

You inquire:

(1) Whether utility funds separately deposited as such by a municipality are held "in the same capacity and in the same right" as other funds of the municipality; and

(2) If question (1) is answered in the affirmative, how your board should handle the matter of prior assessments against municipalities, and whether it will have to return to the municipalities excess assessments which the board made to the municipalities based on the assumption that

only \$5,000 of the municipal funds were insured by the FDIC.

It may readily be conceded that utilities funds of a municipality are separate and distinct from the general fund of the village and must be so handled. There can be no question but that the funds are separate and distinct and must be so handled and treated. This is implicit from the language of the various applicable sections of the statute. See sec. 66.06 (4) (b), (9) (a) and (b) 1, 2, 3, 5, 7, 11, 12, and 13, and (c) 4 b, and sec. 66.06 (10) (a) and (g), and (11) (a), (b) and (c).

While municipal utility funds are undoubtedly separate and distinct from the general funds of the city and must be so used and treated by the municipality, this fact or concept alone may not conclusively establish that the utility funds are municipal funds owned in a different capacity and right from that of the general fund within the definition of "insured deposit" as used in par. (13) of the federal deposit insurance act hereinbefore quoted. This fact or concept is undoubtedly entitled to great weight in a consideration of the problem, but considered alone it is perhaps not entitled to controlling weight.

Sec. 66.06 (11) (c), Stats., provides:

"The income of a public utility owned by a municipality, shall first be used to meet operation, maintenance, depreciation, interest, and sinking fund requirements, local and school tax equivalents, additions and improvements, and other necessary disbursements or indebtedness. Income in excess of these requirements may be used to purchase and hold interest bearing bonds, issued for the acquisition of the utility, or bonds issued by the United States or any municipal corporation of this state, or insurance upon the life of an officer or manager of such utility, or may be paid into the general fund."

It is thus only the surplus after meeting all the requirements provided by sec. 66.06 (11) (c), Stats., which is available for the general expenses of the municipality or which may be placed in the general fund and thus made available for meeting municipal expenses other than utility expenses. Sec. 66.06 (11) (c) must be read in relation to sec. 66.06 (9) (b) 3, Stats., which provides:

"As accurately as possible in advance, said board of council shall by ordinance fix and determine (a) the proportion of the revenues of such public utility which shall be necessary for the reasonable and proper operation and maintenance thereof; (b) the proportion of the said revenues which shall be set aside as a proper and adequate depreciation fund; and (c) the proportion of the said revenues which shall be set aside and applied to the payment of the principal and interest of the bonds herein authorized and shall set the same aside in separate funds. At any time after one year's operation, the council or board may recompute the proportion of the revenues which shall be assignable as provided above based upon the experience of operation or upon the basis of further financing."

These utility revenues (below the surplus, if any, which may be placed in the general fund and made available for other municipal expenses) have been treated by our court as trust funds. Any taxpayer may enjoin a diversion or use of the funds for any purpose other than the specific purposes for which the statutes say such funds must be used. *State ex rel. Brown and another v. Slavan*, 11 Wis. 153; *Weik v. Wausau*, 143 Wis. 645; *Rice v. The City of Milwaukee and others*, 100 Wis. 516; *Oconto City Water Supply Co. v. The City of Oconto*, 105 Wis. 76; *Riesen v. School District*, 192 Wis. 283. And see *Miller v. Milwaukee*, 182 Wis. 549.

It is entirely conceivable that these funds are sufficiently characterized as trust funds of the municipality by the laws of this state to require separate treatment of the funds by the FDIC under par. (9), subsec. (h), sec. 264 of the act.

The foregoing concept points to the conclusion that the utility funds are owned by the municipality in a different capacity and right than that of the general fund of the municipality. Furthermore, it is the well settled law of this state that municipalities function in governmental and proprietary capacities, and that each is a separate and distinct function. *State Journal Printing Company v. City of Madison*, 148 Wis. 396, 134 N. W. 909; *Piper v. Madison*, 140 Wis. 311, 122 N. W. 730; *Apfelbacher v. State*, 160 Wis. 565; *Morrison v. Fisher*, 160 Wis. 621; *Juul v. School District*, 168 Wis. 111; *Srnka v. Joint District No. 3*, 174 Wis. 38; *Sullivan v. School District*, 179 Wis. 502.

It is equally well settled in this state that a municipality acts in a proprietary rather than in a governmental capacity when it engages in the utility business. See cases above cited.

In *Reetz v. Kitch*, 230 Wis. 1, 14, the court comments as follows:

“* * * As is usually the case where city officials neglect to follow orderly procedures, confusion arose, and the distinction between the city as proprietor of a utility and as a unit of government was lost sight of. * * * Here there is no violation of any substantial statutory policy, and the confusion of identity between the utilities and the city may well, as found by the trial courts, have lacked the quality of wilfulness and bad faith. * * *”

The concept that municipalities function in this state in two distinct capacities, namely, governmental and proprietary, leads rather irresistibly to the conclusion that utility funds are held in a different capacity and right from that of the general funds of the municipality.

The language quoted from *Reetz v. Kitch*, *supra*, leads to the same conclusion. While the utility is not a separate municipal unit of government, it does possess a distinct identity from that of the city acting in its governmental capacity. It is sufficiently distinct in identity that the utility may borrow from the municipality. The utility may repay the funds so borrowed to the municipality, and the municipality may use the funds thus repaid for governmental purposes—purposes for which the utility as such could not use the funds so repaid. *Reetz v. Kitch*, *supra*.

For all of the foregoing reasons we are led rather irresistibly to the conclusion that municipal funds and utility funds are held by the city in a different capacity and right from that of the general funds of the city and within the meaning of such term as it is used in par. (13) of the FDIC act.

In answer to your second question, we can see no substantial reason why the board should return to the municipalities any excess assessments which have heretofore been made and collected upon the theory that FDIC insurance

covered only \$5,000 of municipal funds, whether those funds were general funds or utility funds. Nor can we see any reason why the board should change its present method of assessment until such time as FDIC definitely acknowledges that it agrees with the conclusion herein reached and that it will treat utility funds and other municipal funds as deposits of the municipality in separate and distinct capacities and rights, thus insuring that each capacity and right, the governmental and the proprietary, are insured by FDIC, each to the full extent of \$5,000.

FDIC assessments against banks are not made upon the basis of insured deposits. The FDIC assessments are made upon the basis of deposits as that term is defined by sec. 264 (c) (12) of the FDIC act.

Thus, it is only after failure of a bank that FDIC has any occasion to determine what are the "insured deposits" in the bank. Up to that time FDIC is concerned only with the amount of deposits as such, rather than the amount of insured deposits.

Your board has the duty of insuring public funds which are not insured by FDIC. Unless and until FDIC recognizes the validity of the conclusions herein reached and in protection of public deposits in the banks of this state, your board should continue to make assessments as heretofore made. That would seem to be the only manner in which public deposits in the banks may be protected by your board until your board and FDIC are in agreement as to the extent of FDIC coverage of these municipal funds.

In the meantime, it cannot be said that the municipalities have paid something for nothing.

They have not paid something for nothing, as the state deposit fund is carrying the coverage and there has been no acknowledgment by FDIC that they are carrying the coverage.

If and when FDIC agrees with the opinion herein reached, your board should then act accordingly and future assessments made against municipalities should be made on the basis of whatever the board and FDIC agree upon as to the extent of FDIC coverage.

NSB

Public Officers — Board of Public Welfare — Terms of members of board of public welfare who were appointed by governor on October 3, 1939, to serve for certain terms extending from that date and whose appointments were confirmed by senate October 29, 1939, must be computed from date of appointments. Governor and senate, constituting appointing power, are authorized to fix time from which terms are to run since legislature created office of member of board and fixed term therefore without specifying time when terms of members should begin.

October 14, 1940.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, *Executive Secretary*.

You have submitted the following to us:

"Under the provisions of chapter 435, laws of 1939, the board of public welfare and the state department of public welfare were organized. Seven members of the board of public welfare were appointed by the governor on October 3, 1939, confirmed by the senate, October 29, 1939.

"Two members were appointed for a term of two years, two for four years, and three for six years.

"In order to determine the date of expiration of the terms of office of these appointees, as well as for other reasons, it is necessary to have a definite finding as to when the terms of office begin.

"Will you kindly inform this office, therefore, whether the terms of office of these appointees begin on the date of their appointment and filing of an oath of office, namely October 3, or on the date when their appointments were confirmed by the senate, namely October 29."

It is our opinion that the appointments of the members of the board of public welfare date from October 3, 1939. The records in the executive office show that on the day in question the members of the board of public welfare were appointed for terms to run for two, four and six years, as provided for. In the case of a person who was appointed for four years his appointment showed, and the record of his appointment shows, that he was appointed for a term of four years from October 3, 1939, the day upon which the ap-

pointment was dated. The senate confirmed the appointment as made and consequently confirmed the action of the governor in appointing the members of the board for the period stated in their commissions and in the records of the executive office.

It is a rule laid down by authorities dealing with the subject that where the legislature creates an office and fixes the term therefor but does not provide the date upon which the term shall begin, the appointing power may fix the date of the original appointment and all subsequent appointments shall be made with reference thereto. The authorities are collected in a note in 17 Ann. Cas. 1007, and in the American Digest System, Officers, key number 52.

The governor and the senate constituted the appointing power under the law here in question. It specifically provides that the members of the board shall be appointed by the governor by and with the advice and consent of the senate. The appointing power has dated the appointments to run from October 3, 1939, and there is no reasonable basis upon which their authority to do so may be questioned.

JWR

Public Officers — County Board — Malfeasance — Member of county board who is not member of county highway committee may sell land to county without violating sec. 348.28, Stats., if purchase is made by highway committee.

October 15, 1940.

HIGHWAY COMMISSION.

Attention Wm. E. O'Brien, *Chairman*.

You have requested our opinion upon the following statement of facts. You state that Mr. Joseph Smerchek was chairman of the Racine county board and that Racine county found it necessary to acquire certain land belonging to Mr. Smerchek for the purpose of con-

structing a highway. Mr. Smerchek and the Racine county authorities were unable to arrive at a satisfactory figure for the property and the county highway committee issued an award for damages in the amount of \$50.00. In order to avoid delay and expense of litigation, however, the highway committee ultimately reached a conclusion that the property was worth \$150.00 and purchased it from Mr. Smerchek for that figure. A conveyance of the property has been submitted to you, and you request our opinion as to whether you may accept and approve the conveyance pursuant to the provisions of sec. 83.08, Stats.

The statement of facts is, as we understand it, erroneous in one respect—Mr. Smerchek was not at the time of the purchase, and is not at the present time, chairman of the Racine county board, although he was the chairman at one time. It is understood that he was not a member of the county highway committee.

The question would obviously not have been submitted to us were you not in some doubt as to your authority to approve the conveyance. The doubt seems to arise from the fact that the purchase involves a deal by the county highway committee with a member of the county board. You seem to feel that there may be some possible illegality in such action by reason of the provisions of sec. 348.28, Stats., dealing with malfeasance in office. As the section has been construed by the supreme court of this state in the case of *State v. Bennett*, 213 Wis. 456, it does not make unlawful the contemplated purchase. It is not unlawful for a member of the county board to deal with the county unless he is in substance upon both sides of the deal. He must, in order to be guilty of malfeasance, deal as an individual on the one hand with himself as an official, upon the other hand in relation to some public or official service.

In the present case Mr. Smerchek was not a member of the highway committee. Under the provisions of sec. 83.08, Stats., the purchase was to be made by the county highway committee. The only connection between Mr. Smerchek and the committee was that he was entitled to a vote in the selection of its members. It may be argued with great force that anyone who has a voice in the appointment of a county official ought not to be allowed to deal with the county

through that official, but the section in question does not accomplish that purpose and it cannot be given that construction.

It is, of course, understood that we do not advise you to approve the purchase. You may, for example, be convinced that the amount involved is more than the land is worth. If you are, then you should disapprove it. We here express no opinion upon the merits of the transaction other than to say that it is not illegal and void by reason of the facts stated.

JWR

Mothers' Pensions — Subsec. (13), sec. 48.33, Stats., does not create liability for aid to dependent children of veterans not otherwise eligible for aid under subsec. (5) but its sole effect is to determine which counties shall be liable for aid to children of disabled veterans who are in institutions outside their home counties, if conditions of subsec. (5) are met.

October 16, 1940.

FRANK C. KLODE, *Director*,
Department of Public Welfare.

You request an interpretation of subsec. (13) of sec. 48.33, Stats., which provides as follows:

"Where the head of a family is a war veteran and is hospitalized or institutionalized because of physical or mental disabilities, in a county other than that of his legal residence or settlement at time of admission, aid shall be granted to the dependent child or children of such veteran by the county wherein the head of the family had his legal residence or settlement at the time of admission so long as he remains hospitalized or institutionalized."

You state that certain veterans' organizations contend that under the foregoing subsection, if a veteran is institutionalized or hospitalized outside his home county, his chil-

dren must be granted aid under sec. 48.33 regardless of whether the veteran's disability is "likely to continue for at least one year in the opinion of a competent physician" as required by par. (d) of subsec. (5) of said section. You state that you understand that subsec. (13), above quoted, was enacted to protect counties having veterans' facilities from becoming liable for such aid to the families of veterans who move into such counties to be near the disabled veteran during hospitalization; in other words, that it was intended to affect only the question of legal settlement, not to create liability for aid where none would ordinarily exist.

Your interpretation is clearly right, and that of the veterans' organizations is plainly wrong. Subsec. (13) was enacted by ch. 200, Laws 1939, which was entitled as follows:

"An Act to create subsection (13) of section 48.33 of the statutes, relating to aid of dependent children when a war veteran, the head of a family, is hospitalized in a county other than that of legal residence."

Both the title and the body of the act suggest that the legislature was concerned with the question of residence rather than of liability for aid.

The construction urged by the veterans' organizations would create such discrimination between veterans themselves as to be of extremely doubtful constitutionality. Children of a veteran hospitalized in his home county would not be entitled to aid unless his disability were likely to continue for a year, while those of a veteran hospitalized outside his home county would be entitled to aid even if his disability were likely to be of short duration. Assuming that such special privileges would be valid if applied to the children of all veterans, it scarcely requires citation of authority to demonstrate that such discrimination between veterans themselves would probably constitute a denial of the equal protection of the laws, in violation of the 14th Amendment to the constitution of the United States and art. I, sec. 1 of the constitution of Wisconsin. See *State v. Whitcom*, (1904) 122 Wis. 110, 123.

Nor is there any reason for supposing that the legislature intended such a result. If it was intended to make a favored

class of the children of veterans, why limit the favoritism to those whose fathers are hospitalized outside their home counties? The law is intended to provide for the children, not the parents. XXVI Op. Atty. Gen. 289, 290. Presumably the plight of the children is not worse because the father is in an institution in another county.

Moreover, it must be remembered that subsec. (5) of sec. 48.33 begins as follows:

“Such aid shall be granted *only* upon the following conditions: * * *

If subsec. (13) were intended to amend the conditions of aid so far as children of veterans are concerned, it would normally have been made a paragraph under subsec. (5) instead of receiving a separate subsection number. Nothing in subsec. (5) indicates an intention to limit the application thereof to persons not covered by subsec. (13).

Accordingly, you are advised that children of veterans mentioned in subsec. (13) are not entitled to aid unless the fathers' disability is likely to continue for a year or more.
WAP

Public Health — Chiropractic — Osteopathy — Osteopath may not administer injections for cure of arthritis. Person licensed to practice osteopathy and surgery may administer anaesthetic in connection with operation.

Chiropractor is limited to adjustment of spinal column by manipulation by hand and may not administer medicines or drugs or use any therapeutic methods other than such adjustment of spine.

October 16, 1940.

DR. H. W. SHUTTER, *Secretary,*
Board of Medical Examiners,
Milwaukee, Wisconsin.

You request an opinion on the following questions:

"1. Just how far is an osteopath permitted to go in his practice? Under the law is he permitted to give injections for arthritis and also rectal anesthesia?

"2. To what extent is a chiropractor limited? Must he confine himself purely to manipulative work and adjustments?"

This office has recently had occasion to examine the question of the extent of the authority of osteopaths in an opinion reported in XXIX Op. Atty. Gen. 148. For reasons there set out, no person licensed to practice osteopathy alone may use drugs or medicines for any purpose, nor may any person licensed to practice osteopathy and surgery use drugs or medicines except such as are necessary in connection with surgical procedures. No person may use drugs or medicines for the purpose of effecting a cure solely by the action of such drug or medicine unless he is licensed to practice medicine. The fact that such drug or medicine is introduced into the body by mechanical means, as by the use of a hypodermic needle, does not bring it within the field of surgery. Accordingly, it is clear that an osteopath may not give injections for arthritis, but if he is a licensed surgeon he may administer rectal anaesthesia in connection with an operation.

This office examined the authorities with reference to what constitutes the practice of chiropractic in a careful

opinion reported in XXI Op. Atty. Gen. 646. The conclusion there reached contains the answer to your second question:

"From this wealth of authority, it is clear that chiropractic is the adjustment of, ordinarily, the spinal column, and ordinarily only by manipulation by the hand; also, that chiropractic does not include the use of any medicines or drugs, nor surgery, nor the use of any devices which do other than adjust, if indeed, it permits mechanical apparatus even for adjustment." (P. 651.)

WAP

Banks and Banking — Public Deposits — Deposits of state annuity and investment board are public deposits as defined in sec. 34.01, subsec. (1), Stats.

October 21, 1940.

BANKING DEPARTMENT.

We have your letter signed by F. H. Ibach, commissioner of banking, requesting our opinion as to whether certificates of deposit in state banks payable to the "annuity and investment board" constitute "public deposits" as defined and contemplated by sec. 34.01 (1) of the statutes.

It is our opinion that deposits of the state annuity and investment board are public deposits within the meaning of sec. 34.01 (1) of the statutes.

RHL

Public Health — Barbers — Holder of unexpired barber shop manager's and master barber's licenses is not entitled to shop manager's license covering new shop unless he has been actively engaged in barbering not less than forty hours a week for at least one-half of preceding two-year period, under sec. 158.12, subsec. (2), par. (a), Stats.

October 21, 1940.

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

You inquire whether a barber who has renewed his master barber's and shop manager's licenses annually but has not been actively engaged in barbering in this state for forty hours a week for at least one-half of the two-year period immediately preceding, is entitled to be granted a shop manager's license for a new shop. In other words, a shop owner who has not been active desires to open a new shop and the question is whether the fact that he holds a license covering one shop entitles him to a license covering the new one notwithstanding that he does not meet the qualifications required by statute for the issuance for a new shop license.

Subsecs. (1) and (2) of sec. 158.12, Stats., provide as follows:

"(1) No barber shop shall be conducted in this state except by one who, in addition to holding a master barber's license, holds a shop manager's license issued by the state board of health, as provided in this section. The state board of health shall issue a separate shop manager's license for each shop, which license is valid only in the place specified in said license, and which is not transferable.

"(2) A shop manager's license may be granted only to one:

"(a) Who holds an unexpired master barber's license, and who has been actively engaged in barbering in this state not less than forty hours per week for at least one-half of the two-year period immediately preceding the date of application for a shop manager's license."

This office has ruled that when a shop owner moves to a new location the license for the new shop is not to be regarded as a renewal of the former shop license, but is a new

license. This is by reason of the fact that a shop license is not transferable from one location to another. XXIX Op. Atty. Gen. 308. In the opinion just cited, it was said:

“* * * if a barber closes one shop and opens another, he must obtain a new license for the newly opened shop. If, in the interim, his license covering the old shop has expired, the situation is in no wise changed. The old license covering the old premises is not restored. A new license covering new premises is obtained.” (P. 310.)

It follows that the fact that the applicant already holds a license covering other premises is immaterial in determining the applicant's right to be granted a new license. The law absolutely disqualifies one who has not been actively engaged in barbering for the period stated, from being granted a shop manager's license. See XXV Op. Atty. Gen. 367.

In order to give the law the opposite construction in this case, it would be necessary to read subsec. (2) as though the following were added: “or (b) Who holds an unexpired shop manager's license covering other premises.” Such an alternative qualification cannot be read into the law by construction.

WAP

Public Health — Beauty Parlors — Student enrolled in school of cosmetology under sec. 159.02, Stats., is entitled to credit for attendance at classes before board of health is notified of her enrollment and before student permit is issued pursuant to subsec. (8), but such student may not engage in practice work until student permit has been issued. Students matriculated in school of cosmetology on days other than first Monday and four days thereafter in each odd-numbered month, contrary to board of health's rule 11, are not entitled to credit for attendance at classes pursuant to such matriculation.

Students matriculated in school of cosmetology on days other than first Monday and four days thereafter in each odd-numbered month, contrary to board of health's rule 11, are not entitled to student permits under sec. 159.02, subsec. (8), and may be prosecuted for engaging in practice work under sec. 159.15. School authorities misleading students as to legality of such matriculation may be prosecuted under sec. 159.16. Student permits issued to such students heretofore, if any, may be revoked under sec. 159.14.

October 21, 1940.

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

You have requested an opinion with reference to certain provisions of ch. 159 of the statutes, relating to schools of cosmetology. Your first question is whether a student may attend a school of cosmetology and receive credit for a number of hours of attendance before the board has been notified of the fact that the student has been enrolled.

Pursuant to authority granted by sec. 159.03, subsec. (1), Stats., the board has promulgated the following rule with reference to schools of cosmetology, known as rule 11:

"Students shall enter school only on the first Monday and four days thereafter of January, March, May, July, September and November of each year. All application blanks for student permits and proof of qualifications must reach the state board of health not later than the Monday following the last day of each enrollment period. There shall be kept

a complete record of the date a student enters school, daily attendance and attendance at classes. This record shall be open to members of the State Board of Health or the Board's official representatives. A record of daily attendance shall be forwarded to the State Board of Health on or before the fifth day of each month for the preceding month."

Subsec. (2) of sec. 159.03 provides in part as follows:

"The board shall keep a record of all students * * * and a record of its proceedings relating to issuances, refusals, renewals, suspensions and revocations of each license with the name, place of business and residence of each licensee and certificate, and permit holder. These records shall be open to the public inspection at all reasonable times."

Sec. 159.02 (8) provides as follows:

"Any person may receive a student permit:

- (a) Who is at least seventeen years of age;
- (b) Who is of good moral character and temperate habits;
- (c) Who is in good physical and mental condition;
- (d) Who, as shown by certificate or affidavit, has completed the tenth grade, or has an equivalent education as determined by the extension division of the university of Wisconsin, or the Milwaukee board of school directors; and
- (e) Who attends a school teaching cosmetic art which has a certificate of registration from the state board of health."

Under rule 11, above quoted, application blanks for student permits and proofs of qualification are required to reach the board not later than the Monday following the last day of the enrollment period which would be a week after enrollments have commenced. So far as this rule is concerned, therefore, students attending classes before the dead line may receive credit for class attendance during that period.

Turning to the requirement of a student permit, it appears that the law nowhere states the effect to be given to such permit, but it cannot be presumed that the legislature intended it to be a useless document, especially in view of the qualifications necessary to get one. The problem is to

determine its function. It is considered that the purpose of the permit is to allow the holder to engage in student practice as required by sec. 159.02 (5) without being subject to prosecution for practicing cosmetic art without a license. That it is *not* a prerequisite to enrollment in a school and attendance at classes is shown by par. (e) of subsec. (8) above quoted, which requires that the student be *attending* a school in order to qualify for a permit. If one could not attend without a permit, no one could qualify and the law would be a nullity.

It follows that a student is entitled to credit for class attendance before she obtained her permit but since it would be illegal to do practice work without a permit, the board should not give credit for such work done before the permit was issued.

You point to the rule that apprentices are given no credit for time spent in a beauty parlor before their apprenticeship papers are made a matter of record. This is correct, but it is an analogy only to the practice or clinical work of students, not to their classroom or theory courses, since apprentices engaged solely in practice work while employed in beauty parlors. An apprentice does not require a permit to become enrolled in a vocational school course in beauty culture which teaches theory only.

In your second question you state that it has been found that some schools of cosmetology admit students at any time rather than on the first Monday and four days thereafter of the odd-numbered months as required by rule 11, and you inquire whether students so admitted are entitled to credit for attendance at classes. You state that your practice has been to give no credit for the hours put in by the student unless she matriculates and starts her work in the school as provided by that rule.

It is considered that your practice is correct. The requirement that students be admitted only on specified days in alternate months is for the protection of the students themselves to insure a systematic course of instruction beginning with fundamentals and progressing through gradually more advanced stages until the course is completed. It is perfectly apparent that no school can properly serve its students if it admits them helter-skelter at any and all

times. No student can justly complain if she is denied credit for attendance at courses which commenced before she entered school and which she was not prepared to assimilate because of having missed what went before. On the other hand, for the board to give credit in such cases would be to nullify the rule and sanction its violation.

Your third question is whether a student entering a school illegally under the conditions mentioned in your second question is guilty of practicing cosmetic art without a license.

It is considered that such a student would not be entitled to a student permit because sec. 159.02 (8) (e) certainly implies that the student's attendance at school is regular and legal. Where the student has been admitted in violation of rule 11 the board should deny her application for a student permit. If such student then engages in practice work without a permit, she will be subject to the penalties provided by sec. 159.15 for the reasons stated in the answer to your first question. Moreover, if it should appear that the school authorities misled the student into the belief that she might lawfully engage in practice work without such a permit, they themselves would probably be subject to penalty under sec. 159.16.

If any permits have been issued to students matriculated in violation of rule 11, it would appear that the board has authority to revoke them under sec. 159.14 (3) on the grounds stated in subsec. (2) par. (h). However, such a permit would probably not be void and would probably protect the student in doing practice work until such time as the permit is revoked.

WAP

Indigent, Insane, etc. — Poor Relief — Legal Settlement
— Food and shelter received at county or state tuberculosis sanatorium or camp at public expense by poor and indigent person constitutes pauper support within meaning of sec. 49.02, subsec. (4), Stats., and prevents such person from either gaining or losing legal settlement.

Opinion XXIX 395 modified in light of supreme court's decision in *Milwaukee County v. Oconto County*, (1940) 294 N. W. 11, 235 Wis. 601.

October 26, 1940.

DR. C. A. HARPER,
Board of Health.

On September 24, 1940,* this office rendered an opinion to you regarding the legal settlement of a resident of Milwaukee committed to the state tuberculosis camp as a state-at-large patient. On October 8, 1940, the supreme court decided the case of *Milwaukee County v. Oconto County*, (1940) 294 N. W. 11, 235 Wis. 601, which decision makes it necessary to revise our opinion in part, although the answer therein given to your question remains the same.

In our former opinion it was said that the receipt of medical aid at public expense does not constitute pauper support within the meaning of subsec. (4) of sec. 49.02, Stats. This was founded upon opinions reported in XXVII Op. Atty. Gen. 198, XXII 665, XVIII 379, and XIV 294, ruling that medical aid received at public expense at the Wisconsin general hospital is not pauper support. These opinions were not brought to the attention of the court in the *Milwaukee County* case, *supra*, nor are they necessarily inconsistent with the court's opinion, which held that if an inmate of a state or county tuberculosis sanatorium has already acquired the status of a poor and indigent person before entering the institution, then such person's support at the sanatorium is support as a pauper. It appeared that the husband of the patient had applied for and received pauper support shortly before the wife's application was made for admission to a county sanatorium as a county charge. Moreover, he had virtually no property and no means of supporting himself. The court held that under such circumstances

*Page 395 of this volume.

the care rendered to his wife clearly constituted pauper support and prevented his legal settlement from changing.

It therefore appears to be the rule that if a person is not a pauper in fact, then voluntary hospitalization received at public expense by himself or a member of his family does not constitute pauper support, but if he is in fact poor and indigent, such hospitalization does constitute pauper support (though it does not if he is confined involuntarily in an isolation hospital for the protection of the public). In other words, such hospitalization does not *create* a pauper status, but a pauper cannot *terminate* his status by entering a hospital at public expense. This is an application of the rule announced in *Rolling v. Antigo*, (1933) 211 Wis. 220.

In the cases involved in the opinions of this office relating to the Wisconsin general hospital, cited above, it did not appear that the persons involved were indigent. It has been held in Massachusetts, under a law similar to sec. 49.02, that, because a husband is liable for the support of his wife while she is in a lunatic asylum, her support in such an asylum at town expense constitutes pauper support to the husband. *Charlestown v. Groveland*, (1860) 81 Mass. (15 Gray) 15; *Woodward v. Worcester*, (1860) 81 Mass. (15 Gray) 19n; *Oakham v. Warwick*, (1866) 95 Mass. (13 Allen) 88. Apparently this would be true in Wisconsin only if it were shown that the husband was in fact poor and indigent and not merely that he could not stand the extra expense caused by hospitalization.

In your case it appeared that X had been in tuberculosis institutions at either county, state or private charitable expense for a period beginning December 4, 1935, and continuing with brief interruptions until the present. It seems probable that he had an actual indigent status during the time he spent at the state tuberculosis camp, and therefore the food and shelter received there constituted pauper support and prevented him from gaining a settlement during that time. Similarly, if he had had a settlement in Milwaukee at the same time he entered the state camp, his absence while at the camp, even though continued without interruption for a year, would not have caused loss of such settlement.

WAP

Banks and Banking — Building and Loan Associations — Insurance — Banking commission, as owner of properties of delinquent building and loan associations, acts as statutory receiver and liability for assessment on policies of mutual insurance companies of such properties is liability of particular building and loan association only.

Banking commission may insure properties of delinquent building and loan associations held by it in mutual insurance companies.

Members of banking commission may not be held personally liable for any assessments or contingent liabilities which might exist by reason of insuring properties of delinquent building and loan associations in mutual insurance companies.

Mutual insurance company issuing nonassessable policies pursuant to authority conferred by statute would be barred from asserting unconstitutionality of such statute. Statutes regulating insurance companies, classifying various types of insurance companies, and granting powers and imposing limitations thereon appropriate to each are generally held constitutional.

So-called standard mortgage clause grants option to mortgagee to pay premiums or assessments, and mortgagee is not bound to pay such premiums or assessments by such clause. Liability for premiums or assessments on part of mortgagee may be defined by express provisions of mortgage clause.

November 7, 1940.

ALLEN G. PFLUGRADT, *Chairman,*
Banking Commission.

You have requested our opinion as to certain questions arising in connection with the placing of insurance in mutual insurance companies on real property owned by the banking commission of Wisconsin as liquidator of delinquent building and loan associations.

You ask (1) whether, if the banking commission accepted policies in mutual insurance companies on properties owned by the commission as liquidator, the commission would be subjecting itself to assessments or to any contingent liability.

As the owner of properties of delinquent building and loan associations taken possession of pursuant to the provisions of sec. 215.33, Stats., the banking commission is acting merely as a statutory receiver. *Banking Commission v. Flanagan*, 233 Wis. 405, 414. Any liability, whether for assessments of mutual insurance companies or otherwise, incurred by the commission as such statutory receiver of a particular building and loan association would, of course, be a liability only of the estate of that particular association.

You ask (2) whether the banking commission, as owner of properties of delinquent building and loan associations, has authority to become a member of mutual insurance companies.

Subsec. (1) of sec. 201.17, Stats., relating to mutual insurance companies, provides as follows:

"Any mutual insurance company may issue policies to any public or private corporation, board or association in this state and elsewhere; and any public or private corporation, board or association of this state is authorized to make applications, enter into agreements for and hold policies in any mutual insurance company."

Under sec. 215.33, subsec. (2) par. (d), Stats., it is provided, among other things:

"Upon taking possession of the property and business of such building and loan association, the special deputy commissioner of banking is authorized to collect all moneys due to such building and loan association, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. * * *."

The taking of insurance for the protection of property owned by delinquent building and loan associations would appear, without question, to be an act "necessary to conserve its assets and business." That such insurance might be taken out in mutual insurance companies as well as stock companies, in view of the express provisions of the statutes quoted, can admit of no doubt.

You ask (3) whether members of the banking commission could be held personally liable for any assessments or contingent liability which might exist on account of their placing insurance in mutual companies.

This question is answered by the same considerations as the answer to your first question. As therein stated, the commission, in conducting the business and affairs of a building and loan association in liquidation, is merely a statutory receiver and liabilities incurred in connection with the administration of any particular delinquent building and loan association estate are liabilities of such estate only and not of the individual members of the banking commission.

You ask (4) whether the statutes now existing which permit the issuance of nonassessable policies by mutual insurance companies are constitutional.

The provisions of law relating to the issuance of nonassessable policies of mutual insurance companies are contained in sec. 201.07, Stats. Provisions of law permitting the issuance of nonassessable policies by mutual insurance companies upon certain terms and conditions, which have been modified from time to time, have been on the books for many years, the original enactment in this regard being ch. 101, Laws 1919. The answer to your question as to whether such statutes are constitutional would admit of a somewhat more definite answer if it were specified in your request what parties you may have in mind who might challenge the constitutionality of this law and the particular circumstances. It is generally held that a person who has acted under a statute and in pursuance of the authority conferred by it may not question its constitutionality. 12 C. J. 769. Thus, a mutual insurance company writing a policy pursuant to the authority conferred by sec. 201.07, Stats., would, under ordinary circumstances, be barred from asserting the unconstitutionality of this statute as against anyone seeking to enforce rights under the policy. Generally speaking, state statutes regulating insurance companies are sustained as constitutional, and it is held that such regulatory statutes may classify various types of insurance com-

panies and may grant powers and impose limitations thereon appropriate to each. 12 C. J. 1161, 1162; 32 C. J. 981, 982.

You ask (5) certain questions as to the effect of the so-called standard mortgage clause upon the rights of the banking commission as liquidator of delinquent building and loan associations where such association or the commission is mortgagee of property insured in mutual insurance companies. You quote, with particular emphasis on the italicized portions, the provisions of such standard mortgage clause as follows:

"Loss or damage, if any, under this policy shall be payable to _____, mortgagee (or trustee), as interest may appear and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceeding or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided, that, in case the mortgagor or owner shall neglect to pay any premiums due under this policy, the mortgagee (or trustee) shall on demand pay the same.*"

You ask whether assessments or dues which a mutual insurance company might assess against the property owner might under such a mortgage clause be deemed to be premiums and whether, if the property owner did not pay these assessments or dues, the banking commission, under the terms of such mortgage clause, could, as mortgagee, be held responsible for these assessments and dues, together with the original premium as stated in the policy.

As to whether or not dues or assessments might be considered as premiums within the meaning of such mortgage clause we believe that, in view of the subsequent considerations which we will discuss herein, the answer to this question will not be material. For the purpose of this opinion we will consider all dues, assessments and premiums as falling within the term "premiums" as used in the standard mortgage clause, although, of course, dues or assessments

might for many purposes not be regarded as premiums. There appears to be a conflict of authority as to whether a mortgagee is liable for the payment of premiums on a policy taken out by the mortgagor wherein it is provided that, in case the mortgagor defaults, the mortgagee shall pay the premiums. 3 Couch Cyc. of Ins. Law, sec. 608. In some jurisdictions it is held that such provisions of the so-called standard mortgage clause amount to an express covenant to pay on the part of the mortgagee, and in other jurisdictions it is held that the agreement to pay is a mere condition and is optional on the part of the mortgagee. The weight of authority appears to be in favor of the latter construction. See *Coykendall v. Blackmer*, 161 App. Div. 11, 146 N. Y. Supp. 631; 83 ALR 105; 56 ALR 679; 47 ALR 1126. The Wisconsin court in a recent case, while not passing directly on the question, has indicated clearly that it regards such a standard mortgage clause as not binding the mortgagee to pay premiums but merely that the mortgagee might, if he desired, pay such premiums at his option. *State Bank of Chilton v. Citizens Mut. F. Ins. Co.*, 214 Wis. 6. In discussing the standard mortgage clause, the court, among other things, said (p. 10) :

"A determination of the question raised requires us to analyze at least in part the standard fire policy. It is in form a contract between the owner and the insurance company, the terms of which are prescribed by statute. The mortgagee has an interest in the property. The owner had agreed in the mortgage to protect this interest by insurance, which agreement he carried out by procuring the policy in question. The mortgagee paid no part of the premium and entered into no obligation to pay it. If the mortgagor failed to pay the premium, the mortgagee could continue the policy by payment of the premium, but it did not agree to pay it. It seems clear, therefore, that the contract so far as the mortgagee is concerned is one for the benefit of a third party—in this case the plaintiff bank. * * *"

Should there be any doubt as to the effect of the standard mortgage clause any mortgagee may, of course, avoid such doubt by having inserted in the mortgage clause express provisions that the mortgagee shall not be liable for any premiums or assessments. In this regard we may note that

the state retirement fund has adopted for use in insurance policies covering property in which it is mortgagee a mortgage clause to this effect. There would seem to be no reason why the banking commission might not do the same thing, assuming the mutual insurance companies with which it proposes to deal are agreeable to inserting such clauses. There is nothing in the statutes which makes compulsory the use of any particular mortgage clause, it being provided in sec. 203.01., which provides for the standard fire policy, that in addition to certain provisions which the policy must contain as to mortgage interests "other provisions relating to the interests and obligations of such mortgagee, may be added hereto by agreement in writing." The banking commission can, of course, protect itself and the estates of delinquent building and loan associations over which it has possession by proper provisions in insurance policies issued by mutual insurance companies in this regard.

RHL

Public Officers — Sheriff — Upon sale of real estate levied upon pursuant to execution issued by court, real estate being bid in by judgment creditor and no sum of money being collected or paid over by sheriff, fees of sheriff are to be computed under subsec. (33) sec. 59.28, Stats., and not under subsec. (7), sec. 59.28.

November 7, 1940.

GEORGE M. ST. PETER,
District Attorney,
Fond du Lac, Wisconsin.

You have requested our opinion as to the amount of fees allowable to the sheriff in selling real estate under execution issued pursuant to a judgment rendered in the circuit court. In the situation which you describe the real estate was purchased by the judgment creditor for an amount over one thousand dollars but less than fifteen hundred dollars. The

question is whether subsec. (7) of sec. 59.28 of the statutes or subsec. (33) of sec. 59.28 applies.

From reading of subsec. (7) and subsec. (33) it is our opinion that subsec. (33) will apply.

Subsec. (7), from its wording, would appear to apply only in case the sheriff actually effects the collection of a sum of money on an execution. Where only a sale of real estate is involved and it is bid in by the judgment creditor, the sheriff has neither collected nor paid over any sum, so as to bring the transaction within the language of subsec. (7). What the sheriff has done would appear to be squarely within the language of subsec. (33), that is, "selling real estate under * * * judgment or order of court." Since the amount bid in the case which you describe exceeds one thousand dollars, the proper fee would be fifteen dollars plus items properly charged for traveling and publishing any advertisement of sale.

RHL

Public Health — Embalmers — Social Security Act — Old-age Assistance — Funeral Expenses — Sec. 156.14, Stats., does not control discretion vested in public officers nor discretion vested in director of county pension system under sec. 49.30 in those cases where burial of deceased person is to be made at county expense and following of desires and instructions received by such public officials conflict with public interests.

November 16, 1940.

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

In your letter you state:

"In an opinion concerning the selection of a funeral director by a pension director, rendered August 6, 1940 [XXIX Op. Atty. Gen. 344], to Mr. J. C. Davis, district attorney of Sawyer county, it was stated [p. 346] that 'the

director rather than the relatives of the deceased pensioner is the one to exercise discretion as to whom the amount allowed for funeral expenses shall be paid. This, of course, means that the director controls who shall act as the undertaker.'

"Since as a basis for the opinion the provisions of section 49.30, Stats., were quoted but no mention was made nor consideration apparently given to the provisions of section 156.14, the request is hereby made that the opinion above mentioned be amended to include consideration of the provisions of section 156.14 of the statutes."

Sec. 49.30, Stats., provides:

"On the death of a beneficiary such reasonable funeral expenses for burial shall be paid to such persons as the county judge may direct; provided, that these expenses do not exceed one hundred dollars and provided further that the estate of the deceased is insufficient to defray these expenses."

Sec. 156.14, Stats., provides:

"No public officer, employe or officer of any public institution, physician or surgeon shall send, or cause to be sent, to any funeral director, undertaker, mortician or embalmer, the corpse of any deceased person, without having first made due inquiry as to the desires of the next of kin, or any persons who may be chargeable with the funeral expenses of such deceased person, and if any such kin or person be found, his authority or direction shall be received as to the disposal of such corpse."

In your request you submit a brief of the Wisconsin Funeral Directors and Embalmers Association in which it is urged that sec. 156.14, Stats., is controlling and that the relatives or next of kin of the deceased have full freedom of choice in the selection of an undertaker or funeral director and that this choice controls over that of the administrative officer directing and administering the pension system in a county even though the funeral expenses are to be paid for by the county under sec. 49.30, Stats.

As we construe these two sections of the statutes, we do not think that they are in conflict. Quite apart from any question of burial of an old-age pensioner under sec. 49.30,

Stats., we do not believe that it was ever the intent of sec. 156.14, Stats., to deprive a county or other unit of government from making an advantageous contract with respect to burial of deceased persons in those cases where liability for burial rests upon a county or other unit of government. Sec. 156.14 does prevent arbitrary action upon the part of public officials. Corpses may not be buried by public officers, etc., "without having first made due inquiry as to the desires of the next of kin, or any persons who may be chargeable with the funeral expenses of such deceased person," if such persons can be found. Obviously, the "next of kin or any persons who may be chargeable with the funeral expenses of such deceased person" should have first choice in the matter and should be permitted to provide for such burial and pay for same when such is their desire and they are able to do so. Such an inquiry will result in a determination as to whether the body is or is not to be buried at county expense. If the inquiry results in a determination that such persons desire to and are able to provide for the burial at their own expense, or by other than county or other unit of government expense, no public official would be justified in overriding such wishes and directions. Such would be a violation of sec. 156.14, Stats.

If, on the other hand, such inquiry results in a determination that the burial must be and is to be at county or other unit of government expense, the desires or instructions of such persons, while they should be given the utmost consideration by the public officials involved, need not be followed if they conflict with the public interest or with a contract that the unit of government may have with a particular undertaker such as has been heretofore referred to herein.

With respect to relief cases, many counties have a working agreement with all undertakers in the county that a certain kind of burial will be provided and by which all undertakers agree to charge the same price for such a burial. Where there is such a working arrangement with the undertakers, obviously the desires of the next of kin or person chargeable with the funeral expenses should prevail. On the other hand, if the county has a contract with one particular undertaker at an advantageous price for the burial

of all relief cases for which the county is liable, if the burial is to be made at county expense, the terms of that contract will necessarily prevail over the desires or instructions of such persons if they are unable to provide for and pay for the burial.

If the burial of a pensioner is to be paid for by the county under sec. 49.30, the discretion and the duty vested in the county judge or county pension director (see sec. 49.51 (5), Stats.) is not different from the discretion and duty of the public official of a county or other unit of government with respect to burial of relief cases as above discussed.

Sec. 49.30 does give the pension director considerable discretion. The statute does not say that the funeral expenses of a beneficiary shall be paid to such person as the next of kin or any person who may be chargeable with the funeral expenses of such deceased person may desire and in such amount as the county judge shall direct, but rather the statute says "on the death of a beneficiary such reasonable funeral expenses for burial shall be paid *to such persons as the county judge may direct.*"

The administrator of the county pension system may not ignore the provisions of sec. 156.14, Stats. The purpose and scope of that section has already been analyzed in this opinion. The desires and instructions of "the next of kin or any persons who may be chargeable with the funeral expenses of such deceased person" must prevail in all cases where such persons desire and are able to provide and pay for the burial. In those cases where such persons, while they may desire to do so, are not able to provide and pay for the burial, their wishes and instructions should be given the utmost consideration and should prevail up to a point where those desires and instructions conflict with the public interest. Such desires and instructions will conflict with the public interest when the following of same conflicts with any contract that the administrator may have with an undertaker in relation to such cases or where the cost to the county will be in excess of that which the administrative officer usually and customarily allows for such burials.

NSB

Public Health — Beauty Parlors — Massage — Licensed beauty parlor operator using electrical device which is designed for purpose of stimulating muscles and thereby reducing excess flesh is not required to have massage license under sec. 147.185, Stats., since sec. 159.01, subsec. (1), is controlling.

November 16, 1940.

H. W. SHUTTER, M. D., *Secretary,*
Board of Medical Examiners.

You inform us that a number of beauty parlor operators desire to install electrical massage machines for cosmetic purposes and that no hand massage would be involved in the operation of such devices.

We have obtained and studied various literature relating to these devices. The manufacturers state that they are not intended for the treatment of any disease or deformity, and it is assumed that the operator will be dealing with patrons who are normal and healthy. Strictly speaking, the machines do not massage at all, but apply electricity through pads to portions of the body having excess flesh which is supposed to be reduced by electrical impulses contracting and relaxing the muscles in the area where the pads are applied. None of these devices, so far as we are informed, is advertised as, or claimed to be massage devices.

To obtain a massage license under sec. 147.185, the applicant must, in addition to an examination in massage, pass a satisfactory examination in physiology, descriptive anatomy, pathology and hygiene. This indicates that a masseur must not only be familiar with the art of massage, but should know when and where it should be used. These factors, of course, would apply as much in mechanical massage as they would in hand massage, and were the devices in question actually mechanical massage machines, we would be inclined to rule that the operators thereof must, nevertheless, be licensed under sec. 147.185.

Sec. 159.01 (1), Stats., provides:

“ ‘Cosmetic art’ is the systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands, the use of cosmetic preparations and

antiseptics; manicuring, bobbing, dyeing, cleansing, arranging, waving, curling and marcelling of the hair and the use of electricity for stimulating and for the removal of superfluous hair."

Under this section the question arises as to whether the use of the words, "use of electricity for stimulating" are restricted in any way by the words following — "and for the removal of superfluous hair." This doubt is resolved, however, by an examination of ch. 68, Laws 1925, by which cosmetic art was first defined in sec. 159.01 (1) to include among other things, the "use of electricity for stimulating and for the removal of superfluous hair *with the electric needle or by high frequency.*"

It is apparent from the italicized language above that the words "use of electricity for stimulating" are in no way restricted by the words that follow. The italicized words were dropped by ch. 150, Laws 1927, although this in no way changes the application or meaning of the words "use of electricity for stimulating," the sole effect of the 1927 amendment being to place within the definition of cosmetic art the removal of superfluous hair by whatever means employed to accomplish that end.

In XXVI Op. Atty. Gen. 61, it was ruled that sec. 147.185 was applicable to practice of massage for therapeutic purposes, but did not extend to athletic rubs given by clubs in connection with athletics or physical exercise. In XXIX Op. Atty. Gen. 297, an opinion to your board, it was ruled that a graduate registered nurse desiring to open a massage parlor exclusively for women for reducing purposes only, is not exempt from the license requirements of sec. 147.185.

However, because of the fact that the devices in the present instance do not massage at all, as we understand it, but merely "stimulate" muscles by "use of electricity" we are of the opinion that sec. 147.185 has no application and that the use of such devices comes within the purview of sec. 159.01 (1), Stats.

WHR

Charitable and Penal Institutions — Feeble-Minded — Indigent, Insane, etc. — Hospitals for Insane — Superintendents of county insane asylums have no authority under sec. 51.13, subsec. (2), Stats., to release mentally defective inmates transferred to such asylums by department of public welfare pursuant to sec. 52.03 (2). Such persons can be released only by superintendents of state institutions for mental defectives with consent of department of public welfare, under sec. 52.03 (3), after inmate has been retransferred from county asylum to such state institution.

Persons transferred to hospital for insane pursuant to sec. 52.03 (4), after having been first erroneously committed to state institution for mental defectives, may be released on parole from such hospital for insane pursuant to sec. 51.13 (1), same as if originally committed to such hospital.

November 22, 1940.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You inquire under what provisions of law and by what method a mentally defective person who has been committed to the northern Wisconsin colony and training school or the southern Wisconsin colony and training school, and who has been transferred by your department to a county asylum for the chronic insane under sec. 52.03, subsec. (2), Stats., may be given a temporary or final discharge. This question requires a consideration of the following statutes:

Sec. 51.13 (2) and (3):

“(2) The superintendent of any county asylum may, upon the written recommendation of the visiting physician thereof, allow any of its inmates to go therefrom on leave of absence for such time and under such conditions as such physician may direct.

“(3) Upon the expiration of two years from the time of granting such parole or such leave of absence the authority of the superintendent to require the return to the hospital or asylum of the person paroled or granted leave shall end, and the presumption of insanity against such person because of the original adjudication that he was insane shall

cease, and until a new adjudication to the contrary, he shall be presumed sane the same as though his sanity had been established by a judicial determination."

Sec. 52.03 (1), (2) and (3), with reference to the two institutions above named, provides:

"(1) The board of control shall make all necessary regulations to govern the temporary or final discharge of all inmates in said institutions.

"(2) Whenever any person shall be committed to either of said institutions, and such institution shall be filled to its capacity, the board of control may transfer such person to the other institution, or, if both institutions are filled, to a county asylum for the chronic insane.

"(3) The superintendent of each institution, with the approval of the board of control, shall have power to discharge inmates, but no epileptic inmate shall at any time thereafter be sent or returned to any county home."

You state that your department has assumed that sec. 51.13, relating to the parole and discharge of insane patients committed to state and county insane hospitals and asylums, does not apply in the case of mentally defective persons committed under the provisions of ch. 52, Stats. This construction is clearly right, under the following provisions of sec. 52.02 (1):

"Except that the rate for the maintenance, care and treatment shall be computed at the rate of four dollars and eighty cents per week, sections 51.01 to 51.11, inclusive, 51.14, 51.16, 51.17 and 51.19 of the statutes shall govern the examination, commitment and custody of mentally deficient and epileptic persons; but commitments of such persons shall be to one of the institutions named in section 52.01. * * *"

Under the rule that the expression of one is the exclusion of the other, the omission of sec. 51.13 in the enumeration of statutes made applicable to ch. 52 by reference is a clear indication that the legislature did not intend that section to apply. It is therefore clear that the county asylum superintendents do not have authority to grant leaves of absence (which, after two years, would ripen into absolute discharges) in the case of mentally deficient persons trans-

ferred to their institutions by your department under sec. 52.03 (2). This inference is reinforced by the clearly expressed legislative intent to vest in your department the absolute control over the discharge of mental defectives, by sec. 52.03 (1) and (3). (The functions of the board of control were transferred to the department of public welfare by sec. 58.36 (5), Stats.)

How, then, are such persons to be released from custody?

Subsec. (1) of sec. 52.03 vests in your department authority to "make all necessary regulations" governing discharges of inmates in the *state* institutions, but is silent as to inmates of county asylums. It might be considered that persons transferred to county asylums under sec. 52.03 (2) remain constructively inmates of the state colonies, but it is unnecessary to consider that possibility, because subsec. (1) would not in any event authorize the department to grant authority to the superintendents of county asylums to release such inmates. Subsec. (1) is a grant of rule-making power under which the department may determine what qualifications must be met by inmates in order to be eligible for discharge and what the terms and conditions of such discharges shall be, but it does not authorize the department to delegate authority to grant discharges. The legislature itself has exclusively delegated that authority, by subsec. (3), to the superintendents of the state colonies, acting with the approval of the department. In order to exercise this authority intelligently, it may be inferred, the superintendent must have the inmate under his observation, which is impossible if the inmate is in a county asylum.

It is therefore concluded that if a county asylum superintendent believes that a mentally deficient inmate is eligible for discharge, he should request the department to transfer such inmate to one of the state colonies. Then, if the superintendent of the state colony is satisfied, after a suitable period of observation, as to the propriety of discharging the patient, he may do so with the consent of the department pursuant to sec. 52.03 (3).

You also inquire as to the method of release of persons committed to state insane hospitals pursuant to subsec. (4) of sec. 52.03, which reads as follows:

"In case any person shall be sent to either of said institutions through mistake in the diagnosis of his mental condition or disease or from any other cause, to be determined by the board of control acting as a commission in lunacy, such person if insane shall be transferred to a state hospital for the insane, or if a resident of Milwaukee county, to the Milwaukee hospital for the insane; and if found neither insane or mentally deficient such person shall be returned to the county from which committed. In all such cases of transfer or return the expenses of such shall be borne by the county of commitment. All such charges shall be adjusted as provided in section 46.10."

It seems clear that such persons cease to be subject to ch. 52 after a determination by the department that they were erroneously committed to an institution for the mentally deficient and should have been committed to an insane hospital in the first place. No reason is perceived why such persons would not be subject to parole by the superintendent of the insane hospital under sec. 51.13 (1), the same as though originally committed to such hospital.

WAP

Prisons — Prisoners — "Good Time" — Warden of state prison, with consent of department of public welfare, may deprive prisoner of all "good time" theretofore earned as punishment for his first or second offense as well as for third and subsequent offenses, under last clause of sec. 53.11, subsec. (2), Stats., where in his judgment facts warrant such action.

Whether violation of parole condition by convict released on parole is violation of "any regulation of the prison" under sec. 53.11 (2), Stats., not considered, since such parole violation does come within phrase "refuses or neglects faithfully to perform all the duties required of him" as used in that section. Hence paroled prisoner may be deprived of good time theretofore earned, as punishment for such violation of his parole, at least if his parole is thereupon revoked.

November 22, 1940.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You have requested an opinion as to the construction of sec. 53.11, subsec. (2), Stats., which provides as follows:

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

You state that it has long been the practice of your department and its predecessor, the board of control, to deprive parole violators of all good time formerly earned, by authority of the last clause of the foregoing statute. An attorney representing an inmate now questions whether that procedure is authorized by the statute and raises the following questions, to which you request a reply.

"1. May the warden, with the consent of the board of control, under the last clause in section 53.11 (2) of the Wisconsin statutes, cancel all or any part of the 'good time' of a prisoner for the first or second offense for which 'good time' has been ordered forfeited?

"2. Is a violation of a parole condition by a prisoner on parole, on the basis of which parole shall be revoked, a violation of 'any regulation of the prison,' as defined in section 53.11 (2) ?

"3. Does the phrase 'refuses or neglects faithfully to perform all the duties required of him,' as used in section 53.11 (2), include the duties imposed on a prisoner on parole?

"4. If question 2 is answered 'No' and question 3 is answered 'Yes', does an act of misconduct by a parolee while on parole which does not constitute a violation of a specific duty imposed on said parolee by the conditions of his parole, constitute refusing or neglecting 'faithfully to perform all the duties required of him,' as defined in said section?"

The first question is answered in the affirmative. The statute says, "in addition thereto." In addition to what? Obviously, in addition to the forfeitures prescribed for the first, second, third and all subsequent offenses. There is nothing in the language of the statute which indicates any intention to limit the effect of the last clause to offenses subsequent to the second, nor is any reason perceived why the legislature should so limit it. The first or second offense may well be so serious as to warrant a more severe penalty than the loss of only five or ten days of good time. Prisoners, it may be assumed, do not invariably confine their first and second offenses to minor infractions.

In view of the answer herein made to the third question, it is unnecessary to answer the second. Since a violation of the parole condition comes within the portion of the statute quoted in the third question, it becomes academic whether it is also a violation of "any regulation of the prison."

The third question is answered in the affirmative, for two reasons: First, because paroled convicts remain in the custody of and subject to regulations made by your department, under sec. 57.06, and *earn* good time while on parole. XXV Op. Atty. Gen. 154. Second, because this office has re-

peatedly so ruled (VII Op. Atty. Gen. 432; XVI Op. Atty. Gen. 502; XXIX Op. Atty. Gen. 290) and the legislature has accepted such rulings, and the administrative practice of the board of control and your department, as a correct interpretation of the legislative intent, by not amending the law. See *Union F. H. S. Dist. v. Union F. H. S. Dist.*, (1934) 216 Wis. 102, 256 N. W. 788.

It is difficult to answer the fourth question because no situation could possibly arise to which it would apply. Any act of the parolee which could be termed "misconduct" would be, *ipso facto*, a violation of the regulations of your department which constitute the conditions of his parole. In addition to numerous specific requirements and prohibitions, a parolee is required, in general to live a law-abiding life. Moreover, your department and the warden do not deprive parolees of good time previously earned unless the parole is at the same time revoked and the parolee returned to prison—that is, if the parolee commits a minor violation which is not regarded as sufficiently serious to warrant his return to prison, he is not deprived of good time because of it. Whether the power to do so exists is, therefore, an academic question which need not be answered at this time. Obviously, if the "misconduct" is sufficient to cause revocation of the parole, it is sufficient to cause forfeiture of good time theretofore earned, for the reasons stated above in the answer to the third question.

WAP

Criminal Law — Trials — Indigent Defendants — Attorney appointed by circuit court to represent indigent defendant charged with offense is entitled to be paid fee for appearance in county court upon defendant's arraignment, plea of guilty and sentence pursuant to secs. 357.20 to 357.23, Stats. County court has no authority to allow such fee, but application must be made to appointing court, under sec. 357.26.

County court has authority and duty under sec. 357.26, Stats., and art. I, sec. 7, Const., to appoint counsel to defend indigent defendant charged with offense and brought before such court for arraignment pursuant to secs. 357.20 to 357.23, Stats., and to allow fees of such counsel if such appointment of counsel is desired by defendant.

November 22, 1940.

LEWIS J. CHARLES,

District Attorney,

Medford, Wisconsin.

You state that counsel was appointed by your circuit court to represent M. H., who was charged with an offense pending before that court. Thereafter the defendant requested that she be taken before the county court for arraignment and sentence under secs. 357.20 to 357.23, Stats. The county court of Taylor county is a court of record but has no civil or criminal jurisdiction except under the aforementioned statutes. You inquire whether her counsel may be allowed and paid a fee for appearing before the county court, entering a plea of guilty and arguing the matter of the extent of punishment, etc. You further state that in your opinion the county court may not allow any attorney fees, but counsel must apply to the circuit court, which appointed him.

You also state that E. L. was charged with an offense and "pleaded guilty" before the examining magistrate. In legal effect this amounted only to a waiver of preliminary examination, not a true plea of guilty. (See XXIX Op. Atty. Gen. 299, 301.) We gather that he was then bound over to the circuit court for trial but requested arraignment before the

county court under the aforementioned statutes. The question has arisen whether the county court has authority to appoint counsel to represent her upon her arraignment and plea of guilty in that court. You do not state whether the appointment is to be made before or after acceptance and entry of the plea.

These questions require an examination of the statutes involved. Sec. 357.26 provides, so far as material here, as follows:

"The courts of record may appoint counsel to defend any person charged with any offense before such courts, if the accused is destitute of means to employ counsel, and such appointment shall be in time to enable counsel to attend at the taking of any deposition for which leave is granted. The county in which such criminal action or proceeding shall be pending shall pay such counselor for his services and expenses such sum as the court making the appointment shall, by an order to be entered in its minutes, certify to be a reasonable compensation, but not to exceed twenty-five dollars per day for each day actually occupied in such trial or proceeding, 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, and, in addition thereto, the court may allow him ten dollars per day and traveling expenses for attendance at the taking of depositions. Such compensation to counsel for indigent persons shall be paid by the county treasurer upon presentation to him of the certificate of the clerk of the said court therefor. * * *

It will be seen at once that the county court has no jurisdiction to order payment of any fees to counsel appointed to represent M. H. Only "the court making the appointment" has jurisdiction to certify the fee. You are therefore correct in your conclusion that counsel must apply to the circuit court.

The statutory provisions for arraignment and sentence before the county courts are intended to serve two purposes: (1) enabling a defendant who desires to plead guilty to have an immediate trial and commence serving his sentence without waiting for the next term of the court having trial jurisdiction and (2) enabling a defendant who desires to plead not guilty to force the district attorney to file an information before the term of the court having trial juris-

diction. But the statutes carefully preserve all his rights in such a proceeding and it is considered that he is entitled to appear by counsel and to have counsel appointed for him for that purpose if he is indigent.

A defendant who desires immediate arraignment in the court having trial jurisdiction is required by sec. 357.25, Stats., to state in writing "that he desires to plead guilty * * *." No such requirement is made by sec. 357.20 in the case of one who desires immediate arraignment in the county court. Under that section the defendant may, in writing, request arraignment and the district attorney is then required to file an information in the office of the clerk of the court having trial jurisdiction and deliver a copy to the prisoner. Under sec. 357.21 it becomes the duty of the county judge, after receipt of the prisoner's request, to make an order fixing the time and place of the arraignment, which the sheriff shall serve "upon the district attorney, *the prisoner's counsel, if he have any,*" and if the prisoner is a minor, on his nearest relative known to the sheriff.

Sec. 357.22 provides as follows:

"At the time fixed for such arraignment the sheriff or jailer shall produce the prisoner before the county judge at the usual court room of the county court. It shall be the duty of the sheriff, district attorney and clerk of the court having trial jurisdiction to attend upon such arraignment. The clerk shall act as clerk of the county court in the proceeding and shall exhibit the information and the evidence taken before the examining magistrate, if such examination has been had, to the county judge, who shall examine the same. If preliminary examination has been waived by the prisoner the county judge shall inquire into the nature of the case; and may examine witnesses, if necessary, to enable him to judge of the proper amount of punishment to be inflicted. The county judge shall cause the proof to be filed with the clerk of the proper service of such request and his order as herein required. The prisoner shall then, in open court, be arraigned. The county judge or district attorney shall fully explain to him the exact nature of the offense charged in the information and the penalty provided therefor by law."

Sec. 357.23 provides that if after such explanation the prisoner refuses to plead or pleads not guilty that fact shall be entered in the minutes and the prisoner remanded to

await trial. If he pleads guilty the county judge shall receive the plea and pass sentence and judgment thereon. A record of the proceedings shall be kept in the county court and also by the clerk of the court having trial jurisdiction. Sec. 357.24 provides for certification and execution of the sentence the same as though passed by a court having trial jurisdiction.

It will be observed that the foregoing procedure is no mere summary formality. If preliminary hearing has been waived, the county court must inquire into the nature of the case and may examine witnesses, before the arraignment. Defendant must be fully advised of the nature of the offense and the penalty provided. Defense counsel can be of great assistance to the prisoner in the following respects, among others: (1) determining whether the facts warrant a plea of guilty; (2) determining what degree of offense has been committed, if there are degrees; (3) cross-examining witnesses called by the court under sec. 357.22; (4) urging matters to be taken into consideration in fixing the sentence or placing the defendant on probation; and (5) determining whether the sentence is according to law or whether a motion should be made to correct it, or a writ of error taken. It is clearly incorrect to say that even a defendant who intends to plead guilty has no need for an attorney.

It is apparent that the requirement that "the county judge or district attorney shall fully explain to him the exact nature of the offense charged in the information and the penalty provided therefor by law" (sec. 357.22) is no substitute for the defendant's right to be represented by counsel. The county judge does not have the opportunity to investigate the facts and the law which is necessary to put him in a position to advise the defendant, and the district attorney's interest in the case is adverse to the defendant's. Neither sustains the attorney-client relationship with the defendant which would enable the latter to make confidential disclosures.

The supreme court recently stated as follows, in *La Fave v. State*, (1940) 233 Wis. 432, 440-441.

"It is the common practice in the circuit courts of the state, and in trial courts of criminal jurisdiction elsewhere, so far as we are advised, to inquire of a defendant not rep-

resented by counsel on arraignment upon felonies before accepting a plea of guilty, whether he has had advice of counsel, and if he has not, to delay entry of the plea until he has had the opportunity to secure it if he so desires. Non-conformance to such practice does not necessarily constitute error, but it is a salutary and commendable practice. Conformance to it in the instant case would perhaps have avoided the error in the proceedings after imposition of the sentence."

Even after the plea of guilty has been entered and accepted it is not too late for counsel to assist the defendant. In addition to points (4) and (5), above, counsel may successfully move for leave to withdraw the plea and for a new trial. *La Fave v. State*, (1940) 233 Wis. 432.

The defendant has a constitutional right "to be heard by himself and counsel." Wis. Const., art. I, sec. 7. This right has been held to extend to having counsel "present to protect his rights at every stage of the case." *Smith v. The State*, (1881) 51 Wis. 615, 622. If the defendant is too poor to secure counsel, it is the duty of the court to appoint a member of the bar for that purpose and the county is liable for his fees, even in the absence of a statute to that effect. *Carpenter and another v. County of Dane*, (1859) 9 Wis. 274. It is therefore clear that sec. 357.26, Stats., does not confer the right to appointment of counsel, but merely provides the machinery for the exercise of that right and limits the fees. It should be construed as broadly as the constitutional provision which it implements. Cf. *John v. Municipal Court of Milwaukee County*, (1936) 220 Wis. 334, 337.

It is therefore clear that counsel for M. H. is entitled to an allowance of not in excess of twenty-five dollars per day for attendance before the county court, in addition to an allowance for work done in preparing the case, the same to be allowed by order of the circuit court, which appointed him.

It is also clear that the county court, being a court of record, has the power and the duty, after the defendant's request under sec. 357.20 for arraignment, to appoint counsel to represent E. L. either before or after the entry of a plea

of guilty, upon his request and a showing of indigency. The county will then be liable for the attorney's fees under sec. 357.26, Stats.

It may also be added that failure to appoint counsel in a felony case upon motion of the defendant and a proper showing of indigency *may* be a denial of due process of law under the Fourteenth Amendment to the federal constitution. See: *Powell v. Alabama*, (1932) 287 U. S. 45, 71.
WAP

Public Health — County Nurse — Question as to whether county nurse employed under provisions of sec. 141.06, Stats., is entitled to traveling and other expenses in addition to salary is to be determined by terms of contract which county makes with such nurse in any particular case.

November 23, 1940.

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

You request our opinion relative to sec. 141.06, subsec. (3), Stats., which provides as follows:

"The county board shall fix the salary of the county nurse and make necessary appropriations to carry out the provisions of subsection (1); provided, that the county board may at any time discontinue the services of the county nurse at the expiration of her contract."

You ask whether under this section a county nurse is entitled to traveling expenses, including meals and mileage, while attending to the duties outlined in subsec. (1) of sec. 141.06. Since there appear to be no other provisions in the statutes relating to the compensation of county nurses than those contained in sec. 141.06, we believe that the question as to whether traveling and other expenses of a county

nurse are to be reimbursed in addition to salary would depend upon the particular arrangement made by the county with such nurse in any particular case.

A discussion of the construction of contracts with reference to the question of whether an employer is bound to reimburse an employee for expenses incurred in the performance of the employee's duties is found at 39 C. J. 161. The authorities indicate that the basic problem is to determine what the particular contract calls for.

Under the statutes here in question it would seem that the county board has considerable latitude as to the nature of contracts for the employment of county nurses. Under some circumstances the board might feel that some compensation in addition to the salary provided was necessary, and in other circumstances it might not. The answer to your question can only be determined by reference to the contract in the particular case and the facts and circumstances which would govern its construction.

RHL

Industry Regulation — Architects — Architect or professional engineer having become registered under sec. 101.31, Stats., has, under provisions of par. (g), subsec. (9) of said sec. 101.31, right to renew such registration upon lapse by payment of registration fee and prescribed penalty without making new application for registration.

December 5, 1940.

C. A. WILLSON, *Acting Secretary,*
Wisconsin Registration Board of Architects
and Professional Engineers.

You ask our opinion as to whether an architect or engineer whose registration has lapsed for several years may renew the registration by paying the required fee and penalty or whether such architect or engineer must be regarded as a new applicant for registration as an architect or professional engineer.

Your question is answered by reference to sec. 101.31, subsec. (9), par. (g) of the statutes. Par. (g) of subsec. (9) of sec. 101.31 was enacted by ch. 486, Laws 1931, and became effective July 11, 1931. The paragraph expressly provides that the failure on the part of any registrant to renew his certificate every second year in the month of July as required shall not deprive such person of the right of renewal, but the fee to be paid for the renewal of a certificate after the month of July shall be increased ten per cent for each month or fraction of a month that payment of renewal is delayed, provided, however, that the maximum fee for delayed renewal shall not exceed twice the normal fee. Par. (g) further provides that architects registered prior to the effective date of the present registration law (July 11, 1931) shall be required to renew their registration on or before July 31 of the second year following the passage of the act.

In the light of the foregoing, it is clear that any architect or professional engineer who has once become registered under the law as enacted in 1931, either by renewal on or before July 31, 1933, of a registration existing prior to the passage of the 1931 law, or by having made application and

having been registered subsequent to the passage of the 1931 law, has a right at any time thereafter upon the lapse of such registration to have such registration renewed by the payment of the renewal fee and penalty provided without making a new application.

RHL

Counties — County Board — Taxation — Tax Sales —
Resolution of county board which purports to authorize county treasurer to collect real estate taxes for years up to and including year 1936 less penalty, interest and other charges from date of enactment of resolution (November 20, 1940) to June 1, 1941, is void.

Sec. 75.01 (1m), Stats., does not authorize such resolution for reasons assigned in XXIII Op. Atty. Gen. 529 and XXVII Op. Atty. Gen. 749.

Sec. 74.205, Stats., does not authorize such resolution for reasons assigned in XXVIII Op. Atty. Gen. 113.

December 7, 1940.

EARL F. KILEEN,

District Attorney,

Wautoma, Wisconsin.

You have submitted to us a copy of Resolution No. 33 enacted by the county board of supervisors of Waushara county on November 20, 1940, which said resolution reads as follows:

"BE IT RESOLVED, by the county board of Waushara county that the county treasurer be, and is hereby authorized to collect real estate taxes for the years up to and including the year 1936 less penalty, interest and other charges, *from the date of enactment of this resolution to June 1st, 1941, except on certificates outstanding:*

"BE IT FURTHER RESOLVED, that all real estate taxes, up to and including the year 1936 that remain unpaid on June 1st 1941, become subject to the regular *penalty interest and other charges as required by the 1939 statutes.*"

You also submit a copy of an opinion dated November 23, 1940, addressed to W. B. Kent, county treasurer, in which opinion you conclude that the resolution was attempted to be drawn pursuant to sec. 75.01, subsec. (1m), Stats., and that it is invalid, for the reasons assigned in XXIII Op. Atty. Gen. 529 and XXVII Op. Atty. Gen. 749. You request our opinion as to the validity of said resolution.

We agree with the conclusion which you reached in your opinion. If the resolution is attempted to be drawn under authority conferred by sec. 75.01 (1m), Stats., it is void for the reasons assigned in XXIII Op. Atty. Gen. 529 and XXVII Op. Atty. Gen. 749.

Further, sec. 74.205 would not authorize such a resolution for the reasons assigned in XXVIII Op. Atty. Gen. 113. We know of no statutory provision which would authorize the resolution in question.

NSB

Bridges and Highways — Public Lands — State trust lands may not be taken for highway purposes without compensation. Under sec. 32.03, subsec. (1), Stats., general power of condemnation does not extend to state or municipally owned property.

December 12, 1940.

Highway Commission.

Attention Wm. E. O'Brien, *Chairman*.

You have called our attention to sec. 24.39, Stats., and inquire whether it is necessary under this section for the county highway committee on behalf of the state to compensate the state land commission or the conservation commission for lands needed for highway purposes.

Sec. 24.39, subsec. (1), reads:

"The commissioners of the public lands are empowered to grant leases of parts or parcels of any public lands except

state park lands and state forest lands; to grant easements, leases to enter upon any of said lands to flow the same or to prospect for and to dig and remove therefrom ore, minerals and other deposits, and to sell therefrom such timber as the commissioners shall find necessary to prevent future loss or damage. Such easements, leases, licenses and sales shall be made only for a full and fair consideration paid or to be paid to the state, the amount and terms whereof shall be fixed by said commission, and such easements, leases, licenses and sales shall conform to the requirements so far as applicable, prescribed by chapter 26 of the statutes for the exercise by the conservation commission of similar powers affecting state park lands and state forest lands."

In the first place it is important to determine just what state owned lands are governed by the foregoing provisions. State park lands and state forest lands are specifically excepted. "Public lands" for the purposes of ch. 24 are defined by sec. 24.01, and we will not take the space here to set forth the various lands so defined, but merely wish to point out that the state owns many lands other than those defined in sec. 24.01, but, for purposes of this opinion, our remarks in so far as said lands are concerned will be directed primarily to the lands defined in sec. 24.01 and as further limited by sec. 24.39, above quoted.

The importance of the distinction between lands owned by the state for its actual use and the lands which it owns in trust for school purposes, as are most of the lands referred to in ch. 24, will become apparent in our answers to the questions which you have asked.

In connection with your first question mentioned above you point out that in the case of state trunk highways the payment for such right of way, even though negotiated for by the county, would in the final analysis be subject to the approval of the state highway commission and be paid for with state highway funds under the jurisdiction of the state highway commission. Our attention is also directed to two opinions of the attorney general rendered in 1921, X Op. Atty. Gen. 744 and X Op. Atty. Gen. 995.

In the first of these opinions it was ruled that town supervisors might lay out highways over vacant state lands and that the commissioners of public lands had no voice in the matter. In the second opinion it was held that lands occu-

pied and owned by the state may be taken for necessary relocation of trunk line highways; that it was doubtful that compensation should be made for such taking and that condemnation was necessary, since the officers in control of such lands had no authority to bargain for the sale thereof. The lands involved in the latter opinion were under the jurisdiction of the board of control and used in connection with a school for the deaf.

Thus the first of these opinions deals with state trust fund lands and the second with lands owned by the state in its governmental capacity and used for one of the purposes of state government. However, no attempt was made in these opinions to distinguish between the two types of ownership, and the distinction is important from the standpoint of the necessity for compensation. It seems clear that as to state owned lands which are not trust fund lands, the legislature might, in its discretion, provide for the transfer of the use of such land from one state department to another without any compensation whatsoever. But as to trust fund lands, the legislature would be powerless to provide that they might be taken without compensation even for public purposes. These lands, and the trust funds of which they are a part, in the words of Justice Marshall "are high above the competency of the legislature to destructively assault them." *State ex rel. Owen v. Donald*, 160 Wis. 21, 68. The legislature could not set such lands, or any part of them, apart for a state park, and neither could it withhold them from sale. *State ex rel. Sweet v. Cunningham*, 88 Wis. 81. These decisions are based upon the fact that provision for the administration and use of the income from such lands is made in the Wisconsin constitution which, of course, is binding on the legislature as it is on all other branches of the government.

Thus we are forced to disagree with X Op. Atty. Gen. 744, to the extent that it is intimated therein that state trust fund lands may be taken for highway purposes without compensation, although we agree fully with the general holding of the opinion to the effect that town supervisors may lay out highways over such vacant lands. Moreover, the intimation in X Op. Atty. Gen. 744 that the legislature intended that trust fund lands could be taken for highway

purposes without compensation, was dispelled in 1925 by the passage of ch. 159, which amended sec. 24.39 (1) so as to authorize the commissioners of public lands, among other things, to grant easements, but "only for a full and fair consideration."

Hence such commissioners are now specifically authorized to grant easements over trust fund lands for highway or other purposes, but only upon full and fair consideration. In this connection we also call attention to sec. 24.09 (1), which provides in part:

"All public lands that have been heretofore appraised or appraised pursuant to section 24.08, shall, from time to time in the discretion of said commissioners, be offered for sale at public auction, *except that lands required for state use may be sold to other state departments, boards or commissions at the appraised value.* * * *"

It is immaterial that the state is in fact furnishing the consideration through state highway funds. The lands were given to the state in trust by the federal government for certain purposes, viz., that such lands were to be sold and the income devoted to education. There is no authority on the part of the state to divert the lands to other purposes without compensating the fund to which they belong and the legislature, by sec. 24.39 and sec. 24.09 (1), referred to above, has specifically provided that such lands shall be paid for even though purchased for state use by other state departments.

Secondly you inquire whether condemnation proceedings may be resorted to if for any reason a dispute arises as to the "full and fair consideration" to be paid.

As we understand it, there are no such irreconcilable disputes now pending and there never have been. A matter of fact there has always been a wholehearted observance by all parties of the mandate contained in sec. 14.65 (1) to the effect that "The several state officers, commissions and boards shall co-operate in the performance and execution of state work * * *."

Sec. 24.08 makes provision for appraisal of trust fund lands, and, as previously pointed out, sec. 24.09 (1) pro-

vides that where such lands are required for state use they may be sold at the appraised value. If this figure is followed there should be no occasion for any irreconcilable conflict in the acquisition of such lands and under the circumstances we do not feel called upon to further discuss your hypothetical questions to procedure on a controversy that may never arise. At any rate we see no reason to anticipate that such a question will actually arise, and when it does, it will be time enough to attack the problem presented.

Thus far we have considered state trust fund lands and have concluded that they may be taken for highway purposes, but not without compensation.

Your inquiry, however, also mentions conservation commission lands, although no particular lands administered by the conservation commission are suggested. We assume, nevertheless, that you do have in mind lands other than the trust fund lands administered by the commissioners of public lands and this gives rise to the question as to whether lands owned by the state, not in a trust capacity, may be taken or sold for highway purposes.

Some of the state boards and commissions such as the conservation commission, mentioned in your request, have the power to sell lands not needed for departmental purposes. Sec. 24.085 (1), provides:

"The state conservation commission is authorized and empowered to sell at public or private sale, lands and structures owned by the state under the jurisdiction of the state conservation commission when said commission shall determine that said lands are no longer necessary for the state's use for conservation purposes."

Where such statutory power exists, there should be no difficulty in selling lands or granting easements thereon for highway purposes. However, many state agencies have no statutory power to sell lands under their jurisdiction, and we doubt that any power of condemnation exists where a state board either refuses to sell or has no power to sell.

The power of eminent domain is covered in ch. 32 of the statutes, and sec. 32.03 (1) provides in part:

"The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board or commission, nor to the condemnation by one railroad or public utility of the property of another, unless such power is specifically conferred by law. * * *."

Ch. 32, Stats., also sets up the procedure for exercising the right of eminent domain. It is true that additional procedural methods for exercising such right are to be found in secs. 83.07 and 83.08, and that the procedure here provided is more frequently employed in the acquisition of right of way for highway purposes than is the procedure prescribed by ch. 32. However, we do not consider that the optional methods of procedure provided in ch. 83 were intended to change in any way the substantive law of eminent domain as set forth in ch. 32.

Aside from the express limitations prescribed by sec. 32.03 (1), the generally accepted doctrine is that lands owned by the state cannot be taken for public use under a general power to condemn land, and that there must be express statutory authority or the authority must arise by necessary implication. 20 C. J. 620, 18 Am. Jur. 713. Any implication that might exist in this direction is expressly negated in Wisconsin by the provisions of sec. 32.03 (1).

This section also answers in the negative the last portion of your inquiry as to whether lands of a township, village, city, county or school district may be condemned.

X Op. Atty. Gen. 995 is overruled to the extent that it is inconsistent herewith.

WHR

Public Officers — County Judge — Sec. 26, art. IV, Wis. Const., relating to increasing or diminishing compensation of public officers during term does not apply to office of county judge. With respect to such office provisions of subsec. (1), sec. 59.15, and subsec. (1), sec. 253.15 are applicable.

Within meaning of these statutory provisions words "term of office" are used as being personal to particular incumbent and, where county judge has been appointed to fill vacancy in office caused by death, such appointment to continue until holding of election in accordance with statutes, action of county board taken at its annual meeting held prior to such election, increasing compensation to be paid county judge, is valid and fact that board voted that increase was not to take effect until after commencement of term created by election does not change this result.

December 12, 1940.

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

You request our opinion relative to increase in salary of the county judge of your county. We understand the facts to be as follows: Judge Lynn, who was the duly elected county judge, died in July, 1938, and Judge Blanding was at that time duly appointed to fill the unexpired term of Judge Lynn, whose term would have expired in January, 1944. In April, 1939, Judge Blanding was elected to the term from June, 1939, to January, 1944. In November, 1938, the county board at its regular session adopted a resolution fixing the salary of the county judge at \$3600 per annum, which was an increase of \$600 per annum over the salary which had been received by Judge Lynn. By the terms of the resolution, the increase in salary was to become effective January 1, 1940. You ask our opinion whether under sec. 26 of art. IV of the Wisconsin constitution the increase in salary voted by the county board is valid.

It has been held that the constitutional provision to which you refer applies only to public officers whose salaries are

paid out of the state treasury. *Sieb v. Racine*, 176 Wis. 617, and cases cited. See also XXIX Op. Atty. Gen. 139. Thus, section 26 of art. IV of the constitution will not operate as a restriction on the county board in this case since the county judge's salary is paid out of the county treasury and not out of the state treasury.

The determination of the question raised by your inquiry would seem to depend upon the construction to be placed upon subsec. (1) of sec. 253.15 and subsec. (1) of sec. 59.15 of the statutes. Subsec. (1) of sec. 253.15 was enacted by ch. 468, Laws 1935, and is in substantially the same words as subsec. (1) of sec. 59.15, which reads 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: * * *

While there appear to be no decisions construing these provisions of the statutes which would be directly in point here, the wording is to all practical intents, with respect to the question here presented, the same as that used in sec. 26, art. IV of the constitution, where it is stated "* * * nor shall the compensation of any public officer be increased or diminished during his term of office." The meaning of the words "term of office" as thus used was construed in *State ex rel. Bashford v. Frear*, 138 Wis. 536, where it was held that where the office of a justice of the supreme court elected for a ten-year term to commence in January of 1900 became vacant by the death of the elected justice, the salary having been increased by the legislature after the election of the justice but prior to his decease, a justice appointed to fill the office from the time of death to the election of a successor was entitled during such period to the increased salary. The court held that as used in sec. 26, art. IV, the term was personal to the particular incumbent, and since the salary had been changed prior to the incumbency of the appointed successor the constitutional provision prohibiting a change of salary during the term was not violated.

It would seem that the ruling in that case would apply with equal force to the provisions of subsec. (1) of sec. 59.15 and subsec. (1) of sec. 253.15. Looking at these statutory provisions in the light of the facts submitted, they would appear to lend additional support to this conclusion. The statutes direct that the county board shall fix the annual salary of the county judge "to be elected during the ensuing year." In November, 1938, at which time the county board took the action here in question, a county judge, under the provisions of subsec. (2) of sec. 17.21 of the statutes, was to be elected during the ensuing year, that is, on the first Tuesday of April, 1939. Treating the term as was done in the *Frear* case as personal to the officer, the election of April, 1939, created a new term beginning the first Monday of June, 1939, and expiring on the first Monday of January, 1944. We thus conclude that the action of the county board taken in November of 1938 as described in your request was valid with reference to subsec. (1) of sec. 59.15 and subsec. (1) of sec. 253.15. We do not believe that the fact that the county board by its resolution provided that the increase in salary should not take effect until January 1, 1940, which would, of course, be during the term of office of Judge Blanding, will affect this result in accordance with the decision and reasoning upon which it is based.

As stated in the *Frear* case, the purpose of constitutional and statutory prohibitions against increasing the compensation of officers during the term is to make such officers independent of the legislative bodies who fix their salaries. In this view, the increase in salary took place at the time when the county board took its action, that is, in November of 1938, although such increase was not to be effective until January 1, 1940.

It is our opinion, then, that Judge Blanding under the facts here, is entitled to receive the increased salary as provided in the resolution of the board.

RHL

School Districts — Tuition — Social Security Act — Poor Relief — Information — Furnishing or making available to municipality or other unit of government, such as school district, information or records to enable it to determine question of liability arising out of legal settlement question or liability predicated upon sec. 40.21, subsec. (2), Stats., does not contravene any terms, provisions or policy of sec. 49.53, Stats.

December 18, 1940.

FRANK C. KLODE, *Director,*
Department of Public Welfare.

In your letter you state:

"A city contends that aid under section 48.33, Stats., constitutes maintenance as a public charge so that tuition may be collected from the county in which the city is situated, pursuant to section 40.21 (2), Stats., as construed in the recent supreme court decision, *City of Madison v. Dane County*, number 149, handed down on or about November 7, 1940. This city has requested the county pension administration to make certain information available on the ground that the granting of such aid created a cause of action by the city against the county.

"The federal social security act as amended in 1939 by the 76th congress provides that a state plan, in order to be approved for financial participation, must on and after July 1, 1941, provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to dependent children. Title IV, section 402 (a).

"The Wisconsin legislature, desiring to make the provision effective at once, enacted section 49.53, Stats. 1939. In a mandamus action against the secretary of state, the supreme court set the effective date of this section as July 1, 1940. Pursuant to section 49.53 the state department of public welfare promulgated and published rule No. 12, a copy of which is enclosed. We are also enclosing for your ready reference an opinion of the Attorney General of the state of Texas which we have mimeographed for general reference.

"The city requests the following information: the names and addresses of families receiving aid to dependent children and residing in the city; the names of the children receiving such aid who are of legal school age, four to twenty;

the periods of such grants of aid and other data pertaining to the legal settlements of such children. We therefore request your official opinion as to whether any or all of this information may or should be made available by the county pension administration to the city."

Section 49.53, Stats., provides as follows:

"The use or disclosure of information concerning applicants and recipients for any purpose not connected with the administration of aid to dependent children, blind pensions and old-age assistance is prohibited, and the state pension department shall in conformity with the federal social security act and any rules or regulations made pursuant thereto by the federal social security board adopt rules and regulations restricting the use and disclosure of information concerning such applicants and recipients. When adopted by the state pension department, such rules and regulations shall become effective upon publication in the official state newspaper, and copies of such rules and regulations shall be filed in the office of the secretary of state and the offices of the county clerks. Any person violating the provisions of this section or of any rule or regulation promulgated hereunder shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by imprisonment in the county jail for not less than ten days nor more than one year, or by both such fine and imprisonment."

Aid to dependent children under sec. 48.33, Stats., (commonly known as mothers' pensions) constitutes support as a pauper within the meaning of sec. 49.02, (4), Stats. *Milwaukee County v. Waukesha County*, 294 N. W. 835, 236 Wis. 233. Support of either the parent or the child as a pauper makes the child one "maintained as a public charge" within the meaning of sec. 40.21 (2), Stats. *City of Madison v. Dane County*, 294 N. W. 544, 236 Wis. 145.

Aid to dependent children under sec. 48.33, Stats., is therefore of significance both in determining a question of legal settlement under sec. 49.02, Stats., as well as in determining municipal or county liability under sec. 40.21 (2), Stats. The legislature having made the question of aid to dependent children of the utmost significance in the foregoing situations, can it be said that the disclosure of infor-

mation needed to determine liability in relation to such situations is the furnishing of information "not connected with the administration of aid to dependent children" in the sense that that language is used in sec. 49.53, Stats.?

In a restricted sense it may be urged (and not without merit) that these aids can be and are fully administered without regard to liabilities that arise out of legal settlement questions or questions of liability predicated upon sec. 40.21 (2), Stats., and that, therefore, information needed to determine such questions is not information "connected with the administration of" these aids. But in a larger sense it may be urged, and we think with equal merit, that as the legislature has attached certain significance to the rendering of these aids in relation to other questions within the legislative scheme and policy, these aids cannot be said to be fully administered until the administering agency has at least made available to the interested units of government such information in relation thereto as will enable them to operate within the legislative scheme and carry out the legislative policy.

Which of the two senses would seem to be the more consonant with legislative intent? Laws such as sec. 49.53 are usually aimed at prohibition of certain known abuses and to subserve some legislative policy. What legislative policy would be subserved by denying to interested units of government information necessary for them to obtain to enable them to operate in accordance with the legislative scheme and to enable them to carry out the legislative policy? No answer seems readily available.

We conclude that such information is information "connected with the administration of" these aids within the meaning of such language as used in sec. 49.53, Stats.

The information requested seems to be information needed by the city to determine a legitimate question of liability within the statutory scheme. The furnishing of such information would not, in our opinion, contravene any terms, provisions or policy of sec. 49.53, Stats.

NSB

Public Officers — Registrar of Vital Statistics — Statistics — Vital Statistics — Local registrar of vital statistics has no authority to employ physician to investigate cause of death where deceased had no attending physician or attending physician cannot be reached in time, under sec. 69.37, Stats.

Under that section and sec. 69.31, Stats., cost of investigating cause of death is part of burial expenses and cannot be paid by local registrar.

Only fee authorized to be paid from public funds is sum of twenty-five cents for making and filing death certificate pursuant to sec. 69.54, subsec. (1).

December 30, 1940.

DR. C. A. HARPER,
Health Officer.

You inquire as to whether a physician employed to make an investigation as to the cause of death for the purpose of making a death certificate is entitled to a reasonable compensation for his services in that connection. We assume that you mean reasonable compensation to be paid by some government unit. This involves a construction of sec. 69.37, Stats., which provides as follows:

“In case of death without the attendance of a physician, or if the certificate of the attending physician cannot be obtained early enough for the purpose, any physician employed for the purpose shall upon the request of the local registrar or his deputy, make such certificate as is required of the attending physician.”

Under sec. 69.54, subsec. (1), a physician who files a death certificate is entitled to receive the sum of twenty-five cents for each death so recorded, to be paid by the county treasurer upon certification of the state registrar. Complaint is made that a physician who did not attend the deceased in his last illness may be required to make an extensive investigation to determine the cause of death, including in some cases perhaps an autopsy, and that twenty-five cents is insufficient to recompense the physician for the time spent in such investigation.

The first proposition which must be considered is that it is the policy of the law to hold an official custodian of public funds to a very strict accountability and to require clear statutory authority for any disbursements to be made by him. *Milwaukee v. Binner*, (1914) 158 Wis. 529, 531; *Forest County v. Poppy*, (1927) 193 Wis. 274, 277. It is also the rule that one who demands payment of a claim against a municipality must show some statute authorizing it or that it arose under some contract authorized by law and it is not sufficient merely to show that the services performed were beneficial. *Michael v. City of Atoka*, 76 Okla. 266, 185 Pac. 96. The supreme court of Montana has even gone so far as to hold that a public printer who has been paid in excess of the statutory rates for printing is subject to an action on the part of the county to recover back the excess. *Carbon Co. v. Draper*, (1929) 84 Mont. 413, 276 Pac. 667. The rule is well expressed in the case of *People v. Dillon*, 199 Cal. 1, 248 Pac. 230, 234, as follows:

“* * * It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law.”

Sec. 69.54 (1) is the only statute authorizing the payment of any fee to a physician for filing a death certificate. The question is then whether sec. 69.37, above quoted, authorizes the local registrar to employ a physician for the purpose, where there was no attending physician or if the certificate of the attending physician cannot be obtained in time. It is considered that that statute confers no such authority upon the local registrar. It does indeed refer to a physician “employed for the purpose” but it then immediately continues “shall upon the request of the local registrar” etc. If it were intended that the local registrar should employ the physician, it would then be unnecessary for the registrar to make any request upon him for the filing of a death certificate. It is considered that the statute implies that the physician will be employed by someone, but not that he will be employed by the local registrar.

Under sec. 69.31 no body may be buried, cremated or otherwise disposed of until a burial permit has been issued,

and no such burial permit may be issued until a complete and satisfactory death certificate has been filed. It seems apparent that the cost of procuring a death certificate is a necessary part of the expense of burial. The statute places the burden of obtaining such a certificate squarely upon the person desiring to dispose of the body, not upon the local or state registrar of vital statistics.

Whoever desires to procure the burial or other disposition of the body of a person who has died without the attendance of a physician, or where the attending physician cannot be reached in time, must retain another physician to investigate the cause of death. The fee for such investigation must be borne by the person who employs the physician for that purpose. Then upon making and filing a death certificate, the physician will be entitled to a fee of twenty-five cents for that service, to be paid as provided by sec. 69.54 (1).

You are therefore advised that a physician employed for that purpose is undoubtedly entitled to collect a fee for investigating the cause of death, but that such fee is not payable out of any public funds, provided that the physician will be entitled to the usual fee of twenty-five cents for making and filing the death certificate.

WAP

Public Officers — Public Service Commission — Water Powers — Public service commission has power under sec. 31.02, Stats., to establish higher minimum pond elevation for Big Eau Pleine water storage reservoir in order to preserve fish therein than minimum fixed by ch. 478, Laws 1933.

December 30, 1940.

PUBLIC SERVICE COMMISSION.

You ask whether the public service commission has jurisdiction to order the establishment of a higher minimum pond elevation for the Big Eau Pleine water storage reservoir than the statutory minimum pond elevation prescribed

for said reservoir in ch. 478, Laws 1933, for the purpose of protecting fish life therein.

The Wisconsin Valley Improvement Company was authorized by ch. 478, Laws 1933, amending secs. 1 and 3 of ch. 335, Laws 1907, to construct, maintain, and operate the Big Eau Pleine dam and reservoir, subject to conditions and limitations prescribed in said ch. 335, Laws 1907, as amended. It was provided:

“* * * at no time shall the waters in said reservoir(s) be drawn to an elevation less than eleven hundred fifteen feet [above mean sea level] except in case repairs are necessary or for reasons beyond the control of the company.”

The statute further provided that the spillway and flood gates should not exceed elevation of eleven hundred forty-five feet. It appears that when the water in the reservoir is at the minimum elevation of eleven hundred fifteen feet ice may readily form to the bottom of the reservoir with the consequent destruction of fish life therein. To prevent this, the public service commission is now petitioned to require the maintenance of a higher minimum water level for the reservoir than that set out in the 1933 enactment.

That the public service commission has authority to effectuate this purpose seems to us to be clear. By section 9 of ch. 335, Laws 1907, it was provided:

“The right is hereby reserved to the legislature to repeal or amend this act at any time; * * *.”

By section 6 of the chapter authority was vested in the state board of forestry to supervise and control the times and extent of the drawing of water from the reservoirs which the Wisconsin Valley Improvement Company was authorized to construct, maintain and operate. The purpose of the enactment of ch. 335, Laws 1907, as stated in the title, was to produce “a uniform flow of water in the Wisconsin river and its said tributaries, and thereby improving the navigation and other uses of said streams and diminishing the injury to property both public and private.” As to whether the state board of forestry could have, under the

provisions of the original enactment, required the maintenance of a minimum water elevation in the reservoirs constructed by the Wisconsin Valley Improvement Company for the purpose of protecting fish therein we need express no opinion. By ch. 514, Laws 1915, the railroad commission was substituted for the state board of forestry as the agency to control and supervise the drawing of water from the reservoirs. In 1915, also, the legislature passed a general law (ch. 380, Laws 1915) known as the water power act, which in sec. 3 created sec. 1596-2 Stats. 1915, (now sec. 31.02, Stats.) granting authority to the railroad commission as follows:

"Section 1596-2. 1. The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property, is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters;
* * *

"2. The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission
* * *."

In *Chippewa and F. Imp. Co. v. Railroad Comm.*, (1916) 164 Wis. 105, 118, 159 N. W. 739, the supreme court held that the water power act of 1915 was unquestionably intended by the legislature to apply to all dams in the state. It was stated:

"* * * A general policy applicable to all the navigable waters of the state was there announced, and we can entertain no doubt of the intention to make it applicable to the reservoir dams operated by the plaintiff. * * *"

It was held that dams operated by the Chippewa and Flambeau Improvement Company which were constructed under the provisions of ch. 640, Laws 1911, reserving specifically the right to repeal or amend, were brought within the provisions of the water power act of 1915 and that the order of the railroad commission was sustainable under the latter act. The more limited authority bestowed upon the railroad commission to regulate water levels granted by ch. 640, Laws 1911, was held to have been repealed by implication by force of the clear legislative intent to make the water power act controlling.

Since sec. 1596-2, Stats. 1915 (now sec. 31.02), expressly states that it is to apply to all dams "hereafter constructed and maintained in navigable waters", unquestionably the Big Eau Pleine dam built under the authority of ch. 478, Laws 1933, is within its scope, if the later act contains no provision which nullifies its application thereto. A careful reading of the 1933 act discloses no legislative purpose to exempt the Big Eau Pleine dam and reservoir from the provisions of sec. 31.02, Stats. 1933. As a matter of fact ch. 478 did not seek to modify sec. 6 of ch. 335, Laws 1907, which contains the provisions subjecting water levels of the Wisconsin Valley Improvement Company's dams to regulation by state agencies, except by substituting the public service commission for its predecessor and railroad commission. Under the decision in the *Chippewa and F. Imp. Co. v. Railroad Comm.*, case, *supra*, sec. 6 of ch. 335, Laws 1907, was amended by the provisions of the water power act of 1915 and therefore was part of the basic statute under which authority was granted to the Wisconsin Valley Improvement Company to build the Big Eau Pleine dam and reservoir.

The 1939 legislature amended, revised, and consolidated ch. 335, of the laws of 1907 as subsequently amended, in ch. 497, Laws 1939. In sec. 2 thereof the building, operation and maintenance of the waterways in the Wisconsin river is made expressly subject to the requirements of ch. 31 of the statutes. Furthermore, the minimum level set out for the Big Eau Pleine reservoir was repealed. It appears, therefore, that the public service commission may proceed under ch. 31 of the statutes to effect the establishment of

a minimum water elevation for the Big Eau Pleine reservoir in excess of the minimum elevation set out in ch. 478, Laws 1933.

The further question remains as to whether an elevation may be ordered for the purpose of protecting fish life in the reservoir under the provisions of sec. 31.02, Stats. This question has been answered in the affirmative by this office in XXVII Op. Atty. Gen. 424, to which we now adhere.

We therefore advise you that in order to conserve fish in the Big Eau Pleine water storage reservoir the public service commission has jurisdiction to order the establishment of a higher minimum pond elevation than the statutory minimum pond elevation prescribed for said reservoir in ch. 478, Laws 1933.

HHP

Taxation — Tax Sales — Upon reduction in valuation under sec. 75.61, subsec. (2), Stats., amount to be paid is aggregate total of tax recomputed upon value found plus delinquent interest thereon and all penalties, fees and charges which are payable on redemption.

Amount county may charge back is difference between tax returned and recomputed tax, exclusive of interest, penalties and other charges collected by county.

December 30, 1940.

LESLIE J. VALLESKY,
Assistant District Attorney,
Manitowoc, Wisconsin.

You ask what amount may be charged back by the county as a result of a finding by the governing body of the local municipality that the value of real estate upon which the county holds delinquent tax certificates is less than the assessed valuation, pursuant to the provisions of sec. 75.61 (2), Stats., which provides as follows:

"Whenever the county owns and holds tax certificates upon real estate and the owner of said real estate or any person, firm, association or corporation holding a valid lien thereon shall claim the assessment of said real estate to be greater than the value that can ordinarily be obtained therefor at private sale, the respective town board, village board or city council where said real estate is situated may take proof under oath of the value of said real estate and make a finding thereon. Upon the filing of said finding with the county treasurer he shall accept from said owner or lienholder the proper proportional tax on said real estate based upon the value so found, together with the proper charges, as in the case of redemption of tax certificates, shall cancel said tax certificate, and shall give to said owner or lienholder a receipt for said tax. The difference between the tax as returned and the amount of such proportional tax, exclusive of charges, received by the county as a result of the compromise shall be charged to the town, village or city which returned the same and may be included by the county as a special charge in the next tax levy against such town, city or village."

Our attention is directed to an opinion in XXV Op. Atty. Gen. 65, which held that the word "tax" in the phrase "proper proportional tax" of the second sentence of this subsection, means the total amount due upon the tax certificates including delinquent interests, but exclusive of charges, and therefore the amount payable to the county treasurer is the aggregate total of the charges payable on redemption of tax certificates plus such proportionate part of not only the principal of the original tax but also the delinquent interest accrued thereon as the value found bears to the original assessed valuation. The interest on the recomputed taxes is there held to be payable, but as a part of the "tax" rather than as one of the charges. That opinion was prior to the enactment of ch. 503, Laws 1939, which added the last sentence to the subsection as it now reads expressly providing for a charge back by the county. Shortly prior to this amendment we had rendered an opinion that sec. 75.61 (2), Stats., as it then existed, did not provide and there was no authority for a county making a charge back for loss resulting from action taken pursuant thereto. XXVII Op. Atty. Gen. 724.

Thus, the opinion in XXV Op. Atty. Gen. 65 not only was specifically directed, but necessarily limited, to what amount the taxpayer must pay to effect full payment and cancellation of the outstanding certificates. The same result would have been reached whether interest upon the recomputed tax was considered as being a part of the "proportional tax" or included in the "proper charges". If includible as a part of the tax then the interest is not one of the "proper charges" expressly required to be paid, and vice versa. For the purposes thereof it makes no difference upon what basis the interest is included, so long as it is included in the amount that the taxpayer must pay and that is all that the opinion in XXV Op. Atty. Gen. 65 decided.

The subsequent amendment of the subsection by ch. 503, Laws 1939, adding the last sentence expressly authorizing a charge back by the county, however, provides that the amount thereof shall be the difference between the "tax as returned" and the "amount of such proportional tax, exclusive of charges, received by the county." In the computation of the amount of the charge back it makes a difference whether delinquent interest upon the recomputed tax is included in the "proportional tax" or falls within the "proper charges" that the taxpayer has been required to pay. Because, as we view it, the result reached in the former opinion followed quite regardless of the classification into which the interest fell, whereas the contrary is true in the instant situation, we have given extensive consideration to the proper interpretation of the subsection in question. Clearly, as you have pointed out, the words "proportional tax" and "charges" should be given the same meaning throughout the subsection. It is our conclusion that the result reached in XXV Op. Atty. Gen. 65 is correct, but that in so far as it construes the words "proportional tax" as including the interest payable on the recomputed tax it is erroneous, otherwise the subsection is out of joint with the legislative pattern set out in other statutory provisions which are in *pari materia*.

Upon first approach it would appear that the decision of the supreme court of Wisconsin in several cases, *State v. Ry. Cos.*, (1906) 128 Wis. 449, 108 N. W. 594; *State ex rel. Portage Co. D. Dist v. Newby*, (1919) 169 Wis. 208, 171 N.

W. 953; *Westby v. Bekkedal*, (1920) 172 Wis. 114, 178 N. W. 451; *Munkwitz R. & I. Co. v. Diedrich Schaefer Co.*, (1939) 231 Wis. 504, 286 N. W. 30, that interest and penalties are a part of the tax might be decisive upon the question and controlling. The rule there applied is not disputed, but it must be recognized as merely a general rule which is controlling only in the absence of some indication of a contrary legislative intent. In those cases nothing indicated that a restrictive use of the word "tax" was intended, and the application of the rule carried out the only legislative intent that could be presumed from the context or subject matter and the equitable result thus effectuated. The problem here, as it was there, is one of determination of legislative intent. If the intent cannot be otherwise determined, then this general rule would be resorted to and controlling.

At the outset, we find nothing that indicates that sec. 75.61 (2), Stats., is intended otherwise than as a co-ordinate part of the statutes relating to delinquent real estate taxes and in conformity with the general scheme thereof. Being in *pari materia* with other statutes, it must be construed as thereby illuminated and given that effect which will carry out its function in the statutory structure of which it is a part. The opinion in XXV Op. Atty. Gen. 65 states that such statutes as a general rule differentiate between the principal of the tax and the interest and the charges thereon by specifically mentioning them and, therefore, because only the words "tax" and "charges" are used in sec. 75.61 (2), the word "tax" is construed as including the interest. While logically the opposite result would seem to follow, upon reference to the various provisions of chs. 74 and 75 of the statutes we find no such legislative consistency.

On the other hand, the clause "as in the case of redemption of tax certificates" in sec. 75.61 (2) shows that the legislature had the other statutes covering the collection of delinquent real estate taxes in mind and intended this subsection as complementary thereto. The subsection is thus based upon the concepts embodied therein and must be construed in light thereof.

The quoted language, in effect, is a reference to the provisions of sec. 75.01 Stats., which provides that the amount payable in redemption of tax certificates is the aggregate of

the delinquent taxes, the interest thereon to date of payment, penalties and all other fees prescribed by the statutes. This clause relates to the entire amount, not just the charges, that is to be paid under sec. 75.61 (2), Stats., and means that it is the amount that would be payable under sec. 75.01, Stats., in redemption of the certificates if the taxes had been originally computed upon the value found pursuant to sec. 75.61 (2). That this is the intended effect of the clause "as in the case of redemption of tax certificates" seems clear from the fact that it is preceded by a comma. Had the phrase been intended only to modify "proper charges" the comma separating it from the phrase "together with proper charges" would not have been used.

The purpose of the subsection is not to relieve the taxpayer from his own delinquency but rather from the inequitable effect of taxation upon a value greater than the present sale value of the property, by providing for payment of the amount required on redemption of the property from so much of the tax as is not inequitable. To effect full payment and cancellation of tax certificates pursuant to the provisions of sec. 75.61 (2), Stats., there must be paid to the county on each certificate such proportional part of the original tax as the value found bears to the assessed valuation, plus interest upon such recomputed delinquent tax and all charges, fees and penalties, including every item that would be payable on such certificates had the recomputed tax been the delinquent tax in the first instance. Of course, in computing the same, the delinquent interest, penalty and fees must be used which are applicable to each respective tax involved. This observation is made in view of changes that have been made therein over the years. By way of illustration, see ch. 294, Laws 1937, and *Munkwitz R. & I. Co. v. Diedrich Schaefer Co.*, *supra*, construing the same.

Having above given to the provisions of sec. 75.61 (2), Stats., as to the amount to be paid a construction that harmonizes it with other statutes relating to redemption, it must similarly be given a construction as to the amount of charge back consistent with the statutes pertaining to the collection of delinquent taxes and the accounting between the county and the municipalities therefor. Sec. 74.17, *et seq.*, Stats., provide for the return of the delinquent tax roll

by the local treasurer to the county treasurer. Sec. 74.19 (3) specifically provides that the delinquent taxes, together with the interest and charges thereon, thereafter collected by the county, shall belong to the county until the delinquent taxes collected by the county exceed the amount due upon said roll to the county for unpaid county taxes and thereafter the amounts collected on said roll shall belong to the local municipality. The effect of this is that the county is entitled to interest upon its unpaid taxes in the delinquent tax roll, and without any regard for whether it is an excess roll or not. An excess roll is one in which the total taxes unpaid exceed the amount due the county for unpaid county taxes from that municipality for the year involved therein.

Upon the collection by the county, whether before sale or upon redemption thereafter, of delinquent taxes in an excess roll, all interest and charges collected belong to the county and it credits the principal of the tax collected upon the total of unpaid taxes due to it out of said delinquent roll, unless the principal of the taxes previously collected thereon is sufficient to fully satisfy the amount due to the county from the municipality on said roll, in which event the principal of the tax collected and the interest is payable to the local municipality. Accordingly, there would be no occasion for any charge back to the local municipality in respect to an excess roll for the county, as explained above, would suffer no loss. It is only where the reduction under the provisions of sec. 75.61 (2) effects a loss to the county that there would be any occasion for a charge back. That would occur only in the instance of a nonexcess roll, that is, one in which the unpaid taxes do not exceed the county's unpaid tax claim. The absence of a right of charge back throws the loss in taxes returned, arising out of noncollection because of a reduction under sec. 75.61 (2), upon the county, because the county's only source of payment of its tax claim is the collections which it makes of the delinquent taxes returned in said nonexcess roll. The elimination of any part of the taxes in such nonexcess roll renders it impossible for the county to collect the full amount of its county taxes represented thereby. There is no reason in having the one to bear the loss determined by whether the roll is

excess or not. In recognition thereof the last sentence of sec. 75.61 (2), Stats., was added to throw the loss in taxes in the instance of a nonexcess roll where it would fall if it were an excess roll.

Thus the last sentence provides that a county may charge back the difference between the tax as returned and that part of the amount collected which represents the recomputed tax which would have been returned had the newly found value been the assessed valuation in the first instance. To construe this subsection otherwise would deny the county interest on the corrected recomputed tax, which would be in direct conflict with the clear intent expressed in sec. 74.19, Stats. The county keeps the interest and all charges that it collects the same as it would upon payment to it of delinquent taxes in a nonexcess roll either prior to sale or in redemption of certificates thereafter. But it may charge back its loss which is the amount of the tax that it has been precluded from collecting by the reduction.

The taxes of each of the years involved, if more than one, must, of course, be dealt with separately.

HHP

Civil Service — Counties — County Ordinances — Public Officers — Deputy Sheriff — County board is not empowered under provisions of sec. 59.21, subsec. (8), par. (a), Stats., to prescribe qualifications for office of deputy sheriff other than qualification that applicant must have resided in county for at least one full year prior to date of contemplated examination.

December 31, 1940.

RICHARD G. HARVEY, JR.,
District Attorney,
Racine, Wisconsin.

The county board of supervisors of Racine county has enacted an ordinance pursuant to the provisions of sec. 59.21

(8) of the Wisconsin statutes. The subsection in question, so far as it bears upon the question here involved, reads as follows:

“(a) In counties having a population of less than five hundred thousand, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by paragraphs (a) and (b) of subsection (1) of this section, and fix the salary of such deputies; and may further provide by ordinance, that deputy sheriff positions shall be filled by appointment by the sheriff from a list of three persons for each position, such list to consist of the three candidates who shall receive the highest rating in a competitive examination of persons residing in such county for at least one full year prior to the date of such examination. Such competitive examinations may be by a county civil service commission or by the state bureau of personnel at the option of the county board and it shall so provide by ordinance. The director of the state bureau of personnel shall upon request of the county board conduct such examination according to the methods used in examinations for the state civil service and shall certify an eligible list of three names for each position to the sheriff of such county who shall thereupon make an appointment from such list to fill such position within ten days after the receipt of such eligible list. The county for which such examination is conducted shall pay the cost thereof. In the event that a civil service commission is decided upon for the selection of deputy sheriffs, then the provisions of sections 16.31 to 16.44 shall apply so far as consistent with this subsection, except sections 16.33, 16.34 and 16.43 and except the provisions governing minimum compensation of the commissioners and except that such ordinance may provide for three commissioners.”

The ordinance adopted by the Racine county board is entitled “An Ordinance to Provide for Civil Service Examination for Deputy Sheriffs, Their Term of Office, and the Method of Dismissal.” Section II (a) of the ordinance reads as follows:

“A person to be eligible to apply for the position of deputy sheriff must be a male citizen of the United States and the state of Wisconsin, not less than 25 years of age nor more than 45, and a resident of Racine county for one full year immediately preceding the date of application. No person shall be eligible who has been convicted at any time

or place of a criminal offense amounting to a felony unless the judgment of conviction has been reversed or a complete pardon has been granted."

You have requested our opinion as to whether the county board has the power under the subsection in question to prescribe as a qualification for a deputy sheriff that he be "not less than 25 years of age nor more than 45".

We are of the opinion that the county board does not have such power. The legislative power of county boards is derived from art. IV, sec. 22 of the Wisconsin constitution, which reads as follows:

"The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

County boards do not under this constitutional provision possess general legislative powers.

"It must be conceded that the county board has no general power of legislation. It possesses such powers of legislation in purely local matters as are delegated to it by the supreme legislative power. * * *." *Northern Trust Co. v. Snyder*, 113 Wis. 516, 531.

In the absence of a provision such as that contained in sec. 59.21 (8) (a), Stats., we assume that, the legislature having provided by sec. 59.21 (1) for the appointment of deputy sheriffs by the sheriff, it thereby vests within the sheriff the authority to select his subordinates from those people who are competent to receive appointment under the constitution and the statutes of the state of Wisconsin. The sheriff is a constitutional officer and he derives his powers and duties from the same source that the county board derives its powers, namely, from the legislature. In the performance of his statutory functions the sheriff is not subject to regulation of a legislative nature by the county board in the absence of a state statute conferring such power upon the county board. *Beale v. The Supervisors of St. Croix Co.*, 13 Wis. 500; *Reichert v. Milwaukee County*, 159 Wis. 25.

To the extent that sec. 59.21 (8) (a), Stats., has conferred upon county boards the right to act with reference to the selection of deputy sheriffs they may function. They may not, however, function in that respect beyond the power thereby conferred. The quoted portions of the subsection in question confer upon the county board the authority to do four things, as follows: (1) provide for the number of deputy sheriffs within certain limitations; (2) fix the salary of such deputies; (3) provide by ordinance that deputy sheriff positions shall be filled by appointment by the sheriff from a list of three persons for each position, such list to consist of the three candidates who shall receive the highest rating in a competitive examination of persons residing in such county for at least one full year prior to the date of such examination; and (4) provide by ordinance that competitive examinations may be by a county civil service commission, which it may create, if none exists, or by the state bureau of personnel.

Nothing is indicated in the statute under consideration which confers upon county boards the authority to prescribe qualifications for the office of deputy sheriff. It is probably true that any competitive examination would necessarily require a prescribing of desirable standards and the grading of applicants upon the basis of their fitness in relation to the standards. On the other hand, the statute, by providing for the conduct of examinations by a county civil service commission or by the state bureau of personnel, as the case may be, has delegated to such bodies the function of grading applicants as to desirable qualifications.

For example, it is provided that the provisions of secs. 16.31 to 16.44 shall apply in examinations conducted by a county civil service commission with the exception of secs. 16.33, 16.34 and 16.43, and with other exceptions not here involved. Sec. 16.36 (3), one of the included sections, provides in part as follows:

"The weights, if any, to be given to previous experience, training, age, sex, written or demonstration test, oral test, and the various other phases or elements of the examination to which the applicant may be subjected, shall be provided for in advance by the rules of the commission [county civil service commission]. * * *."

If the examination is given by the state bureau of personnel pursuant to the request of the county board, it may be said that it has been the uniform practice in the conduct of such examinations for the bureau of personnel to prescribe entrance qualifications for the examination and to determine the weight that should be given to the various factors involved in evaluating the work of one taking the examination.

We have been able to find no statute relating to the powers of the county board that would confer the power which it has attempted to exercise. The only statute that would come close to granting such power would be sec. 59.07 (6), Stats., providing that the board shall: "Represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision is made."

This provision is not, however, applicable. If there were no provision at all relating to the establishment of civil service in the sheriff's department, we would have no question but that the county board would be unable to establish such a system notwithstanding the grant of power in sec. 59.07 (6), Stats.

If such a grant of power existed under sec. 59.07 (6), Stats., then there would be no occasion for the existence of sec. 59.21 (8), Stats., and we would not here be concerned with attempting to determine the extent of power granted by that section.

The establishment of a civil service system for the administration of a sheriff's office is a matter of state as well as of county concern and for that reason, among others, would not fall within the provisions of sec. 59.07 (6), Stats. Cf. *Montgomery and another v. Board of Supervisors of Jackson County*, 22 Wis. 69; *Frederick v. Douglas County and others*, 96 Wis. 411.

If sec. 59.07 (6), Stats., does not provide authority to enact a general civil service ordinance it does not provide authority to exercise that power in connection with action under sec. 59.21 (8), Stats.

We are aware of the fact that Attorney General Finnegan in an opinion published in XXIV Op. Atty. Gen. 747, 749, expressed an opinion contrary to the one here expressed. The

matter was there considered by Attorney General Finnegan in the following language:

"Lastly, you inquire whether the county board, when adopting such ordinance, may prescribe such reasonable rules for eligibility and such methods of conducting examinations as are not directly prohibited by the provisions of ch. 349.

"This question is answered in the affirmative.

"The statute is not self-executing, and to be made effective would require an ordinance specifying more details than are outlined by the statute. We refer you to the general power of the county board under sec. 59.07 (19) to perform all other acts and duties which may be authorized or required by law, and sec. 59.01, which authorizes a county 'to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the duties charged upon it by law, and shall so continue until altered by law.' "

We are unable to see that the reasons given in the quoted language support the result. The statute is self-executing if it be given a restricted interpretation. It is incorrect to say that the statute includes many things not expressly provided for and is therefore not self-executing. The correct approach, to our way of thinking, would be to construe the statute to mean what it says and if this be done, it is self-executing.

Neither does the former opinion add to its weight when it suggests that the county board's authority under sec. 59.07 (19) to perform all acts and duties which may be authorized or required by law is a basis for the exercise of the power to prescribe qualifications. Such reasoning simply begs the question. It assumes the answer, namely, that the power in question is authorized by law when that is the very question at issue.

We are of the view that the reasoning of the prior opinion is unsound and accordingly must advise you that it does not represent the opinion of this office at the present time. Rather, as we have indicated, we are of the opinion that the county board has no power to prescribe qualifications such as the one here in question.

The opinion which we have here expressed follows to some extent the reasoning expressed in an opinion in XXVI

Op. Atty. Gen. 22, in which Attorney General Finnegan's opinion, to which we have heretofore referred, was expressly disapproved. The opinion in XXVI Op. Atty. Gen. 22, however, implies that no authority may impose qualifications for deputy sheriff under sec. 59.21 (8) (a) based upon age. We are of the opinion that age may be taken into consideration in the giving of such examinations and that sec. 16.36 (3) so indicates. Since the question is not specifically involved in the present case, however, we shall reserve it for consideration until such time as it is necessarily presented.

JWR

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