

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOL. XXX

January 1, 1941, through December 31, 1941

JOHN E. MARTIN
Attorney General



MADISON, WISCONSIN
1941

1900

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point. from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee ... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam ... from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON,

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

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

Neillsville from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock .. from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee.. from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison ... from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay.. from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee.. from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston ... from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee from Jan. 2, 1939, to

ATTORNEY GENERAL'S OFFICE

JOHN E. MARTIN Attorney General
JAMES WARD RECTOR Deputy Attorney General
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J. R. WEDLAKE Assistant Attorney General
ALBERT G. HAWLEY** Assistant Attorney General
WILLIAM A. PLATZ Assistant Attorney General
BEATRICE LAMPERT Law Examiner

*Deceased September 26, 1941

**Deceased November 1, 1941

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Public Health — Sewage Systems — Public Officers — Sewerage Commission — Joint sewerage commission created under sec. 144.07, subsec. (4), Stats., is required to obtain advance approval of operation and maintenance expenses from governing bodies of municipalities involved under sec. 144.07 (4) (d). Within its budget so approved it may hire and fix compensation of necessary employees and purchase necessary materials.

Where joint sewerage commission is created by two or more municipalities under sec. 144.07 (4) it has authority to determine proportionate amounts of operating and maintenance expenses to be paid by respective municipalities. Commission's determination is final unless one of municipalities appeals to circuit court under sec. 144.07 (4) (f), Stats.

January 2, 1941.

DR. C. A. HARPER,
State Health Officer.

You state that two adjoining communities in Wisconsin have created a joint sewerage commission pursuant to sec. 144.07, subsec. (4), Stats., and that the commission so created has allocated the costs of operation and maintenance of the sewerage disposal plant and the intercepting sewers between the two municipalities on a proportionate basis. You request an answer to the following two questions which have arisen:

"1. Whether the commission has sole authority to determine and fix these charges to provide the degree of treatment required, and

"2. Whether the charges determined by the commission representing the two municipalities shall be paid in the amounts indicated as necessary to perform the functions with which the commission is charged under the statutes."

Sec. 144.07 provides two alternative methods whereby adjoining cities may use a single sewerage disposal system. Under subsecs. (1), (2) and (3), one municipality may own the system and, in effect, sell the service thereof to the other municipality. Under subsec. (4), which is involved here, the municipalities may create a joint sewerage commission, which constitutes a body corporate with "the power [to] proceed as a common council and board of public works"—sec. 144.07 (4) (d).

The specific statutory provisions necessary to a determination of your questions are the following:

"(4) (e) Each such municipality shall pay for its proportionate share of such sewerage system, including additions thereto, and also its proportionate share of all operation and maintenance costs as may be determined by the commission. * * *"

"(4) (f) Either of such municipalities being aggrieved by the determination of the commission on matters within its jurisdiction may appeal to the circuit court of the county in which such aggrieved municipality is located as provided in paragraph (b) of subsection (3)."

Subsec. (3) (b), referred to in the last quoted provision, provides that the governing body of any municipality which deems the charge unreasonable may

"Commence an action in the circuit court of the county of the municipality furnishing the service to determine the compensation. The complaint shall be served with the summons, the action shall have precedence over any different civil cause except actions wherein the state or a department of state government is a party, and the court shall always be deemed open for trial thereof, and the same shall be tried and determined as other civil actions. Either party within

thirty days after service of a copy of the judgment may appeal to the supreme court as in other actions. If judgment is that reasonable compensation is a sum equal to or greater than the sum certified the costs shall be paid by the plaintiff, otherwise by the defendant."

This office has ruled that when two municipalities proceed under subsecs. (1), (2) and (3), whereby one municipality sells the service of its sewerage disposal plant to the other, the public service commission has no jurisdiction over the compensation charged for such service, but the aggrieved municipality must resort to its remedy under subsec. (3). XXVIII Op. Atty. Gen. 503. The reasons there announced apply with even more force to the situation of municipalities which are parties to a joint sewerage commission plan.

Under subsec. (e) above quoted, the proportionate shares of operation and maintenance costs are to be determined by the commission. Under subsec. (f) either municipality may, if it deems itself aggrieved by the commission's determination, take an appeal to review the same in the circuit court. That is its sole statutory remedy and unless such an appeal is taken, the determination of the commission is final.

Subsec. (4) (d) provides in part as follows:

"* * * All bond issues and appropriations made by said commission shall be subject to the approval of the governing bodies of the respective municipalities."

This provision was held by the supreme court to be "vague" and not to authorize bond issues by the commission in *Behnke v. Neenah*, (1936) 221 Wis. 411, 415. That case involved the matter of the original capital investment rather than operation and maintenance expense, but it would seem that as to the latter, the statutory language quoted is equally vague. It would seem that the expenses to be incurred by the commission must be approved in advance by the common councils of both cities involved, although subsec. (4) (c) gives the commission the authority to employ and fix the compensation of engineers, assistants, clerks and other employees.

It would appear, therefore, that the commission must prepare and submit to the governing bodies of the cities involved a proposed annual budget, and if it be approved it may then employ and fix the compensation of necessary help and purchase necessary materials within the budget. It may then allocate the expense between the municipalities according to the proper proportionate share of each, and its determination in this regard can be upset only by appeal to the courts as above stated. It is considered that this conclusion is supported by the case of *Behnke v. Neenah*, (1936) 221 Wis. 411, above cited.

WAP

Physicians and Surgeons — Public Health — Optometry — Osteopathy — Exemption of physicians and surgeons from licensing provisions of sec. 153.01 of optometry law applies to osteopathic physicians and surgeons.

January 2, 1941.

THOMAS C. WEST, *Secretary,*
Board of Examiners in Optometry.

You have inquired whether the optometry statute applies to osteopathic physicians and surgeons.

Sec. 153.01, Stats., relating to the practice of optometry, provides in part:

“* * * No person shall practice optometry without a certificate of registration properly filed. This shall not apply to *physicians and surgeons* * * *.”

The question therefore is whether an osteopathic physician and surgeon is a physician and surgeon within the meaning of sec. 153.01.

In XXVII Op. Atty. Gen. 379, this department expressed the opinion that a person licensed to practice osteopathy

and surgery under sec. 147.17 (1), Stats., is considered to be a physician and surgeon as that phrase was used in a policy of insurance. It was pointed out there that in the law of contracts, words are to be given their ordinary and popular meaning, unless a contrary intention appears. Similarly, words and phrases used in the statutes are to 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. Sec. 370.01 (1), Stats.

No attempt is made in ch. 153 to define "physicians and surgeons," as that term is used in the exception to the optometry license law. However, the medical practice act in sec. 147.14 (2) refers to a "medical or osteopathic physician." Moreover, the optometry law containing the present exemption of "physicians and surgeons" was enacted by ch. 488, Laws 1915, effective August 4, 1915, at which time the medical practice act as amended by ch. 438, Laws 1915, effective July 27, 1915, contained the following provision:

"Section 1436b. Wherever either the words physician, surgeon, or osteopath are used in the statutes of the state of Wisconsin, they shall be construed to mean and include any and all persons holding a license or certificate of registration to practice either medicine, surgery, or osteopathy, and to no others."

Clearly the provisions of sec. 1436b were controlling at the time of the adoption of the optometry law, and they are equally controlling now, because while such provisions are no longer contained in the medical practice act, the substance thereof is now found in ch. 370 relating to the construction of statutes in sec. 370.01 (41) which provides:

"PHYSICIAN, SURGEON OR OSTEOPATH. The words 'physician,' 'surgeon' or 'osteopath' mean a person holding a license or certificate of registration from the state board of medical examiners."

Medical physicians and osteopathic physicians are both licensed by the state board of medical examiners which, un-

der sec. 147.13 (1) must have one osteopathic member. The license granted is a license to practice medicine and surgery in the one instance, and osteopathy and surgery in the other. We are informed that all applicants for licenses are given the identical examination except that applicants for licenses to practice osteopathy and surgery are not examined in *materia medica*, and applicants for licenses to practice medicine and surgery are not examined in osteopathy. In so far as study of the eye and diseases thereof is concerned, the professional training is the same in both instances and the examination by the board is identical as we understand it.

The only distinction is that brought out in XXI Op. Atty. Gen. 163, which is that an osteopath may not use or prescribe medicines for treatment of eye diseases, although he may use the term "oculist" in his practice, and may use such drugs and medicine as are necessary to the successful performance of an actual surgical operation in connection with the treatment of eye diseases.

WHR

Bridges and Highways — Intrastate Bridges — Bridge constructed under provisions of sec. 87.02, Stats., in city of second class and over which connecting street was subsequently routed is subject to maintenance and operation allotment provided by sec. 84.10, subsec. (1), par. (d), Stats.

January 10, 1941.

HIGHWAY COMMISSION.

Attention Wm. E. O'Brien, *Chairman*.

You state that a certain bridge was constructed under the provisions of sec. 87.02, Stats., in a city of the second class and that subsequently a connecting street was routed over the bridge so that for purposes of allotment of trunk highway maintenance funds under sec. 84.10, subsec. (1), Stats., the bridge apparently qualifies under both pars. (c)

and (d). In view of this situation you inquire whether the cost of maintenance and operation should be met out of the allotment provided by par. (c) to cities, or out of the allotment provided by par. (d) to the state highway commission.

Sec. 84.10 (1) (c) reads:

“There shall be allotted to the state highway commission for all cities of the first, second and third class, for the maintenance and operation of free, swing or lift bridges located on connecting streets in such cities, not to exceed a total sum of one hundred thirty thousand dollars. Such sum shall be distributed by the commission on February 15th of each year and shall be apportioned pro rata upon the basis of the necessary and actual expenditures by each such city. Each city of the first, second and third class shall annually, on or before January 31st, submit a written report to the state highway commission showing the actual expenditures during the previous calendar year for the maintenance and operation of such bridges.”

In the absence of any other or further statutory provision on the subject, we would have no difficulty in reaching the conclusion that the foregoing provision applies.

However, sec. 84.10 (1) (d) provides:

“There shall be set aside for the maintenance and operation of bridges constructed, reconstructed, or purchased under the provisions of sections 87.02 and 87.03 and free bridges located on the state trunk highway system or connecting streets in cities of the fourth class which have a length, not including approaches, of three hundred feet or more, or a swing or lift span, the sum of seventy-five thousand dollars. All matters relating to the maintenance and operation of such bridges shall be under the jurisdiction and complete control of the state highway commission. Maintenance shall not include snow removal or drift prevention for bridges located on connecting streets. Maintenance and operation shall not include the roadway lighting system.”

Both of these provisions came into the statutes by ch. 528, Laws 1929, although there have been some amendments since then which are not material to the present discussion.

Obviously the legislature did not intend that any particular bridge should qualify under both pars. (c) and (d), since if the cost of maintenance and operation were paid out

of one allotment, it could not very well at the same time be paid out of the other.

Thus we conclude that different classifications were intended to be set up in pars. (c) and (d), respectively.

Originally the bridge in question was not on a connecting street. Consequently, at that time it could not have qualified under par. (c), since that paragraph, among other things, is limited to bridges on connecting streets.

However, in the first instance, the bridge did qualify under par. (d), since it was constructed under sec. 87.02.

Does the mere fact that a connecting street was subsequently routed over the bridge take it out of the purview of par. (d) and place it under par. (c)? We think not.

It is to be noted that par. (d) sets up several different classifications of bridges eligible for the allotment therein provided. These classifications are as follows:

(1) Bridges constructed, reconstructed, or purchased under the provisions of sec. 87.02 (relating to intrastate bridges).

(2) Bridges constructed, reconstructed, or purchased under the provisions of sec. 87.03 (relating to interstate bridges).

(3) Free bridges located on the state trunk highway system or connecting streets in cities of the fourth class which have a length, not including approaches, of 300 feet or more, or a swing or lift span.

It has been held that where a statute contains a general provision covering a subject as a whole, and also a specific clause or provisions relating to a particular element included in such subject, such special provision must prevail. *State ex rel. Donnelly v. Hobe*, 106 Wis. 411.

Applying the foregoing rule here, it is to be noted that the only specific mention made of bridges constructed under sec. 87.02, as is the bridge in question, is in par. (d) and not in par. (c) and since, as we have already suggested, par. (d) was intended to cover different classifications than those embraced in par. (c), we must consider par. (d) as controlling because of its special clause relating to bridges constructed under sec. 87.02.

We believe this also answers your question as to whether the bridge should be maintained and operated by the city,

or whether all matters relating to its maintenance and operation shall be under the jurisdiction and complete control of the state highway commission, since the latter situation specifically prevails under the wording of the statute in all cases coming within the purview of par. (d) of subsec. (1) of sec. 84.10, which, as we have indicated, applies here. Furthermore, sec. 87.05 (2), to which you have called our attention, reads in part:

“All matters relating to the maintenance and operation of bridges constructed, reconstructed, or purchased under the provisions of section 87.02 shall be under the jurisdiction and complete control of the state highway commission
* * *”

WHR

Indigent, Insane, etc. — Poor Relief — Legal Settlement — Mothers' Pensions — For purposes of mothers' pension law, receipt of public aid by family of child in whose behalf application is made during year preceding application does not bar child from having legal settlement in county in which application is made, notwithstanding provisions of sec. 49.02, Stats. Sec. 48.33, Stats., controls.

Sec. 49.03, relating to recovery of poor relief furnished by town, city or village and to removal of poor persons from towns, cities and villages in which they are supported as transients, does not apply in administration of aid to dependent children.

January 16, 1941.

DEPARTMENT OF PUBLIC WELFARE.

Section 48.33, Stats., relating to aid to dependent children, provides in subsec. (5), par. (b), that aid furnished for the benefit of a child must be conditioned upon the fact that the child has a legal settlement in the county in which application is made for aid. You have requested our opin-

ion as to whether the legal settlement of a child for whom aid is sought under this section is to be determined by the test laid down by sec. 49.02, Stats., relating to determination of legal settlement for purposes of administering poor relief.

Our answer is that the test laid down by sec. 49.02 and by judicial decisions construing that section should be applied in determining legal settlement under sec. 48.33 except as there may be any conflict thereby arising. There is at least one such case of conflict and in that case the provisions of sec. 48.33 must govern.

Sec. 48.33 (5) (b), Stats., reads as follows:

“Such child must have a legal settlement in the county in which application is made for aid; but such child may, with the approval of the court, reside and be cared for outside of the county while receiving aid. For the purposes of this section, the receipt of public aid during the year next preceding by the family of any child shall not bar such child from having a legal settlement in the county.”

The quoted provision is in conflict with sec. 49.02, Stats., for the following reasons: Under the provisions of sec. 49.02 (2), Stats., a legitimate child derives a settlement from the settlement of his father, if his father has one in this state. Under the provisions of sec. 49.02 (7), Stats., the father, having once acquired a settlement, retains it until it is lost by acquiring a new one or by voluntary and uninterrupted absence from the place of settlement for a year or more. Under the provisions of sec. 49.02 (4), Stats., every person of full age who shall have resided in a town, city or village for one whole year shall gain a settlement therein, but no such residence shall permit him to gain a settlement if, during such period of residence, he is supported as a pauper. Thus, a father having a legal settlement in this state and residing in a town, city or village other than that of his legal settlement, could not acquire a settlement at his place of residence while there being supported as a pauper. His legitimate children, deriving their place of settlement from the father, could, likewise, acquire no settlement at the place of residence.

The same conflict would arise in several other instances where questions concerning the derivation of legal settlement by minors from the settlement of their fathers or mothers are involved.

The court in the case of *Milwaukee County v. Waukesha County*, 236 Wis. 233, 294 N. W. 835, 837, used the following language with reference to determining the place of legal settlement under the provisions of sec. 48.33, and we assume that it is this language which has caused you to submit the question here under consideration :

“* * * The term legal settlement as used in sec. 49.02, Stats., and as used in the sentence quoted from sec. 48.33 (5) (b), Stats., are the same and are to be determined by the terms and conditions imposed by the general laws upon the subject as stated in sec. 49.02, Stats. * * *.”

We do not feel that the court, by reason of this passage, has taken the position that sec. 49.02 is to govern in determining legal settlement under sec. 48.33 in any case where there is a conflict between the two sections. Undoubtedly, the court had in mind the fact that the term “legal settlement” used in sec. 48.33 is not defined and that, since both the public assistance covered by that section and the public assistance dealt with by sec. 49.02 are similar in nature, it must have been the legislative intention to use the term “legal settlement” in sec. 48.33 as the term is defined in sec. 49.02. The court could not have intended, however, to hold that where sec. 48.33 contains an express provision dealing with the acquisition of a legal settlement for the purposes of that section, it is to be nullified by applying the provisions of sec. 49.02.

Sec. 48.33 is clear and direct to the effect that public assistance furnished to the family of a child during the year preceding an application for aid shall not prevent the child from acquiring a legal settlement for purposes of receiving aid as a dependent child. This provision, as we have said, is in conflict with sec. 49.02 where, for purposes of poor relief, any period during which a family has received public assistance may not be computed in determining the period of residence necessary to acquire legal settlement.

There is a rule so well understood as to require no citation of authority in its support that where two statutes cover the same subject matter, the one specifically and the other generally, the specific governs.

We are of the opinion, therefore, that the receipt of public assistance by a family during a year preceding an application for a mother's pension for one of its members will not prevent that member from acquiring a legal settlement.

You have also requested our opinion as to whether provisions for adjustment of claims between counties and municipalities and for removal orders, covered by sec. 49.03, Stats., relate to dependent children's aids.

We are of the opinion that the provisions of sec. 49.03 do not apply to aids for dependent children. Secs. 49.01 to 49.10, Stats., relating to the administration of poor relief by towns, cities, villages and counties, have been a part of the statutory law of this state from the beginning of its statehood. They are derived from the provisions of ch. 28, Rev. Stats. 1849, as is recognized in *Holland v. Cedar Grove*, 230 Wis. 177.

The statutes dealing with aid to dependent children, on the contrary, are of recent origin. It is no longer open to question in view of the decision of the supreme court but that aid to dependent children under the provisions of sec. 48.33, Stats., constitutes a form of pauper support, but it does not follow by any means that such aid is poor relief within the meaning of those statutory provisions which have dealt with poor relief as a wholly independent matter for so many years.

Under sec. 49.01, Stats., towns, villages and cities are required to relieve and support the poor settled within their boundaries. Sec. 49.15 provides for the adoption of the county system of poor relief, under which responsibility for care of the poor may be shifted from local municipalities to the county. Sec. 49.03 provides for the care of the poor in municipalities other than those of legal settlement and for recovery of the expense of such relief from the town, city, village or county ultimately liable.

These provisions existed in the statutes long prior to the enactment of any statute dealing with aid to dependent chil-

dren and are wholly inconsistent with those provisions of sec. 48.33, relating to liability for aid to dependent children. Under sec. 48.33, no liability is imposed upon towns, cities and villages for the care of dependent children. Such aid is granted by the judge of a juvenile court or of a county court and is financed by the county, which, in turn, receives financial aid from the state. The towns, cities and villages do not grant such aid, nor are they financially responsible for such aid, and consequently there could be no occasion for utilizing the provisions of sec. 49.03, which apply only to those cases in which towns, cities or villages, having furnished relief to one not settled therein, are permitted to recover the cost thereof.

The same considerations to which we have just referred apply to the matter of removal orders under sec. 49.03, Stats.

There are several reasons, in addition to those given, which support our view that the provisions of sec. 49.03 do not apply to questions involving aid to dependent children. From what has been said, however, further discussion is unnecessary.

JWR

Bridges and Highways — Law of Road — Transportation of Inflammable Liquids — Sec. 85.45, subsec. (5), Stats., does not apply to transportation of petroleum products with flash point above eighty degrees Fahrenheit.

January 16, 1941.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Deputy Commissioner.*

You have requested our opinion upon the following question:

“If any part of a commodity being transported has a flash point of less than 80° F. is the quantity which may be transported limited to 2,000 gallons? In other words, could a ve-

hicle being loaded with 1,999 gallons of an inflammable liquid which has a flash of less than 80° F. carry in addition thereto a quantity of fuel oil of which the flash point is in excess of 80° F.?"

The applicable statute is sec. 85.45, subsec. (5), Stats., which reads as follows:

"It shall be unlawful to transport in any motor vehicle, trailer or semitrailer upon the public highways any gasoline, naphtha, benzine, fuel oil, 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."

The violation of the section is made a misdemeanor by sec. 85.91, Stats.

Under the quoted section it is perfectly clear that petroleum products with a flash point of less than 80° F. may not be transported except in a single motor vehicle or semitrailer attached to a motor tractor and may not be transported in any such motor vehicle or semitrailer in a quantity exceeding 2,000 gallons. It provides as well that such motor vehicle or semitrailer shall be plainly marked to show that inflammable substances are being transported therein. If a motor vehicle or semitrailer carries less than 2,000 gallons of the specified petroleum products with a flash point of less than 80° F., the law is not violated notwithstanding the fact that other products with a flash point in excess of 80° F. are carried. The matter of carrying petroleum products with a flash point above 80° F. is not covered by the statute either specifically or impliedly.

JWR

Counties — County Board — County Board Resolutions — Education — Special Schools — County School of Agriculture — Public Officers — County Agricultural School Board — County board may not under provisions of sec. 59.08, subsec. (8), Stats., abolish board of trustees provided for in sec. 41.47 and vest functions of board in committee of county board.

January 17, 1941.

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

You have submitted for our opinion a question concerning the abolition of the board of trustees of the Racine county agricultural school. Such a school was established pursuant to the provisions of sec. 41.47, Stats. The county board, by resolution, has abolished the offices of trustees of the school and has vested the functions of the board of trustees in a committee of the county board. You ask our opinion as to whether the action of the county board is proper, and have called our attention to an opinion in XXI Op. Atty. Gen. 1036 which, in substance, justifies such action. The applicable statutory provisions read as follows:

“41.47 County schools of agriculture; creation. (1) The county board may appropriate money for the organization, equipment and maintenance of a county school of agriculture, pursuant to the provisions of sections 41.47 to 41.58. The boards of two or more counties may unite in establishing and maintaining such a school.

“(2) The county clerk or clerks shall notify the dean of the college of agriculture whenever it has been voted to establish such school.

“(4) The county boards may borrow money and issue bonds for the purpose of procuring the necessary grounds and erecting the necessary buildings, and for improving the same from time to time, for such schools.”

“41.48 Same; school board, appointment, oath, organization. In all counties whose population is less than two hundred fifty thousand, a board to be known as the ‘County Agricultural School Board’ is created, which shall have

charge and control of all matters pertaining to the organization, equipment and maintenance of such school. The membership and organization and officers of said board and the election, appointment, terms and qualification of the members and officers of the board shall be the same as is provided in the case of 'county normal school board.' "

"59.07 General powers of board. The county board of each county is empowered at any legal meeting to:

"* * *

"(6) 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."

"59.08 Special powers of board. * * *

"* * *

"(8) The county board, at any annual meeting, may abolish, create or reestablish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation for which is paid in whole or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion thereof, notwithstanding the provisions of any special or general law to the contrary."

In XXI Op. Atty. Gen. 1036 it was held in a rather similar situation that a statutory board could be abolished and its function transferred to a committee of the county board. The reasoning runs along the line that sec. 59.08 (8) permits the county board to abolish any office; that when a statutory office is abolished, no provision exists for the discharge of the functions for which it was created, and that the county board may discharge them pursuant to the provisions of sec. 59.07 (6), Stats. It is reasoned further that since the county board may discharge the functions, it may delegate the discharge of them to a committee in view of the fact that the functions involved may be properly delegated.

We completely disagree with the opinion cited. We agree that the county board may abolish any office created by statute except those specified in sec. 59.08 (8). We do not agree, however, that when the office is abolished its functions may be transferred to the county board. Sec. 59.08 (8), Stats., does not so provide either expressly or impli-

edly. Neither can it be fairly argued that once an office is abolished no provision exists for the discharge of its functions, and that the county board may, therefore, discharge them under the provisions of sec. 59.07 (6), Stats.

If a statute makes provision for the discharge of statutory functions, sec. 59.07 (6) is not called into operation. The county board might abolish the board of trustees of the agricultural school, but notwithstanding that fact provision would still exist under sec. 41.48 for the management of the school. The county board could not repeal the statute, and until such time as it was repealed it would constitute a provision for the management of the school. Consequently, the county board cannot itself manage the school under the theory that the law does not provide for its management.

Sec. 59.08 (8), Stats., makes it clear that any county board may abolish a county office falling within a specified class. Thus the board is given considerable latitude in electing whether certain functions shall be discharged and certain activities carried on in the county over which it has jurisdiction. That, however, is an entirely different matter from so utilizing power conferred under sec. 59.08 (8) as to take a statutory scheme for the discharge of certain functions and the performance of certain services and by action of the county board converting the scheme into a wholly different one. In substance, the county board may elect to get out from under certain laws. It may not, in our opinion, accept a law in part and reject it in part.

We accordingly disapprove the opinion to which you call our attention, and state it as our considered opinion that the county board does not have the authority to exercise the power which it has attempted to exercise by virtue of the resolution in question.

JWR

Indigent, Insane, etc. — Poor Relief — Public Health —
Sec. 146.17, Stats., prohibiting interference with individual's right to select his own physician or mode of treatment, should be used by municipalities as guide to exercise of discretion vested in them in administration of poor relief laws but it does not prohibit conscientious exercise of discretion.

January 21, 1941.

BOARD OF HEALTH.

Attention Dr. C. A. Harper.

In your letter you state:

“Three cases of syphilis exist in an indigent family who live in a city in a Wisconsin county, but who have a legal settlement in another municipality in that county. This family wishes to be treated by a physician of their own choice. The authorities of the municipality, where they have legal settlement, however, insist upon sending them to another physician for treatment. The physician whom the family has selected claims he has a right to treat these cases because indigents have the right to select their own physician and because he charges the ordinary fees agreed upon by the County Medical Society of the county for treatment of indigents. The municipal officials insist they can hire whom they choose since they have to pay the bill.

“Section 146.17 reads as follows:

“‘Limitations. Nothing in the statutes shall be construed to authorize interference with the individual's right to select his own physician or mode of treatment, nor as a limitation upon the municipality to enact measures in aid of health administration, consistent with statute and acts of the state board of health.’

“On the other hand, we understand that an attorney general's opinion exists which states that the relief authorities are not obligated to pay any bill unless prior contract has been made with them.”

You request our opinion with respect to the problem.

Sec. 146.17, Stats., appears to have been originally enacted by chapter 674, sec. 1407a-6, Laws 1913. Then, as now, the section was contained in that part of the statutes dealing with certain public health problems and conferring power upon the state board of health and other administra-

tive agencies in relation thereto. The section, as originally enacted, reads as follows:

“Nothing in sections 1407a-1 to 1407a-6, inclusive, shall be construed to empower or authorize the board of health or its representative to interfere in any manner with the individual’s right to select a physician or mode of treatment of his choice.”

The said section continued to read substantially as above set forth until it was amended by ch. 448, sec. 59, Laws 1923, to read as it now reads. What seems to have been the legislative intent in changing the language of said section, “Nothing in sections 1407a-1 to 1407a-6, inclusive, shall be construed to empower or *authorize the board of health or its representative to interfere,*” as the law read from 1913 to 1923, to that of “Nothing in the statutes shall be construed to authorize interference” by the 1923 amendment? Then, as now, municipalities and other administrative agencies were given broad *police* powers with respect to control of communicable diseases; were given broad regulatory powers with respect to control of such diseases, and the enactment of sanitary rules and regulations reasonably calculated to prevent disease and promote health. (See for instance ch. 76bb to ch. 76e, inclusive, Stats. 1921; and ch. 140 to ch. 147, Stats. 1939.

In relation to the problem of interference with the patient’s or regulated person’s or family’s right to select a physician of his own choosing, it obviously could have been argued with a good deal of force that, under the statute as it read prior to the 1923 amendment, as the legislature had specifically declared that the board of health and its representatives could not interfere with the right, other agencies, not acting as a representative of the state board of health, including municipalities, by implication had authority to interfere with such right. The 1923 amendment made it clear that municipalities and other regulating authorities in relation to health matters, in the exercise of the powers conferred upon them, were not to interfere with a patient’s normal right to select his own physician or mode of treatment.

We are speaking now of the normal right of a non-indigent to select his own physician or mode of treatment in those situations where the regulatory authorities in the exercise of their regulatory powers may have unjustifiably (in the opinion of the legislature) interfered with a non-indigent person's right to select his own physician where medical treatment was required. Under the situation that existed prior to the 1923 amendment it would seem that municipalities or other agencies not acting as "a representative" of the state board of health by virtue of powers conferred upon them, may well have asserted the right to unjustifiably interfere with such freedom of selection. The 1923 amendment put that question beyond cavil. Municipalities and other agencies exercising regulatory powers may not unjustifiably, under the guise of regulation, interfere with a non-indigent's personal right to select his own physician and mode of treatment and where the interference with such right is not related to public health. It seems to us that the foregoing is all that the 1923 amendment was designed to accomplish.

We do not suppose that anyone would argue in spite of what appears to be broad language in section 146.17, Stats., that an indigent patient could demand of the municipality charged with the duty of furnishing medical services that the municipality furnish him with a member of the staff of the Mayo clinic or that an indigent patient situated in the southern part of the state could demand the furnishing of a doctor by the municipality where the doctor practices in the northern part of the state. Illustrations might be multiplied indefinitely. If the statute were interpreted literally, it would be impossible to apply section 143.07, Stats., as the final application of said statute obviously involves compulsory hospitalization and in institutions where the staff is in no sense selected by the patient.

We do not think that the statute has any application at all to indigent cases other than furnishing some guide to the officials of the municipalities as to the policy of the state. We think that it may fairly be said that the policy is to interfere as little as possible with the individual's right to select his own physician. Nevertheless, the administration of the poor relief statutes is lodged with the municipalities or

with the county where the county has adopted the system of county relief. These officers are necessarily given a very broad discretion with respect to the administration of relief. It is elementary that professional services, such as medical services, may not be performed by a physician for an indigent and the physician have any claim for reimbursement by the municipality or county in the absence of a contract of hiring (express or implied) by said municipality or county. XXI Op. Atty. Gen. 149; *St. Joseph's Hospital v. Withee*, 209 Wis. 424.

It goes without saying that if the doctor in question furnishes professional services to this indigent family he will not be able to recover against the municipality in the absence of a contract of hiring by the municipality.

Public officials administering the poor relief laws necessarily have a broad discretion. In the administration of such laws they have to balance the interests of the individual with those of the public. When the public officials have offered to furnish medical services to an indigent, the services to be performed by a physician named by the municipal officers, we think that a municipality has performed the statutory duty cast upon it, providing the public officers in thus selecting the physician are not acting wholly arbitrarily and capriciously. Discretion vested in public officials can never justify wholly capricious and arbitrary action. The line between valid exercise of discretion and capricious and arbitrary action is not one which can be drawn with exactitude. The line is drawn by the courts only by appraisal of the particular action as applied to all of the particular facts and circumstances of a particular case. It is not for us to appraise whether the action of the public officials in the instant case is within or without the bounds of their discretion. There can obviously be many unknown factors entering into a determination of that question. Upon the face of the situation, it would seem somewhat difficult to justify the position taken by the public officials but they may have perfectly legitimate and valid reasons for their action and which bring their action well within the field of the discretion conferred upon them. Section 146.17 is no insurmountable barrier to the exercise of that discretion. The public officials should, however, use the section in ques-

tion as a guide in determining how that discretion should be exercised.

It would seem that the family's wishes in the matter should be respected and given the greatest consideration by the public officials up to a point where the public officials, in a conscientious exercise of discretion, feel that the public interest requires that the family's wishes in the matter be overridden.

NSB

School Districts — Tuition feature of sec. 40.47, Stats., relates to nonresident tuition. Indigent resident tuition provided for by sec. 40.21, subsec. (2), Stats., is excepted from provisions of sec. 40.47 (5) and hence from provisions of sec. 40.47 (6). Accordingly, those provisions of sec. 40.47 (6) providing for state paying unpaid nonresident tuition claims and recovering against municipality are not applicable to resident indigent tuition under sec. 40.21 (2), Stats.

January 21, 1941.

DEPARTMENT OF PUBLIC INSTRUCTION.

In your letter you state:

“In the case of *City of Madison, a municipal corporation, Respondent, v. Dane County, a municipal corporation, Appellant*, [236 Wis. 145] the court held that the county is liable for the tuition of indigent pupils having legal settlement within the school district in which the pupils attend school when the county is on the ‘county system of relief’ pursuant to the provisions of sec. 40.21 (2), Stats. * * *

“Section 40.47 (6) of the statutes makes it the duty of the municipal clerk to enter upon the next tax roll such sums as may be due for such tuition from his municipality, etc.

“Question 1-a: Does the duty of the municipal clerk set forth by sec. 40.47 (6) of the statutes attach to the county clerk when tuition statements for high school tuition are filed with said clerk pursuant to the provisions of sec. 40.21 (2), Stats.?”

“Question 1-b: Are indigent tuition bills filed in the county to be automatically considered a charge against the county welfare appropriation?”

“Question 2: Does the state become liable for delinquency in indigent tuition payments on the part of the county under the provisions of sec. 40.47 (6), Stats.?”

The tuition feature of section 40.47, Stats., relates to non-resident tuition. See subsec. (3), subsec. (4) and subsec. (5) thereof. Section 40.47 (5) and (6) in so far as material, provides:

“(5) The tuition for any given year for *nonresident* pupils who have pursued high school work shall be determined as follows: * * * Before July in each year the school clerk shall file with the clerk of each municipality from which any tuition pupil was admitted, *except pupils defined by subsections (2) and (2a) of section 40.21, the claim for which indigent pupils shall be filed as provided for under those subsections,* * * *”

“(6) The municipal 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, * * *”

This latter section likewise provides the machinery for the state paying such tuition claim in the event that the municipality does not, and for the state recovering over against the municipality.

Sec. 40.21 (2) provides:

“Every person of school age maintained as a public charge shall for public school purposes be deemed a resident of the school district in which he resides, except that such school district shall be compensated by the municipality or by the county in case the county system of poor relief is in effect in such municipality in which such person of legal school age has a legal settlement as defined in section 49.02 with an amount equal to the pro rata share of the year's expense of maintaining such school, based upon the total enrollment and year's expense of the maintenance of such school. The county wherein the school district is located shall be liable for such indigent school tuition for

those persons who have no legal settlement in any city, town or village in the state. This subsection applies to both elementary and high schools.”

By the express language of sec. 40.21 (2) it is an indigent resident tuition section of the statutes. It will be noted that sec. 40.47 (5), by express language, relates to nonresident pupils and that the indigent resident tuition claim, under sec. 40.21, is expressly excluded from the provisions of said section. The term “such tuition” in sec. 40.47 (6), Stats., must then refer to the nonresident tuition in sec. 40.47 (5), Stats. No other conclusion would seem to be permissible in view of the following language:

“The municipal 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, * * *”

County clerks do not have charge of, nor are they charged with, any duty with respect to making up tax rolls. The machinery set up by section 40.47 (6) for collection of nonresident tuition is consistent with and fitted into the machinery of assessment, making up of tax rolls and collection of taxes. Such machinery is entirely unworkable and impossible as applied to the collection of indigent resident tuition under section 40.21 (2), Stats., for the very simple reason that the county clerk cannot place such tuition items on the tax roll. He does not make up the tax roll and has no duty with respect thereto. It would be impossible to collect resident indigent tuition, which is provided for under section 40.21 (2), Stats., by the machinery of section 40.47 (6), Stats., without completely rewriting the statute. That is a legislative function. It is not the function of statutory construction.

The above analysis answers your questions 1-a and 2. The provisions of section 40.47 (6) are not applicable to indigent resident tuition cases under section 40.21 (2), Stats. The county clerk is therefore obviously under no duty to place indigent resident tuition claims upon the tax roll (he cannot do so) and for the same reason the state is under no obligation to pay unpaid resident indigent tuition claims.

In view of our answer to question 2, your question 1-b, as follows, "Are indigent tuition bills filed in the county to be automatically considered a charge against the county welfare appropriation?" appears to be of no concern to your department.

NSB

Counties — County Ordinances — Municipal Corporations — Beer Licenses — Place where liquor and beer are served is not *ipso facto* "roadhouse" or "place of amusement" within meaning of sec. 59.08, subsec. (15), Stats. Accordingly, county boards have no authority to enact ordinances requiring closing of such places after 1:00 A. M. XXVIII Op. Atty. Gen. followed.

January 21, 1941.

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

Your predecessor, Ray J. Haggerty, has requested an opinion as to the power of the county board to enact an ordinance to close all taverns in the county outside of the cities and villages at 1:00 A. M.

In XXVIII Op. Atty. Gen. 347, this office ruled that a county has no power to enact an ordinance providing that no premises for which retail liquor or beer license has been issued shall be permitted to remain open for any purpose whatsoever during the hours from 1:00 A. M. to 8:00 A. M. The conclusion there announced is undoubtedly applicable to the proposed ordinance mentioned in Mr. Haggerty's letter. However, we have given the matter some additional study and submit the following additional reasons why no such ordinance may be enacted.

Sec. 59.08 (15) provides that the county board may

"Exercise all the powers conferred by law on cities to regulate by ordinance, dance halls, roadhouses, and other places

of amusement outside the limits of incorporated cities and villages. The powers hereby conferred shall be in addition to all grants, and shall be limited only by express language."

The power conferred by the foregoing subsection unquestionably includes the power to enact closing hour regulations. *Stetzer v. Chippewa County*, 225 Wis. 125. But it is clear that taverns as such are not included within the list of places made subject to regulation by subsec. (15). A "place of amusement" is a place where some sort of attraction or entertainment is provided. See 3 Words and Phrases (Permanent edition) pp. 372-373. It has been held that a saloon is not a "place of public accommodation, resort or amusement" within the meaning of the New York civil rights law. *Gibbs v. Arras Bros.*, (1918) 222 N. Y. 332, 118 N. E. 857, L. R. A. 1918F, 826, Ann. Cas. 1918D, 1141. In fact, laws in several states forbid the sale of liquor in places of amusement. See cases cited at 32 Words and Phrases, (Permanent edition) p. 564. It is therefore apparent that a place where liquor is served is not *ipso facto* a place of amusement.

Nor does it come within the meaning of the word "roadhouse" as used in subsec. (15). The construction of that word is controlled by the rule, *noscitur a sociis*—that is, its meaning is to be inferred from the other words appearing with it, namely, "dance halls" and "other places of amusement." It is considered that a place where liquor and beer are sold at retail is not *ipso facto* a "roadhouse," but that something more than a barroom is contemplated by the use of that word.

Accordingly, you are advised that for the reasons announced in the earlier opinion and for the further reasons herein set forth, county boards have no authority to enact closing ordinances covering taverns located outside of cities and villages.

WAP

Automobiles — Law of Road — Violation of sec. 85.215, subsec. (1), Stats., which prohibits renting of motor vehicles without filing sufficient bond or insurance policy with motor vehicle department, may be punished under sec. 85.91 (1) regardless of civil liability imposed by sec. 85.215 (2), Stats.

January 21, 1941.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Deputy Commissioner*.

You ask whether it is illegal for any person, firm or corporation to rent any motor vehicle for compensation until such person, firm or corporation shall have filed with the motor vehicle department a bond or policy of insurance as specified in sec. 85.215, Stats., which reads:

“(1) No person, firm or corporation shall for compensation rent any motor vehicle to be operated by or with the consent of the person renting the same, unless there shall be filed with the motor vehicle department a good and sufficient bond or policy of insurance issued by a company or exchange organized under the laws of the state of Wisconsin, or duly authorized to transact business therein, which shall provide that the company or exchange issuing the same shall be liable to the person sustaining injury or damage to property, and shall pay all damages for injuries to persons not exceeding five thousand dollars for any one accident, or damages to property not exceeding one thousand dollars for any one accident due to the negligent operation of such motor vehicle.

“(2) Any person, firm or corporation failing to comply with the provisions of this section shall be directly liable for all damages to persons or property caused by the negligence of the person operating such rented vehicle, to the extent that such liability could be established if this section had been complied with.”

Subsec. (1) of sec. 85.91 provides in part:

“Any person violating any provisions of * * * sections 85.21 to 85.23 * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed ten dollars for the first offense

and for the second or each subsequent conviction within one year thereafter, by a fine not to exceed twenty-five dollars.”

We take it that the question intended to be raised is whether the penalties provided in sec. 85.91 (1) are intended to apply to a violation of sec. 85.215 (1), in view of the additional civil liability created under sec. 85.215 (2) for such violation.

Sec. 85.215 was created by ch. 328, Laws 1929, effective July 26, 1929. The relevant portion of sec. 85.91, quoted above, was enacted later in the same year by ch. 454, Laws 1929, effective November 5, 1929. It seems conclusive that the penalties so provided were intended to apply to sec. 85.215, since this section is clearly covered by the wording “sections 85.21 to 85.23” mentioned in sec. 85.91 (1), as created by ch. 454.

If any inference as to the legislative intent can be made, it must be to the effect that the requirement of sec. 85.215 was considered of such benefit to the public welfare as to justify the increased civil liability created by subsec. (2) thereof, in addition to the penalty provided by sec. 85.91 (1) for a violation. As our court stated in *Watts v. Rent-a-Ford Co.*, 205 Wis. 140, 142, in reference to this section of the statutes:

“The statute was passed in the exercise of the police power. The object of it clearly falls within that power, and is a worthy one. The consummation of it would promote the public good * * *.”

It is therefore our opinion that it is illegal to rent a motor vehicle to be operated by or with the consent of the person renting the same unless there is first filed with the motor vehicle department the bond or insurance policy specified by sec. 85.215 (1), and that a violation of this section may be punished under sec. 85.91 (1), regardless of the civil liability imposed by sec. 85.215 (2).

WHR

Taxation — Tax Collection — Tax Sales — County is not accountable to local municipality for excess of proceeds of sale by county of tax deeded lands over redemption value of outstanding tax liens against land. XXVI Op. Atty. Gen. 572 overruled.

January 27, 1941.

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

Your county holds the tax certificates for the years 1932 to 1939, on certain real estate in the city of Madison. The delinquent rolls for the 1932 and 1933 taxes are excess rolls upon which the county taxes have been fully paid. As it is proposed that the county take tax deeds to the property you request an opinion as to the liability of the county to the local municipality upon the future sale of such property and particularly upon the question of whether there is any difference in the liability of the county depending on the year's certificate upon which the tax deed is taken. You request a re-examination of the conclusion reached in XXVI Op. Atty. Gen. 572, that the excess of the proceeds of a sale by the county of tax deeded lands over the unpaid tax liens thereon belongs to the local municipality where the tax deed was taken on a certificate for taxes in an excess roll upon which the county has been fully satisfied.

The conclusion reached in XXVI Op. Atty. Gen. 572 was grounded upon the provisions of sec. 74.19, subsec. (3), Stats., which provides that taxes returned delinquent to the county shall be collected, with interest and charges thereon, by and shall belong to the county as its own property, but that if such delinquent taxes returned exceed the sum due the county for unpaid county taxes then the excess of such delinquent taxes when collected shall be paid over to the local municipality together with the interest and charges thereon that are collected. The whole amount of the proceeds of the sale of the land by the county, including the excess over the total tax liens on the land sold, was there treated as delinquent taxes collected and therefore the pro-

visions of sec. 74.19 (3), Stats., were applied to the disposition of the entire proceeds. No consideration was given to the distinction between the total taxes, including interest and charges thereon, for which the county, in the event of collection thereof, was accountable to the local municipality under sec. 74.19 (3), Stats., and the amount of the proceeds realized upon the sale which was in excess of said total taxes.

Sec. 74.19 (3), Stats., deals with and is applicable only to the disposition of the delinquent taxes, together with interest and charges thereon, that are collected by the county. The excess of the proceeds of the sale over the redemption value of the tax liens against the property can not represent delinquent taxes, including interest and charges thereon, collected by the county by virtue of the very fact that such excess is over and above the total of the redemption value of the tax liens. Such excess is rather a profit which happens to arise on the conclusion of the statutory procedure for the collection of delinquent taxes. As sec. 74.19 (3), Stats., deals only with the disposition of delinquent taxes, together with interest and charges thereon, which are collected, any liability of the county to account to the local municipality for anything in excess thereof, if the same exists, must be found in other statutory provisions.

Sec. 75.36, Stats., specifically deals with the subject of tax deeds to the county and the liability of the county to account for delinquent tax liens on property to which it takes a tax deed. It provides as follows:

“When any lands upon which the county holds a tax certificate shall not be redeemed as provided by law the county clerk shall execute to the county, in his name of office, a deed therefor, witnessed, sealed and acknowledged and in like form as deeds to individuals; and such deeds shall have the same force and effect as deeds executed by such clerk to individuals for lands sold for nonpayment of taxes; but no such deed shall be issued until the county board shall, by resolution, order the same. The county taking such deed shall not be required to pay any delinquent or outstanding taxes on such land, the redemption value of any outstanding tax certificates, or interest or charges until the land is sold by the county, or in the case of lands registered as forest crop lands, until the forest crop is taken off. If the sum re-

alized on such sale or from the severance of such forest crop is insufficient to pay all of said taxes, delinquent taxes, certificates, or charges, the amount realized shall be applied thereto and there shall be no further liability upon the county for the same."

By express provision therein a tax deed to the county has the same force and effect as though it were issued to an individual. Thus the county, upon the taking of a tax deed, becomes vested with title in fee to the property subject, however, only to a liability to account to the local municipality for the delinquent tax liens thereon. In *Spooner v. Washburn County*, (1905) 124 Wis. 24, 102 N. W. 325, it was held that the county upon taking a tax deed became liable and immediately accountable to the local municipality for the redemption value of the certificate upon which the tax deed was founded and of the other outstanding tax liens on the land held by the county. At pages 33-34 the court said:

"* * * There is nothing in the statute showing that the county, under such deeds, takes a more restricted or qualified title than individuals would take, nor are there any limitations on its power to deal with the lands as it sees fit. Under similar statutes in other states the deed is held to vest all the interest and title in fee, * * *. The county may therefore dispose of the lands, as sole proprietor, at a price in excess of, or for less than, the redemption value of the tax certificate when the deed was executed. Under such circumstances, it seems within the legislative purpose that the county should be liable to the town as all other purchasers under these circumstances, namely, for the redemption value of the certificate when the land was deeded to the county, and for the redemption value of any outstanding tax certificate on such lands, as well as all subsequent taxes remaining unpaid which were levied while the county owned the land."

This decision was prior to the amendment of sec. 75.36, Stats., by ch. 405, Laws 1929, which added the last two sentences to the statute as it now exists. Thus, prior to such amendment, the county, upon taking a tax deed, became liable and immediately accountable to the local municipality for the redemption value of the outstanding tax liens which

the county held upon such land the same as if the county had collected the same in full. In the absence of the last two sentences of the present sec. 75.36, this would still be the law and the county would be immediately accountable to the local municipality under sec. 74.19 (3), Stats., upon taking a tax deed. In the event of a subsequent sale of the land by the county for an amount in excess of the total outstanding tax liens for which it would be accountable there would be no liability on the county to pay such excess to the local municipality. On the other hand, if it sold the land for less than the total of the tax liens that would not in any way cut down the county's liability. Thus, sec. 74.19 (3), Stats., is without determinative effect upon the question of the disposition to be made of the excess under consideration.

The addition by ch. 405, Laws 1929, of the last two sentences to sec. 75.36, Stats., did not enlarge or increase the liability of the county to account for tax liens accruing when the county takes a tax deed but merely postponed or deferred the time of accountability therefor and limited the county's liability to an amount not in excess of the amount realized upon the subsequent sale of the land. In other words, this amendment did not change the liability of the county as established by *Spooner v. Washburn County*, *supra*. but provided that the county did not have to discharge such liability and account therefor until it had subsequently sold the land and that it should not be held accountable on such liability for any amount greater than the proceeds realized upon such sale. As to the quantum of the county's liability this amendment dealt solely with instances of sale for less than the total tax liens on the property and contains no language that in any manner can be deemed to enlarge or include therein the amount by which the sale proceeds exceed the total liens thereon.

While sales of tax deeded lands for an amount in excess of the tax liens thereon are considerably less frequent than sales for less than the tax liens, nevertheless, the legislature must have had the possibility thereof in mind when it adopted the amendment to sec. 75.36. If it had been intended by such amendment that the county should be accountable for the entire proceeds of the sale, regardless of whether more or less than the total of the tax liens, it

would have been easy to do so by providing that the liability of the county should be for the sum realized upon the sale but for not to exceed such amount. Assuming that the legislature had both situations in mind, then the amendment must be limited in its effect to the only situation to which it is addressed, being the liability of the county as it previously existed in the instance of a sale for less than the outstanding tax liens. Not being addressed to the matter of the county's liability in the event of a sale for a greater amount, it must be taken as not intended as affecting the same. If, on the other hand, the legislature was concerned only with the situation arising where the county sold the land for less than the tax liens and the amendment was passed solely to take care thereof, then obviously the amendment can be given no greater effect than the subjects which it was intended to embrace.

As we construe the provisions of secs. 74.19 (3) and 75.36, neither of them covers the disposition to be made of the excess over tax liens realized by a county upon the sale of tax delinquent lands. The county is not accountable to the local municipality for such excess or profit unless some other statutory provision requires it. We find no such statutory provision.

Our information is that the vast majority of the counties in the state for many years have so construed the statutes and the practice therein has been for the county to keep such excess. We are also informed by the municipal accounting division of the tax department that it has so interpreted and applied the statutes in making county audits in all instances where any excess roll accounting has been involved.

Your question as to whether it makes any difference in the county's liability if it takes the tax deed on the oldest certificate which it holds or on one of the subsequent certificates, demonstrates the difficulties that are encountered if the conclusion in XXVI Op. Atty. Gen. 572 were to stand. That opinion would determine who is entitled to the profit arising out of the sale on the basis of whether the tax certificate upon which the tax deed was taken represented taxes in an excess or nonexcess roll. There would obviously be a difference in the liability of the county if the character of

the tax roll of the certificate on which the deed is taken is controlling as to the disposition of the excess over the tax liens. Where the tax deed was taken by the county on a certificate of an excess roll year then the profit would be credited to or paid to the local municipality as the collection of the taxes of that tax year. On the other hand, if the certificate upon which the county took the tax deed represented taxes in a nonexcess roll year the profit would belong to the county. Such would be the disposition of the profit notwithstanding that the certificates of the other years whose collection would be effected by such sale might be included in nonexcess rolls in the one situation or in excess rolls in the latter case. As the sale is deemed to effect a collection of not only the taxes represented by the certificate upon which the deed is taken but also of the taxes of all other outstanding tax certificates held by the county, then if the excess were deemed to be taxes collected it is fully as much a part of the taxes represented by the certificates other than the one on which the deed was taken as it is a part of the taxes represented by that certificate. It is no more a part of one than it is of the other. At best, under such a theory, the profit would have to be divided between or prorated to all of the years involved. But neither sec. 74.19 (3) nor sec. 75.36, Stats., so provides. They use the words "taxes", "delinquent taxes", "certificates", "interest and charges thereon", and "redemption value of outstanding tax certificates". This particularly in the use of words, under the rule of *expressio unius est exclusio alterius*, precludes the excess realized upon the sale from being included within the word "taxes" or any of the other terms therein contained and therefore the sale proceeds in excess of the tax liens do not come within the purview of those sections. See our opinion to the Assistant District Attorney of Manitowoc county, dated December 30, 1940.*

The whole problem is merely one of accounting between the county and the local municipality for taxes collected. Where the county sells tax deeded land for an amount equal to or in excess of all the tax liens thereon, it is accountable to the local municipality for the redemption value of such

*XXIX Op. Atty. Gen. 476.

of said tax liens held by the county as are a part of excess rolls, regardless of whether they are prior or subsequent to the year's taxes represented by the certificate upon which the tax deed was taken. The county's liability is to account for all unpaid taxes returned to it as delinquent which are in effect collected by it when it sells land to which it has taken a tax deed. *Town of Bell v. Bayfield County*, (1931) 206 Wis. 297, 239 N. W. 503, is not to the contrary. It merely held that the county is accountable to the local municipality on each excess roll separately and may not apply the amount due thereon to the local municipality as a credit upon, or offset against it, the amount unpaid to the county upon delinquent rolls of subsequent years for its share of the taxes of such later years.

It is clear that a tax deed to the county cuts off all rights on certificates of prior years which are not held by the county. XX Op. Atty. Gen. 1067. But the county, by taking a tax deed, can no more cut off its liability to so account for taxes returned to it for collection, and for which it holds the certificates, of years prior to the certificate upon which the tax deed is taken than it can preserve as liens on the property the certificates for delinquent taxes of subsequent years. The absence of adversity in interest which operates to merge the subsequent liens in the title taken likewise prevents a cutting off of accountability for the prior liens. We call your attention also to the opinion in XXVIII Op. Atty. Gen. 74, which covers the situation where the land is sold by the county for less than the total outstanding tax liens against the property.

It is, therefore, our opinion that XXVI Op. Atty. Gen. 572 is erroneous and that the county is entitled to any excess of the sale price of tax deeded lands over the total of the outstanding tax liens against the property and that the accountability of the county to the local municipality is not dependent upon the character of the roll of the tax certificate upon which the tax deed is taken.

HHP

Public Health — Slaughterhouses — Sec. 146.11, Stats., is not restricted to places where business of slaughtering animals for human consumption is carried on but applies also to slaughtering of animals for preparation of animal foods, such as mink, fox and dog foods.

January 30, 1941.

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

You inquire whether the slaughterhouse law, sec. 146.11, Stats., applies to a place where the business of slaughtering animals for the purpose of preparing food for animals, such as mink, fox and dog foods, but not for human consumption, is carried on.

For the purpose of your question it will be sufficient to consider only the first sentence of subsec. (1), which reads as follows:

“No person shall erect or maintain any slaughterhouse, or conduct the business of slaughtering, upon the bank of a watercourse; nor, unless under federal inspection, within one-eighth mile of a public highway, dwelling, or business building; or put a carcass or offal into a watercourse nor upon the banks of a watercourse flowing through any city, village or organized town of two hundred or more inhabitants. * * *”

In the first place, it may be mentioned parenthetically that the prohibition against putting a carcass or offal into a watercourse, etc., applies to all persons, whether engaged in operating slaughterhouses or not. Hence it is immaterial where or for what purpose the animal was killed, or whether it died from natural causes.

Sec. 146.11 applies to “slaughterhouses” and “the business of slaughtering.” As pointed out in XXVIII Op. Atty. Gen. 566, the word “slaughterhouse” is defined variously as “a building where beasts are butchered for the market” (Webster) or “a house or place where animals are killed for food” (New English Dictionary). Giving the term the liberal construction due to all health measures, it is apparent

that it is broad enough to cover places where animals are slaughtered for animal food as well as for human consumption.

The historical purpose of regulating slaughterhouses is not so much to insure the purity of the product as to protect the public from the noxious and offensive character of the business itself. *Slaughterhouse Cases*, (1873) 83 U. S. (16 Wall.) 36; *Taylor v. The State*, (1874) 35 Wis. 298; 2 Kent, Com., 340. It is based on the principle underlying the regulation and abatement of nuisances, that every person ought to use his property in such a way that he will not injure his neighbors (*sic utere tuo ut alienum non laedas*). Whether the product is to be used for human consumption or for animal food, it may be assumed that the abattoir will be as fragrant in the one case as in the other.

This conclusion is strengthened by the fact that sec. 146.12 (4) requires rendering plants to be located not less than one-eighth mile from a dwelling, business building or public highway. None of the products of a rendering plant under that section may be used for human consumption. Sec. 146.12 (1), (2). Yet the plants are subject to the same restrictions as to location as are slaughterhouses. There would be an unexplained hiatus in the law if places for slaughtering animals for human food and rendering plants were regulated and restricted in their location, but places for slaughtering animals for animal food were unrestricted and unregulated.

You are therefore advised that slaughterhouses where animals are killed for purposes of preparing animal foods are subject to sec. 146.11, Stats.

WAP

Public Health — Beauty Parlors — Sec. 159.08, subsec. (5), Stats., exempts apprentices and students of cosmetology who had actually commenced their training before enactment of subsecs. (1), (4) and (4a), sec. 159.08 from licensing requirements thereof. But it does not exempt anyone from requirements of sec. 159.02 (3), which prescribes requirements of admission to and graduation from schools of cosmetic art; hence no student may be admitted to or graduated from such school in accordance with law as it had existed theretofore after effective date of sec. 159.02 notwithstanding such student may have been previously enrolled for future attendance. Nor may any student admitted to school pursuant to previous "enrollment" claim benefit of exemption provided by sec. 159.08 (5), since such admission would be contrary to law and hence is not within intent of exemption, which was to prevent hardship to those previously lawfully admitted to schools under former statute.

January 30, 1941.

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

You request an opinion as to the effect of the following subsections of sec. 159.08, Stats.:

"(1) All applications for licenses under this chapter shall be filed with the board. No license shall be issued unless the applicant presents proof that he is of good moral character; in good physical and mental health, and has completed the tenth grade education or has an equivalent education as determined by the extension division of the university of Wisconsin or the Milwaukee board of school directors.

"* * *

"(4) 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.

"(4a) The fee to be paid by an applicant for an examination to determine his fitness to receive an operator's license

shall be ten dollars. If a license be issued the fee for said license shall be two dollars.

"(5) Requirements of subsections (1), (4) and (4a) of this section shall not apply to any duly registered apprentice in any beauty parlor in the state at the time of the enactment of this section nor to any student enrolled in a cosmetic school at the time of the enactment of this section, provided that said school has been approved by the board."

Prior to the enactment of the foregoing requirements by ch. 431, Laws 1939, sec. 159.08, Stats. 1937, provided as follows:

"Applications for licenses under this chapter shall be filed with the state board of health. No license shall be issued unless the applicant presents competent proof that he is of good moral character and has an education equivalent to the completion of the eighth grade in the common schools.

"(a) Applicants for managers' or itinerants' licenses shall be at least twenty-one years of age; citizens of the United States; have practiced in a beauty parlor or school of cosmetic art for at least eighteen months, including time spent in instruction.

"(b) Applicants for an operator's license shall have a total experience of at least six months as an apprentice, including time spent in instruction in a beauty parlor or school of cosmetic art.

"(c) Applicants for a manicurist's license shall be at least eighteen years of age and have served three months under the supervision of a licensed manager."

Formerly schools of cosmetic art were required to give a course of at least 600 hours of study (sec. 159.02, Stats. 1937), but as a practical matter they usually allowed their students to complete an apprenticeship equivalent to at least 1144 hours of work. Now they are required to give a course of instruction of 1500 hours, requiring at least eight months to complete (sec. 159.02 (3), Stats. 1939).

You inquire (1) whether sec. 159.08 (5), above quoted, makes clear that students enrolled prior to the enactment of ch. 431, Laws 1939, may complete their course of 1144 hours and become licensed without examination by the board, and (2) whether the word "enrolled" as used in sec. 159.08 (5) requires actual attendance at a school or whether it is sufficient that the student have "contemplated" entering a school

prior to the enactment of the law, but not actually commenced attending until afterward. We assume that you infer that the student must have done more than just think about possibly entering a school of cosmetology, but must have "signed up" in some way so that her name would be "enrolled" at the school, for future attendance. Obviously, no one would argue that an uncommunicated mental act could possibly be construed as an "enrollment."

Subsec. (5) of sec. 159.08 is clearly a proviso. Compare *Pabst Brewing Co. v. Milwaukee*, (1912) 148 Wis. 582, 586. It limits the application of subsecs. (1), (4) and (4a) of the same section, but by well established rules of construction *it does not limit any other part of the act.*

Sec. 159.02 (3) provides in part as follows:

"No school teaching cosmetic art shall be granted a certificate of registration unless it requires as a prerequisite to admission, completion, as shown by certificate or affidavit, of the tenth grade or an equivalent education as determined by the extension division of the university of Wisconsin or the Milwaukee board of school directors, and unless it requires as a prerequisite to graduation a course of instruction of not less than fifteen hundred hours to be completed within a period of not less than eight months instruction of not more than eight hours in any one day. * * *"

It is clear that nothing in sec. 159.08 (5) can be held to limit the foregoing requirement. No *school may admit* any student, whether theretofore "enrolled" or not, unless she has a tenth grade or equivalent education, nor may any school *graduate* any student, whenever enrolled, unless the 1500 hour course has been completed as prescribed. Then what is the effect of sec. 159.08 (5)? It is simply that a student lawfully *admitted* under the old law, may, after completing an 1144 hour course, be licensed without examination by the board without proving that she has a tenth grade or equivalent education and without graduation from a school of cosmetic art. Such a person can *avoid* the requirements of sec. 159.08 (1) and (4) by virtue of the proviso contained in subsec. (5). But neither a school nor anyone not theretofore admitted to a school can avoid the requirements of sec. 159.02 (3), since the proviso does not apply

to that section. Hence no one can be admitted to or graduated from a school under the old law after the effective date of ch. 431, Laws 1939.

This conclusion is fortified by the rule of strict construction applicable to provisos in legislation generally. The rule is stated as follows in 59 C. J. 1089:

“A proviso which follows and restricts an enacting clause general in its scope should be strictly construed, so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso.”

The United States supreme court has stated the rule as follows.

“* * * we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, *that proviso is construed strictly*, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being *within the words as well as within the reason thereof.*” *United States v. Dickson*, (1841) 40 U. S. (15 Pet.) 141, 165 (italics supplied.)

See also: *In re Opinion of the Justices*, (1926) 254 Mass. 617, 151 N. E. 680, 681; Endlich, *Interpretation of Statutes* (1888) sec. 186.

It is obvious that the proviso contained in sec. 159.08 (5) was intended to prevent hardship to those who had commenced their course of apprenticeship or study relying upon the law as it then existed to enable them to become licensed operators after a certain time. The proviso can be justified on no other grounds consistent with the constitutional principle of equal protection of the laws to all persons.

The legislature has enacted that no person shall hereafter be *admitted* to any school, or *graduated* therefrom, except according to the new law. It has made no proviso with respect to that requirement. Then it has enacted that no person

shall be *licensed* except according to the new law, *provided* that this shall not apply to any duly registered apprentice or any student enrolled in any school at the time of the enactment of the new law. The proviso thus amply protects those to whom the new law would otherwise be a hardship. There is no reason for extending its benefits to persons who had not yet actually entered upon their training relying upon the old law. Applying the strict rule of construction above stated, no such extension can properly be made.

Construing the law as a whole, therefore, it appears that the word "enrolled" as used in sec. 159.08 (5) cannot be construed in the broad sense in which persons are sometimes "enrolled" by their parents in a private school or university as soon as they are born. Since no person may be lawfully admitted to a school of cosmetic art except in accordance with the new law, the word "enrolled" as used in the proviso must be construed in the narrow sense as requiring that the student have been actually in attendance on or before the day the new law was enacted.

WAP

Public Health — Basic Science Law — Time during which board of medical examiners may revoke license of person convicted of crime committed in course of his professional conduct is not limited by provisions of sec. 147.20, subsec. (3), Stats., or otherwise.

February 6, 1941.

BOARD OF MEDICAL EXAMINERS.

Attention Dr. H. W. Shutter, *Secretary*.

You have inquired as to when the time expires during which the board of medical examiners may revoke a license of one who has been convicted of some offense committed in the course of his professional conduct, and you refer to a case where a doctor has been convicted and served his sentence before the board had any knowledge of the conviction and sentence.

Sec. 147.20, (3), Stats., provides:

“When any person licensed or registered by the board of medical examiners is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the board of medical examiners a certified copy of the information and of the verdict and judgment, and upon such filing the board shall revoke the license or certificate.”

In XXVI Op. Atty. Gen. 378, we pointed out that the conviction does not result in automatic suspension of the license, but that affirmative action is required on the part of the board and that until the clerk of the court files with the board of medical examiners a certified copy of the information, verdict and judgment, as prescribed by the statute, there is nothing upon which the board can proceed to revoke the license.

We assume that the failure of the board to act in the instance mentioned was due to the fact that no certified copy of the papers mentioned was filed with the board.

If such record is now before the board, we see no reason why it should refrain from revoking the license even though the physician has served his sentence. Sec. 147.20 (3) is

not a part of the criminal statutes. It is purely civil in nature, and its operation is in no way contingent upon the serving of the sentence imposed by the criminal court. As long as the conviction stands unreversed, and its legal consequences have not been absolved by a pardon, the mandate of sec. 147.20 (3) is operative, and we know of no statute of limitations which would stay its operation. Certainly there is nothing in the statute indicating that the legislature did not intend that the revocation should occur late rather than not at all.

Presumably the theory underlying the statute is that one who has been convicted of a crime committed in the course of his professional conduct has thereby demonstrated his incompetence or unworthiness to treat the sick, and the public should be protected by having his license revoked. This concept is entirely unrelated to the matter of punishment for the offense committed and consequently would be in no way affected by the circumstances of whether or not the sentence imposed had actually been served.

WHR

Banks and Banking — Mutual savings banks organized under provisions of ch. 222, Wis. Stats., are empowered by express statutory authority to become members of federal reserve system.

February 7, 1941.

ROBERT K. HENRY,
Banking Commission.

You have requested an opinion as to the power of a mutual savings bank, organized under ch. 222 of the Wisconsin statutes, to become a member of the federal reserve system.

By sec. 222.21, subsec. (1), par. (a), Wis. Stats., mutual savings banks are given the power to become members of a federal reserve bank as provided in sec. 221.04 (3). This

latter subsection expressly grants the power to a bank to purchase so much of the capital stock of a federal reserve bank as will qualify it for membership and to become a member of such federal reserve bank. The foregoing statutory provisions, being enacted later in point of time and for the specific purpose of authorizing membership in the federal reserve system, will control as against the provisions of sec. 222.13, which provides that no mutual savings bank shall invest any part of its deposits in the stock of any corporation.

RHL

Public Health — Beauty Parlors — Cosmetologists licensed under ch. 159, Stats., are not forbidden to pare normal toenails and apply cosmetic preparations to feet by anything contained in chiropody law, ch. 154, Stats. But treatment of abnormal or pathological conditions of feet, such as corns, bunions, callouses and like, is within exclusive province of licensed chiropodists and may not be undertaken by cosmetologists.

February 14, 1941.

DR. H. W. SHUTTER, *Secretary,*
Board of Medical Examiners.

You request an opinion concerning the following situation:

"A number of cosmeticians or beauticians operating under the jurisdiction of the Wisconsin state board of health have been performing a 'beauty service' to the toe nails which they term 'pedicuring.' It is our understanding that at least one school of beauty culture is contemplating teaching the subject of 'pedicuring.'

"A perusal of the statutes governing the work of beauticians indicates that there is no provision for 'pedicuring.' Since the work of this type is a form of service comparable

to manicuring, it would entail the use of medicaments; the cutting, filing and treatment of abnormal nails (most shoe wearing people having abnormal nail tendencies) and the removal of calloused tissue, corns and excrescences under nails and in nail grooves."

You inquire whether pedicuring by cosmetologists constitutes a violation of the chiropody act, ch. 154, Stats. Sec. 154.01, subsec. (1), defining the practice of chiropody, provides as follows:

"The practice of chiropody is the diagnosis or mechanical or surgical treatment, or treatment by the local application of drugs, of abnormal nails, or superficial excrescences on the hands and feet, such as corns, warts and callouses, or fissures and bunions, or the diagnosis or mechanical but not surgical treatment of congenital or acquired deformities of the feet, but does not include surgical operations upon the hands or feet for congenital or acquired deformities or conditions requiring the use of an anaesthetic other than local, nor incisions involving structures below the skin, nor of any portion or organ of the body above the feet, except that the diagnosis and mechanical treatment shall include the tendons and muscles of the lower leg in so far only as they shall be involved in the enumerated conditions of the feet."

Subsec. (2) of sec. 154.01 exempts from the application of the chapter only physicians and nonresident chiropodists in consultation with chiropodists registered in this state. It is therefore immaterial whether or not the cosmetology law, ch. 159, statutes, covers work on the feet, since licensed cosmetologists are not exempted from the provisions of ch. 154 and therefore may not perform any of the functions defined therein as the practice of chiropody.

The question whether licensed cosmetologists are precluded from doing any work on the feet was raised informally several months ago by the cosmetology division of the board of health. At that time we were advised that the cosmetologists were restricting themselves to the paring of toenails and the application of cosmetic preparations to the feet and were not attempting to treat pathological conditions such as corns, callouses, bunions and other excrescences.

The distinction between the functions of the chiropodist and of the cosmetologist is that the former is authorized to

treat pathological conditions of the feet while the cosmetologist is authorized to attend to the cosmetic needs of his clientele. The paring of normal toenails and the application of cosmetic preparations to the feet is not included within the statutory definition of chiropody above quoted and hence does not constitute a violation of ch. 154 if done by persons other than licensed chiropodists. It follows that licensed cosmetologists may engage in such practice but may not treat pathological conditions of the feet, which are within the exclusive field of the chiropodist.

WAP

Bridges and Highways — Drainage Districts — Taxation — Tax Sales — County owning and holding unredeemed drainage assessment certificates bid in under sec. 89.37, Stats., may apply for sale of property under sec. 89.37, subsec. (4), par (d), whether or not it has taken deed on its general tax certificates. If it has taken such deed, proceeds of sale should be first applied to payment of drainage district assessments. Application for sale should not be made in either case until expiration of five years from date of drainage assessment certificates.

February 17, 1941.

DONALD W. GLEASON,

District Attorney,

Green Bay, Wisconsin.

Attention J. Norman Basten, *Assistant.*

You have asked several questions relating to drainage assessment certificates issued under sec. 89.37 of the statutes, which are hereinafter separately quoted:

“1. When the county has taken a tax title by virtue of tax certificates (regular, not special), may it bring an action in circuit court immediately, under section 89.37, (4), (d) ?”

We assume that when you say the county has taken title you mean that it has taken a tax deed under section 75.14 of the statutes, for general delinquent taxes, and that there are drainage assessment certificates outstanding. We assume, also, that the county has bid in the drainage assessment certificates in trust for the drainage district, and continues to hold them without having taken a drainage assessment deed, since it is only for such cases that the procedure in section 89.37, subsec. (4), par. (d), was provided. The remedy therein prescribed is for the benefit of creditors entitled to proceeds of the drainage assessments. That it is not a procedure primarily for the benefit of certificate owners, as such, is apparent from the fact that it does not lie upon the application of any purchaser of a certificate except the county, and from the further fact that other procedure, hereinafter discussed, is provided for the enforcement of either tax or special assessment certificates. The county is required to bid in drainage assessment certificates if there are no other purchasers, but does not thereby become liable for the assessments. If the certificates are not redeemed or sold and the county elects not to render itself liable for the assessments by taking a drainage assessment deed, there is no other method to enforce collection than that provided in section 89.37 (4) (d). The county initiates such a proceeding in its representative capacity, as trustee for the persons entitled to the proceeds of the drainage assessments, rather than for the primary purpose of canceling the assessments and cutting off the lien.

If the drainage assessment certificates had been assigned to others (assuming that this could be done as a consequence of a loan negotiated under section 89.47), presumably the assessments would have been paid to the drainage district under the requirements of section 89.37 (2), and there would be no occasion for resort to the remedy provided to enforce collection of the assessments. Any action to enforce a certificate after the assessment has been collected and the district paid would be in the hands of the owners of the certificates, and should be in pursuance of the statutory remedies provided for that purpose. If any one owning a tax or special assessment certificate, and beneficially entitled thereto, desires to foreclose it so as to cut off

subordinate liens, a remedy is provided in section 75.19 of the statutes. Section 89.37 (4) (d) was neither needed nor intended to provide machinery for such purpose. A drainage assessment certificate, according to the case of *In re Dancy Drainage District*, 199 Wis. 85, 225 N. W. 873, is subordinate to the lien of a general tax certificate. Such priorities could be adjudicated in foreclosure proceedings.

If the county has taken a deed for general taxes, and also holds drainage assessment certificates in trust without having taken a deed thereon, the procedure outlined in section 89.37 (4) (d) may be followed. This was done in *In re Dancy Drainage District, supra*. Where the procedure is warranted by the circumstances, the county is a proper party to make the application, regardless of the nature of its interests independent of the statute. *In re Wood County Drainage District*, 201 Wis. 368, 230 N. W. 57. The *Dancy Drainage District* case, *supra*, holds, however, that when the county has taken a deed for general taxes the proceeds of a sale under sec. 89.37 (4) (d) must be first applied to the drainage assessments, because the deed operates to extinguish the general tax, and the county's title is subject to the lien of the drainage assessment.

Section 89.37 (4) (d) provides that the remedy is available "in case * * * the lands * * * have not been redeemed * * * within the period prescribed by the statutes relating to general taxation". It prescribes a method whereby the right of redemption by the owner is cut off, and title divested for tax delinquency. Doubtful provisions of such a statute are construed most favorably to the owner's right of redemption. *Jones v. Collins*, 16 Wis. 595; *Lander v. Bromley*, 79 Wis. 372, 48 N. W. 594; *Klug v. Soldner*, 228 Wis. 348, 280 N. W. 350; Cooley on Taxation (4th ed.) sections 1467 and 1562. Action can not be taken under sec. 89.37 (4) (d), therefore, until the time allowed for redemption has expired.

"2. In the event that the answer to the above question (1) indicates that the county must wait the expiration of the redemption period prescribed by statute, then what is the period of waiting, i. e., is it the five year period under ch. 75, or is it the three year period prescribed for taking a tax deed by virtue of the drainage tax certificates as prescribed in ch. 88 and 89?"

Provisions of subsec. (4) (d) and subsec. (5) of sec. 89.37 of the statutes throw some doubt on the question as to length of time allowed for redemption of drainage certificates. Subsection (4) (d) refers to the period prescribed by the statutes relating to general taxation, which is five years. (See sec. 75.01.) Since special assessments are regarded as falling within the scope of general statutes providing for sale and conveyance of lands for nonpayment of taxes (see *Dalrymple v. City of Milwaukee*, 53 Wis. 178), the period of redemption on drainage assessments would be governed by sec. 75.01 in the absence of a specific provision inconsistent therewith.

Subsec. (5) sec. 89.37 provides that a drainage assessment deed may be issued after the expiration of three years from the issuance of a drainage assessment certificate. This indicates a legislative intent to cut off the right of redemption at the end of three years if deed is taken, since a deed divests title from the original owner.

When subssecs. (4) and (5) of sec. 89.37 were originally adopted there was no inconsistency between them as to redemption period, because three years was the time then allowed under the general tax collection statutes. The redemption period under such general statutes was extended to five years by ch. 244, Laws 1933, but no change was made in sec. 89.37 (5). It is possible that the failure to change the latter provision was an oversight, because it is not easy to discern a reason why a longer redemption period should be allowed before divestment of title by sale upon a court order than by tax deed.

Whatever the explanation, subsec. (5) of sec. 89.37 specifies that a drainage assessment deed may issue after the expiration of three years from the issuance of the certificates. While it may be argued that the express provision in that subsection implies an intent to limit the period for redemption of land from drainage assessments to three years in all cases, it is a well established rule of construction that tax collection statutes are to be liberally construed in favor of the right of redemption. In order to insure validity of the proceedings, a five-year redemption period as fixed in sec. 75.01 should be allowed before instituting action under sec. 89.37 (4) (d).

"3. In the case where the county is the owner and holder of both the tax certificate and the drainage tax certificate but has taken no deed to the property, can the county make application to the circuit court, under section 89.37 (4) (d), and if it can, can it do so immediately or must it wait for the prescribed time to expire, which period of time applied is the five year or the three year period?"

Where the county owns and holds both general tax and drainage assessment certificates, but has taken no deed, it may proceed under sec. 89.37 (4) (d) as was done in *In re Wood County Drainage District*, 201 Wis. 368, 230 N. W. 57.

In accordance with the discussion under question 2, it should await the expiration of a redemption period of five years before applying to the circuit court for an order of sale.

BL

Indigent, Insane, etc. — Poor Relief — Funeral Expenses— When proper county official has directed undertaker to bury body of recipient of old-age assistance for specified sum, in accordance with sec. 49.30, Stats., undertaker may recover from county under his contract. In absence of fraud or other special circumstances it is no defense upon contract that family of decedent has paid undertaker for additional services agreed upon between them.

February 17, 1941.

J. C. RAINERI,
District Attorney,
Hurley, Wisconsin.

You have asked whether the county may deduct from the sum agreed to be paid to a funeral director for burial of a recipient of old-age assistance, by reason of the payment by the family of the decedent for additional services agreed upon between them and the funeral director.

A governmental unit becomes liable in contract for support or services rendered a poor person, within the scope of the statutes, at the request of an authorized officer. *Town of Dakota v. Town of Winneconne*, 55 Wis. 522, 13 N. W. 559; *Davis v. Town of Scott*, 59 Wis. 604, 18 N. W. 530; *Beach v. Town of Neenah*, 90 Wis. 623, 64 N. W. 319. If any question arises as to what was in fact agreed upon between the officer and the person giving the service, such question should be submitted to a jury. *Beach v. Town of Neenah*, *supra*.

You have not specified the relationship to the decedent of the persons designated as his "family", but we assume you refer to his wife and children. In the absence of a contract or other special circumstances, a wife was not liable at common law for funeral expenses of her husband. 30 C. J. 609; *Compton v. Lancaster*, (Ky.) 114 S. W. 260; *McNally v. Weld*, 30 Minn. 209, 14 N. W. 895. It is also well established that a child was not liable for the support of a parent at common law. *Guardianship of Heck*, 225 Wis. 636, 275 N. W. 520.

Section 49.11 of the statutes obligates a wife and children to support an indigent husband or father under certain circumstances. Even if such statute should be construed to include funeral expenses, however, it would not furnish a defense by the county as against a third person rendering services under a contract, nor would it constitute the basis for recovery by the county from the family, unless liability were first established by procedure in county court in the manner prescribed. The court discussed sec. 49.11 in *Guardianship of Heck*, *supra*, 639, saying:

"It is clear from a consideration of this case that the liability of a child for the support of a parent can only be enforced by the statutory proceeding, and that the liability of the child is measured by the extent of its failure to comply with the determination of the county court."

In *Saxville v. Bartlett*, 126 Wis. 655, 105 N. W. 1052, the court discussed the same provisions, then designated as sec. 1502, Stats. 1898, p. 658.

“It is very apparent that these sections are prospective in their character, and do not contemplate that a town or an individual may proceed to relieve a pauper and afterwards recover the amounts expended of the proper relative, but rather that the supervisors, upon failure of such relative to maintain the pauper in a manner approved by them, may apply to the county judge to fix the manner and amount of the relief to be given by the relative or relatives in the future, and upon a failure to comply with that order may by action recover amounts unpaid under the order for the use of the poor. This is plainly a case where a new right has been created and a complete remedy for its enforcement has been provided with it. The law is well settled that in such a case the remedy provided is exclusive.

Under your statement of facts, we assume that no proceedings were had under sec. 49.11, Stats., to charge the family of the decedent with his support. Under such circumstances, his wife and children are under no statutory liability for payment of funeral expenses.

One who is under no legal liability to perform a duty may contract to assume such liability, but your letter indicates that the contract of the family of the decedent covered a distinct and limited service which was performed and for which they paid. The liability of the wife and children is limited in such case by their agreement.

If the “family” to which you refer includes the husband of a recipient of old-age assistance, his liability to the county would not necessarily be governed by the authorities herein cited but in any event it could not be set up by the county as a defense to its contract with the person furnishing the services.

BL

Public Officers — District attorney inducted into armed forces of United States under provisions of selective service act does not cease to be inhabitant of county from which he is inducted within provisions of sec. 17.03, Stats., and circuit judge may appoint district attorney pro tempore to attend to district attorney's duties pending his return under provisions of sec. 59.44 (1).

February 18, 1941.

SAMUEL BLUTHE,
District Attorney,
Wautoma, Wisconsin.

You have submitted the following statement of facts for our consideration:

"I registered under the selective service act on October 16th. I had not then been elected to the office. In December, before the beginning of my term I was required to fill out and return my questionnaire. This, of course, did not show that I was holding any office. The local board placed me in Class 1 A and ordered me to present myself for physical examination. I do not think I ought to question the board's decision by appeal or otherwise since that would have the appearance of a claim for special consideration."

You desire to know: first, whether your induction into the military service of the United States, followed by removal to some other state in line of duty, would cause the vacation of your office under the provisions of sec. 17.03, Stats., and, second, if your office is not vacated, whether the circuit judge has authority under the provisions of sec. 59.44, subsec. (1), Stats., to appoint a district attorney pro tempore pending your return.

First. We are of the opinion that your office would not be vacated by reason of your absence from the state in the service of the armed forces of the United States. Sec. 17.03, so far as material, reads as follows:

“Any public office, including offices of cities, villages and school districts, however organized, shall become vacant upon the happening of either of the following events:
“ * * *

“(4) His ceasing to be an inhabitant of this state; or if the office is local, his ceasing to be an inhabitant of the district, county, city, village, town, ward or school district for which he was elected or within which the duties of his office are required to be discharged; * * * .”

The word “inhabitant” is used in a variety of senses. In a legal sense, however, it has a fixed meaning. In such a sense it refers to one who has located himself at a particular place with the intent of making that place his home. It implies the idea of legal residence or domicile.

It is uniformly held that service in the armed forces of the United States does not bring about a change in the domicile of one so serving, even where the service is voluntary. 1 Beale, Conflict of Laws, (1935) sec. 21.2.

We might cite many cases with respect to the proper meaning of the word “inhabitant,” but the matter is so clear and the authorities so generally accessible that we do not feel it necessary to do so.

We are accordingly of the opinion that your absence from the state in the service of the United States government will not bring about the vacation of your office under the provisions of sec. 17.03, Stats. You will continue to be an inhabitant of your county notwithstanding your absence. And we might call attention to the fact that under the provisions of art. III, sec. 4 of the Wisconsin constitution, dealing with suffrage, you will not have lost your voting residence in this state.

Second. Sec. 59.44, Stats., so far as it is material to the present discussion, reads as follows:

“(1) When there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is near of kin to the party to be tried on a criminal charge, or is unable to attend to his duties, the circuit court, by an order entered in the minutes stating the cause therefor, may appoint some suitable person to perform, for the

time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting.

“(2) The court may, in the same manner, and in its discretion, appoint counsel to assist the district attorney, in the prosecution of persons charged with crime punishable by imprisonment in the state prison, and in case of prosecutions before a grand jury, and upon indictments found by grand juries, and in bastardy cases. Such counsel shall be paid such sums as the court, by order entered in the minutes, certifies to be a reasonable compensation therefor, which sum shall in no case exceed twenty-five dollars per day for each day actually occupied in such prosecution, and not to exceed fifteen dollars per day for not more than five days actually and necessarily occupied in preparing for trial in any one case, the same to be paid in the manner provided by law for the payment of counsel for indigent criminals.”

The above quoted section clearly provides:

*“When there is no district attorney for the county, or he is absent from the court, * * * or is unable to attend to his duties, the circuit court * * * may appoint some suitable person to perform, for the time being, * * * the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting.”*

There would seem to be no question but that the quoted language would permit the appointment of a district attorney pro tempore in a case where the regularly elected district attorney is unable to attend to his duties by reason of induction into the service of the United States under the provisions of the selective service act. Nothing appears under the clear provisions of the section to deal with the causes of inability to attend to duties and we must, accordingly, take the view that the cause of one's inability to attend to his duties is beside the point. The same holds true with the element of time. Thus, if a district attorney were for a short time disabled physically, a district attorney pro tempore could clearly be appointed and we think the same is true even though the disability is not physical and extends over a considerable period of time.

The italicized portion of the above quoted section has been on the statute books of this state since 1849. It is found as section 68, chapter 10, R. S. 1849. Since that time the remaining portion of the section has been added. Nothing in the history of the statute indicates that as contained in sec. 59.44 the italicized language should receive a construction any different from that which was required by its provisions as originally enacted.

JWR

Taxation — Tax Sales — Time required between publication of notice of application for tax deed under sec. 75.12, Stats., and issuance of such deed is three months from expiration of last week of publication.

February 18, 1941.

DONALD W. GLEASON,

District Attorney,

Green Bay, Wisconsin.

Attention J. Norman Basten, *Assistant.*

You have asked what length of time is required after publication of notice under section 75.12 of the statutes before issuance of a tax deed.

Section 75.12 requires notice "that after the expiration of three months from the service thereof" a tax deed will be applied for. Where the notice can not be served personally or by registered mail, the statute provides for publication of "the notice hereinabove provided", which can refer only to notice in accordance with the first phrase quoted; that is, that application for a deed will be made three months after the service is completed. Service by publication is not complete, under the rule of *Cox v. The North Wisconsin Lumber Co.*, 82 Wis. 141, 51 N. W. 1130, until the end of the last week during which publication is required to be made.

While subsec. (2) of sec. 75.12 specifies that notice of application for a tax deed may be served "in the same manner" as a summons in an action in the circuit court, that provision is expressly limited to manner of service and incorporates no other rules of circuit court procedure. Section 75.12 and the immediately following sections provide a complete summary procedure for divestment of title for delinquent taxes, and do not contemplate circuit court action as a part of such procedure. This is further indicated by the fact that the legislature has provided an alternative method of enforcing the tax lien through court action in section 75.19.

BL

Trade Regulation — Real Estate Brokers — Law providing that resident of another state, having real estate brokers' license law imposing standards substantially as rigorous as those of Wisconsin, may not obtain Wisconsin real estate brokers' license unless he holds license from state of his residence would be valid.

February 18, 1941.

ELLIOT N. WALSTEAD, *Secretary,*
Wisconsin Real Estate Brokers' Board.

You have requested an opinion on the validity of a statute providing that no real estate broker's license may be issued to a nonresident unless he holds a license from the state of his residence.

Although a state may not deny to a citizen of another state the right to engage in a lawful business or occupation solely on the ground of citizenship, citizenship, in its strict legal sense, is something distinct and apart from residence. *La Tourette v. McMaster*, 248 U. S. 465, 63 L. ed 362, 39 S. Ct. 160, affirming 89 S. E. 398, 104 S. C. 501; *Douglas v. New York, New Haven & H. R. Co.*, 279 U. S. 377, 49 S. Ct. 355.

Where a profession or occupation is one which may be licensed and regulated under the police power of a state,

the privilege of engaging in such profession or occupation may be conditioned upon residence in such state, if that is an appropriate means of carrying out the purpose of the regulation. *La Tourette v. McMaster, supra*, (insurance broker); *Holland v. Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121, (real estate broker); *State v. Green*, 112 Ind. 462, 14 N. E. 352, (physician); *King v. State Board of Pharmacy*, 160 Ky. 74, 169 S. W. 600, (pharmacist); *France v. State*, 57 Oh. St. 1, 47 N. E. 1041, (physician).

The legislature can, and sometimes does, use the term residence as equivalent to citizenship, but wherever possible the term residence will be construed in its primary meaning if such construction is necessary to the validity of a statute. *Douglas v. New York, New Haven & H. R. Co., supra*.

Real estate brokers may be licensed and regulated under the police power, on the ground that the relationship between broker and client is one of trust and confidence, and that regulation is essential to protect the public against dishonesty and incompetence. *State ex rel. Green v. Clark*, 235 Wis. 628, 294 N. W. 29; *Payne v. Volkman*, 183 Wis. 412, 198 N. W. 438; *Holland v. Fla. Real Estate Commission, supra*; *State ex rel. Davis v. Rose*, 97 Fla. 710, 122 So. 225; *Roman v. Lobe*, 243 N. Y. 51, 152 N. E. 461, 50 A. L. R. 1329, and annotation in 50 A. L. R. 1334; *Massie v. Dudley*, 173 Va. 42, 3 S. E. (2d) 176.

The supreme court of Florida held a provision constitutional which restricted the issuance of real estate brokers' licenses to state residents. The court commented, in *State ex rel. Davis v. Rose, supra*.

"The purpose of the statute under consideration is to stabilize real estate transactions and to protect the public against financial loss through a future repetition of unscrupulous practices in transactions involving the sale and purchase of real estate. Experiences of the recent past in Florida have demonstrated that the methods followed by many in such dealings, without the restraint of this statute, have readily adapted themselves to the perpetration of deception and imposition. * * * The statute attempts to accomplish the result stated by permitting only those who possess certain special qualifications of aptitude, ability, and

integrity to engage in the business of real estate broker.

"In his fiduciary relationship to his customer, the broker invites, and usually receives, a high degree of confidence and trust, in the bestowal of which it is competent for the state to protect the customer by reasonable regulations upon the broker. * * * It is appropriate and lawful, therefore, that adequate, but reasonable, special qualifications, including that of residence in Florida and consequent continued amenability to the process of our courts, be exacted of those who would engage in that business. See 12 C. J. 1120. The reasons for the qualification of residence are manifold, sound, and under the circumstances are lawful, in view of the recent past in Florida when many disingenuous practices and impositions were perpetrated by unscrupulous dealers, mostly of nebulous or transitory residence, upon credulous and unwary purchasers." 122 So. 225, 239, concurring opinion of Strum, J.

It was a similar line of reasoning in the case of *La Tourrette v. McMaster*, *supra*, which resulted in the holding of constitutionality with respect to a provision limiting the issuance of insurance brokerage licenses to residents who had been licensed agents in the state for two years.

Since real estate brokers' licenses could be withheld entirely from nonresidents as a measure tending to safeguard the public, it follows that if the privilege is extended to nonresidents it may be conditioned in some other manner appropriate to accomplish the same purpose. Real estate brokers' license laws enacted by different states have generally the same purpose, which is to insure as far as possible the integrity and competence of persons engaging in the business. See *Roman v. Lobe*, *supra*, which listed the states having such laws in 1926, and discussed the trend of legislation in that field. A license issued in another state would indicate that the authorities had found the licensee a fit person to act as a real estate broker, provided the law of such other state bases the issuance of a license upon such a standard. Under such circumstances, a requirement that a license be issued to a nonresident only if he holds a license from the state of his residence would serve to carry out the same purposes as does the specification of qualifications for resident licenses.

It is possible, however, that a real estate brokers' license law of another state might be enacted solely for revenue

purposes. In such a case the issuance of a license in that state would have no relation to the objects sought to be achieved under the Wisconsin law, unless it were to insure that any nonresident licensee should be a professional real estate broker, and not a transient procuring a license for a single transaction or for temporary purposes. Since the purpose of the law proposed, according to your letter, is to aid the Wisconsin authorities in passing upon the competence and integrity of the applicant, it would be advisable to add to the law a proviso which would make the nonresident exception available only to licensees of states whose laws have the same purpose as our own and fix standards which our board finds to be substantially similar to ours, or at least as rigorous.

The fact that there would be some persons who could not obtain licenses under such a provision without establishing residence in Wisconsin would not be a fatal objection to the law's validity. It is a characteristic of every license law which is not strictly a revenue measure that it limits the persons who may enjoy the privileges conferred by a license. If exclusion from the privilege is based upon lack of qualifications bearing a reasonable relation to the scheme of regulation, those excluded have no just complaint.

Although motor vehicle license laws are not enacted for the same purpose as are real estate brokers' license laws, some of the decisions respecting the former are pertinent in so far as they hold reciprocal provisions to be nondiscriminatory between citizens of different states. The courts have upheld provisions which extend to nonresident automobile operators certain privileges provided their automobiles are licensed in states extending the same privileges to residents of the enacting state. *Hendrick v. Maryland*, 235 U. S. 610, 35 S. Ct. 140, 59 L. ed. 385; *Kane v. New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. ed. 222; *Storaaski v. Minnesota*, 283 U. S. 57, 51 S. Ct. 354.

The last case cited upholds the constitutionality of such a reciprocal provision as against a nonresident who could not claim the benefits of the provision because his automobile was registered in a military reservation rather than in another state.

BL

Public Officers — Conservation Commission — Members of conservation commission to be appointed under sec. 23.09, Stats., should be appointed and confirmed in February but do not take office until July 27 following.

February 20, 1941.

HONORABLE JULIUS P. HEIL,

Governor of the State of Wisconsin.

You have requested our opinion upon two questions which relate to the interpretation of sec. 23.09 of the Wisconsin statutes. The section in question, so far as material, reads as follows:

“(2) To carry out the purpose of this section and other acts for like purposes, there is created a state conservation commission of six members, three of whom shall be from the territory north, and three from the territory south of a line running east and west through the south limits of the city of Stevens Point. The members of said commission shall be appointed by the governor by and with the advice and consent of the senate. The term of office for each member of the commission shall be six years; provided, that of those first appointed two shall be appointed for two years, two for four years, and two for six years. *Thereafter and during February in each odd year, two members shall be likewise appointed and confirmed for a full term.* The commissioners appointed shall be persons having knowledge of and interest in conservation.”

You desire to know whether appointments should be made to the commission in February of each odd numbered year and, if appointments are to be made in February, the time when the terms of the persons so appointed commence.

The subsection in question was created by ch. 426, Laws 1927. As created, it read precisely as it now does except that the word “section” was substituted for the word “act” in the first sentence, and the portion italicized in the above quotation was added, by ch. 262, section 4, Laws 1929.

Ch. 262, Laws 1929, was a revisor’s bill. The revisor’s note, explaining the reason for the addition of the italicized language, reads as follows:

“There is no specific provision for any appointments except the first. Subsequent appointments are in all probability implied.” (Bill No. 104, S. sec. 4.)

Ch. 426, Laws 1927, which, as we have seen, created sec. 23.09, was published on July 22, 1927. The appointments of the commissioners provided for were made on July 27, 1927, for terms of two, four and six years, in accordance with the provisions of the statute. The terms of the first commissioners, therefore, were fixed by the original appointments and extended for periods of two, four and six years from July 27, 1927. Subsequent appointments have been made upon that basis. It has been the practice to regard the terms of incumbent commissioners as running to July 27 of odd numbered years.

It is rather difficult to explain the purpose of the additional language inserted in the Revisor's Bill of 1929. So far as the note throws any light upon the insertion of this language, it appears that the revisor thought some provision was necessary for appointments subsequent to the original appointments. The law, as originally enacted, contained no specific provision for appointments other than the first two, four and six-year appointments and it seems to have been the revisor's view that, although subsequent appointments were probably implied, some specific provision should be inserted providing for them. As to why the further provision should be inserted requiring that such further appointments be made in the month of February—the question remains unanswered so far as our research is concerned.

It is a rule of statutory construction, well understood, that a change in a statute made by a revisor's bill is not intended to change the substantive law unless such a change is clearly evident by the terms thereof. It is the view that a change in language or the addition of language made in a revisor's bill is intended merely to clarify rather than to effect a change in the substantive law. If there is any ambiguity in a statute following a revisor's change, the courts will construe it as though there had been no intent to effect a change in the substantive law, but if, by the clear provisions of the language employed, a change in the substantive law is effected, the courts will give the change effect.

Applying this rule to the questions raised, it is evident that one change was made by the addition of the language added in 1929. It was clearly provided that appointments to the conservation commission should be made and confirmed in February of each odd numbered year and consequently, by reason of that fact, the duty devolves upon the governor and the legislature to make and confirm the appointment in accordance with the language of the statute. The clear language of the statute overcomes any presumption that no change was intended. There is no requirement arising from the added language, however, that the terms of office of incumbent members end with the appointment and confirmation of new members in February. There is nothing inconsistent with the idea of appointing and confirming a member of the commission in February for a term beginning on the 27th of the following July. Consequently the presumption would be that there was no intention to change the law in this latter respect.

Our viewpoint as to the time when the term begins is borne out by the administrative interpretation that has been given to the section since its enactment. Subsequent to the revisor's change in 1929 appointments have been made for terms ending on July 27 of the odd numbered years. Thus, the executives who have served since 1929 have taken the view that the terms of the members of the conservation commission begin as of July 27 in the odd numbered years notwithstanding the provision that appointments should be made in February. The administrative construction of a statute which is on its face ambiguous is given considerable weight by the courts in any case involving the proper construction of the statute.

In view of the foregoing it is our opinion that sec. 23.09 requires that members of the conservation commission be appointed and confirmed during the month of February for terms beginning on the 27th of July following.

JWR

Insurance — Insurance Corporations — Capital and Surplus — Insurance companies writing fidelity insurance in addition to other kinds of insurance are required under provisions of sec. 201.11, subsec. (2) and sec. 204.041, Stats., to have capital stock of two hundred fifty thousand dollars in addition to capital stock which is required for transaction of other types of insurance business under provisions of sec. 201.11, (1), Stats.

Insurance companies transacting other kinds of insurance in addition to surety insurance must compute capital stock requirements upon basis of requirements for insurance other than surety insurance and must add requirements for surety insurance.

February 28, 1941.

MORVIN DUEL,

Commissioner of Insurance.

You have presented the following statement to us and have requested our opinion with respect to the question raised in the statement:

“A stock casualty company of another state has made application to this department for permission to transact business in Wisconsin. We have raised the question of whether or not the company had a sufficient capital to meet the requirements of section 201.11 of the statutes. Section 201.04 prescribes the various lines of business for which a company may be incorporated or licensed to do business in this state. Section 201.11 reads as follows:

“(1) No stock insurance company shall transact business unless it has capital, in cash or invested as provided by law, of at least two hundred thousand dollars for the insurance specified in any one subsection of section 201.04; with an additional one hundred thousand dollars for the insurance mentioned in any other subsection which may be transacted by such company, provided that no such company shall be subject to higher capital requirements than those in effect when it began to transact the business of insurance in this state. No additional capital shall be required for the insurance specified in subsection (17) of section 201.04.

“(2) A company transacting the business mentioned in subsection (7) of section 201.04 shall have a capital of at least two hundred and fifty thousand dollars and a surplus

of at least one hundred and twenty-five thousand dollars, in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation.

“(3) No stock insurance company shall begin business unless it has a surplus equal to one-fourth of its capital stock.”

“This department has always taken the position that the reference in subsection (1) of 201.11 inferred one of the subsections of 201.04 other than subsection (7). For example, if a company applied for admission to transact the following lines set forth in 201.04, namely, (8) title insurance, (9) credit insurance, (10) burglary insurance, (15) automobile insurance, we would insist that the amount of capital paid in should be \$500,000 and that if that same company, in addition to the above mentioned lines also wrote (7) fidelity insurance, the capital should be \$750,000.

“The company making application contends that if (7) fidelity insurance were listed as the first line, then the capital requirement would be \$650,000, instead of \$750,000. We specifically call your attention to subsection (2), which in our opinion is an exception to subsection (1) in that the capital and surplus required varies from the requirements of subsection (1) of 201.11.

“Will you kindly give us an opinion as to your interpretation of the requirements set forth in section 201.11?”

In our opinion your construction of the applicable statutes is correct.

For many years sec. 201.04, Stats., has enumerated the kinds of insurance for which insurance companies may be formed. Among such kinds of insurance we find, for example, fire, marine, life, disability, liability, steam boiler, fidelity, etc. These classifications existed for quite some time prior to the year 1919.

In connection with such classifications the law has for some years made provision with respect to the capital of insurance companies doing an insurance business in the state. In the 1917 statutes section 1897*g* provided as follows:

“1. No stock insurance company shall transact the business of insurance unless:

“(a) It has a capital stock actually paid, in cash or invested as provided by law, of at least one hundred thousand dollars for the insurance specified in any one subsection of section 1897; [sec. 201.04, Wis. Stats. 1939]

“(b) With an additional fifty thousand dollars for the insurance mentioned in any other subsection which may be transacted by such company;

“ * * * ”

This provision was renumbered under the decimal system of numbering to be sec. 201.11 (1) (a) (b) during the period between 1917 and 1933 and by ch. 120, Laws 1933, the requirement in subsec. (a) was raised from one hundred thousand dollars to two hundred thousand dollars, and the requirement in subsec. (b) was raised from fifty thousand dollars to one hundred thousand dollars.

In 1919 the legislature enacted ch. 655, relating to incorporation and licensing of surety companies. Sec. 1966-33c was created by section 1 of that act and read as follows:

“No domestic corporation hereafter organized shall be authorized to commence the transaction of the surety business in this state unless it has a capital stock of at least two hundred and fifty thousand dollars and a surplus of at least one hundred and twenty-five thousand dollars, both fully paid in cash. No domestic insurance corporation authorized in this state to transact other classes of insurance shall hereafter be authorized to transact the surety business unless in addition to the capital stock and surplus requirements for the classes of insurance being transacted by such corporation, it shall also have a capital of at least two hundred and fifty thousand dollars and a surplus of at least one hundred and twenty-five thousand dollars.”

There seems to be no question as to what the legislature intended by the provisions of sec. 1966-33c. It intended to provide that any insurance company applying for a license to transact the surety business in the state, following the passage of the section, should have a capital stock of at least two hundred and fifty thousand dollars in addition to all such capital stock requirements as were imposed by the law for other kinds of insurance which it was transacting. Thus, if a company were transacting a fire and marine insurance business, it would be required to have a capital stock of three hundred thousand dollars, on the basis of present requirements. If it chose to transact the surety business, it would be required to have an additional capital stock of two hundred and fifty thousand dollars.

The requirement would obviously be the same if the company were newly organized and applied for the surety company license at the same time that it applied for the authority to write the other types of insurance. The statute can hardly be interpreted to impose a different requirement where the reason for the requirement would be the same in both cases and the language can be fairly interpreted as imposing the same requirement.

Sec. 1966-33*c*, Wis. Stats. 1919, has been renumbered and is now sec. 204.041. The language of the section, however, remains unchanged so far as is here material.

The only other change in the applicable statutes was made in the revision of 1933 when sec. 201.11 was revised.

So far as material here, the revision repealed paragraphs (a) and (b) of sec. 201.11 (1) as it had theretofore existed and incorporated these two paragraphs as subsec. (1) without designating them as separate paragraphs. Subsec. (2) was added and reads as set out in your request for this opinion. It specifically incorporates the substance of the capital stock requirement relating to surety companies in the general provisions relating to the capital stock requirements of insurance companies generally.

Sec. 204.041 applies specifically to domestic companies but sec. 204.05 imposes the same requirements on foreign companies. Sec. 204.05 was created by ch. 655, Laws 1919, as sec. 1966-33*d* in connection with the enactment of sec. 1966-33*c* which, as we have seen, contained the provision now found in sec. 204.041.

JWR

Courts — Quasi Garnishment — Municipal Corporations — Municipal Law — Judgment against town may not be collected under quasi-garnishment proceedings provided by sec. 304.21, Stats.

March 5, 1941.

FRED R. ZIMMERMAN,

Secretary of State.

Attention Mr. C. A. Nickerson, *Auditor.*

You have asked whether a judgment against a town is collectible under the quasi-garnishment law contained in section 304.21 of the statutes. We are of the opinion that it is not.

It is true that section 304.21 includes within its terms judgments obtained against "any person, firm or corporation", which phrase is sufficiently broad to cover towns if that is otherwise in accord with the legislative intent. Section 370.01 (12) provides that the word "person" may extend and be applied to bodies politic and corporate. The language of the latter provision, however, is permissive rather than mandatory, and does not apply if a contrary legislative intent is manifest.

It is a well established rule of statutory construction that a statute of general application, no matter how inclusive its terms, will not be construed to apply to the government or its agencies if such construction would impair their rights or interests, unless the statute includes them expressly or by necessary implication. Wisconsin cases which have followed the rule are: *State ex rel. Martin v. Reis*, 230 Wis. 683, 284 N. W. 580; *Necedah Manufacturing Corp. v. Juneau County*, 206 Wis. 316, 237 N. W. 277, 240 N. W. 405, 96 A. L. R. 4; *Fulton v. State Annuity and Investment Board*, 204 Wis. 355, 236 N. W. 120; *Sullivan v. School District No. 1 of the City of Tomah*, 179 Wis. 502, 191 N. W. 1020; *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101; *Milwaukee v. McGregor*, 140 Wis. 35, 121 N. W. 642.

Construing section 304.21 to include judgments against the government and its agencies would be detrimental not only to the government agencies, but to the public gener-

ally. Funds due from the state to a town are frequently allocated for a particular public purpose. To divert them to payment of a judgment would interfere with the exercise of the governmental functions for which they were intended.

There is no affirmative indication that the legislature intended section 304.21 to apply to judgments against the state or its agencies. On the contrary, there are indications that it was not intended to be so applied. Throughout the section, persons, firms and corporations in whose favor or against whom judgments may be entered are dealt with as a class separate and distinct from the state, cities, counties, villages, towns, school districts, and other municipal corporations with which the judgment may be filed for collection. Furthermore, section 66.09 provides complete machinery for collection of judgments against towns, cities, counties and other specified municipal corporations, by means of future tax levy. The object of the section is to provide a method of enforcement which will not interfere with the operation of governmental budgets and the exercise of the governmental functions based thereon. Subsec. (3), sec. 66.09 provides:

“No process for the collection of such judgment shall issue until after the time when the money, if collected upon the first tax levy as herein provided, would be available for payment, and then only by leave of court upon motion.”

While the quasi-garnishment proceedings under section 304.21 may not be, strictly speaking, a process for collection of a judgment such as would fall within the express prohibition of the above quoted subsection, it is an alternative or supplementary method of collection which is within the spirit of the prohibition.

BL

Social Security Act — Child Protection — Blind Pensions — Poor Relief — Old-age Assistance — It is mandatory upon secretary of treasury and federal social security board to cause to be paid to state operating under approved plan of public assistance such percentage of state's payments for old-age assistance, aid to dependent children, and blind pensions as is fixed by federal act, provided such payments are lawfully made under state law. Moneys delivered into hands of beneficiaries are lawful payments under Wisconsin law even though evidence in nature of canceled checks or receipts is required as to use of such moneys by beneficiaries before future payments are made and even though payments are made by means of two or more checks.

State may not recoup state's share of lawful expenditures made by counties for old-age assistance, aid to dependent children, and blind pensions, even though no federal aid is received, but may recoup payments made to counties on account of expenditures not authorized by state law. Amount allowed to counties for old-age assistance and blind pensions is not affected by failure of federal government to make allowance to state, but counties are not entitled to federal share of aid to dependent children unless aid is actually paid by federal government to state.

March 7, 1941.

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

You wrote us on February 12 that the federal social security board has declined to make an allowance from federal funds for certain payments made by the Wisconsin counties in 1936 and 1937 for old-age assistance, aid to dependent children, and blind pensions.

I

Your first question is what recourse, if any, the state has against the ruling of the social security board.

The refusal of the federal board to match funds expended is based upon the ruling that the disallowed payments were conditional or restrictive and do not fall within the defini-

tions of old-age assistance, aid to dependent children, and blind pensions, in the social security act. For convenience, the definitions as they existed during the period in question are set out here:

Title I, sec. 6, social security act, 42 USCA sec. 306:

“When used in this title the term ‘old-age assistance’ means money payments to aged individuals.”

Title IV, sec. 406 (b), social security act, 42 USCA sec. 606:

“The term ‘aid to dependent children’ means money payments with respect to a dependent child or dependent children.”

Title X, sec. 1006, social security act, 42 USCA sec. 1206:

“When used in this title the term ‘aid to the blind’ means money payments to blind individuals.”

Your office informs us that the following practices were ruled by the social security board to constitute conditional or restrictive payments not within the purview of the foregoing definitions:

(a) Requesting a recipient whose aid is increased because of a special need, such as for medical attention, to present a receipt each month showing payment of the amount granted for the special purpose.

(b) Issuing to a recipient whose aid is increased because of a special need, such as for medical attention, two checks, one in the amount needed for the special purpose, and the other for the balance of the aid.

It is our understanding that in the latter case the checks are made payable to and actually delivered into the hands of the recipient. You have indicated that the practice of issuing two checks is for the convenience of the recipient of the aid, and in many cases is done at his special request. Neither practice is general, but is followed only in selected cases.

You have raised the question of constitutionality, but we do not believe that such question is presented in this case.

The *ex post facto* provision which you mention would have no application. That provision prevents enactment of a law providing a penalty for an act which was not a crime when committed, or a law increasing the jeopardy for an act committed before its passage. The right of the state to receive federal aid is not one protected by the constitution.

The question whether the state is entitled to receive federal aid for expenditures made under the circumstances above described, and to enforce its right by legal action, depends primarily upon the construction of the federal social security act. The social security board apparently made its ruling upon what it considers to be the proper interpretation of the definitions above quoted. If its interpretation is correct, such interpretation can be applied for all periods following the effective date of the act, since the legal effect of the law did not depend upon a ruling of the social security board. If the ruling is based upon an erroneous interpretation of the federal social security act and federal officials are withholding funds to which the act clearly entitles the state, there are appropriate legal means by which the right can be enforced. The two principal questions of construction upon which the case revolves are:

a. Whether the statute imposes a clear and mandatory duty upon federal officials to pay federal funds to the state under proper circumstances, or whether the payment of such funds depends upon the exercise of the discretion of the social security board;

b. Whether, if there is a mandatory duty, the circumstances of the present case are such as to bring it within the scope of the mandate.

a.

That the statute confers some discretionary power upon the social security board does not prevent it from also imposing mandatory duties, since a statute may be mandatory in some respects and discretionary as to other matters. *Hirt v. City of Casper*. (Wyo.) 103 P. (2d) 394.

Some discretion, although limited by the standards set out in the act, is given the federal social security board with respect to approval of state plans for administering

aid. Once the state plan has been approved, however, the act provides that the secretary of the treasury "shall" pay to each state which has an approved plan a sum equal to a certain percentage of the amount expended for old-age assistance, aid to dependent children and aid to the blind, which amount the board "shall" certify to the secretary of the treasury for payment, after computing it in accordance with statutory directions. There is nothing to indicate that the board is to have discretion to determine the amount due on any basis other than that fixed by the act. The amount to be paid in advance must necessarily be estimated, but the amount certified is to be adjusted so that the payment for any previous quarter shall equal "the amount which should have been paid to the state" under the fixed percentages specified in the act. (See Title I, sec. 3, social security act, 42 USCA sec. 303; Title IV, sec. 403, social security act, 42 USCA sec. 603; Title X, sec. 1003, social security act, 42 USCA sec. 1203.)

The only instance in which the board is authorized to suspend payments under an approved plan is when it finds, after notice and opportunity for hearing, that the plan has been so altered or is being so administered that it fails to comply with the standards fixed in the act. (See Title I, sec. 4, social security act, 42 USCA sec. 304; Title IV, sec. 404, social security act, 42 USCA sec. 604; Title X, sec. 1004, social security act, 42 USCA sec. 1204.) The latter provision is prospective in its operation and may be applied only after notice, opportunity for hearing, and a finding by the board. It clearly indicates that congress did not intend to authorize the social security board to establish administrative rules retroactive in their operation or for any purpose except to administer the express standards laid down in the act.

The use of the term "shall" in prescribing duties of public officers, while not conclusive, tends to indicate that the duties imposed are mandatory. In *Escoe v. Zerbst*, 55 S. Ct. 818, 295 U. S. 490, 79 L. ed. 1566, reversing (C.C.A.) 74 F. (2d) 924, certiorari granted 55 S. Ct. 640, 294 U. S. 704, 79 L. ed. 1240, the United States supreme court said, 819-820:

"We find in this statute more than directory words of caution, leaving power unaffected. This is so if we consider the words alone, putting aside for the moment the ends and

aims to be achieved. The defendant 'shall' be dealt with in a stated way; it is the language of command, a test significant, though not controlling."

The court went on to say that, in determining whether an act imposes a mandatory duty, its purpose and its effect on public and private interests must be considered as well as its language. The social security act was enacted to induce states to establish uniform and stable plans for public assistance, the law being in the nature of an offer which, when complied with by states, creates a right in their favor and an obligation on the part of the federal government to the extent of the appropriation made. Whether the act is mandatory upon the secretary of the treasury and the social security board can best be determined by application to a hypothetical case in which a state has given assistance under an approved plan in such a manner that there is no question as to the amount due, and the social security board neglects to make a certification. If the act were purely discretionary, the federal officials might refuse to make a certification in such a case and the state would have no recourse. The purpose of the act can not be assured without construing it to impose an absolute duty upon the social security board and the secretary of the treasury to perform the acts prescribed.

After the state plan of assistance has been approved, the duty of the federal officials is one of computation and payment, under fixed standards. Such a function is ministerial rather than discretionary. *United States ex rel. Parish v. MacVeagh*, 214 U. S. 124, 29 S. Ct. 556 (computation of damages); *Roberts v. United States*, 20 S. Ct. 376, 176 U. S. 221, 44 L. ed. 443 (payment of interest on audit certificates).

The fact that the officer directed to make the computation or payment must necessarily construe the statute in order to determine whether the payment is to be made, or the amount due, does not prevent his duty from being mandatory. In *Roberts v. United States*, *supra*, the United States supreme court said, pp. 379-380:

"* * * Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, there-

fore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which, no discretion is committed to him, and, which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

The computation of benefits under a pension law often requires an interpretation of the law by pension board officials, but the duties of such officers have been held in the following cases to be mandatory: *State ex rel. Donahue v. Board of Trustees of Firemen's Pension Fund of the City of Indianapolis*, 7 N. E. (2d) 196; *People ex rel. Albright v. Board of Trustees of Firemen's Pension Fund of and for the City and County of Denver*, 82 P. (2d) 765, 103 Colo. 1, 118 A.L.R. 984.

b.

Assuming that the social security act places upon the secretary of the treasury and the social security board a mandatory duty to compute and pay state aids in accordance with the standards fixed in the act, such duty extends only to payments which fall within the terms of the law. In construing the law, the board has determined that the payments under the circumstances above described do not fall within the definitions of old-age assistance, aid to dependent children and blind pensions, for which the states are to receive contribution from federal funds.

Old-age assistance and blind pensions are defined in the federal social security act as money payments "to" the described beneficiaries, and aid to dependent children is defined as money payments "with respect to" the beneficiaries.

In the cases you describe, as we understand it, the payment was actually delivered into the possession of the person entitled to aid, in such manner that he could not have been prevented from using it in any manner he saw fit. If a particular payment were in fact conditioned, the failure of the beneficiary to observe the condition would render him

liable in some manner, as for the conversion or improper use of funds. Under the circumstances surrounding the payments here questioned, the county would have no claim upon a payment previously made, regardless of the use to which it might be put by the payee.

In the absence of statute, there is no right on the part of an individual to receive assistance from the government. The federal statute does not purport to create a right in so far as individual recipients of assistance are concerned, independently of state law. The states are free to adopt a system of aid or not as they choose. Until such a state system is adopted, no rights accrue to individuals. The payments referred to in the federal social security act must, therefore, be made in satisfaction of such obligations as are created by state laws under approved plans. Any money lawfully paid to a recipient under a state plan is a payment within the definition of the federal social security act.

Since there is no obligation on the part of the state to furnish aid, it may grant aid upon such conditions as it chooses with respect to eligibility of beneficiaries. That congress contemplated the imposition by states of conditions as to eligibility for assistance is indicated by the prohibition in the federal law of certain types of conditions. Under the rule of "expressio unius exclusio alterius est", such provisions impliedly recognizes that other conditions may be imposed without forfeiting the right to contribution under the social security act. (See Title I, sec. 2 (b), social security act, 42 USCA sec. 302 (b); Title IV, sec. 402 (b), social security act, 42 USCA sec. 602 (b); Title X, sec. 1002 (b), social security act, 42 USCA sec. 1202 (b).)

The Wisconsin statutes, particularly secs. 48.33 (6), 47.08 (6), 49.21, and 49.29 (2), which were a part of the state plan approved by the social security board, make the amount to be paid a beneficiary subject to a fixed maximum, a matter to be determined by the local authorities in each case, upon the basis of the need of the individual. Under the Wisconsin statutes the amount of aid or assistance may be altered from time to time to accord with varying circumstances affecting the needs of the recipient. Obviously the aid is to be paid the recipient to be expended for commodities and services needed. To hold that local authorities may

not inquire into the needs which are actually being met by the payments would make futile any investigation attempting to relate the amount paid to the need of the individual. If evidence in the nature of a receipt or a canceled check is requested of the beneficiary to show the purposes for which payments are used, in order to enable local authorities to determine the amount needed for future periods, it is not a condition or a restriction upon the previous payment. If the amount paid to a beneficiary has been based upon special needs, including medical services or supplies, it is not only proper for the local authorities to investigate whether the beneficiary is actually required to make payments for such purposes, but a conscientious compliance with the spirit of the law apparently requires such an investigation. Evidence whether or not payments are made for such purpose has a direct bearing on the determination of the amount of the beneficiary's needs for future periods. The requirement that evidence be presented to aid in such a determination can not be regarded as a condition upon a previous payment, when there is no possibility of recoupment regardless of what may be shown by such evidence.

Even if conditions were imposed, that would not necessarily remove the payments from the definitions contained in the social security act, provided the conditions were such as might lawfully be imposed under the state law.

In doubtful questions of statutory construction no absolute prediction of outcome can be made prior to interpretation by a court of last resort, but we are of the opinion that the federal social security law, correctly interpreted, does not authorize the social security board to withhold aid for payments made under the circumstances outlined above.

The federal social security law contains no express provision for appeal to other agencies from rulings of the social security board such as the one here in question. Congress has provided, however, that all functions of the social security board shall be administered under the direction of the federal security administrator. It is possible that a revision of the ruling might be obtained by a hearing before the latter.

Court action can be taken to compel the performance of mandatory duties by public officers, and to enforce payment

of funds which are withheld in violation of statutory requirements. We are not here suggesting the form of legal action to be taken if that course proves necessary. That question can be decided later if your department authorizes and directs court action.

II

The discussion of your second and third questions overlaps to some extent, and we are setting them out together:

(2) If the ruling of the social security board is to be accepted, can the state in turn (under sec. 49.38, Wis. Stats., or otherwise) by means of adjustments, recover from the counties the share of the grants which were allegedly improperly made?

(3) If adjustments can be effected in the county grants, should they be made: (a) by recouping both the federal and state shares of the grants to which exception has been taken, or (b) by recouping only the federal share of such grants?

The payment to counties on account of old-age assistance is to be made, under sec. 49.38, "if the state pension department shall be satisfied that the amount claimed has actually been expended in accordance with the provisions of sections 49.20 to 49.38"; for aid to dependent children, under section 48.33 (11) (b), "if the state pension department shall be satisfied that the amount claimed is correct and that the aid allowed in such county has been granted in compliance with the requirements of this section"; and on account of blind pensions, under sec. 47.08 (11), "eighty per cent of the approved amount paid by such county for blind pensions pursuant to the provisions of this section." The language clearly implies that the counties are to be reimbursed only for expenditures authorized by and made in accordance with the statutes. The above sections specifically allow audit adjustments to be made at any time after payment is made to the county. If later audits show that aid has been granted by counties in violation of the statutes, the express provisions of the above sections furnish authority for making the adjustments by deduction for both state and federal aid.

If the payments have been made lawfully, and in accordance with the statutes, counties are entitled to state aid as

specified therein, and no deduction can be made of the state's share, even though no contribution is received from the federal government. Whether deduction may be made for the share withheld by the federal government in such cases must be answered differently with respect to aid to dependent children than for the other types of aid. Secs. 47.08 (11), relating to blind pensions, and 49.38, relating to old-age assistance, provide for the payment to counties of eighty per cent of the amounts expended, without any express provision making such payment dependent upon the receipts of federal aid. Section 48.33 (11) (b) provides that the amount allowed counties for aid to dependent children shall be one-third of their expenditures "plus a proportionate part of the fund received from the federal government as aid for dependent children". Under the latter provision, deductions of the federal share may be made from payments to counties on account of disallowances by the federal government. The fact that such a provision is included in section 48.33 (11) (b) makes the absence of a similar provision in sections 47.08 (11) and 49.38 significant. Counties are entitled to be paid the full eighty per cent for old-age assistance and blind pensions lawfully granted under the state law, regardless of whether the payments are matched by federal funds.

BL

Banks and Banking — Savings Banks — Wisconsin Statutes — Sec. 222.21, subsec. (2), Stats., being later statute than sec. 223.10, supersedes it to extent that two are in conflict; mutual savings banks may, when authorized by commissioner of banking, exercise fiduciary powers enumerated in sec. 222.21 (2) notwithstanding wording of sec. 223.10.

March 13, 1941.

BANKING DEPARTMENT.

Attention Mr. Robert K. Henry, *Commissioner*.

You have called our attention to sec. 223.10 of the statutes, which reads as follows:

“No court of this state shall appoint or name any corporation as trustee, executor, administrator, guardian, assignee, receiver, or in any other fiduciary capacity unless such corporation is organized and existing under the provisions of sections 223.01 to 223.09 of the statutes, or unless such corporation is a duly organized state bank which has become entitled under subsection (6) of section 221.04 to exercise fiduciary powers, or is a national bank with authority to exercise such powers.”

In this connection you also refer to sec. 222.21 (2), Stats., which provides that when authorized by the commissioner of banking any mutual savings bank may exercise certain fiduciary powers.

Since these statutory provisions are clearly conflicting, you have asked for our opinion as to which is controlling.

By no reasonable construction could effect be given to both provisions, and under such circumstances, the courts have uniformly held that the later statute prevails over the earlier statute to the extent that it is inconsistent therewith. *Jones v. Broadway Roller Rink Co.*, 136 Wis. 595. The earlier statute is, by necessary implication, repealed by the later one, in so far as it would interfere with giving effect to the later one. *State ex rel. M. A. Hanna Dock Co. v. Willcutts*, 143 Wis. 449.

Sec. 223.10 was enacted by ch. 180, Laws 1919. At that time fiduciary powers were restricted to trust companies or-

ganized under secs. 223.01 to 223.09 (then numbered secs. 2024-77*i* to 2024-77*q*). Sec. 223.10 was amended in 1927 by ch. 265, effective June 25, 1927, so as to permit the exercise of fiduciary powers by state banks and national banks under certain circumstances.

Subsec. (2) of sec. 222.21, permitting the exercise of fiduciary powers by mutual savings banks when authorized by the commissioner of banking was created by ch. 381, Laws 1927, effective July 19, 1927. No changes material to the present discussion have been made in either section since that time.

You are therefore advised that sec. 222.21 (2), supersedes sec. 223.10 to the extent that it is inconsistent therewith, and that when authorized by the commissioner of banking mutual savings banks may exercise the fiduciary powers specified in sec. 222.21 (2) notwithstanding the apparent limitations of sec. 223.10.

WHR

Bridges and Highways — Trunk Highways — Funds may not be used by municipalities under sec. 84.10, subsec. (1), par. (b), Stats., for street lighting but may be used for following purposes when actually performed on selected connecting streets: routine sweeping or cleaning of streets, including flushing or sprinkling with water; painting vehicle or pedestrian lane markings and restricted parking area designations; policing to prevent traffic violations or to apprehend traffic violators; policing for purpose of directing traffic.

March 13, 1941.

WILLIAM E. O'BRIEN, *Chairman,*
Highway Commission of Wisconsin.

You have asked whether funds may be used by municipalities under section 84.10, subsec. (1), par. (b), Stats., for the following purposes:

1. Street lighting
2. Routine sweeping or cleaning of streets including flushing or sprinkling with water
3. Painting vehicle or pedestrian lane markings and restricted parking area designations
4. Policing to prevent traffic violations or to apprehend traffic violators.
5. Policing for the purpose of directing traffic.

Section 84.10 (1) (b) allots funds "for maintenance of" certain streets, and specifies:

"* * * Said allotments may be used for maintenance, repair, construction, snow removal and traffic regulation on * * * said streets * * *"

The first two items mentioned would be included in the enumerated purposes only if they can be classed as maintenance, and the other three if they may be classed as traffic regulation on said streets.

The definition of "maintain" most commonly quoted by the courts is that contained in Webster's New International Dictionary:

"* * * to hold or keep in any particular state or condition, esp. in a state of efficiency or validity".

A general reading of the cases in which the term is involved is not especially helpful because, as stated in *Davis Holding Corporation v. Wilcox*, 153 A. 169, 171, 112 Conn. 543:

"* * * The word 'maintain' has no precise legal significance in the construction of statutes, its meaning varying with the statute in which it is used, the subject-matter of the law, and the purpose to be accomplished * * *."

The term "maintain" as used in sec. 84.10 (1) (b) has not been specifically construed by our courts. The opinion in XIX Op. Atty. Gen. 530 construed the term as used in section 84.10 (1) (d), relating to allotments for maintaining bridges. In that opinion a distinction was made between maintenance and operation, and it was held that the lighting

of a bridge is operation rather than maintenance. After the issuance of the opinion, the legislature amended sec. 84.10 (1) (c) and (d) so as to provide funds for maintenance *and operation* of bridges, and stated specifically: (See ch. 30, Laws 1935.)

“* * * Maintenance shall not include snow removal or drift prevention for bridges located on connecting streets. Maintenance and operation shall not include the roadway lighting system.”

The amendment indicates that the legislature does not desire the allotment of funds for bridges to be made on the basis of maintenance as distinguished from operation, but it also shows that there are certain specific matters not to be included in either term. The fact that the legislature has not used the term operation in connection with highways as well as bridges is probably of no especial significance. Highways and streets are not referred to as being “operated”, but there are some functions in connection with draw or lift bridges which are more appropriately called operation than maintenance. The purpose of sec. 84.10 (1) as a whole is to encourage municipalities to keep connecting streets and bridges in proper condition for use, and to compensate them accordingly. It is unlikely that the legislature intended to compensate for a greater degree of care in connection with bridges than for streets, except as their structural differences require additional service to render bridges usable.

Maintenance is frequently used as synonymous with, or including, operation. Maintenance of facilities such as highways, which are not commonly spoken of as being operated, may include some functions which would be spoken of as operation if other types of facilities were involved. Generally speaking, maintenance of highways includes such services as tend to keep them in good condition for travel.

In the use of the term “traffic regulation”, it seems probable that the legislature intended to include functions which municipalities are obligated or authorized to perform by the state law contained in chapter 85 of the statutes. Traffic is defined in sec. 85.10 (31) so as to include all vehicles and pedestrians moving in the streets. To regulate is defined by

Webster's New International Dictionary (1926) as "to adjust or control by rule, method, or established mode."

The traffic regulation for which the funds may be used by municipalities is expressly limited by the statute to regulation "on said connecting streets". The latter phrase prevents the use of the money for general police and traffic department expense.

1.

Street lighting

It might be argued that street lighting falls within the term maintenance, particularly in view of the language in *The Merrill Railway and Lighting Company v. The City of Merrill*, 80 Wis. 358. We believe, however, that the history of the amendments to section 84.10 (1) shows that the legislature did not intend the funds to be so used. Chapter 30, Laws 1935, which amended section 84.10 (1) (d) so as to authorize expenditures in connection with "maintenance and operation" of bridges expressly excluded snow removal, drift prevention and street lighting. Thereafter the legislature enacted chapter 299, Laws 1935, which amended section 84.10 (1) (b) by specifying the purposes for which funds might be used for connecting streets, including "maintenance, repair, construction, snow removal and traffic regulation". Snow removal was expressly excluded from subsection (d) by the first amendment, and expressly included in subsection (b) by the second. Street lighting was expressly excluded from subsection (d) by the first amendment, but was not included in subsection (b) by the second. It seems logical to assume that the legislature would have mentioned street lighting in the later amendment if it had intended that state funds might be expended for such purpose.

2.

Routine sweeping or cleaning of streets including flushing
or sprinkling with water

Sec. 62.16 (4) (a) reads in part:

“The city may cause streets to be opened, improved, swept, sprinkled, and cleaned.”

Sec. 61.44 (1) gives similar powers to villages.

It is true that the above sections do not specifically refer to sweeping, sprinkling and cleaning as maintenance, but other duties imposed by law in connection with the highways have been held to constitute highway maintenance although not expressly so classified by the statutes. *Lickert v. Harp*, 213 Wis. 614, held that a county employee engaged in cutting weeds was performing a function of highway maintenance, although sec. 84.07 (3), which imposes the duty of cutting weeds, deals with the latter function separately from the general duty of highway maintenance which is imposed by subsection (1) of the same section.

Accumulations of foreign matter in a highway may be such an insufficiency or want of repair as to render the city liable under sec. 81.15 for injuries resulting to travelers. The regular routine sweeping, cleaning, and flushing of streets prevents accumulations of refuse and dirt which might interfere with the safe and convenient use of the highway. It was said in *Connor v. City of Manchester*, 60 Atl. 436, 437, 73 N. H. 233:

“* * * The presence of dirt, rubbish, and ashes in a street may cause it to be in a bad state of repair and in an unsuitable condition for travel. *Parsons v. Manchester*, 67 N. H. 163, 27 Atl. 88. It certainly has a tendency to cause such a condition. * * * Any act that is reasonably necessary to put or keep a street in ‘good repair suitable for travel thereon’ is ‘repairing’ or ‘maintaining’ the street, within the meaning of the statute under consideration; and it can not be said, as matter of law, that the removal of dirt, rubbish, and ashes from the streets and from receptacles on or near streets is not such an act.”

3.

Painting vehicle or pedestrian lane markings and restricted parking area designations

Section 85.10 (37) of the statutes defines official traffic signs as “all signs and markings other than signals, not inconsistent with this chapter, placed or erected by authority

of a public body or official having jurisdiction for the purpose of guiding, directing, warning or regulating traffic". Obedience to such markings is required by sec. 85.12 (3). Markings such as you have described fall within the foregoing definition, and are authorized either specifically or impliedly by various provisions of chapter 85 of the statutes. Markings for the purpose of regulating parking are authorized by sec. 85.19 (2) (b) and (3) (g); of traffic lanes by sec. 85.10 (34) and (37); and of pedestrian areas by secs. 85.77, and 85.44 (1) and (4).

Such markings, since the statutes require that they be obeyed, are regulation of traffic and are in furtherance of through traffic as well as of local traffic. That parking regulations are for the benefit of through travelers as well as for persons stopping to park their vehicles is held in *Flynn v. Bledsoe Co.*, 267 P. 887, 92 Cal. App. 145, in which the court said, p. 890:

"* * * Obstruction to a street is a serious menace to the automobile public and is as great a consideration as could be presented to a city council to induce the enactment of an ordinance which would tend to minimize the obstruction thereof by parked vehicles."

Markings which have the effect of keeping parked vehicles and pedestrians within fixed boundaries tend to keep a portion of the roadway clear for through traffic.

4.

Policing to prevent traffic violations or apprehend traffic violators

Sec. 85.12 (1) of the statutes provides in part:

"It shall be the duty of the police and traffic departments of every political unit of government * * * to enforce the provisions of sections 85.10 to 85.86 and 85.91. Such officers are authorized to direct all traffic within their respective jurisdictions either in person or by means of visual or audible signal in accordance with the provisions of said sections; * * *"

Enforcement of the traffic laws contained in chapter 85 of the statutes is by the above section made a duty of local officials. Enforcement is in furtherance of and an aid to travel over the highways. Such policing as is actually performed on the selected connecting streets is traffic regulation on such streets and within the purposes for which state highway aids may be used. No allotment under section 84.10 (1) may be used for policing, however, except where it is performed on the selected connecting streets to enforce traffic regulations.

5.

Policing for the purpose of directing traffic

The statutory provision quoted and the comments made in connection with the preceding item are equally applicable to policing for the purpose of directing traffic.

BL

Counties — Public Officers — County Board — Neither chairman nor any other member of county board may charge or receive greater compensation for per diem allowance or travel expense than is authorized by statute or by legislative action of county board, even though such person gives additional services or incurs additional expense.

March 13, 1941.

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

Your questions relating to compensation of county board members are repeated separately in connection with the discussion of each.

1. Can a county board member lawfully make any claim for per diem over and above the aggregate fixed by statute or by the county board?

The answer to the above question must clearly be in the negative. The court had before it a claim of a county board member for per diem allowance in excess of the maximum fixed by the statute, in *Henry v. Dolen*, 186 Wis. 622, 203 N. W. 369, and it was said, p. 624:

"A consideration of this case must be premised upon the well established proposition that a public officer takes his office *cum onere* and is entitled to no salary or fees except what the statute provides. *Outagamie Co. v. Zuehlke*, 165 Wis. 32 (161 N. W. 6), * * *."

2. Can a county board member lawfully charge the county for mileage where he attends committee meetings or otherwise after he has reached the aggregate number of days for which he could charge per diem in accordance with the statute or as fixed by the county board?

The matter of allowance for travel expenses of a member of a county board was considered by the court in *State v. Cleveland*, 161 Wis. 457, 152 N. W. 819, 154 N. W. 980. The court said, p. 459:

"A public official's right to compensation is purely statutory; what the statute gives he receives, but no more. Mechem, Pub. Off., sections 855, 856. * * * No provision is made for traveling expenses, and this means that, like other officials in that situation, they must defray their own expenses of this nature."

If a county board member incurs mileage expense in addition to that for which the statute authorizes compensation, he may not lawfully charge the county for the excess.

3. Can a county board member or the chairman of the county board lawfully make any charge for services other than for actual committee work, in addition to his services during meetings of the county board?

The claim under consideration in *Henry v. Dolen*, *supra*, was that of a county board member for extra compensation for services in addition to committee work and attendance at board meetings. The court said, pp. 625-626:

“* * * Any services performed by him must have been performed either in his official capacity or as an employee of the county board. If performed in his official capacity he is limited to the compensation provided by statute. If performed as an employee of the county board he is in no better position, because sec. 4549, Stats., penalizes any county officer who shall have, reserve, or acquire any pecuniary interest, directly or indirectly, in any contract, proposal, or bid in relation to any public service. Any right to compensation as a mere employee of the county board must rest upon contract, express or implied. The services for which defendant claims compensation were public services. To have a pecuniary interest in any such contract subjects the defendant to the penalties prescribed by sec. 4549, Stats. It also renders the contract void.”

Sec. 4549 referred to in the foregoing excerpt is now section 348.28.

Either the chairman or any other member of the county board is governed, with respect to services performed for the county, by the rule laid down in the above case, and may not lawfully charge or receive extra compensation in addition to that fixed by law.

BL

Public Officers — Register of Deeds — Statistics — Vital Statistics — Birth Certificates — Register of deeds may decline to register certificates of births which occurred more than year previously, when such certificates are offered by local board of health or by state board of health without statutory fees.

March 14, 1941:

CONNOR HANSEN,

District Attorney,

Eau Claire, Wisconsin.

You have asked whether the register of deeds is required to register certificates of births which occurred more than a year previously, when the certificates are offered by a city

board of health or by the state board of health without the statutory fees.

While section 69.56, subsec. (1), and section 59.51, subsec. (7) of the statutes impose upon the register of deeds the duty to register births, sections 59.57 (11b) and (12) give him the right to collect the statutory fees in advance. The obligations imposed by the above sections are reciprocal, and the duty of the register of deeds exists only when the reciprocal duty of payment has been performed.

The case of *State v. Wickham*, 77 Oh. St. 1, 82 N. E. 517, 518, involved a somewhat similar question. There the county commissioners notified the register of deeds that the county would not pay for preparation of indexes for which the law provided. The court said, pp. 5-6:

“* * * These ‘general indexes’ are to be made only when in the opinion of the county commissioners they are needed and they so direct; but the power to direct and the obligation to pay are reciprocal; for, while the recorder *shall* make the indexes when directed by the commissioners, the statute is just as imperative that he *shall* receive compensation. So that when the commissioners notified the recorder that they would no longer pay for the service, the later was necessarily relieved from the duty of further performing it.”

Since the certificates were not presented within a year after the births so as to require the county to pay the fees under sec. 59.57 (11b), and since the fees were not paid by the persons offering the certificates, the register of deeds may decline to register them.

BL

Appropriations and Expenditures — Public Officers — Federal Draft Administrator — University — University President — President of university, by accepting office of federal draft administrator, vacated his office as president if that position was office. This question is not determined, however, since in any event he continued to act as president and was at least officer *de facto* and was entitled to pay as such. If position was not office, he is entitled to pay as employee.

March 14, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

You have submitted the following for our opinion:

“Article XIII, section 3, of the Wisconsin constitution, reads as follows:

“No member of congress, nor any person holding any office of profit or trust under the United States * * * shall be eligible to any office of trust, profit or honor in this state.’

“When Dr. Dykstra was appointed draft director by the president of the United States, we held his salary checks as president of the university because of our fear that such payment was in conflict with the constitutional provision mentioned above.

“* * *

“Can we make payment to Dr. Dykstra, as president of the university, notwithstanding the fact that he is federal draft director?”

We do not find it necessary to determine whether the constitutional provision referred to does or does not apply. The provision does not apply unless Mr. Dykstra, as president of the university, occupied a state office at the time he accepted the position of federal draft administrator. If his position as president constituted an office it was vacated by his acceptance of the federal office. *State ex rel. Hazelton v. Turner*, 168 Wis. 170.

In the case of such a vacancy it could, no doubt, have been filled by the proper authority. No one assumed to fill a va-

cancy, however, and Mr. Dykstra, so far as we are advised, has continued to claim the presidency and has, in fact, assumed to discharge the duties of that position under a claim of right to do so. Moreover, there has not been, so far as we are advised, anyone claiming the presidency as against the right asserted by Mr. Dykstra.

Under such circumstances, there can be no question but that Mr. Dykstra, as a *de facto* officer, is entitled to the salary attaching to the office, if it is an office, even though a vacancy existed. See *State ex rel. Kleinsteuber v. Kotecki*, 155 Wis. 66.

If, as president of the university, Mr. Dykstra was not a state officer at the time he assumed the federal office, it is, of course, evident that section XIII, article 3 of the constitution does not apply. If, as president, he was not an officer, he was an employee in the technical sense of the word. It is an extremely difficult thing to analyze the status of an employee's relationship to the state, particularly in the case of employees who are not subject to the civil service law. If Mr. Dykstra is an employee, as distinguished from an officer, he is not subject to the civil service law. Sec. 16.08, Wis. Stats.

It has been held that university professors are not public officers in any sense that excludes the existence of a contract relation between themselves and the board of regents. Thus, it is said that the relationship is contractual. *Butler v. The Regents of the University*, 32 Wis. 124. On the other hand, it has been said that the relationship between public bodies and their employees is not contractual in the sense that that relationship is ordinarily understood. *Dandoy v. Milwaukee County*, 214 Wis. 586.

It seems to be established, however, that such duties as an employee may have and such rights as he may have are based upon agreement rather than upon statute. This is true at least in those cases where the statutes do not specifically deal with the employee's duties, compensation, tenure, etc.

If Mr. Dykstra was an employee, it is apparent that no provision is made by law covering his duties and compensation, except the provisions made by secs. 36.06 and 36.12, Wis. Stats. Under the provisions of sec. 36.06 the board of

regents is authorized to elect a president, to fix his salary, to fix the length of his employment and to remove him at pleasure. It is thus evident that the matter of Mr. Dykstra's compensation, if he is an employee, is dependent upon his agreement with the board of regents.

We are not advised as to all the facts in the case, but it seems to be generally accepted that from the time he accepted the federal office, Mr. Dykstra has spent more or less time in Madison attending to university affairs. It seems to be accepted, moreover, that the board of regents has been satisfied with the amount of time which Mr. Dykstra has devoted to his affairs and that the board has specifically approved compensating him upon the basis of the time he has actually spent.

Assuming, therefore, that by the terms of his original employment, Mr. Dykstra was supposed to devote his entire time to the affairs of the university in return for the salary paid him, it is evident that the board of regents could, if the board so desired, grant him the same compensation for part time service. This is so because the matter of compensation is entirely within the hands of the board.

If our suppositions have been correct as to the agreement, express or implied, between Mr. Dykstra and the board of regents, and if our assumption has been correct as to his spending at least part of his time directing the affairs of the university, we are of the opinion that his salary should be paid him even if he is an employee. We may add, in this connection, that the certification by the university that a salary is due Mr. Dykstra is *prima facie* evidence that the salary is in fact due. See sec. 14.37, Wis. Stats.

JWR

Criminal Law — Common Law Conspiracy — Public Health — Nursing — Ch. 149, Stats., which prohibits nurse from holding herself out as registered nurse and practicing as such without certificate of registration, does not specifically provide any penalty for hospital authorities who knowingly hire nurse who has no such certificate and permit her to practice as registered nurse; but they may nevertheless be guilty of aiding and abetting violation thereof under such facts; they may also be guilty of common law conspiracy to violate ch. 149 under provisions of sec. 348.40, Stats.

March 17, 1941.

DR. C. A. HARPER,
Health Officer.

You inquire whether, if a hospital employs a nurse in the capacity of a graduate (registered) nurse, knowing that the nurse is ineligible to practice as such in the state of Wisconsin, the hospital authorities should be held liable under the law for such employment of the nurse.

Sec. 149.06 (4), Stats., provides as follows:

“No person shall practice or attempt to practice, as a registered, trained, certified or graduate nurse without a certificate, nor use the title, letters or anything else to indicate that she is a registered nurse.”

The only offense under ch. 149 of the statutes is to practice as a registered nurse without a certificate. Practical nursing is permitted, provided that the nurse does not hold herself out as a registered nurse. *Nickley v. Eisenberg*, (1931) 206 Wis. 265, 270. Nor is there any provision in ch. 149 which prohibits hospitals from employing nurses who are not registered according to law.

It follows that unless the nurse in question holds herself out as a registered nurse she would not be violating the law. While ch. 149 does not forbid hospitals from employing unregistered nurses, it does not follow that hospital authorities may not be guilty of violating that chapter if they aid and abet the nurse in a violation thereof. The general rule is

that one who aids and abets in the commission of a misdemeanor may be charged and convicted as a principal (though not as an accessory) even though he does not belong to the statutory class of persons capable of committing the offense. 5 A. L. R. 782; 74 A. L. R. 1110; XXII Op. Atty. Gen. 381.

It has been held that a woman may be guilty of rape or a man of raping his own wife or a single man of bigamy, by reason of being present, aiding and abetting such an offense committed by another. *Boggus v. The State*, (1866) 34 Ga. 275, 278.

Moreover, if the hospital authorities corruptly agree with the nurse to employ her in the capacity of a registered nurse, knowing that she is not registered, and pursuant to that agreement the nurse is hired and actually practices at the hospital as a registered nurse, the hospital authorities would be guilty of a common law conspiracy under sec. 348.40 which provides as follows:

“Any person guilty of a criminal conspiracy at common law shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars; but no agreement, except to commit a felony upon the person of another or to commit arson or burglary, shall be deemed a conspiracy or be punished as such unless some act, beside such agreement, be done to effect the object thereof by one or more of the parties to such agreement.”

The Wisconsin supreme court has held in a recent case that the foregoing statute covers conspiracies to violate statutes as well as conspiracies to commit common law offenses. *State v. Martin*, (1939) 229 Wis. 644.

It is also well established that persons who are themselves incapable of committing an offense may, nevertheless, be convicted of a conspiracy to commit that offense, provided that some member of the conspiracy is capable of committing it. *The State ex rel. Durner v. Huegin*, (1901) 110 Wis. 189 at 246; 12 C. J. 576; 15 C. J. S. 1105.

Thus it is held that persons who are not bankrupts may be guilty of a conspiracy to conceal assets of the bankrupt from the trustee, although only the bankrupt himself is capable of committing the principal offense. *United States*

v. Rabinowich, (1915) 238 U. S. 78, 86-87. And it has also been held that a woman who agreed with another person that he should transport her from Illinois to Wisconsin for the purpose of prostitution was guilty of a conspiracy to violate the white slave act although she could not violate the act herself. *United States v. Holte*, (1915) 236 U. S. 140 at 145. Similarly, persons who are not government officers may be convicted of conspiracy with such officers in asking for and receiving a bribe. *Downs v. United States*, (C. C. A. 3d 1925) 3 F. (2) 855, 857; *State v. Myers*, (1922) 36 Idaho 396, 211 Pac. 440 at 445. Likewise, a person who is not an officer, director, agent or employee of a bank may be guilty of conspiracy with such officer, director, agent or employee to violate the banking law by making a false entry in the books of the bank, *Curtis v. United States*, (C. C. A. 10th 1933) 67 F. (2) 943, 946-947, or by certifying a check when the drawer has insufficient funds to cover it, *Chadwick v. United States*, (C. C. A. 6th 1905) 141 Fed. 225, 236-237, or by embezzling the funds of the bank, *State v. Davis*, (1932) 203 N. C. 13, 164 S. E. 737, 745. Likewise, a person may be guilty of a conspiracy with a census enumerator to insert fictitious names in a census report, an offense which only the enumerator could commit. *United States v. Stevens*, (D. Minn. 1890) 44 Fed. 132, 140.

In view of all of the foregoing examples, it is clear that the hospital authorities may be guilty of aiding and abetting a violation of ch. 149, Stats., and they may also be guilty of conspiring with a nurse to violate said chapter. Of course it must be shown that they entered into an agreement with the nurse corruptly, that is, with knowledge that she was not a registered nurse and that for her to practice as such would violate the law, and an overt act in furtherance of the conspiracy must be proved under the conspiracy statute above quoted.

WAP

Public Health — Wisconsin General Hospital — No provision exists for finding by county judge with respect to question as to whether county has hospital within meaning of sec. 142.04, Stats.

March 18, 1941.

BURTON E. HOFFMANN,
District Attorney,
 Montello, Wisconsin.

Section 142.04, Stats., provides that persons certified for treatment at the Wisconsin general hospital shall be certified at joint county and state expense as provided by sec. 142.08 except that in any county where there is a hospital persons certified in excess of two for each one thousand inhabitants of the county shall be maintained at county expense.

Your county judge has determined that there is no hospital in your county and you request our opinion as to whether the judge has authority to make such a determination.

The judge's action was based upon an opinion reported in XXIV Op. Atty. Gen. 155, in which it is said, p. 155:

“* * * it is for the judge to determine when there is no hospital in the county. * * *.”

We have searched the statutes in vain for any indication that the county judge is authorized to make a finding such as that to which you have referred. The attorney general's opinion, to which we have called attention, is based upon no statutory provision, express or implied.

Secs. 142.01, 142.02, 142.03 and 102.04, Stats., provide in substance that, upon certain facts being made to appear to the satisfaction of the county judge, upon application, the judge may enter an order directing that a person be treated at the Wisconsin general hospital. That is the extent of the judge's function. The provision relating to payment for the treating of a person so certified is not in any way tied up

with a function which the judge is to perform. The judge merely orders the person to be treated at the Wisconsin general hospital and his function in this respect is the same irrespective of the fact that the county is to pay the entire cost or one-half of the cost.

The provisions made for determining financial responsibility are found in sec. 142.08, Stats.. It is there provided by subsec. (3) :

“On or before October first in each year the board of regents [of the university] shall file with the secretary of state a statement setting forth in detail the account of each certified patient during the fiscal year ended on June thirtieth next preceding.”

Subsec. (4) provides :

“The secretary of state shall thereupon certify to each county * * * one-half the amount paid by the state for each patient certified to the Wisconsin general hospital within the quota for the county, and the full amount paid by the state for each such patient certified in excess of the quota for that county to the Wisconsin general hospital, these amounts to be certified, levied and collected with the general state taxes; * * *.”

It thus appears that there is no specific provision as to who shall determine the question of whether there is or is not a hospital within a county from which patients are certified. And such a determination is necessary since the county has a quota if there is a hospital and must assume the entire cost for patients certified in excess of the quota.

It is our impression that the secretary of state is the proper person to determine whether there is or is not a hospital within a particular county for the purposes of these sections. We have already stated that there is no occasion for the county judge to determine the question at the time of ordering the person to be treated at the hospital. Neither is there any occasion for the hospital itself making such a determination. The law simply provides that if a person is treated at the hospital the board of regents of the university shall certify the cost of treatment to the secretary of

state and the secretary of state shall certify to the county for payment the full cost or one-half the cost of maintaining each patient from that county, depending upon whether its quota has or has not been exceeded. Thus, the first step at which it becomes necessary to make a determination is that point at which it becomes necessary to determine the financial liability of the county for treatment. This point is reached when the secretary of state is required to make a certification to the county of its portion of the cost of caring for a patient.

We accordingly hold, therefore, that under the statutes the secretary of state should make the determination as to whether or not there is a hospital in any particular county. This necessarily implies that any findings upon the subject by either the county judge or by the Wisconsin general hospital are unauthorized. We do not mean to indicate, however, that it is not perfectly proper for the judge to make such a finding. If the secretary of state cares to take the judge's finding into consideration he may do so and it doubtless would be very helpful to him in any case where there was a question as to the status of a county. On the other hand, the secretary of state is not bound by the judge's determination.

The judge does not act as a court in certifying cases. He acts purely in an administrative capacity. Consequently any such finding as is made in connection with certifying cases is not the determination of a court. If it were, then there would be a question as to whether, even if erroneous, such a finding would not be binding until reversed. Under the circumstances, however, there is no such question in the case and we must accordingly take the view that the judge's finding is of no effect whatsoever.

We think the attorney general's opinion upon which the judge relied in making his finding is an incorrect view of the law and we accordingly express the view that it will not be followed during the present administration of the attorney general's office.

JWR

Agriculture — Rabies — Sec. 95.21, Stats., does not apply to removing dogs to or from district quarantined for rabies.

March 19, 1941.

TO THE HONORABLE, THE ASSEMBLY:

We have received a request for an opinion as follows:

“RESOLVED by the assembly, That the attorney general be and he is hereby respectfully requested to render an official opinion to the assembly at the earliest possible moment on the question whether under section 95.21 of the statutes any dog in a district which is quarantined for rabies may be taken outside of the district if leashed or otherwise under the control of the owner.”

In my opinion section 95.21, Stats., has no application whatsoever to the state of facts referred to in your request. The section reads as follows:

“95.21 Quarantine for rabies. Whenever any district shall be quarantined for rabies, all dogs within said district shall be kept securely confined or tied or held in leash or muzzled. Any dog not so confined or tied or leashed or muzzled is declared to be a public nuisance and may be impounded; and the sheriff and his deputies and every constable, marshal, other police officer or a duly authorized humane society shall actively co-operate in rendering said quarantine effective. The clerk of every town, city or village wholly or partly within the quarantine area shall promptly post in at least three public places in this town, city or village, such notices of quarantine as may be furnished him by the department for posting.”

As I read the language of the section it clearly provides that where a district is quarantined all dogs within the district shall be confined, tied, held in leash or muzzled. There is no restriction of any kind as to removing dogs from the district or as to bringing them into the district.

I call your attention to the fact, however, that sec. 95.19, Stats., provides in part:

“No person shall * * * remove from one part of the state to another * * * any animal afflicted with or that has been exposed to any contagious or infectious disease, except as authorized by the regulations or orders of the department [of agriculture] * * *.”

Sec. 95.16 defines the term “contagious or infectious disease” as including rabies. It thus appears that under sec. 95.19 any animal afflicted with or exposed to rabies may not be removed from one part of the state to another. Just what this provision means is debatable. In a sense, an animal is removed from one part of the state to another when it is removed from a house to a barn on the same parcel of land. Whether removal of an animal from one quarantined district to another would constitute removal from one part of the state to another, is a question which is not easily answered, but we are inclined to think that it would constitute such a removal. The question, however, is not entirely free from doubt.

JWR

Indigent, Insane, etc. — Parole of Insane — Transfer of Insane Convicts — Superintendent of county asylum has authority under sec. 51.13, subsec. (2), Stats., to grant leave of absence to insane person transferred to such asylum from central state hospital, when such person was originally transferred to central state hospital from prison pursuant to sec. 51.22, but only after such person's prison term has expired. XXVIII Op. Atty. Gen. 193 distinguished.

Superintendent of central state hospital has no authority to parole prisoner transferred to said hospital from prison pursuant to sec. 51.22 after expiration of patient's prison term since 51.13 (1) does not apply to central state hospital and sec. 51.234 does not cover such cases.

March 19, 1941.

DEPARTMENT OF PUBLIC WELFARE.

You state that A B was on December 23, 1933 convicted of an offense and sentenced to the state prison for a term of three to eight years. On February 5, 1937 he was found by the board of control to be insane and was transferred to the central state hospital under sec. 51.22, Stats. With deductions for good time, his prison term expired May 29, 1938. On June 30, 1939, he was transferred by the board of control to the Sauk county asylum pursuant to authority contained in sec. 51.12 subsec. (3), which is the only subsection of that section which is made applicable to the central state hospital by sec. 51.23 (1).

You inquire whether the superintendent of the county asylum has authority to grant leave of absence to A B under the provision of sec. 51.13 (2), Stats., and also whether the superintendent of the central state hospital would have authority to parole such a case under sec. 51.13 (1) at any time after the prison term expired.

Sec. 51.22 provides in part that the state board of control (now the department of public welfare), acting as a commission in lunacy, may adjudge any prisoner insane or feeble-minded and with the approval of the governor remove

him to the central state hospital or to one of the feeble-minded colonies. That section concludes with the following provision:

“* * * When a prisoner thus removed recovers his reason before the expiration of his sentence he shall, by order of the board, be returned to the prison from whence he was taken.”

Sec. 51.12 (3), which is made applicable to the central state hospital by sec. 51.23 (1), provides as follows:

“Whenever, by a fair trial, it shall have become reasonably certain that any patient in either state hospital is incurably insane, and such patient is retained to the exclusion of others whose cases are of a more hopeful character, the board may transfer him to some county asylum authorized by law to receive such patients.”

Sec. 51.13 provides as follows:

“(1) Each superintendent of the state and northern hospitals for the insane and the Milwaukee county hospital for the insane may permit any inmate in his hospital to go at large on parole, if in his opinion it is safe and proper to do so. Whenever within two years after granting such parole it becomes unsafe or improper to allow such persons to remain longer at large, the superintendent shall require his return to the hospital, unless such person shall have been adjudged sane by competent authority.

“(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.”

At XXVIII Op. Atty. Gen. 193 this office rendered an opinion with reference to a person who had been transferred from the prison to the Winnebago state hospital, presumably because of lack of facilities at central state hospital. She was subsequently transferred to a county asylum and the specific question raised was whether or not the board of control should enter into a contract with the superintendent of the county asylum whereby the latter would agree never to grant the prisoner leave of absence under sec. 51.13 (2). The difference between that case and the one here under consideration is that in the former the prison term of the insane person had not yet expired, whereas in this case it has.

In that opinion it was ruled that the superintendent of the county asylum would not have any authority to grant leave of absence to such a patient. It is considered that the reasoning of that opinion would not apply to an insane person whose prison term has expired, since such a person is no longer to be classified as an insane criminal, but upon the expiration of his sentence acquires the status of any other ordinary insane person. He is not held in custody by virtue of sec. 51.22, nor is he subject to being returned to the prison upon regaining his sanity. No reason is perceived why such a person should be denied the right to a leave of absence under the same conditions as any other ordinary insane person.

The provision for leaves of absence is intended to permit the temporary release of harmless insane persons who require neither treatment nor custodial care. Many such persons are permitted to go at large under supervision and in fact many of them, although found insane by the court, are never committed to any asylum or hospital. This serves the dual purpose of permitting such persons to live useful lives so far as their capacities permit and also of relieving congestion in the asylums, making room for other persons who require custodial care. Of course, persons whose insanity is of such a nature that it is dangerous to permit them to be at large are not granted leaves of absence and, if they have homicidal or suicidal tendencies, they are not even ordi-

narily left in the county asylums, but are transferred to the central state hospital pursuant to authority contained in sec. 51.22.

Considering the purpose of the leave of absence provision of sec. 51.13 (2), together with the fact that the patient's prison term has expired, no reason is perceived why such a person should be treated any differently from other chronic insane cases in the county asylums. No provision of law specifically forbids the granting of leaves of absence to such persons and it is considered that the reasons stated in XXVIII Op. Atty. Gen. 193 do not apply to such a person.

Moreover, we are advised that the board of control and your department have for many years so construed the law and such administrative construction is of course entitled to considerable weight.

Your second question is whether the superintendent of the central state hospital has authority to parole such a case after the expiration of the prison term. Sec. 51.13 (1) is the only statute under which insane persons in state hospitals may be paroled, and that section is specifically made inapplicable to the central state hospital by sec. 51.23 (1). There is a specific statute dealing with paroles from the central state hospital, sec. 51.234, but this section applies only to feeble-minded persons committed to the central state hospital under the provision of secs. 357.11 and 357.13. Applying the rule that the expression of one is the exclusion of the other, it is apparent that the statutes do not contemplate that the superintendent of the central state hospital has any authority to parole insane inmates, even though their prison terms may have expired. Neither, for that matter, have the superintendents of the other state hospitals for the insane authority to parole persons transferred to their hospitals under sec. 51.22, since such persons are "subject to the statutes governing inmates of the said central state hospital." Sec. 51.23 (3).

If it is deemed advisable that such persons be subject to parole, an amendment of the statutes will be necessary to effect that result.

WAP

Public Health — Beauty Parlors — Student transferring from one school of cosmetology to another must file application in second school under provisions of sec. 159.02, subsec. (4), Stats.

Under present rules of board of health, student so transferring is entitled to credit for hours put in at first school, notwithstanding that such transfer may have been made on date other than that fixed by rule 11 of board for entering school, since that rule applies only to original entries and not to transfers. Fifteen hundred hours of instruction required for graduation under sec. 159.02 (3) need not all be earned in same school although they must all be earned in schools registered by board under sec. 159.02.

March 21, 1941.

DR. C. A. HARPER,
Board of Health.

You have requested an opinion with reference to transfers by students of cosmetology from one school certified under ch. 159, Stats., to another such school. Your first question is whether the student must submit an application form to the second school, or whether the application submitted to the first school is sufficient. Sec. 159.02, subsec. (4), provides as follows:

“No school holding a certificate of registration from the state board of health shall enroll or admit any student unless such student shall make and file in duplicate a duly verified application in a form to be prepared and furnished by the state board of health. One copy of such application shall be retained by the school and the other copy shall be sent to the state board of health.”

Subsec. (3) of the same section provides in part as follows:

“No school teaching cosmetic art shall be granted a certificate of registration unless it requires as a prerequisite to admission, completion, as shown by certificate or affidavit,

of the tenth grade or an equivalent education as determined by the extension division of the university of Wisconsin or the Milwaukee board of school directors, * * *.”

The statutes above quoted make no distinction between students entering school for the first time and transfer students. The requirement that the student file an application and a certificate or affidavit showing completion of the tenth grade or an equivalent education runs to the school, not to the student. In other words, the statute makes it the duty of the school to demand such an application, not of the student to give it. It is clear that the second school cannot claim that the filing of an application in the first school constitutes a compliance with the law by the second school. The second school must perform its statutory duty itself and cannot rely upon what some other school did.

We understand that before issuing a student permit the board of health requires the student to furnish a birth certificate and a letter or certificate from a high school principal showing completion of the tenth grade. It is not necessary that the student apply for a new student permit upon transferring from one school to another, so it is unnecessary for the student to furnish a second birth certificate and proof of completion of the tenth grade. However, this has nothing to do with the question of whether or not the student must file an application for admission to the second school on the regulation form furnished by the board.

You have also asked whether hours of instruction obtained in one school may be recognized toward graduation of a student later entering another school.

Sec. 159.02 (3) reads in part:

“No school * * * shall be granted a certificate * * * unless it requires as a prerequisite to * * * graduation a course of instruction of not less than fifteen hundred hours to be completed within a period of not less than eight months instruction of not more than eight hours in any one day. * * *”

The foregoing section would not prevent recognition of hours of instruction given under proper conditions in a different school. We understand that the board of health exer-

cises such control over the curricula of all registered schools of cosmetology in the state that the same subjects are taught in all schools at the same time. Accordingly, there is no apparent reason why students should not be permitted to transfer from one school to another and to receive full credit for the number of hours put in in each school. Nothing in the rules of the board nor in ch. 159, Stats., forbids such transferring.

Rule 11 of the board provides in part as follows:

“Students shall enter school only on the first Monday and four days thereafter of January, March, May, July, September and November of each year.”

The rule then continues by providing that application blanks for student permits must reach the board of health not later than the Monday following the last day of each enrollment period.

The purpose of this rule was considered by this office in the opinion at XXIX Op. Atty. Gen. 424, from which it appears that it was intended to insure a systematic course of instruction and to prevent students from being admitted at an advanced stage of a course without having had the preliminary work necessary to understand the more advanced subjects. In view of the fact that all schools teach the same subjects at the same time, this reasoning does not apply to a student admitted as a transfer from another school. Moreover, the rule itself does not seem to apply to such a situation because, immediately after the sentence above quoted, it contains a provision for application for a student permit which, as pointed out above, is not necessary in a case of a transfer who already holds a permit. It is concluded therefore that the expression “enter school” as used in the rule means to enter upon a course of instruction for the first time rather than to be admitted to any particular school. It follows that the period for entering provided by rule 11 does not apply to transfers.

Of course if it should develop that students begin to flit from one school to another, acquiring their technical education on the run so to speak, it may be necessary for the

board to consider whether to amend its rules so as to prevent that practice, but under the present rules it is apparently permitted.

BL

WAP

Automobiles — Law of Road — Intoxicated Drivers — Courts — Justice Courts — Criminal Law — Arrest and Examination — Since penalty for violation of sec. 85.13, Stats., includes suspension of defendant's driver's license pursuant to sec. 85.91, subsec. (3), offense is beyond trial jurisdiction of justice of peace as provided in sec. 360.01 (5). Jurisdiction of justice being limited to holding preliminary hearing and binding defendant over for trial, he has authority to fix bail of defendant upon return of warrant, without any formal arraignment, and to continue examination to future date, pursuant to sec. 361.09, upon return of warrant by arresting officer.

March 29, 1941.

HUGH M. JONES, *Commissioner,*
Motor Vehicle Department.

You state that a person was apprehended on a Saturday for operating an automobile while under the influence of intoxicating liquor contrary to sec. 85.13, Stats. The arresting officer signed a complaint and the justice of the peace immediately issued a warrant. Your letter states further:

“* * * However, the defendant was not in condition to stand trial before midnight, and since the justice of the peace could not hold court on Sunday, the question arises whether the justice of the peace has authority to release defendant on bail before formal arraignment in court.”

Your letter indicates that you assume that the justice of the peace has trial jurisdiction of this offense. At least one circuit judge has held that such offenses as this are beyond the trial jurisdiction of a justice of the peace and we are of the opinion that this holding is clearly correct, although it appears to be the practice in many counties for the justices to try such offenses and sentence the offenders.

Sec. 85.91, subsec. (3), provides as follows:

“Any person violating any of the provisions of sections 85.13, 85.135, and subsection (1) of section 85.14 and subsections (1) to (5) of section 85.40, 85.81 and 85.83 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in addition to any other penalty provided by law, by a fine not to exceed one hundred dollars or by imprisonment in the county or municipal jail for not more than six months, or by both such fine and imprisonment. The operator’s license of such person may also be revoked or suspended for a period not to exceed one year; and for the second or each subsequent conviction within one year thereafter such person shall be punished by a fine not to exceed two hundred dollars or by such imprisonment not to exceed one year, or by both such fine and imprisonment, and in addition thereto by suspension or revocation of the operator’s license for not to exceed one year.”

By sec. 360.01 (5) the trial jurisdiction of justices is limited to offenses “the punishment whereof does not exceed six months’ imprisonment in the county jail or a fine of one hundred dollars, or both such fine and imprisonment, except as otherwise provided.” There is no specific provision giving justices jurisdiction of traffic offenses, and it appears on the face of sec. 85.91 (3), above quoted, that the punishment for a violation of sec. 85.13 exceeds the jurisdiction of a justice of the peace, since in addition to the fine and imprisonment, the defendant’s driver’s license may also be revoked or suspended for a period not to exceed one year.

The question has been raised whether suspension of the driver’s license is to be regarded as a punishment. Historically, any disability which might result to a person by reason of a conviction of crime has been regarded as a punishment. Thus, Blackstone speaks of “a disability, of holding offices or employments, being heirs, executors, and the

like," as a part of the punishment for certain offenses. 4 Bl. Com., page 377. He also speaks of forfeiture of goods as "a punishment annexed by law to some illegal act. * * *" 2 Bl. Com. 267. See also 2 Bl. Com. 419-420, and 4 Bl. Com. 377.

Moreover, the language of sec. 85.91 (3) speaks of suspension or revocation of the driver's license as a part of the punishment for a second offender.

Since the justice does not have trial jurisdiction of the offense under ch. 360, he must proceed under ch. 361, his jurisdiction being limited to examining the defendant and binding him over to a higher court for trial. Sec. 361.09 provides as follows:

"Any magistrate may adjourn an examination or trial pending before himself from time to time as occasion may require, not exceeding ten days at one time, without consent of the defendant or person charged, and to the same or different place in the county as he shall think proper; and in such case, if the party is charged with a capital offense, he shall be committed in the meantime; otherwise he may be recognized in a sum and with sureties to the satisfaction of the magistrate for his appearance for such further examination; and for want of such recognizance he shall be committed to prison."

In such cases it is not necessary to arraign the defendant before a justice, although this is frequently done. The proper procedure is simply that a return of the warrant be made before the justice and that the prisoner be asked whether he desires a preliminary hearing. If he waives a preliminary hearing, the justice may immediately order him bound over for trial and fix bail. On the other hand, if the prisoner demands a preliminary hearing, the justice may fix a date for such hearing and may fix the amount of the bail and take the defendant's recognizance as provided in sec. 361.09 above quoted.

Accordingly, in the case that you mention, it was perfectly proper for the justice to admit the accused to bail on Saturday night, and upon the date set for the trial the justice should either hold a preliminary hearing, or, if the de-

defendant waives such hearing, he should bind him over for trial to a higher court which has trial jurisdiction of the offense.

WAP

Indigent, Insane, etc. — Hospitals for Insane — Liability of parole guardian of inmate of central state hospital for insane paroled under provisions of sec. 51.234, Stats., discussed.

April 7, 1941.

DEPARTMENT OF PUBLIC WELFARE.

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

You request the opinion of this office relative to the interpretation of the following language contained in sec. 51.234, subsec. (1), of the Wisconsin statutes:

“* * * The central state hospital for the insane shall not be liable in any manner for such patient while on parole. Such liability shall devolve upon the parole guardian of said inmate.”

You desire an opinion as to the interpretation of this language so that the institution may advise parole guardians as to the nature and extent of any liability on the part of such guardians.

Sec. 51.234 relates to paroles from the central state hospital for the insane. The language above quoted comprises the last two sentences of subsec. (1) of said section. This language does not place any responsibility or liability upon the parole guardian in addition to any such responsibility or liability otherwise existing by law. There being nothing in the statutes placing liability of any kind upon such a parole guardian, his liability would be that existing at common law.

The central state hospital would not be liable for acts committed by an inmate of the hospital either while a patient there or while on parole outside the hospital, the central state hospital being an agency of the state performing a governmental function. There is thus no previously existing liability which, under the words of the statute above quoted, would devolve upon a parole guardian. The decisions indicate that a parole guardian is not liable for the acts of an insane ward except in the case of negligence or

failure to use reasonable care on the part of the guardian in controlling his ward. Each case, of course, rests on its own facts, but we have not found any case where the guardian was held liable for the acts of the ward. It appears that a guardian may rely, at least to some extent, on the judgment of the hospital authorities in releasing the inmate in his charge, and unless there is some change in the condition of the ward occurring after his release and which is known to the guardian, it is not likely that the guardian would sustain liability for acts committed by the ward.

The parole guardian must, of course, take reasonable precautions to prevent acts on the part of the ward injurious to persons or property, but this would, generally speaking, seem to be the extent of the liability of the guardian.

RHL

Counties — Common School Tax — Public Lands — National Forests — National forest income received by county through operation of 16 USCA 500 is to be used under sec. 59.07, subsec. (22), Stats., toward payment of county school aids and is not in addition thereto.

Under sec. 59.075 (1) county school aids are raised by levy on all taxable property in county and reduction in such aids resulting from national forest income will therefore be reflected in levy as whole rather than merely in levy on those particular properties located in school districts situated in national forests.

April 7, 1941.

RALPH STELLER,

District Attorney,

Hayward, Wisconsin.

You state that Sawyer county has received the sum of \$1446.47 from the federal government as national forest income under the Title 16 USCA 500. The payments have been received as follows:

Year	Amount
1936-----	\$126.25
1937-----	177.13
1938-----	284.88
1939-----	440.63
1940-----	417.58
	\$1,446.47

In connection with the foregoing facts you raise the following questions:

"1. Is this money to be apportioned to the various school districts within the boundaries of the national forest on an acreage basis or otherwise?

"2. Is this money to be apportioned to these certain school districts in lieu of a portion of the usual county school aid raised under sections 40.87 (4) (a) and 59.075 (1), or in addition to said aid? Section 500 of Title 16 of The Code of Laws of the United States of America provides that this money shall go to the public schools of the county. Does that mean all the schools, or just the schools within the boundaries of the national forest or school districts being partly within a national forest?

"3. Should the total amount of county school aid required to be levied under section 40.87 (4) (a) be reduced by the amount received as national forest income and the balance levied on an equalized basis as other county taxes are levied, or

"4. Should only such properties whose assessment might be affected in national forest areas be given a reduction in levy for county school aid because of the National Forest Income received, or should this money received as National Forest Income be divided equally between the public schools of the county and in addition to that the usual school aids raised under sections 40.87 (4) (a) and 59.075 (1) ?"

16 USCA 500, as far as material here, reads:

"Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated. * * *"

Sec. 59.07 (22), Wis. Stats., reads:

"In any years when the national forest income to any county is less than five hundred dollars, the entire sum shall be used toward payment of county school aid required under paragraph (a) of subsection (4) of section 40.87 to school districts included within national forest boundaries, but when such annual income shall exceed five hundred dollars, then seventy-five per cent shall be used for such school aid and the remainder shall be allotted to the county highway committee for construction and maintenance of highways within or leading to national forests."

The school equalization aids referred to in sec. 40.87 (4) (a) Stats., are raised by a tax levy by the county board under sec. 59.075 (1) "upon the aggregate assessed valuation of the county." Thus there is no distinction made in so far as the tax levy is concerned between property lying within a school district included within national forest boundaries and the tax levy on property not so included. This disposes of your fourth question.

A careful study of the statutes quoted and referred to above makes unnecessary a detailed discussion of each of the remaining questions raised, since the answer to some of these questions will, in effect, furnish the answers to the others, and, with this in mind, we will consider next the second question asked.

It is clear from a reading of sec. 59.07 (22) that national forest income is to be used "toward payment of county school aid required" under the law, and not in addition to such aid. Thus the county equalization school tax to be levied would be computed by subtracting the amount of national forest income from the amount of county school aid as certified by the county superintendent of schools under sec. 59.075 (1).

If this income is used toward payment of county school aids, and is not in addition thereto, any school district in the county, whether wholly or partially within national forest boundaries or entirely outside of such boundaries, will receive only the county school equalization aid to which it would be entitled if no national forest income were available. Assuming for purposes of illustration that school district A within the boundaries of a national forest is entitled to \$300.00 county school aid, it will receive that amount

in any event, and hence it is immaterial so far as the aid itself is concerned whether the entire \$300.00 is raised by the county under sec. 59.075 (1) or whether part of it is derived by the county from national forest income.

This being true, there is no point in making any detailed discussion of your first question as to whether national forest income is apportioned among the various school districts within the boundaries of a national forest on an acreage basis or otherwise. As above indicated, neither acreage nor assessed valuation nor any other similar yardstick has anything to do with the situation since every school district, regardless of national forest considerations, receives from the county the aids specified in sec. 59.075 (1). The matter is one of concern only to the county itself whose county-wide tax levy for equalization aid in any particular year will be reduced by the amount of national forest income which the county receives for that year. Incidentally, the provision of sec. 59.07 (22) relating to instances where the annual income from various aids exceeds \$500.00 would not apply because, on the figures furnished, the income has been less than \$500.00 for each of the years mentioned.

WHR

Indigent, Insane, etc. — Minors — Child Protection — School Districts — Tuition — County is liable under provisions of sec. 40.21, subsec. (2), Stats., to school district for tuition for children attending school in such district who are maintained as public charges.

Children placed in foster homes under provisions of sec. 48.07 are maintained as public charges within meaning of that term as used in sec. 40.21 (2).

April 8, 1941.

CLARENCE V. OLSON,
District Attorney,
Ashland, Wisconsin.

In your letter of March 17, 1941, you request our opinion relative to the application of sec. 40.21, subsec. (2), Wis. Stats., to the liability of a county to a school district in the county for tuition for children placed in foster homes in the school district pursuant to sec. 48.07 of the statutes and attending school in the district. You call attention, among others, to the previous opinions of this office found in XX Op. Atty. Gen. 742, XXV Op. Atty. Gen. 413, and to an opinion rendered to the director of the department of public welfare under date of February 28, 1940, found in XXIX Op. Atty. Gen. 87. In the last opinion it was held, in accordance with previous opinions and decisions of the court, that a child placed in a foster home under the law establishing the state public school 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 entitled to attend the district school of said district tuition free. This opinion did not discuss the application of sec. 40.21 (2), which section applies only in cases where the child is maintained as a public charge. Children placed in foster homes under the provisions of sec. 48.07 are, under subsec. (6), par. (a) thereof, in the event no other provision is made by law for the support of such children, a charge upon the county. Such children are, of course, maintained as public charges within the meaning of that term

as used in sec. 40.21 (2). This was expressly held in XX Op. Atty. Gen. 742, to which opinion we adhere, and with respect to such children the school district is entitled to receive tuition from the county in which such children have a legal settlement as defined in sec. 49.02 in accordance with the provisions of sec. 40.21 (2). See also XXV Op. Atty. Gen. 413.

RHL

Insurance — Life Insurance — Sec. 206.05, subsec. (1), Stats., relating to election of officers of mutual insurance companies, requires that notice of appointment of inspectors of election and nomination of candidates for directors be filed at least sixty days prior to date of election. Failure to comply with this requirement renders election void.

April 23, 1941.

MORVIN DUEL,

Commissioner of Insurance.

Attention H. T. Wolberg, Senior Actuary.

You state that in an attempted compliance with sec. 206.05, subsec. (1), Stats., a domestic mutual life insurance company filed with your department notice of appointment of inspectors and nomination of candidates for directors. Such filing was made fifty-seven days prior to the date of the annual meeting.

We are asked first whether the statute requires that filing be made with the commissioner of insurance at least sixty days prior to the date of the election.

Sec. 206.05 (1), reads:

“Not more than ninety nor less than sixty days prior to any general election by any mutual company, the directors or trustees shall appoint three voters, who are not directors or trustees, as inspectors of election, who shall be paid by

the company, and such directors or trustees shall suggest a candidate for every office to be filled at the ensuing election, and shall file with the commissioner a certificate thereof, giving the names, occupations and addresses of such inspectors and nominees."

A dominant rule in the construction of statutes is to discover and give effect to the legislative purpose. *State ex rel. Wisconsin Allied Truck Owners Ass'n v. Public Service Commission*, 207 Wis. 664. It seems apparent that the legislature intended that notice be filed prior to the election, since there would be little occasion for knowing the names of the nominees after the election had been held. Also sec. 206.09 provides for the filing of the complete results of the election. Yet, unless the sixty-day provision for filing is mandatory, it apparently could be performed any time, even after the date of the election, when it would serve no useful purpose.

Sec. 206.05 (3), provides:

"One hundred or more voters of such company may suggest candidates for the offices to be filled, by filing with the commissioner and with the secretary of the company, not more than ninety nor less than sixty days prior to such election, a certificate signed and acknowledged by them, giving the names, occupations and addresses of their candidates, together with a statement signed by said candidates that they will accept office if elected."

Clearly the filing under the above section must be at least sixty days prior to the date of the election. There is no indication of an intention to distinguish in this respect between directors or trustees or voters, and no reason for such distinction appears. Furthermore, the only direction as to time for filing with the commissioner is that contained in the words "not more than ninety or less than sixty days prior to any general election." The section begins with the foregoing quoted words and it would be doing violence to the ordinary rules of grammar if such words were not so construed as to modify the remainder of the sentence following such words.

It is our opinion that the above considerations require the pertinent parts of sec. 206.05 (1) to be read as follows:

“Not more than ninety nor less than sixty days prior to any general election by any mutual company, the directors or trustees shall appoint * * * and shall file with the commissioner * * *.”

You further inquire as to the effect of late filing.

Sec. 206.06 reads

“(1) No vote shall be counted if cast for any person other than one who was nominated as provided in section 206.05.”

Since the candidates in the situation mentioned have not been nominated in strict compliance with sec. 206.05 (1), votes cast for them are not to be counted, by reason of the operation of sec. 206.06 (1), quoted above.

As stated in 19 C. J. S. 32:

“A method of electing directors provided by statute may by its terms be mandatory, and a person who claims to be a member of a board of directors, trustees, or managers, but who has not been duly elected in the mode provided by law is without right or title to the office.”

Also the fact that the inspectors were not appointed pursuant to sec. 206.05 would appear by analogy to vitiate their appointment, and thus invalidate the election. An illustration of the effect of noncompliance with such a statute is to be found in the case of *In re Remington Typewriter Co.*, 196 N. Y. S. 309. In this case one of the inspectors was elected by a per capita vote instead of by a stock vote as required by statute. This was held to have vitiated his appointment and the ensuing election of directors was declared void for the reason that there was only one legally chosen inspector instead of the plural number required by the statute and corporation bylaws.

Secs. 206.08 and 206.09 apparently make inspectors necessary for a proper election, and consequently their invalid appointment would render the election void.

This may appear to be a harsh result, particularly in view of the near compliance with the statute. However, since the legislature has established a fixed, arbitrary period during which the filing is to be made, it is difficult to urge that substantial compliance is sufficient. If the legislature had felt that a period of less than sixty days would suffice, it could have said so, but since it has said sixty days, we do not believe it is within our province to change this in effect to fifty-seven days or any other figure short of that specified by the legislature itself.

WHR

Education — School Administration — Teacher Tenure Law — Repeal of teacher tenure law, sec. 39.40, Stats., would terminate tenure rights acquired under law.

Principals and school superintendents are included within definition of teacher under provisions of sec. 39.40.

Sec. 39.40 does not deprive school board of right to impose higher scholastic qualifications than have been attained by one who has acquired tenure, provided they are imposed in exercise of good faith and no teacher is dismissed without having been permitted reasonable opportunity to comply with such additional requirements.

School board may reduce salary of teacher who has acquired tenure provided change is made in good faith and not as subterfuge to avoid application of tenure statute.

April 25, 1941.

TO THE HONORABLE, THE SENATE.

Certain questions relating to the teacher tenure law, sec. 39.40, Stats., have been submitted to me for my opinion thereon. The questions and my opinion with respect thereto are as follows:

Question 1. If a teacher has acquired tenure under the present teacher tenure law, does she retain all of the rights and privileges accorded her under the present law, even though that law is repealed?

Answer. This question is answered in the negative. Sec. 39.40 does not grant contract or vested rights to those who have attained tenure pursuant to its provisions. *Elsie Morrison v. Board of Education of the City of West Allis, et al.*, 297 N. W. 383. There can be no doubt that this decision by the Wisconsin court will be sustained by the United States supreme court if an appeal is taken to that court. *Dodge v. Board of Education*, 302 U. S. 74. Since no contract or vested rights are created, the repeal of the section would terminate any rights which a teacher had acquired thereunder. The situation would stand as though the statute had never existed. *Dillon v. Linder*, 36 Wis. 344.

Question 2. Do principals and superintendents of schools come within the provisions of the present teacher tenure law?

Answer. This question is answered in the affirmative. Sec. 39.40, Stats., defines the word "teacher" as used in the section. With certain exceptions not material, a teacher is a person who holds a teacher's certificate, whose legal employment requires such a certificate, and who is employed by a school board, board of trustees or managing body of any school system or school, or by a county superintendent as a supervising teacher. Since principals and superintendents of schools are required to possess teachers' certificates, they would be included within the definition of the word "teacher." Moreover, subsec. (5) of sec. 39.40, dealing with the application of the tenure provisions to teachers who have attained the age of sixty-five, excepts from its provisions principals, superintendents or supervising teachers. This is an indication of a clear legislative intent that principals, superintendents and supervising teachers are included within the definition of the word "teacher", since there would otherwise be no occasion for excepting them from the provision dealing with teachers who have reached sixty-five years of age.

Question 3. Where teachers have gained tenure under the present law, can a board of education or a school board demand, in the case of the teaching positions held by them, higher scholastic qualifications than such teachers now possess or may have possessed during the time they secured such tenure?

Answer. I do not find it possible to give an unqualified "yes" or "no" answer to this question. I think that a board of education may require higher scholastic qualifications of a teacher than those which the teacher possessed at the time of securing tenure, but I do not think that a teacher may be dismissed for failure to attain the higher qualifications unless he is afforded a reasonable opportunity to meet the additional requirement.

Sec. 39.40 provides, in substance, that once tenure is obtained, a teacher shall not lose his position until he is discharged for misbehavior, inefficiency, or some comparable cause. *State ex rel. Schmidtkunz v. Webb*, 230 Wis. 390. This policy to give permanency to the tenure of teachers cannot be avoided by subterfuge. If the statute means what it says, and we have no right to assume that it means any less, it would not permit of a discharge in the case of one who acquired tenure and thereafter was confronted with the demand that he meet additional scholastic requirements which he had had no opportunity to attain. *Cf. State ex rel. Karnes v. Board of Regents*, 222 Wis. 542.

On the other hand, the statute could not have been intended to deprive school boards of the power to fix scholastic standards for teachers employed in their schools and to otherwise regulate the conduct of the school system. School boards possess that power generally, and we find nothing in the statute which even by implication discloses an intent to deprive them of it. As a consequence, a school board could undoubtedly require one who had attained tenure to meet additional requirements and could undoubtedly dismiss a teacher for failure to comply with the requirements. Perhaps such failure to comply could be denominated inefficiency. Certainly it would constitute a cause comparable to misbehavior or inefficiency.

We wish to make it clear, however, that any additional requirements imposed must be a reasonable requirement

and must be imposed in the exercise of good faith. It could not be used as a subterfuge to avoid the operation of the tenure law. We shall discuss this aspect more fully in our answer to the next question.

Question 4. Does a school board or board of education have the power to reduce the salary of any incumbent teacher who has obtained tenure under the present law?

Answer. This question is answered in the affirmative. School boards are authorized by statute to contract with teachers and by virtue of such contract to set their compensation. Note, for example, as to the school boards of common school districts, sec. 40.19. As in the case of the answer to the preceding question, we find nothing in sec. 39.40 which expressly or by implication discloses an intention to deprive school boards of this power. Such being the case, we think that a school board may change a teacher's compensation after the teacher acquires tenure provided the change is made in good faith and is not made for the purpose of avoiding the operation of the tenure law. It has so been held by other courts. See, for example, *Emerson v. Board of Trustees of Paularino Elementary School Dist.*, (D. C. A. Cal.) 73 Pac. (2d) 935. Other cases to the same effect may be found in extensive annotations at 110 A. L. R. 791; 113 A. L. R. 1495, and 127 A. L. R. 1298.

JWR

Counties — County Board — Public Officers — Superintendent of County Asylum — Matron of County Asylum — Under sec. 59.15, subsec. (1), par. (e), Stats., county board may at its annual meeting or at adjourned annual meeting reduce salaries of superintendent and matron of county asylum from salaries previously fixed under sec. 46.19, Stats., by board of trustees of county institutions.

May 3, 1941.

OSCAR J. SCHMIEGE,
District Attorney,
Appleton, Wisconsin.

You state that the board of trustees of the county asylum has fixed the salaries of the superintendent and matron of the asylum. We are asked whether the county board has power to reduce the salaries so fixed.

Sec. 46.19, Wis. Stats., provides:

“(1) Every such county institution shall be managed, pursuant to regulations prescribed by the board of trustees, by a superintendent, who shall be appointed by and be removable at the pleasure of said board.

“(2) The trustees shall fix the compensation and prescribe the duties of the superintendent, who shall execute and file an official bond with sureties approved and in an amount fixed by the trustees.

“(3) Except as otherwise provided by law, the superintendent shall, subject to the approval of the trustees, appoint, fix the designation and compensation of, and prescribe the duties of all necessary additional officers and employes of said institution, and may remove them at his discretion, subject to the county civil service law.”

Sec. 59.15, subsec. (1), par. (e), reads in part:

“The county board, at its annual meeting, shall fix the salary or compensation for any office or position (other than the county officers designated by section 59.12, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation of which is paid in whole or in part, by the county and the jurisdiction and duties of which lie

wholly within the county or any portion thereof, and such salary or compensation may be fixed from time to time at any annual meeting of the county board for the ensuing year; and such power is hereby granted to the county board *notwithstanding the provisions of any special or general law to the contrary.* * * *.”

The language of sec. 59.15, subsec. (1), par. (e), is broad enough to include the present situation, and must control unless there are some implied limitations to its scope. Ch. 190, L. 1923, created this paragraph. At that time, sec. 46.19 was already in existence. Any presumption based upon time of passage must, therefore, favor sec. 59.15 (1) (e), as it is the later enactment.

It is also apparent that the legislature in granting the power to the county board “notwithstanding the provisions of any special or general law to the contrary” made clear its intention that sec. 59.15 (1) (e) should control absolutely all situations within its compass.

Thus, where a statute fixed a specific fee which an examiner of blind and deaf should receive for examining each applicant, it was the opinion of this department that such statute was subordinate to sec. 59.15 (1) (e). Accordingly, the county board could fix the compensation at an amount greater than that which was prescribed. XXV Op. Atty. Gen. 671.

In XXVIII Op. Atty. Gen. 19 it was ruled that the question of providing housing and maintenance for the superintendent of the county workhouse is a matter for the board of trustees only. The reasoning followed was that housing and maintenance constitute a form of compensation, and sec. 46.19 empowers the board of trustees to fix the compensation of the superintendent. However, the opinion was directed primarily to the question of the power of appointing the superintendent, no question as to compensation having been raised in the request, and consequently the effect of sec. 59.15 (1) (e) on the element of compensation was not considered. Hence, to the extent that the opinion goes beyond the question asked and conflicts with the conclusion reached here, it should be disregarded.

Sec. 59.15 (1) (e) provides that the salary or compensation may be changed from time to time at the *annual* meeting of the county board. We understand from your letter that the changes in salary will be effected at an adjourned annual meeting. As such, it is still the annual meeting and therefore within the statute. XVI Op. Atty. Gen. 189.

It might be noted that under sec. 46.19 (2) the board of trustees has power to fix the compensation of the superintendent only. Sec. 46.19 (3) empowers the superintendent, subject to the approval of such board, to fix the compensation of all additional employees "except as otherwise provided by law." Hence it is clear that the compensation of the matron is likewise subject to the control of the county board under sec. 59.15 (1), (e), Stats.

WHR

Fish and Game — Fishing in Outlying Waters — Resident Wisconsin commercial fisherman may purchase boat owned by resident of Michigan and enrolled by federal government in Michigan and upon re-enrollment of boat at Wisconsin port he is entitled to resident net and set hook commercial fishing license under sec. 29.33, Stats., permitting use of such boat in outlying waters of Wisconsin.

May 5, 1941.

CONSERVATION COMMISSION.

Attention H. W. MacKenzie, *Conservation Director*.

You request our opinion upon the following questions:

(1) A licensed resident commercial fisherman desires to purchase a boat to be used by him immediately in his fishing on the outlying waters of Wisconsin. The boat he contemplates buying is owned by a resident of Michigan and is

registered in that state. Upon the purchase of this boat, may he use the same immediately in his commercial fishing industry?

(2) If the above mentioned boat was registered in Michigan in 1940, but no renewal was made in the latter part of 1940, as required, and six months have elapsed since the registration ran out, may a Wisconsin licensed commercial fisherman purchase such boat and use it immediately in his commercial fishing operations?

Sec. 29.33, Stats., relates to the licensing of net and set hook fishing in outlying waters. This section requires that the fisherman in securing this type of license must list, among other things, the vessel or vessels he is going to use in carrying on his fishing. No vessel other than those so listed may be used except upon express permission of the director of conservation when it is necessary to replace one of the licensed vessels because of disrepair. (Sec. 29.33 (3) (d).) Thus it would be impossible for the commercial fisherman to add this new vessel to his fleet without securing a new license and including this vessel in the license.

If he is willing to secure a new license there is no statute forbidding the use in Wisconsin of a vessel registered in Michigan. It is true that a person so acting is defined as a nonresident and, therefore, forced to pay a higher license fee under sec. 29.33 (3) (c), Stats., which reads as follows:

“For the purpose of this section, a nonresident shall be deemed to be any person who has not actually resided within the state of Wisconsin for two years immediately prior to the date of application for a license, or, any person applying for a license for use of a boat registered or of record at a port outside of the state of Wisconsin, or, any firm, company, copartnership, partnership, association or corporation in which any part of their stock, boat, nets and fishing equipment has been owned by nonresident persons, as defined herein, at any time during the six months immediately prior to the date of application for a license.”

However, there is no reason why the vessel could not be purchased by the Wisconsin fisherman, who could then have

it re-enrolled in Wisconsin, and apply for the fishing license at which time the boat would not be "registered or of record at a port outside of the state of Wisconsin." Thus the fisherman could apply for a license as a resident under sec. 29.33 (3) (c). Note that the statute does not require that the vessel be registered in Wisconsin for any length of time. It does require that an individual have resided within the state for two years. It also requires that the entire equipment, boats, etc., of a firm, partnership, or corporation be owned by residents for six months, although this provision does not apply to individuals. Therefore, if the vessel has been enrolled in Wisconsin for any length of time before the application for a license by an individual, that is sufficient to make him a resident applicant.

To better discuss the question it is necessary to have some knowledge of the law of registration and enrollment of vessels by the federal government. There is a distinction between the two.

"Every vessel of the United States must have a register or an enrollment, the former for foreign trade, the latter for domestic commerce. Without them, and without the right one, a vessel is entitled to no protection under the United States laws. *Badger v. Gutierrez*, 4 S. Ct. 563, 565, 111 U. S. 734, 28 L. ed. 581." As summarized in 46 USCA 251, Note 3.

In the case of fishing on the Great Lakes enrollment is the proper term.

"* * *, provided * * * That vessels operating on the Great Lakes and their connecting and tributary waters under enrollment and license issued in conformity with the provisions of section 258 of this title, shall be deemed to have sufficient license for engaging in the taking of fish of every description within such waters without change in the form of enrollment and license prescribed under the authority of that section. (As amended 1936)" 46 USCA 263.

We will assume that in your request, as in the statute, the word "registered" was used in its ordinary sense, and that therefore you mean that the vessel in question was enrolled and licensed by the federal government in Michigan.

Under the federal law an enrollment and license is automatically voided upon a sale of the vessel. 46 USCA sec. 266 and notes.

Therefore, before this recently purchased vessel could be used by a Wisconsin commercial fisherman, he must have it re-enrolled in the Wisconsin district. This would at once make it a Wisconsin vessel for the purpose of sec. 29.33 of the Wisconsin statutes.

On the other hand, if the Wisconsin commercial fisherman applied for the state fishing license while the boat was still owned in Michigan, or before it was re-enrolled in Wisconsin, he would, for the purposes of sec. 29.33 (3) (c), be treated as a nonresident.

The fact that the vessel was not enrolled at all during the last six months is immaterial. The term "registered or of record" in sec. 29.33 (3), (c) of the Wisconsin statutes must be interpreted by analogy to the interpretation of the laws as to residence. If the vessel is not at present enrolled or registered it must be treated as being of record in the district in which it was last registered or enrolled.

WHR

Fish and Game — Newspapers — Publication of Orders
— Conservation commission orders issued under sec. 29.174, subsec. (5), Stats., must be published in official state paper.

It is discretionary with commission as to what other paper, if any, is also to be used for publication of order, but such discretion must not be abused and should be honestly exercised in accordance with facts pertaining to each particular order.

May 5, 1941.

CONSERVATION COMMISSION.

Attention H. W. MacKenzie, *Conservation Director*.

You ask whether orders of the conservation commission issued under sec. 29.174, subsec. (5), Stats., are required to be published in newspapers other than the official state paper. The present practice is to publish in the official state paper only, and to provide notice to other sections of the state through news stories. You state that this practice is more advisable because the news stories are a more effective means of informing the public generally than official publications, and newspapers of less experience than the official state paper are prone to make errors in publication, which causes delay of the date upon which the order becomes legally effective. Also there is a considerable saving in publication fees if the orders are published in the official state paper only.

Subsec. (5), sec. 29.174, Wis. Stats., reads in part:

“All orders promulgated, under the authority of this section, shall take effect, upon approval of the governor and after publication in the official state paper and in such other newspapers as the conservation commission may deem advisable to fairly advise the residents of the communities affected by the provisions of such orders. * * *.”

We take it that the word “publication” as used in the foregoing statute means a full publication of the text of the order in the manner that legal notices are usually pub-

lished, so that proof of publication can be made in the form prescribed by sec. 328.19, Stats. This is further indicated by the fact that in prosecuting a violation of an order issued under sec. 29.174 (5), proof of publication of the order would be essential.

Consequently, news stories, however widely circulated, cannot be regarded as meeting the mandate of the statute, although we feel that such stories are highly to be commended and, therefore, ought not to be discouraged.

Publication in the official state paper is clearly mandatory under the language of the above statute.

The remainder of the statute appears to vest rather broad discretion in the commission as to what paper or papers, if any, are to be used for publication in addition to the official state paper.

It may well be in any given instance that publication in the official state paper alone would "fairly advise the residents of the communities affected by the provisions" of some particular order. This, however, does not mean that the commission would be justified in arbitrarily adopting a policy of never publishing an order in a newspaper or in newspapers other than the official state paper, for that would amount to an abuse of discretion or rather a failure to exercise any discretion whatsoever in so far as any particular order might be concerned, especially where it could be shown that the official state paper would be one which by no stretch of the imagination could be said to fairly advise residents of a community in some distant part of the state affected by such order.

We must assume that the legislature intended the discretion given the commission should be honestly and fairly exercised in accordance with the circumstances relating to each order as it is issued. Adoption of a policy of using only news stories in addition to the publication of the order in the official state paper in our opinion falls short of compliance with the statute, although, as previously indicated, we do not mean to intimate that such a procedure could never be followed, particularly where the official state paper happens to be one which would fairly advise the residents of the community affected by the order in question.

WHR

Taxation — Title to lands which have formed bed of artificial lake for more than twenty years does not pass from original private owners to state in trust, and such lands are subject to tax assessment.

May 5, 1941.

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

There are situated in your county at least two artificial lakes, which were created more than twenty years and perhaps more than fifty years ago by the erection of a dam. These artificial lakes cover substantial areas. In some cases the towns in which the lakes, or portions thereof, are located have assessed the land forming the bed of these lakes as well as the land above the water. For example: If there had been a two hundred acre farm in the vicinity of the lake prior to the existence of said lake and upon the creation of the artificial lake a portion of the two hundred acres was covered with water, the portion under water has been assessed more or less upon the same basis as marsh land, and that portion of the farm still remaining out of water has been assessed on the basis of farm land. As a result of this practice Dodge county now holds a number of tax certificates covering parcels of land forming a part of the bed of these lakes, the assessments from which the tax certificates resulted having been made after the lake had been in existence more than twenty years.

The contention has been made that, after the artificial lakes had been in existence for twenty years, title to the bed of such lakes passed from the original private owners to the state, which now holds title in trust. Consequently it is further argued that after the twenty-year period the lands forming the bed of these artificial lakes were not subject to assessment, and the tax certificates resulting from such assessments are illegal. Before any action is taken by Dodge county declaring the tax certificates illegal and charging

the taxes back to the municipality which originally assessed them, you desire to have the opinion of this office regarding the merits of this contention.

Until 1933 it undoubtedly was the law of this state that where a dam was erected across a stream and an artificial lake resulted therefrom, the artificial condition so resulting became, by lapse of time, in the nature of a natural condition and the title to the lands submerged by the erection of the dam passed from the original private owner to the state in trust. *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. W. 880; *Attorney General ex rel. Becker, et al., v. Bay Boom Wild Rice and Fur Company, et al.*, 172 Wis. 363, 178 N. W. 569; *Minehan v. Murphy*, 149 Wis. 14, 134 N. W. 1130, and *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436. See also *Johnson v. Eimerman*, 140 Wis. 327, 122 N. W. 775.

This conclusion was reached by application of the statute of limitations:

“* * * By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes * * *.” *Diana Shooting Club v. Lamoreux, supra*, page 55.

However, in the case of *Minehan v. Murphy, supra*, Justice Timlin registered a strong dissent from this doctrine, contending that it permitted the title to land to be cut off by supposed adverse possession which never in fact existed because the state made no claim to the land, had not been in possession of the same, and was not given title to such land by any statute.

One of the leading cases supporting the doctrine of the transfer of title to the bed of an artificially created lake is the case of *Village of Pewaukee v. Savoy, supra*. It resulted from the existence of a condition arising at Pewaukee Lake, a meandered navigable body of water about five miles long and averaging about three-fourths of a mile in width. The level of the water in the lake was artificially raised about the year 1838 by a dam. The court held that

because this condition had existed for more than twenty years it became the natural condition, and the title to the lands flooded by the artificial increase in the height of the lake became vested in the state by dedication. The court stated that the uninterrupted and continuous use of this land by the public, acquiesced in for twenty years, constituted conclusive proof of the dedication.

In 1933 the court decided the case of *Haase v. Kingston Co-operative Creamery Association*, 212 Wis. 585, 250 N. W. 444. It was there held that where the owner of land creates an artificial body of water upon his own premises, he may permit the public to enjoy the ordinary use of such waters, and it may be that by the lapse of time such enjoyment will ripen into a dedication which he will not be permitted to destroy; but such a use of the waters does not amount to adverse possession in favor of the state, giving the state title to land under the waters.

The case of *Pewaukee v. Savoy*, *supra*, was overruled in so far as it held that the state acquired title to land under the waters by adverse possession. The court also approvingly cited the dissenting opinion of Justice Timlin in the case of *Minehan v. Murphy*, *supra*, and criticised the opinions in *Johnson v. Eimerman*, *supra*, and *Minehan v. Murphy*, *supra*, in the following language:

“While a dam is a fairly permanent institution, it is by no means an agency of perpetual existence. It will decay and wear away in time, and, when it does, the waters will recede to their natural level. While the owner of the dam may be restrained from affirmatively interfering with the artificial level which he has created, it is not at all clear how he could be coerced to make the repairs necessary for its perpetual existence, especially when the proprietor of the dam becomes bankrupt, as occasionally happens. Under such circumstances, the application of the principal in the *Savoy Case* would strip the riparian owners of their titles and vest the same in the state, when the water receded, a result against equity and justice. This doctrine was repudiated by Mr. Justice Timlin in an opinion in which Mr. Justice Kerwin concurred, in *Minehan v. Murphy*, 149 Wis. 14, 134 N. W. 1130. We have seen no answer to the position taken by Mr. Justice Timlin in that opinion, in which he holds that under such circumstances no such thing as adverse possession in favor of the state ever existed. We can

see none. It appears to us wholly unnecessary, in order to protect the rights of the public upon such artificial waters, to go to the extent of saying that the state has acquired the title to the land under such waters by adverse possession. The rights of every one are fully secured when the public and riparian owners are accorded, and protected in, the same rights upon such waters as they are entitled to enjoy upon natural, navigable waters. But the application of such doctrine to artificial waters created upon private lands, as it apparently was applied in *Johnson v. Eimerman* and *Minehan v. Murphy*, becomes far less defensible. It is but trite to say that the landowner may devote his land to any lawful purpose. If he sees fit to create a pond or lake upon his own premises for his own purposes, it is difficult to see why he should permit the public the ordinary use of such waters at the peril of losing title to the land under the water. Such a doctrine would deprive many of our water-power enterprises of the title to land overflowed, vest it in the state, remove it from taxation, and reduce the capital investment in the enterprise upon which it has been supposed it was entitled to a return in the form of rates and charges for utility service. We think the true rule is this: where the owner of land creates an artificial body of water upon his own premises, he may permit the public to enjoy the ordinary use of such waters, and, it may be, that by the lapse of time such enjoyment will ripen into a dedication which he will not be permitted to destroy. But such a use of the waters does not amount to an adverse possession in favor of the state giving the state title to the land under the waters, and, so far as previous decisions to the contrary are concerned, they are hereby overruled." *Haase v. Kingston Co-operative Creamery Association, supra*, pages 587-589.

While this decision refers to an artificial body of water created by the land owner upon his own premises we do not perceive any reason why the rule should be different in a case where the land forming the bed of the artificial lake belongs to more than one person. It is our opinion that the title to the lands forming the bed of the two artificial lakes did not pass from the original private owners to the state, and that such tax certificates may not be declared illegal upon the theory that such lands were owned by the state and hence were exempt from taxation.

JRW

Public Health — Funeral director licensed under ch. 156, Stats., may operate more than one funeral establishment.

Sec. 156.06 does not require that applicant for renewal of funeral director's license own or maintain recognized funeral establishment, but requires only that he be "doing business" at such establishment. This requirement is sufficiently met by showing that applicant has contract with owner of such establishment permitting him to conduct funerals there. Board and committee of examiners is justified in requiring that copy of such contract be submitted to it. Contract need not be for full license year but must be in effect at time of granting renewal license.

May 7, 1941.

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

You request an opinion with reference to two problems arising under the law relating to funeral directors and embalmers.

In your first question you state that a certain funeral director owns and operates two funeral establishments, one in Milwaukee and another in Big Bend. You direct attention to sec. 156.09, Stats., and inquire whether it is lawful for a man to operate two funeral establishments. You state that it has been the position of the board and the committee of examiners that there must be a licensed funeral director in charge of each funeral establishment.

Sec. 156.09 provides as follows:

"Funeral director's and embalmer's licenses and certificates of apprenticeship shall be displayed conspicuously in the place of business conducted by the licensee or where the licensee or apprentice is employed."

You state that the funeral director in question claims that he complies with this section by carrying his license with him and displaying it in each of the establishments when he is operating at that particular one.

It is considered that the board's construction of the law is incorrect. It is the general rule that licensing statutes must be construed strictly against the government and in favor of the citizen. 37 C. J. 213. A case which applies this rule of construction to a situation similar to that involved in your question is *United States ex rel. Kreh v. Ingham*, (1912) 38 App. D. C. 379, 380. The statute involved in that case required insurance solicitors to obtain a license stating the name of the insurance company for which the solicitor was thereby licensed to work. A licensed solicitor made application for a second license entitling him to work for another insurance company, which was denied by the commissioner of insurance. The court held that the law would not be presumed to require that each licensed solicitor work for only one insurance company, and issued a writ of mandamus compelling the insurance commissioner to grant the second license. The court stated as follows:

"* * * The calling of such a solicitor being lawful and subject only to reasonable regulation, the intent of the lawmaking power to abridge or curtail the exercise of the right to pursue that calling ought clearly to appear, and not be presumed."

Similarly the right of a licensed funeral director to operate more than one place of business ought not be considered abridged or curtailed by implication, but such intention should clearly appear. The statute defines a "funeral director" as follows:

156.01 (3) "A 'funeral director' is a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in:

"(a) Preparing, other than by embalming, for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies;

"(b) Maintaining a funeral establishment for the preparation and the disposition, or for the care of dead human bodies; or

"(c) Who shall, in connection with his name or funeral establishment, use the words, 'funeral director,' 'undertaker,' 'mortician' or any other title implying that he is engaged as a funeral director as defined in this subsection."

It might be argued that since paragraph (b) above quoted provides that the funeral director maintain "a funeral establishment," this indicates that he shall not maintain more than one. However, under sec. 370.01 (2) it is a general rule of construction of the statutes that

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

Accordingly, nothing in this subsection prevents a funeral director from operating more than one establishment.

Your second question relates to the renewal of licenses of funeral directors who do not themselves own a recognized funeral establishment, but who have contracts with owners of such establishments whereby they are permitted to conduct funerals therein. You call attention to the provision of sec. 156.06:

"* * * before any renewal license shall be delivered to any licensed funeral director, proof must be furnished by the applicant, to the satisfaction of the board and committee, that he is doing business at a recognized funeral establishment and provided further that if such applicant is not doing business at a recognized funeral establishment at the time for renewal of his license, he shall be given a certificate, upon the payment of a fee of one dollar therefor, to the effect that he is in good standing as such funeral director, and shall be entitled to such renewal license, at any time thereafter, when he is located at a recognized funeral establishment, and upon payment of the renewal fee provided by law."

You inquire whether a licensed funeral director who does not own his own establishment must be denied a renewal of his license or whether it is sufficient that he have an agreement with another funeral director as stated above. In this connection your attention is invited to sec. 156.04 (1), which provides as follows:

"The business of a funeral director must be conducted in a funeral establishment equipped for the care and preparation for burial or transportation of dead human bodies.

What shall be deemed 'necessary equipment' shall be defined in the rules and regulations to be adopted by the committee with the approval of the board."

The quoted portion of sec. 156.06 must be regarded as a requirement that the applicant for renewal supply proof that he is complying with sec. 156.04 (1). The purpose of the latter section is apparently to insure that the preparation of dead bodies for burial will be conducted in a proper place, subject to inspection by the board. It is not intended to insure that every funeral director own or maintain such a place. Applying the rule of strict construction against the government noted above, it is considered that a funeral director is entitled to a renewal of his license if he has a contract right, under which he is actually "doing business," to conduct his business in a regularly equipped and recognized funeral establishment.

As used in license statutes, the expression "doing business" implies a regular course of dealing and not isolated transactions. *People v. Beakes Dairy Co.*, (1918) 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260. Accordingly, it is not sufficient that the licensee have been permitted to conduct occasional funerals at such a recognized establishment, but a contract whereby he is permitted "to do business" at such establishment from time to time as occasion arises should be required.

You state that oral assurances that such an arrangement has been made have sometimes turned out to be inaccurate statements of the fact and that accordingly the board and the committee of examiners have required that a copy of the written contract with the owner of the establishment be submitted. You inquire whether this requirement is justified. Since the statute requires "proof * * * to the satisfaction of the board and committee," the board and committee are justified in demanding any reasonable proof which is necessary to satisfy them of the fact. Under the circumstances, it is proper to require that the written contract be submitted.

You also inquire whether such written contract shall be for the full license year or whether it is sufficient if it con-

tains a ten-day cancellation clause. The statute, sec. 156.06, requires only that at the time of granting the renewal license the applicant must be "doing business at a recognized funeral establishment." Accordingly, if the contract is in effect at the time the renewal is granted, that is all that the statute requires. Of course, if the contract should subsequently be cancelled, the licensee could not thereafter conduct funerals elsewhere than in some recognized funeral establishment without violating sec. 156.04 (1) above quoted.

WAP

Automobiles — License Plates — Patents — Design for proposed 1942 automobile license plates, which differs from 1941 plates only in that corners are to be rounded off instead of substantially square as heretofore, does not infringe either patent No. 2,012,346 or patent No. 2,185,945.

May 7, 1941.

HUGH M. JONES, *Commissioner,*
Motor Vehicle Department.

You have submitted with your request for an opinion the following material: (1) a blue print of the 1941 automobile license plate; (2) a blue print of a proposed plate to be used in 1942; (3) a drawing showing the dimensions of the proposed 1942 plate; (4) a copy of patent No. 2,185,945; (5) a copy of patent No. 2,012,346; (6) a letter received by your department from John P. Meehan, holder of the two patents. You inquire whether the proposed 1942 Wisconsin license plates infringe either of the patents.

You state that due to the fact that it has become impossible to get steel of uniform weight for use in the manufacture of the plates, the plates now in use have frequently ex-

ceeded one pound in shipping weight, resulting in increased postage. In order to reduce the weight so that hereafter all plates will be within the one pound shipping weight classification, your department determined to use rounded ends instead of substantially square corners as heretofore. The radius of the proposed rounded corners is shown on the blue print as $2 \frac{5}{16}$ inches, and the width of the plate is shown as $6 \frac{9}{32}$ inches.

Patent No. 2,012,346 was applied for by Mr. Meehan on December 31, 1934 and was granted August 27, 1935. The salient features of this patent are a license plate with counter-sunk holes to receive the bolts with which the plate is attached to the bracket, and a particular form of crimping the edges and embossing the legend on the plate. Examination of the 1941 Wisconsin license plate indicates that the method of crimping the edges now in use differs from that described in the 1935 patent, and it is our opinion that, assuming the patent to be valid, it is not infringed by the present Wisconsin plates.

The patent which is more directly involved in your question is No. 2,185,945, which was applied for by Mr. Meehan on September 2, 1939 and granted January 2, 1940. This patent is for a license plate which differs from the former patent in several respects. It does not provide for counter-sunk bolt holes, the form of crimping the edges is slightly different from that of the earlier patent and the corners are rounded in much the same way that you propose to use on the 1942 Wisconsin plates. Claim No. 1 of the patent reads as follows:

“A vehicle license plate of the class described, comprising: a flat metal plate having parallel straight side edges, parallel straight end edges and a medial field portion, said side and end edges being connected by curved corner portions each of which has a radius of not less than one-fourth the distance between said side edges, and an embossed bead surrounding the field portion, said bead having curved corner portions closely adjacent and substantially parallel to the first mentioned respective curved corner portions, whereby to provide increased rigidity of the plate at and adjacent said corner portions, the arc of each corner extending substantially 90° .”

The purposes of rounding off the corners are stated in the patent to be to prevent bending and distortion of the plate due to the fact that square corners more easily catch on passing objects, to make packing and unpacking of the plates easier, and to reduce shipping weight.

The form of crimping the edges of the plate described in the 1940 patent is also different from that now in use on the Wisconsin plates and, if the same be continued on the 1942 plates, it would not constitute any infringement of this patent, even assuming that the patent is a valid one. The only remaining question is whether the rounding off of the corners constitutes an infringement. As to this, it seems quite clear under the authorities that the rounding of the corners does not of itself constitute a patentable invention, so that the question of infringement does not arise.

"A mere change in an existing means involving a difference only in form, proportions, or degree, and resulting in doing substantially the same thing in the same way, by substantially the same means, but with better results, is not invention. Such changes amount only to a mere carrying forward or more extended application of an original idea of another. It is otherwise, however, if a change in form produces a new and useful result. *Where the need therefor is obvious, there is no invention in mere enlarging or strengthening, or in increasing the weight of a device. The same is true with respect to mere diminution in size or reduction in quantity.*" 48 C. J. 72-73. (Italics supplied.)

It appears from your letter that the idea of reducing the size of the corners by rounding them in order to reduce shipping weight had been determined upon by your department prior to the receipt of a letter from Mr. Meehan calling your attention to his patent. It seems clear that anyone faced with the problem of reducing the weight of the existing plates without at the same time reducing the space available for the printed legend would have thought of the reduction of the corners either by rounding them or by cutting them off diagonally. Under the circumstances, such an alteration of form is not a patentable invention.

In *Cutler Hammer Mfg. Co. v. Beaver Machine & Tool Co.*, (C. C. A. 2d, 1925) 5 F. (2d) 457, 462, the court held invalid the patent of an electric switch, saying:

“* * * Nor does the invention rest in putting an old form of switch into an old form of casing, nor will it amount to invention to change the form or design, as was done in the second patent, *so as to make it smaller, different in shape, or more compact*, while still using the mechanism of the first patent.” (Italics supplied.)

It has also been held that an electric attachment plug is not patentable because it is small, even though its compact size makes it more convenient than larger plugs. *Benjamin Elec. Mfg. Co. v. Northwestern Elec. E. Co.*, (C.C. A. 2d, 1918) 251 Fed. 288.

In *Linde Air Products Co. v. Morse Dry Dock & R. Co.*, (E. D. N. Y., 1917), 239 Fed. 909, 916, the court said:

“* * * *The mere diminution in size or reduction in quantity* which may prove advantageous in an application of a certain device to accomplish one specific object or result out of all those covered by a broad prior patent does not of itself constitute a new invention.” (Italics supplied.)

See also: *Estey v. Burdett*, (1884) 109 U. S. 633; *King v. Gallun et al.* (1883) 109 U. S. 99; *American Morgan Co. v. Joy Mfg. Co.*, (W. D. Pa. 1939) 31 F. Supp. 419; *Kil-Nock Co. v. Chicago Plating Co.*, (N. D. Ill., 1926) 10 F. (2d) 536; *In re Myers*, (Ct. of Customs & Patent App. 1939) 104 F. (2d) 391; *In re Wilms*, (Ct. of Customs & Patent App. 1933) 63 F. (2d) 355; *In re Einstein*, (Ct. of Customs & Patent App. 1931) 46 F. (2d) 373; *In re Staude*, (Ct. of Customs & Patent App. 1931) 46 F. (2d) 579; *In re Bennett*, (Ct. of Customs & Patent App. 1930) 40 F. (2d) 755.

The rule is stated as follows in 20 R. C. L. 1142-1143:

“That which is *obvious to persons skilled in the art* or is the product of mechanical skill is not patentable. *No invention is involved in a mere change of form, size, degree or proportion, an alteration of quality, quantity or convenience*, the application of an old process or device to a new or analogous use or subject, * * *” (Italics supplied.) See *R. W. Clark Mfg Co. v. Tablet & Ticket Co.*, (C. C. A. 7th, 1927) 18 F. (2d) 91; *Chicago Forging & Manufacturing Co. v. Bassick Co.*, (D. Conn., 1932) 60 F. (2d) 581.

A case presenting a very analogous situation is *Hollister v. Benedict, etc., Mfg. Co.*, (1885) 113 U. S. 59, 28 L. ed. 901, 905-906, in which it appeared that a patent had been granted for a revenue stamp to be attached to a liquor keg. It contained a detachable strip containing information showing the description of the keg to which it was originally attached, the removal of which would cancel the stamp. The internal revenue department used a similar stamp and suit was brought against an official of the department for infringement of the patent. The court held the patent invalid, stating as follows:

“* * * It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward.”

It is concluded, therefore, that patent No. 2,185,945 so far as it covers the rounding of the corners of a license plate, is invalid since that feature of the license plate is not a patentable invention. As to the balance of the patent, with reference to the method of crimping the edges of the plate and embossing the legend thereon, it is concluded that the proposed 1942 plate will not infringe the patent if the same method is used as in the 1941 plates.

WAP

Constitutional Law — Public Officers — Judges — Legislature may prescribe by law that judges of statutory courts be attorneys at law, but it is doubtful that such qualification could be imposed with respect to judges of circuit and supreme courts.

May 9, 1941.

TO THE HONORABLE, THE ASSEMBLY:

A copy of Resolution No. 44, A., has been submitted to me by the clerk of the assembly. The resolution reads in part as follows:

“RESOLVED by the assembly, That the attorney general be respectfully requested to render an official opinion to the assembly at his earliest convenience on the question whether the statute proposed by Bill No. 56, S., as amended by Amendments Nos. 1, S., and 1, A., is violative of the Wisconsin constitution.”

Bill No. 56, S., as amended by Amendments Nos. 1, S., and 1, A., creates sec. 256.025. It provides that no person shall be eligible to hold an office as judge of a court of record who is not an attorney at law and a member in good standing of the bar of this state with the following provisos:

(1) That the requirement shall not apply to any judge who has held office for fifteen or more consecutive years;

(2) That the requirement shall not apply to county judges in counties with a population of less than fourteen thousand inhabitants, and,

(3) That no judge in office at the time the law becomes effective shall be disqualified from finishing out his term.

We have no hesitancy in saying that such a requirement as that proposed would be constitutional as applied to judges of statutory courts of inferior jurisdiction created pursuant to the provisions of article VII, sec. 2 of the Wisconsin constitution. It is very doubtful, however, that the legislature could constitutionally impose such a requirement with respect to the judges of the circuit and supreme courts which are constitutional courts created by the said article VII, sec. 2.

We shall discuss the matter, first, as applied to judges of statutory courts such as municipal, superior and county courts, and, second, as applied to judges of the circuit and supreme courts, which are created by the constitution.

First. The Wisconsin constitution contains no express provision as to the qualifications of judges of statutory courts. There are, however, certain general provisions affecting the qualifications of such judges. Art. XIII, secs. 2 and 3 of the constitution, provides as follows:

“Dueling. Section 2. Any inhabitant of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory, shall forever be disqualified as an elector, and from holding any office under the constitution and laws of this state, and may be punished in such other manner as shall be prescribed by law.

“Eligibility to office. Section 3. No member of congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) or under any foreign power; no person convicted of any infamous crime in any court within the United States; and no person being a defaulter to the United States or to this state, or to any county or town or to any state or territory within the United States, shall be eligible to any office of trust, profit or honor in this state.”

These sections are general in nature and apply to all offices whether judicial, administrative, executive or legislative.

It was held at an early date in this state that the general disqualifications imposed by the provisions above set out were not exclusive in character and did not deny legislative power to impose qualifications reasonable in character as a condition of eligibility to statutory offices which the legislature was at liberty to create or abolish as it might see fit. The court has adhered to this rule throughout a course of many years. *State ex rel. Tesch v. Von Baumbach*, 12 Wis. 310; *Fordyce v. State ex rel. Kelleher*, 115 Wis. 608; *State ex rel. Williams v. Samuelson*, 131 Wis. 499; *State ex rel. Gubbins v. Anson*, 132 Wis. 461; *State ex rel. Buell v. Frear*, 146 Wis. 291; *State ex rel. Bloomer v. Canavan*, 155 Wis. 398.

The only question that remains for discussion, therefore, is whether the requirement that a judge of a court of record be an attorney at law of good standing of the bar is or is not a reasonable requirement. We are of the opinion that such a requirement is a reasonable one. In fact, the requirement has been imposed for many years with respect to county courts in the larger counties and with respect to certain statutory courts of inferior jurisdiction created by special act, such as municipal courts. We might by way of illustration call attention to the list of municipal courts contained in the Wisconsin Annotations of 1930 under the table of special, private or local laws. A rather indiscriminate reference to several of the statutory provisions creating such courts discloses that in each case the law contains a requirement that the judge of the court in question be an attorney at law in good standing of the bar of this state. These special statutory courts have existed in this state for many years and laws imposing the requirements referred to date back beyond fifty years. The requirement that county judges in certain specified cases be attorneys at law was first imposed by chapter 660, Laws 1907.

While the question here at issue does not appear to have been squarely raised, the supreme court in *State ex rel. Fugina v. Pierce*, 191 Wis. 1, affirmed a judgment of ouster against a county judge who did not possess the qualification imposed by sec. 253.02 that he be an attorney at law in good standing of the bar. Former Attorney General Owen in an opinion reported in IV Op. Atty. Gen. 558 (1915), held that the legislature could constitutionally impose a requirement that a judge of a county court be an attorney at law in good standing. It thus appears that there has been a general legislative, administrative and judicial acceptance of the view that the requirement that a judge be an attorney at law is a reasonable one and that such a requirement is within the power of the legislature to prescribe under the constitution. This view has prevailed over a course of many years and we have no doubt the question is thereby foreclosed under well established principles of constitutional law.

Second. In addition to the general provisions referred to above dealing with disqualification for public office, the Wis-

consin constitution contains specific provision with respect to the qualifications of judges of the supreme and circuit courts.

Art. VII, sec. 10 provides as follows:

“Compensation and qualifications of judges. Section 10. Each of the judges of the supreme and circuit courts shall receive a salary, payable at such time as the legislature shall fix, of not less than one thousand five hundred dollars annually; they shall receive no fees of office, or other compensation than their salary; they 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. *No person shall be eligible to the office of judge who shall not, at the time of his election, be a citizen of the United States and have attained the age of twenty-five years, and be a qualified elector within the jurisdiction for which he may be chosen.*”

The situation differs from that which we have discussed in connection with statutory offices in that the office is constitutional, not statutory, and the matter of qualification for office is specifically dealt with. Both of these considerations bear upon indications by the supreme court that additional qualifications for the offices may not be prescribed.

In *State ex rel. Tesch v. Von Baumbach*, 12 Wis. 310, 312, the court used the following language in referring to the power of the legislature to prescribe qualifications for constitutional offices:

“* * * As to all such offices and public trusts, to which the people, in the exercise of their paramount authority, have impliedly declared who shall be eligible, either by prescribing special circumstances which shall disqualify, or by reserving to themselves or to the appointing authorities a certain freedom of choice, there are very obvious reasons for holding that eligibility is in the nature of a constitutional right, and that the legislature possesses no power of exclusion not given by the constitution; * * *.”

This language must undoubtedly be considered as dictum in view of the fact that the court was not dealing with a constitutional office in that case. The fact remains, however,

that the language was used and that in several subsequent cases the same dictum has been repeated. We cannot, in attempting to anticipate a ruling of the supreme court at the present time, ignore the effect of these statements.

Cases in which the dictum has been repeated in one form or another are: *Fordyce v. State ex rel. Kelleher*, 115 Wis. 608; *State ex rel. Bloomer v. Canavan*, 155 Wis. 398; *State ex rel. Buell v. Frear*, 146 Wis. 291; *State ex rel. La Follette v. Kohler*, 200 Wis. 518.

As we understand the basis of the view above set out, it is to the effect that where the constitution imposes specific disqualifications in dealing with the qualifications for a particular office, it has thereby evidenced the intent that there shall be no further disqualification for that office. Thus considered, a disqualification is equivalent to saying that everyone not so disqualified is eligible for the office. There are several cases in other jurisdictions which are in accord with this view. Some cases, on the other hand, are contrary. It has been indicated, for example, by at least three courts that a constitutional disqualification does not amount to a qualification in negative terms. These courts contend that a provision to the effect that certain persons are disqualified is not equivalent to a provision that all persons not so disqualified are eligible. Rather, they take the view that such negative provisions do not deny to the legislature the power to prescribe reasonable qualifications for constitutional offices.

It would serve no useful purpose here to discuss each of these various cases in detail. It is sufficient to say that perhaps the weight of authority inclines to the view taken by the Wisconsin supreme court and that in view of the repeated dicta by our court it is probable that it would hold the law contemplated by the bill in question to be invalid as applied to constitutional officers. For the benefit of those who may care to pursue the subject further, we refer to: 47 A. L. R. 476, 481; Annotated Cases 1915A 343; 19 Annotated Cases 743; 1 Cooley, Constitutional Limitations, (8th ed.) 139; 46 Corpus Juris 936.

JWR

Mothers' Pensions — Aid for dependent child cannot be granted under sec. 48.33, Stats., to mother whose husband is absent from home in armed forces of United States unless such absence is coupled with one of circumstances enumerated in subsec. (5), par. (d) of said section.

May 15, 1941.

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

You have asked whether aid may be granted under sec. 48.33 of the statutes, where a child in need of public support, is living with its mother and the father is absent from home in the armed forces of the United States, because of either enlistment or selective service.

You refer to the definition of a dependent child contained in subsec. (12), sec. 48.33, which is broad enough to include a child under the circumstances described. The definition does not of its own force entitle any person within its scope to the benefits of the section. It is not contemplated that aid shall be given on behalf of every child included in the definition unless the conditions specified in subsec. (5) are also met. The opening sentence of subsec. (5) reads:

“Such aid shall be granted only upon the following conditions.”

The language is inclusive, indicating that the conditions prescribed in all of the ensuing subdivisions must be present in each case.

Under subsec. (4), sec. 48.33, the aid is to be paid, not directly to the child, but to the person having its care and custody. Par. (d), subsec. (5), contains an enumeration of the situations under which aid shall be paid when the child is in the care and custody of the mother or stepmother. Subsec. (7) contains the alternative conditions to be met if the child is in the care of another relative. Subsec. (5) (d) of sec. 48.33 reads:

“Aid shall be granted to the mother or stepmother of a dependent child who is dependent upon the public for proper support if such mother or stepmother is without a husband, or the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least one year in the opinion of a competent physician, or the wife of a husband who has been sentenced to a penal institution for a period of at least one year, or the wife of a husband who has continuously deserted her for one or more years, if the husband has been legally charged with abandonment for a period of one year, or if the mother or stepmother has been divorced from her husband for a period of at least one year and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought.”

Under this provision, the mere absence of the father from home, unless coupled with one of the other enumerated circumstances such as desertion or divorce, is not a condition upon which aid can be granted. Where the legislature has expressly enumerated the circumstances under which aid is to be granted and has provided for no alternatives, the granting of aid under other circumstances is impliedly prohibited. If it is desirable to provide for additional grounds for payment of aid, that is a matter for legislative consideration.

BL

Minors — School Districts — Tuition — Children placed in home by state department of public welfare after having been committed to state public school at Sparta have residence for school purposes in municipality in which such home is located, notwithstanding fact that more than four children, not all of whom are related as brother and sister, have been placed in single home contrary to sec. 48.38, subsec. (1), par. (b), Stats. State is not liable for tuition of such children under sec. 40.21 (2a). Whether sec. 40.21 (2) applies to such children not determined. XXV Op. Atty. Gen. 46 and XXIX Op. Atty. Gen. 87 followed.

May 16, 1941.

A. W. BAYLEY,

Department of Public Welfare.

You have submitted with your request for an opinion five bills for tuition charges sent to your department by the city of Rice Lake, and inquire whether they are legitimate charges against your department and, if so, what funds they are to be paid from. The bills are on printed forms and recite on their face that they are made pursuant to sec. 40.21, subsec. (2) of the statutes, against the state of Wisconsin.

The facts out of which these claims arise are that five children, four of whom have the same surname and are apparently brother and sisters, together with a fifth child, were placed by the state public school at Sparta in the home of a man residing in Rice Lake. This home is not a "child welfare agency" as provided in sec. 48.35, but apparently is a "foster home" as provided in sec. 48.38.

Sec. 48.38, subsec. (1), par. (b), provides in part:

"* * * No more than four children may be placed in a foster home unless all are in the relationship to each other of brother or sister."

It appears to be the position of the city that since five children, not all of whom are related as brother and sister, have been placed in a single home, the home cannot be regarded

as a "foster home" within the meaning of sec. 48.38. The difficulty with this position is that even if the home is not a "foster home" that does not make it a "child welfare agency" in the meaning of sec. 48.35, since the home is not licensed as such "child welfare agency" by your department. The only provision for payment of tuition fees by the state is sec. 40.21 (2a), which provides that the state superintendent of public instruction shall certify to the state treasurer amounts due as tuition for "all children in children's homes, regardless of whether they were sent there by parents or guardians or by any county," to be paid from the appropriation provided by sec. 20.25 (3). This department has ruled that the term "children's homes" as used in sec. 40.21 (2a) signifies "some regularly established institution or agency organized for the purpose of receiving and caring for children committed there by the county or sent there by parents or guardians" and does not include foster homes. XXV Op. Atty. Gen. 46. As to children in foster homes, this department has repeatedly ruled that they are to be regarded as residents of the place where the home is located for school purposes. XXIX Op. Atty. Gen. 87 and opinions there cited.

While under the facts stated there may have been a violation of the law relating to the foster homes during such time as five children were maintained in the home in question, still the reasoning of the opinions relating to foster homes is applicable, namely, that the children are not residing in the school district for the main purpose of attending school there. XXIX Op. Atty. Gen. 87, 88.

Since the home is not organized as an institution for receiving children placed there by their parents or by some county, it does not come within the provisions of sec. 40.21 (2a).

Accordingly, the claim for tuition of these children cannot be paid from any state funds. Moreover, the claim could not in any case be allowed by your department, since claims under sec. 40.21 (2a) must be presented to and allowed by the superintendent of public instruction and are payable from the appropriation made by sec. 20.25 (3) and not from any appropriation to your department.

Sec. 40.21 (2), under which the claims appear in their face to be made, does not create any claim against the state or any department thereof. It provides for payment of tuition by either the municipality of legal settlement or by the county if the child has no legal settlement within the state, in the case of indigent pupils. Whether any municipality or county is liable for the tuition of these children under that subsection, is not involved in your request and no opinion is expressed on that question.

WAP

Taxation — Tax Sales — Tax deed taken by county under general tax certificate is subject to lien of outstanding special assessment certificates owned by village and issued subsequent to certificate upon which county's deed was taken. Last two sentences of sec. 75.36, Stats., relating to payment by counties of proceeds from sale of property upon which it has taken tax deed, do not relieve such property from lien of outstanding certificates not owned by county or held by it for collection. If county desires to convey clear title to land on which it has taken tax deed, it must pay in full amount due on certificates owned by village and constituting lien as above described.

May 16, 1941.

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

You state that Walworth county has taken a tax deed to certain real estate upon which there were also outstanding special assessment certificates held by a village. The property was quitclaimed by the county at its market value, the sale price being in excess of the amount due as general taxes but insufficient to pay the special assessments. You state

that you believe the county should retain from the proceeds of the sale the amount due for general taxes and should turn the balance over to the village.

While you do not so state, we are assuming, from your suggestion that the county retain the full amount due for general taxes, that the village's share of general taxes for the years in question has been paid in full. If that is not the case, you may consult the opinion in XXVIII Op. Atty. Gen. 74 for instructions as to apportionment between the county and village.

You do not specify the nature of the special assessments involved nor the method by which the village became the holder of the certificates. Since levy and collection of special assessments for different purposes are dealt with in numerous separate sections of the statutes, such assessments are not all necessarily governed by the same rules. For purposes of this opinion, we are assuming that the special assessment certificates are legally held by the village in a proprietary capacity and that such certificates are still outstanding.

Your letter does not state the years for which the certificates were issued. Under the decision in *Pereles v. Milwaukee*, 213 Wis. 232, 251 N. W. 255, which holds that the rule of inverse priority of tax liens applies as between a county and a municipality, a complete determination of the respective rights can not be made without information as to whether the special assessment certificates were issued prior or subsequent to the issuance of the general tax certificate upon which the deed was taken.

As was pointed out in XXVIII Op. Atty. Gen. 74, the taking of a tax deed by a county is subject to the lien of any outstanding certificate held and owned by someone other than the county; and issued subsequent to the one with respect to which the county acquired its deed. See also *Pereles v. Milwaukee*, *supra*. This situation is not altered by the last two sentences of sec. 75.36, which were added by chapter 405, Laws 1929. Those sentences relate to the county's obligation to account to municipalities for delinquent taxes returned to and held by it for collection and do not change the priorities as to certificates owned by third persons, including municipalities, in their proprietary capacity. As to

such certificates the taxes have been paid, so far as the county is concerned, and the county is no longer responsible for collection. *Pereles v. Milwaukee, supra*. See also the discussion in *Town of Bell v. Bayfield County*, 206 Wis. 297, at pages 301-302, 239 N. W. 503, in which the court construed the last two sentences of sec. 75.36, Stats., as relating to the municipalities' rights in tax moneys collected by the county, and not to their proprietary rights.

While the case of *Pereles v. Milwaukee, supra*, did not involve special assessment certificates, it was stated in *State ex rel. Dorst v. Sommers*, 234 Wis. 302, that the distinction between general taxes and special assessments drops out after the sale, unless it is otherwise provided by statute.

According to the rule in the *Pereles* case, if the certificates held by the village were issued upon sales prior to the one with respect to which the county took its tax deed, and if there is no special provision to the contrary in the statute providing for the special assessment, the village's lien is cut off by such deed. The proceeds of the sale of the property in such a case belong solely to the county provided the village's share of the general taxes has been paid to it. See XXX Op. Atty. Gen. 29.

If the special assessment certificates held by the village were issued subsequent to the one by virtue of which the county took its deed, and if there is no special provision to the contrary in the statute providing for the special assessment, the title to the property in question is subject to the lien of the special assessments. The opinion in XXVIII Op. Atty. Gen. 74 suggests that in such a case the proceeds of the sale of the property should be first applied to payment of the assessments which constitute the outstanding lien. The situation here is somewhat different from the one under consideration in that opinion. In order to clear title to the property here, it might be necessary for the county to turn over to the village not only the entire proceeds of the sale but also an additional sum.

If the village is not paid the amount due on certificates which constitute a lien against the title, it may proceed to enforce its rights against the land. Whether it is necessary for the county to pay to the village the sum necessary to discharge the lien depends upon whether it is under obliga-

tion to its purchaser to clear the title to the property. Since you state that the sale price represented the full value of the property, it seems probable that the purchaser expected to receive title free and clear of encumbrance. The county's obligation in such a case would be governed by the rules applicable to any vendor conveying land under the same circumstances.

If the special assessment certificate was issued at the same time as the general tax certificate upon which the deed was taken, the question of relative priorities would probably have to be determined from the particular statute under which the special assessment was levied. *In re Dancy Drainage District*, 199 Wis. 85, at page 94, 225 N. W. 873. This question we would not presume to determine without further information.

BL

Public Officers — State Employees — Quasi Garnishment
— Lien obtained against salary of state employee by filing transcript of judgment with secretary of state under sec. 304.21, Stats., remains in full effect upon nonexempt salary accrued after adjudication in bankruptcy until such time as judgment is discharged by discharge in bankruptcy, and secretary of state should, for his own protection, withhold enough of bankrupt's salary to protect himself until question of discharge is finally determined.

May 16, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

You state that on March 24, 1941, a transcript of a judgment against a state employee was filed with your department under the provisions of sec. 304.21, Stats., the judgment being dated November 5, 1935. The employee in ques-

tion commenced working for the state on February 17, 1941, and prior to the filing of the transcript had assigned his entire salary for March and April. On March 31 he filed his petition in bankruptcy and was adjudicated a bankrupt by the federal court on April 2.

It is stated further in your letter that the practice of the secretary of state in instances of this sort is to hold the nonexempt portion of the salary due at the time of the adjudication subject to the order of the trustee in bankruptcy and that, as to salary accruing subsequent to the adjudication, it has been the practice to hold back the nonexempt portion up to the amount of judgments on file, so as to protect the secretary of state in the event that the bankrupt should fail to obtain a discharge of his debts in bankruptcy.

It is the contention of the attorney for the bankrupt in the instant case that the secretary of state has no right to hold back any salary of the bankrupt accruing subsequent to the adjudication because the lien provided by sec. 304.21, having been obtained within four months before the filing of the petition in bankruptcy, is void under the bankruptcy act if at the time of the obtaining of the lien the person was insolvent. 11 USCA sec. 107, subd. a (1). An affidavit of the employee has been filed with you to the effect that he was insolvent in fact and in law during the time in question.

You have therefore asked for our advice as to whether you may properly withhold any of the salary of the bankrupt accruing subsequent to the adjudication and prior to the discharge of the bankrupt, and, secondly, as to the effect of the assignment in question.

The first question, in our opinion, is governed by the decision of our supreme court in the case of *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, where it was pointed out that the judgment itself was not affected by the bankruptcy statute above referred to, and that the lien acquired by the judgment creditor under sec. 304.21 (then numbered sec. 3716a) remains in full effect upon the salary accruing after the adjudication, although when the judgment is discharged by the discharge in bankruptcy, the lien acquired by the judgment creditor through filing a transcript of the judgment with the secretary of state is discharged as to salary of the

bankrupt falling due subsequent to the adjudication. The court said at pp. 442-443:

“* * * If the bankrupt be refused a discharge, the plaintiff will be entitled to have enough reserved by the secretary of state out of the after-acquired earnings to pay any balance on his judgment not discharged by dividends in the bankruptcy proceedings. The secretary of state should for his own protection hold enough of the bankrupt’s salary as it falls due to protect himself from liability until the question of his discharge is finally determined.”

It is true that the wording of sec. 67, subd. f, of the bankruptcy law of 1898 involved in the *Hull* case is not identical in wording with the corresponding provisions of the present law, and that there are some variances in wording between sec. 3716a, 1915 Stats., and the present sec. 304.21, but these differences are not material so far as the present purposes are concerned. For instance, in the Collier-Bender pamphlet edition (1938) of the 1938 bankruptcy act (Chandler act) it is stated at p. 150, in speaking of subdivision a (1) of sec. 67 (11 USCA sec. 107):

“* * * It attains the same result as old subdivisions c and f; only the mechanics are different.”

Hence there is no occasion for concluding that the result in *Jefferson Transfer Co. v. Hull*, *supra*, case would be any different under the present bankruptcy act. The rule laid down in the above case appears to be in accord with the holdings elsewhere, where similar questions have arisen. In the case of *In re Van Buren*, 164 Fed. 883, it was held that enforcement of a judgment against salary payments due pending the discharge should be enjoined, but the employer was ordered to withhold, pending the discharge, such sums as would be payable upon the judgment in case the discharge should not be granted. A similar ruling is to be found in *In re Beck*, 238 Fed. 653, and the same doctrine is recognized in *Clark v. Badgley*, (1929 N. J. Eq.) 145 Atl. 232. In *Taylor v. Buser*, 167 N. Y. S. 887, it was stated that the lien of a garnishee execution obtained within four months of adjudication should not be regarded as nullified;

but as between the debtor and the creditor holding the garnishee execution, it would still continue in force, provided, of course, the judgment was not discharged.

We consider that the foregoing disposes of your first question and you are, therefore, advised that it is proper to withhold from the nonexempt salary accruing subsequent to adjudication an amount sufficient to pay any judgment filed under sec. 304.21. If the bankrupt obtains a discharge in bankruptcy, the judgment will be discharged, assuming it to be a judgment of such character as may be discharged in bankruptcy, and the accrued salary may then be paid the bankrupt. If he is denied a discharge in bankruptcy, the judgment must be honored the same as if no adjudication in bankruptcy had occurred.

The foregoing discussion is subject to such modification as may arise out of your second question, involving the effect of the assignment filed within four months of the adjudication.

Considering first the moneys earned prior to the adjudication, if the assignment constituted a fraudulent transfer or preference, it would not be effective as against the trustee in bankruptcy. See 11 USCA sec. 107, subd. d. Otherwise it would be valid, since an adjudication in and of itself does not operate to nullify the assignment of salary earned prior to that time.

However, the salary earned subsequent to the adjudication presents an entirely different situation. The court said in *In re West*, 128 Fed. 205, 206:

“* * * The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. * * *”

This language was quoted and approved in *Local Loan Company v. Hunt*, 292 U. S. 234, 242-243.

The above quotation suggests another reason for holding back the salary accrued subsequent to the adjudication, and there is just as much, if not more, reason for the secretary of state to protect himself against the assignee as there is to protect himself against the judgment creditor. In the event of the failure of the bankrupt to obtain a discharge, both the assignment and the judgment would be effective in the order of their respective priorities, and, as a matter of fact, even though the assignment were given within the four months preceding the adjudication, it might, nevertheless, be effective if supported by a present consideration (as we are told is the case here), although no discharge were ever granted the bankrupt.

As to assignments which would be discharged in bankruptcy, it would seem advisable to have the bankrupt execute a new assignment if it is his wish to effect an assignment of his salary accruing subsequent to adjudication. This would clearly be effective, since bankruptcy affects only those obligations incurred prior to the filing of the petition. *Zavelo v. Reeves*, 227 U. S. 625. Should a discharge be obtained, assignments on file will be rendered ineffective if based upon provable debts not excepted by the bankruptcy act from the operation of a discharge. Where assignments become thus unenforceable the salary is payable to the assignor. If the debt represented by the assignment has not been proved, or is excepted from the discharge, the assignment will remain effective, and the money should be paid to the assignee.

WHR

Counties — Public Officers — County Board — Adoption by county board of committee recommendation upon oral motion may be sufficient under sec. 59.03, Stats., to place members on annual salary, even though proposition is not submitted in form of written resolution.

Provision in such recommendation specifying that it shall be effective as to members elected in certain year prior to action is to be construed as marking commencement rather than duration of change, and action is operative as to members who could be legally affected under sec. 59.03, subsec. (2), par. (f), that is, members elected at next ensuing election.

May 19, 1941.

JOHN P. MCEVOY,

District Attorney,

Kenosha, Wisconsin.

You have asked for an opinion relative to the effect of a certain action whereby your county board adopted the recommendations of a committee to place board members on an annual salary basis under the provisions of sec. 59.03, subsec. (2), par. (f), Stats.

Your first question is whether the action of the board in adopting the committee's recommendation is sufficient to accomplish the purpose, or whether it is necessary that the proposition be submitted as a formal resolution. Your report of the meeting at which the action was taken shows that the committee report was presented by one of the supervisors as a "recommendation", that a motion was made and seconded for "the adoption of the above resolution" (referring to the report), and that the board voted unanimously in favor of the motion. The committee recommendation was apparently written, but no proposition in the form of a written resolution was presented.

As you have pointed out, the statutes do not expressly impose a specific form or method of procedure for fixing the compensation at an annual salary, except that it is to be done at an annual meeting by a vote of two-thirds of the members elected.

In *Bartlett v. Eau Claire County*, 112 Wis. 237, the supreme court held that the adoption of a committee report which embodied a resolution fixing fees of county officers was sufficient action by the board to fix the fees as recommended. The court said, p. 245:

“* * * If it can reasonably be deduced from the record that the members of the county board by vote declared themselves in favor of specific fixing and regulation of those fees, it is the duty of the courts to give effect to such decision, for therein spoke the legislative power of the state. All reasonable liberality must be accorded the minor deliberative bodies of the state; notably county boards, town meetings, school-district meetings, and the like, where, by reason of the character and vocation of the men comprising such bodies, the technicalities of procedure are not strictly enforced, nor perhaps fully understood. * * * It is generally considered in deliberative assemblies that the adoption of a report of a committee containing recommendations constitutes a sufficient declaration of the body itself in favor of those recommendations. * * *”

While the committee report involved in the above case apparently included a resolution (see page 246 of the opinion), the term “resolution” may be applied to the adoption of either an oral or written motion by a legislative body, as well as to a formal proposition submitted to it. In Black’s Law Dictionary, (3d ed.) the term “resolution” is defined:

“The determination or decision, in regard to its opinion or intention, of a deliberative or legislative body, public assembly, town council, board of directors or the like. Also a motion or formal proposition offered for adoption by such a body.”

Your next question is relative to the effect of the following provision in the recommendation, which was adopted by the board in 1940:

“We further recommend that this report be in effect as to all county board members elected at the April election in the year 1939.”

Sec. 59.03 (2) (f) of the statutes says that the county board at its annual meeting may, by a two-thirds vote of its members elected, "fix the compensation of the members of such board *to be elected at the next ensuing election* at an annual salary * * *." The italicized phrase above quoted also occurs in another provision of the same subsection, which authorizes the county board to increase the per diem rate of compensation. It has been ruled that such provision gives the board the right to make the increase applicable only to members elected at the next ensuing election, and not to members elected theretofore or thereafter. In other words, the board may not, by a single resolution make the change applicable to all future members. See IV Op. Atty. Gen. 456, and VII Op. Atty. Gen. 240. Under the terms of the statute, it would be impossible for the county board to take action in 1940 which would be effective to change the basis of compensation for members elected in 1939.

If, therefore, the action of the county board were construed as applying solely to members elected in 1939, it would be void *in toto*. If the language is susceptible of two constructions, one rendering the resolution void and the other valid, that construction which saves it will be adopted. In *Burgess v. Dane County*, 148 Wis. 427, 134 N.W. 841, a resolution to change the method of compensating the register of deeds "to be elected during the ensuing year, to wit, the year 1902" was construed to mark the commencement and not the duration of the change. The court said in part, pp. 434-435:

"It is contended by plaintiff that the phrase 'to be elected during the ensuing year, to wit, the year 1902,' limits the duration of the intended change to the term of the register of deeds elected in 1902, and that such a limitation rendered the resolution void. Unquestionably the board had no power to provide for a temporary change. If a lawful change was effected it was a permanent one. * * * It must be conceded that the language of the resolution will bear the construction contended for by plaintiff. But we think the phrase, 'to be elected during the ensuing year, to wit, the year 1902,' can be construed to mark the commencement and not the duration of the change; that is, to mean only that

the change is to take effect with the commencement of the term of the register of deeds to be elected in 1902.
* * *”

It is also a fundamental rule that legislation will be construed wherever possible as having a prospective application. If we construe the phrase, “We further recommend that this report be in effect as to all county board members elected at the April election in the year 1939”, as intended to have a prospective application with the specific reference marking only the commencement of its operation, the action is still void as to all members except those elected at the election next ensuing after its passage. (See IV Op. Atty. Gen. 456 and VII Op. Atty. Gen. 240.) That fact, however, is not sufficient to render the action void as to the part which the county board might legally adopt under sec. 59.03 of the statutes. The recommendation of the committee referred to that section, and it is obvious that the board intended to act thereunder.

A law which is invalid in so far as it purports to operate retroactively may be upheld as to future cases. *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380. See also *State ex rel. Reynolds v. Sande*, 205 Wis. 495, in which it was held that the invalidity of a section of a law relating to the appointment of the first judge of a new court would not affect the validity of the enactment as a whole but would merely postpone the time for its coming into operation until a proper election could be held.

We are of the opinion that the action of the county board is operative as to members who could be legally affected under the provisions of sec. 59.03 of the statutes, that is, members elected in the spring of 1941.

BL

Military Service — Sec. 45.185, Stats., requiring local governmental units to see that graves of “all soldiers, sailors or marines who shall at any time have served in the army or navy”, includes graves of persons who served for any period, regardless of whether they were honorably discharged.

May 27, 1941.

RALPH M. IMMELL,
Adjutant General.

You have asked whether sec. 45.185, Stats., obligates local authorities to care for graves of persons who deserted from the army or navy of the United States. The section reads in part:

“(1) Every town board, village board, or common council of every city shall at all times see that the graves and tombstones of *all soldiers, sailors or marines who shall at any time have served in the army or navy* of the United States, * * * receive proper and decent care
* * *”

You also call our attention to sec. 45.16, Stats., which provides for the burial by public authorities of “any honorably discharged soldier, sailor or marine.” Sec. 45.185, from which the first excerpt above quoted was taken, was enacted by ch. 366, Laws 1919. At that time sec. 45.16 had been in effect for many years, and there were a number of other statutes (e. g., secs. 45.12 and 45.20) which related to obligations assumed by the government with respect to honorably discharged soldiers. Sec. 45.10 was also in effect, relating to relief for “needy soldiers, sailors or marines” without reference to the manner of their discharge. In the same year in which sec. 45.185, Stats., was enacted, the legislature also enacted sec. 45.21, which relates to soldiers, sailors and marines “honorably discharged.” The legislature, therefore, used the different terminology not only in laws adopted at different times, but in laws adopted in the same session.

A review of the sections indicates that where the benefits of the statutes are restricted to honorably discharged soldiers, the primary purpose of the legislature may have been recognition of meritorious service performed by the individual, and that where the benefits extend to all soldiers the chief motive may have been to handle a public problem created by the large number of discharged soldiers. Sec. 45.16 provides that interment of an honorably discharged soldier shall not be in a cemetery used exclusively for the burial of paupers, which indicates that the legislature intended the burial to be one appropriate to the recognition of faithful service. While it may not readily appear why the liability imposed upon local governmental units should be broader in connection with the care of soldiers' graves than in connection with their burial, we are not warranted in assuming that the distinction in language is without significance. As was stated in *Commonwealth v. Woodring*, 137 A. 635, 639, 289 Pa. 437:

“* * * where, in an agreement, will, or statute there is a change in the method of expression, the presumption, usually of great force, is that the intention was to give to the later words a different meaning from those formerly used.”

It may be that in providing for care of the graves, the legislature had in mind not only recognition of individual military service but the proper preservation of all cemeteries and memorial parks in which soldiers might be buried. If counties desire to provide individual memorials in recognition of faithful service, sec. 59.07 (14a) authorizes them to furnish a marker for the grave of every soldier, sailor or marine “who served with honor.”

The phrase “all soldiers, sailors or marines who shall at any time have served in the army or navy,” which is used in section 45.185, is broad enough to include a soldier who served for a period and then deserted, regardless of whether or not his desertion was punished by court martial, and regardless of the manner of his discharge. The mere fact of desertion does not of itself wipe out the military status of a soldier. During the period of desertion he is still in military service

so as to be subject to court martial without appeal to courts having jurisdiction over civilians. See *Lunenburg v. Shirley*, 132 Mass. 498. In any event, the service performed prior to desertion would bring him within the terms of the statute.

BL

Appropriations and Expenditures — Public Printing — Wisconsin Cranberry Growers Association — Expense of printing annual report of Wisconsin Cranberry Growers Association may not be paid out of appropriation for public printing contained in sec. 20.10, subsec. (4), Stats.

May 27, 1941.

F. X. RITGER, *Director,*
Bureau of Purchases.

You have requested an opinion as to whether the expense of printing the annual report of the Wisconsin Cranberry Growers Association may be paid by the state from the appropriation contained in sec. 20.10, subsec. (4), Stats.

Sec. 20.10 (4) of the statutes makes the following appropriation:

“Annually * * * such sums as may be necessary for all public printing * * * prescribed by law to be furnished to any state office or officer, or other body, and for which there is no other appropriation properly chargeable therewith.”

Public printing is defined in sec. 35.01, which reads in part:

“The public printing is all the printing and binding * * * and rebinding necessary to preserve books, documents, manuscripts, periodicals and other material collected by any state officer or department or by the state historical

society, state institutions, normal schools and the state university for which payment may lawfully be made out of the state treasury."

We are informed that the organization here involved is a voluntary association of cranberry growers. It cannot be classed as a state officer, department or institution within the foregoing definition.

Whatever basis there may be for a claim that the expense of printing the association's report may be paid with state funds arises in connection with sec. 94.35, which reads:

"The Wisconsin cranberry growers association shall obtain and publish information relative to the cultivation and production of cranberries. Said society shall hold semiannual meetings in August and January at such place as it shall determine. The secretary thereof shall report to the governor immediately after each January meeting an itemized and verified account of all disbursements made during the previous year and shall then publish an account in pamphlet form, not to exceed two hundred and fifty copies of fifty pages each, of the transactions of the association and a summary of the information collected during the previous year relating to the cultivation and production of cranberries, which pamphlets he shall cause to be distributed gratuitously to cranberry growers in this state. The expenses incurred under this section shall be charged to the appropriation for the Wisconsin cranberry growers association."

A review of the history of this provision aids in clarifying the legislative intent. In the original enactment (ch. 263, Laws 1893, also sec. 1479a, Stats. 1898) the provision included an appropriation for the Wisconsin Cranberry Growers Association. In the 1913 legislative session, various sections of the statutes were revised by chs. 675 and 772 for the purpose of consolidating all appropriations into a single chapter. The appropriation for the Wisconsin Cranberry Growers Association was segregated, and the provisions relating to the functions of the association were amended in the same manner as the other statutes from which appropriations were removed, by adding

"The expenses incurred under this section shall be charged to the appropriation for the Wisconsin cranberry growers association."

The sentence last quoted referred to the specific appropriation which was placed in sec. 172-114 of the statutes, later renumbered 20.61 (3).

In 1925, the appropriation for the Wisconsin Cranberry Growers Association was repealed, and at the same time an annual appropriation of the same amount was made to the department of agriculture "for investigation and control of diseases affecting the cranberry plant." (See ch. 392, Laws 1925.) Under the provisions hereinafter quoted from sec. 93.07, Stats., relating to the duties of the department of agriculture and markets, the legislature had the benefit of the recommendations of that department when the change was under consideration. (See minutes of joint finance committee for Thursday, May 28, 1925, p. 276.) Sec. 93.07 reads in part:

"It shall be the duty of the department:

"* * *

"(4) To receive and examine, prior to their transmission to the director of the budget, the biennial request for state aid of * * * the Wisconsin Cranberry Growers Association * * * and other similar societies and associations receiving state aid; to transmit and make recommendations upon these requests to the director of the budget and the governor; and to advise as to the manner of expending and accounting for state moneys appropriated to all such societies and organizations."

The appropriation to the department of agriculture and markets for investigation and control of diseases affecting the cranberry plant is no longer carried specifically in the statutes, but the department allocates a certain sum from the appropriation under sec. 20.60 (1) for the purpose of promoting cranberry culture. The action taken by the legislature in 1925 indicates that it intended the appropriation to the department of agriculture and markets to be in lieu of the one formerly made to the Wisconsin Cranberry Association, and not in addition thereto.

There being no longer any appropriation for the Wisconsin Cranberry Growers Association, and the report of the association not being public printing within the scope of secs. 20.10 (4) and 35.01, Stats., we find no statutory au-

thorization under which you might grant the requisition of the association's secretary for the printing of such report. The payment of the printing expense under such circumstances would be contrary to the provisions of art. VIII, sec. 2 of the Wisconsin constitution, and of sec. 20.75, Stats.

This opinion disapproves the one in XVI Op. Atty. Gen. 413.
BL

Public Officers — Liability — Negligence — Tuberculosis Sanatoriums — Neither state, counties nor private charitable corporations are liable for personal injuries caused by negligence of officers or employees of tuberculosis sanatoria maintained by them.

State is not liable for damages caused by unsafe construction of sanatorium buildings, but counties and private charitable institutions are liable for such injuries under safe-place statute, sec. 101.06, Stats.

Insurance against such liability, covering county sanatoria, may be procured by order of county boards under sec. 59.07 (23) and by boards of trustees in case of private sanatoria in their discretion.

May 29, 1941.

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

You have inquired as to the liability of state, county and private tuberculosis sanatoria for personal injuries caused by negligence of their officials or employees or by reason of failure to construct institution buildings in such a manner as to render them safe. You are concerned especially with the question whether such institutions should obtain public liability insurance.

School Districts — Union High School Districts — Where it is proposed to consolidate territory of three municipalities into one union high school district, under provisions of sec. 40.64, Stats., petition for submitting question need be signed by only one-tenth of electors of entire territory involved, and it is not necessary that petition show signatures of one-tenth of electors in each of affected municipalities.

One election for entire territory is sufficient and it is not necessary that there be majority vote in each particular municipality involved.

May 29, 1941.

MISS ELIZABETH HAWKES,

District Attorney,

Washburn, Wisconsin.

You have asked for our opinion on several questions arising under sec. 40.64, Stats., in connection with the proposed consolidation of the territory of three townships into one union high school district.

Such a proceeding is initiated under sec. 40.64 by a petition, and you inquire first, if the signers may all be from one municipality or whether such petition must be signed by one-tenth of the electors of each of the municipalities affected.

The requirements respecting the petition are set forth in subsections (2) and (3) of sec. 40.64, the material portions of which read as follows:

“(2) In case the territory is entirely in one municipality, the question of establishing such district shall be submitted to the voters of such territory, whenever a petition, signed by one-tenth of the electors of the territory, is filed with the municipal clerk praying for the submission of such question. * * *

“(3) In case the territory lies in more than one municipality the petition may be presented to any municipal clerk and he shall, within five days after receipt of said petition, notify the other clerks of the receipt of such petition, and shall set a date and place for a meeting with them to fix the time and place for holding the election. * * *.”

The question narrows itself down to what is meant by “one-tenth of the electors of the territory” as used in subsec.

(2), since this is the only provision relating to the number of required signatures. The word "territory" must be related back to the use of that word as it appears in subsec. (1), which provides in part:

"(1) A high school district may be established in any contiguous compact territory (outside of cities) having an area of not less than thirty-six square miles, with an assessed valuation of one million two hundred and fifty thousand dollars or more. * * *"

Thus it is apparent that the word "territory" refers to the area proposed to be consolidated into a single union high school district, regardless of municipal boundary lines (except in the case of cities, which does not concern us here). Hence it is immaterial whether the required one-tenth of the electors signing the petition reside in one municipality or another affected by the proposed consolidation. The only requirement is that the petition be signed by one-tenth of the total number of electors residing in the three townships affected.

If the legislature had intended to require the signatures of one-tenth of the electors in each municipality affected, it could easily have said so, and since the statute says "one-tenth of the electors of the territory", we are not at liberty to read into it any additional limitations based upon municipal boundaries.

Secondly, you inquire whether the election provided for in sec. 40.64 is to be held in each municipality, or at a common polling place.

This question is answered in XXIV Op. Atty. Gen. 227, where it was ruled that when the territory of the proposed union high school district lies in more than one municipality, one election for the entire territory is sufficient and no separate election in each municipality is required.

This, in effect, also answers your third question, as to whether a majority vote of all the municipalities involved is required. Obviously if there is but one election by secret ballot, it would be impossible to tell whether or not there was a majority vote in each of the affected municipalities.

WHR

Corporations — Public Utilities — Sec. 196.80, subsec. (4), subd. (d), par. 1, as created by ch. 78, Laws 1941, sets up method for computing filing fee for articles of incorporation of consolidated public utility company whereby there is credited against usual filing fee amounts paid by constituent companies in respect of authorized capital stock so that there will always be minimum fee of at least twenty-five dollars.

Under sec. 196.80 (4) (d) 2, only single certified copy of resolution adopting consolidation plan need be filed with secretary of state and no fee is required for filing such copy.

June 3, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

You have asked for our advice on several questions relating to your duties under ch. 78, Laws 1941.

The first question is as to what fee is to be charged for filing the articles of incorporation of a consolidated public utility company under sec. 196.80, subsec. (4), subd. (d), par. 1, Stats.

This provision requires that there shall be filed with the secretary of state:

“1. Articles of incorporation of the consolidated company prepared in accordance with this subsection and with authorized capital stock aggregating the authorized capital stock of the constituent companies, and with powers aggregating the corporate powers of the constituent corporations, and specifying the number constituting the board of directors, their term of office and the manner of their election, and otherwise complying with the requirements of section 180.02, accompanied by the usual fee for filing articles of incorporation or amendments thereof *but after crediting the amounts paid by the respective constituent companies in respect of authorized capital stock.* * * *”

The usual filing fee in respect to authorized capital stock of corporations is fixed at a minimum of twenty-five dollars, by sec. 180.02 (3) (b), Stats., with an additional charge of one dollar for each one thousand dollars of authorized capital stock in excess of twenty-five thousand dollars.

You state in your letter that there can be no "usual fee" after giving the credit prescribed by sec. 196.80 (4) (d) 1, quoted above, and that no matter what the authorization of stock of the constituent companies is, the application of the credit will always result in zero.

This statement is true, provided that in computing the credit, you include both the \$25.00 minimum fee prescribed in all cases, and add thereto one dollar paid by each of the constituent companies for each thousand dollars of capital stock in excess of \$25,000.00. For instance, corporation A and corporation B, each having an authorized capital stock of \$10,000.00, consolidate to form corporation C, having an authorized capital stock of \$20,000.00. The "usual fee" for filing in the case of a \$20,000.00 company under sec. 180.02 (3) (b) is \$25.00, but as against that there must be credited \$50.00, consisting of the \$25.00 fee paid by both corporation A and corporation B. Thus nothing is owing for filing the articles of the consolidated company. Or, taking the case of corporation A, a \$50,000.00 company combining with corporation B, a \$50,000 company, to form corporation C, with an authorized capital stock of \$100,000.00. There will be a total credit of \$100.00 representing the fees previously paid by A and B. This completely offsets the \$100.00 fee which would be the "usual fee" for incorporating company C with \$100,000.00 of authorized capital stock. We are unable to visualize any consolidation wherein the credit accruing from the filing fees paid by the constituent companies would be less than the "usual fee" which would be due normally for incorporating the new company.

However, such a construction would make meaningless the filing fee provisions for consolidated companies, and would convict the legislature of having enacted an absurdity. This runs contrary to the rule that a law should be given a reasonable and sensible construction and effect should be given to every word, clause and sentence thereof, if possible.

Consequently, it is our conclusion that the words "but after crediting the amounts paid by the respective constituent companies in respect of *authorized capital stock*," must refer only to that portion of the filing fee prescribed by sec. 180.02 (3) (b), consisting of "one dollar for each one thou-

sand dollars of its *authorized capital stock* in excess of twenty-five thousand dollars." If the legislature had meant otherwise in enacting sec. 196.80 (4) (d) 1, it could easily have said "but after crediting the filing fees paid by the respective companies." Instead it used verbatim the wording "authorized capital stock" which is found in that portion of sec. 180.02 (3) (b) quoted above.

By adopting this construction it is apparent that every consolidated company will pay a "usual fee for filing articles of incorporation" of at least \$25.00, the minimum fee prescribed for filing under sec. 180.02 (3) (b), regardless of the credit which may be due by virtue of payments by the constituent companies of one dollar for each \$1,000.00 of authorized capital stock in excess of \$25,000.00. Certainly no good reason suggests itself for complete exemption from all filing fees, which would be the result under the construction stated in your letter. Exemption from statutory filing or licensing fees are to be strictly construed, and we ought not to read any such exemptions into the statutes, in the absence of express language requiring that result.

This disposes of your first question and the further suggestion contained therein that possibly the fee to be charged should be \$10.00 as for an amendment of corporate articles. Obviously, when corporation A and corporation B consolidate to form corporation C, the articles of corporation C are not amendments respectively of the articles of A and B, which corporations have ceased to exist. Corporation C is an entirely distinct and separate entity, having a corporate life and existence of its own.

Secondly, you inquire whether the resolution as to the adoption of the consolidation plan must be submitted to your department in duplicate.

Sec. 196.80 (4) (d) 2 provides that there shall be filed:

"A copy of the resolution of the stockholders of each constituent company adopting the plan of consolidation duly certified in the manner specified in subsection (2) of section 180.07."

Sec. 180.07 (2) states:

“Duplicate copies of such amendment, with a certificate thereto affixed, signed by the president and secretary, or if none, the correspondent officers, and sealed with the corporate seal, if there by any, stating the fact and date of adoption, and, if a stock corporation, the total number of shares voting in favor of such amendment, and, if a nonstock corporation, the total number of members and the total vote in favor of such amendment, and that such copy is a true copy of the original, shall be filed * * *.”

It is to be noted that sec. 196.80 (4) (d) 2 requires that a copy be certified in the manner specified in sec. 180.07 (2). This must refer to that portion of 180.07 (2) which relates to the contents and form of the certificate. “Certify” is defined in Black’s Law Dictionary (3d ed.) as follows: “To testify in writing; to make known or establish as a fact.”

Clearly the number of copies of the resolution is a matter separate and distinct from the manner and form of certification of such copies. It is, therefore, our opinion that sec. 196.80 (4) (d) 2 controls, and that only a single copy is required.

The above discussion renders moot your third inquiry relating to disposition of the duplicate.

You ask finally whether any fee is required in connection with filing the resolution adopting the consolidation plan. Since no provision is made for such fee, it must be presumed that no fee is required.

WHR

Appropriations and Expenditures — Conservation Commission — Counties — Reforestation — Where appropriation under sec. 20.20, subsec. (14), par. (b), Stats. for payment of aid for county forest reserves as authorized in sec. 59.98 (5), is insufficient to pay ten cents per acre therein provided, payments should be prorated.

June 4, 1941.

CONSERVATION COMMISSION.

Attention H. W. MacKenzie, *Conservation Director*.

Our attention is called to sec. 59.98, subsec. (5), Wis. Stats., which provides for payment to the county of ten cents for each acre of county-owned land entered under the forest crop law. Sec. 20.20 (14) (b) appropriates \$180,000.00 for this purpose. You state that the amount of land now in this classification exceeds 1,800,000 acres, so that it is impossible to pay ten cents per acre, and you ask whether the payments should be prorated.

Art. VIII, sec. 2, Wisconsin constitution, provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. So, in *Clas v. State*, 196 Wis. 430, our supreme court in referring to the powers of the commissioner of the department of agriculture, stated, pp. 432-433:

“* * * In the expenditure of the public moneys he is strictly limited to the sums appropriated by the legislature for a given purpose. No discretionary power is vested in him to exceed such appropriations. * * *”

In the absence of a supplemental appropriation by the emergency board under sec. 20.74, the commission is, therefore, limited in this respect to the sum provided in sec. 20.20 (14) (b), Stats.

The remaining question concerns itself with the proper disposition of the inadequate appropriation. The case of *State v. Davis*, (1923) 114 Kan. 270, 217 Pac. 905, at 908-909, appears analogous. A measure provided for the payment to each Kansas veteran of the World War of one dollar for each day spent in service. The appropriation of

\$25,000,000 for this purpose was found to be insufficient. The court held that the veterans' claims should be prorated, stating:

“* * * It is a general policy of courts of equity to distribute the assets proratably among all the creditors * * *. The application of the equitable rule of payments between debtor and creditor should govern here as in any case of insufficiency of funds.”

There is nothing in either sec. 59.98 (5) or sec. 20.20 (14) (b) to indicate that any particular county is to have priority or preference over any other county in the matter of sharing the aids therein provided when any shortage in the appropriation occurs.

It is our opinion, therefore, that as in the *Davis* case, *supra*, the proper solution lies in payment of the funds on a prorata basis.

WHR

Taxation — Tax Sales — Property owner seeking to redeem tax certificate is not required by sec. 75.01, subsec. (1), Stats., to pay subsequent certificates of sale held by owner of certificate.

June 13, 1941.

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

You have presented for consideration a question that has arisen out of the purchase of certain lands by your county at the tax sales of the years 1935 to 1940, both inclusive, and for which it still holds all of the certificates. Recently the county gave notice of intention to take a tax deed thereto on the 1935 certificate and the owner then came in

to redeem the land therefrom. He tendered the total amount due on the 1935 certificate, but the county treasurer refuses to accept the same, contending that the purchase by the county at the subsequent tax sales of 1936 to 1940 constituted payment of the taxes imposed subsequent to the 1935 sale and therefore, in order to redeem the 1935 certificate, the owner must, under the provisions of sec. 75.01, subsec. (1), Stats., pay not only the amounts due on that certificate standing alone, but also the total of the amounts represented by all of the subsequent certificates held by the county.

Sec. 75.01 (1), Stats. 1939, provides as follows:

“The owner or occupant of any land sold for taxes or other person may, at any time within five years from the date of the certificate of sale, redeem the same or any part thereof or interest therein by paying to the county treasurer of the county where such land was sold, for the use of the purchaser, his heirs or assigns, the amount of the taxes for which such land was sold and all subsequent charges thereon authorized by law, or such portion thereof as the part or interest redeemed shall amount to with interest on the amount of said taxes at eight-tenths of one per cent per month or fraction thereof from January first after the tax year, and all other taxes and charges thereon imposed subsequent to such sale and paid by such purchaser or his assigns prior to such redemption, with interest thereon at said rate, vouchers or other evidence of the payment of which shall have been deposited with the county clerk or produced to such person seeking to redeem;
* * *”

These quoted provisions have been in the statutes in substantially the same form since at least 1878. While over the years there have been variations as to the length of the period of redemption, the rate of interest and in other minor respects, none of which are here material, the statute has been otherwise the same for more than sixty years in providing that lands sold for taxes may be redeemed within a prescribed time after the date of the certificate of sale, by paying the amount due upon the certificate of sale. The italicized portion, which requires that payment also be made of “all other taxes and charges thereon” imposed on the land subsequent to the sale and paid by the purchaser or his as-

signs prior to redemption, has remained unchanged through all these years, with the exception of interest rate modifications which have paralleled changes made respecting the interest rate on tax certificates.

The question to be covered by this opinion is thus narrowed down to whether the purchase by the holder of a tax certificate of the lands covered thereby at subsequent tax sales and the issuance to such purchaser of tax certificates therefor constitutes the payment of subsequent taxes so as to fall within the portion of the statute which is above italicized. This particular provision has not been passed upon by the courts and we find no opinions of our office respecting the same. While there are similar provisions in the statutes of other states that require property owners to pay subsequent taxes in order to redeem from a tax sale, there is so much variation therein and such a difference from our statute that decisions from other jurisdictions are of no assistance in construing the same. Our court, however, has held that the provisions of sec. 75.01, Wis. Stats., are to be liberally construed in favor of those whose rights would otherwise be divested thereunder. *Menasha Wooden Ware Co. v. Thayer*, (1912) 150 Wis. 611, 615, 137 N. W. 750, and cases therein cited.

The various statutes providing for the sale of land for nonpayment of taxes, which includes sec. 75.01, were designed for and have no purpose other than providing an effective means of enforcing the taxes thereon. They are pointed solely towards promoting continuity of revenue each year for the various subdivisions of government. In providing for a sale each year of tax delinquent land to anyone who will pay the current unpaid taxes thereon, there is given to the owner additional time thereafter in which to redeem by reimbursing the purchaser with interest and thereby avoid the loss of his property through such delinquency. The possibility of obtaining title to the land if the owner does not redeem, together with the interest considerations, are designed to attract purchasers. The objective is to thereby produce revenue which is available for the present needs and purposes for which the taxes were levied and yet, at the same time, give the owner of the property an additional period in which to pay such taxes by redeeming

from the sales that will provide him a reasonable time in which to recoup financial reverses or recover from temporary financial distress that may have given rise to his said tax delinquency.

With this in mind it is apparent that the amount which the statute contemplates the owner of the land shall pay the certificate holder in order to redeem the land therefrom is that amount which will reimburse the holder for the total of taxes and charges paid by him, plus interest thereon, which are represented and secured as a lien on the property by the particular certificate of sale sought to be redeemed. In effect, the holder of the certificate, through the medium of the tax sale procedure, has made available to the government for immediate use the amount of delinquent taxes for which the property was sold, and so to redeem the land therefrom the property owner must reimburse him for the amount thus advanced or the obligation so discharged, plus interest thereon. There is nothing in the statutes to indicate that each year's taxes are not a separate matter for purposes of redemption, except the above italicized language of sec. 75.01 (1), Stats. This provision, however, carries out and is consistent with the above discussed pattern of the statutes respecting tax sales. It requires that the owner, in order to redeem his property from a particular tax sale certificate, must pay not only the taxes for which the property was sold at that sale, plus charges and interest, which are represented by and clearly encompassed in the lien of that certificate. He must also reimburse the holder thereof for any subsequently imposed delinquent taxes which the certificate holder has paid prior to sale, plus interest and charges thereon. Obviously there would be no certificate of sale to secure reimbursement for such subsequently paid taxes, and to permit redemption without it would be inequitable, as the certificate holder probably paid said taxes in order to protect the certificate held by him. To cover this situation, the statute allows the subsequent taxes paid to be added to and made a part of the lien of the previously held certificate of sale. See XXI Op. Atty. Gen. 1115.

In view of the foregoing considerations, the above italicized words in sec. 75.01 (1), Stats., must have been used

in their common and ordinary meaning. So construed, this language refers to the payment of taxes, as those words are used in their ordinary and usual every day sense, and thus prescribes that the amounts the purchaser has paid to discharge subsequent taxes after they have become delinquent so as to preclude the land from being sold for their nonpayment, are included, plus interest and charges, in the sum of money which the owner must pay in order to redeem. Nothing in subsec. (1) in any way indicates or even suggests any other meaning.

There are other considerations, in addition to the above rationalization of the purpose of the language in question, which support the above construction. It is perfectly clear that if the property were sold in successive years to different persons there is nothing in this statute that requires the owner to pay all the outstanding subsequent certificates which are not held by the owner of the certificate which he is seeking to redeem. There is no more reason for requiring the payment of all subsequent certificates where they are held by the same person than where they are held by different persons. If there were to be only one period of redemption which was to run from the date of the first certificate of sale, it would apply equally as well to one situation as to the other. If such were the intent of the statute it would have so provided without regard to whether the subsequent certificates were held by the same person or not. Certainly if such were the intended import of this statute it would have been very easy to say so, and instead of the language used.

The statutes relating to tax sales are, however, formulated upon a contrary pattern, which is that there is a separate period of redemption as to each sale for nonpayment of taxes regardless of who purchased at the sales or holds the certificates thereof. To hold that the purchase at subsequent sales by the holder of a prior certificate constitutes the payment of taxes within the meaning of sec. 75.01 (1), Stats., so that payment would have to be made of all the subsequent certificates in order to redeem the first certificate, would, in effect, deny to the owner of the property his full statutory right of redemption in respect to each of the subsequent sales, which right is clearly granted to

him by the opening portions of the subsection. Yet, the owner would be entitled to his full period of redemption as to each of the subsequent sales if the purchasers at the subsequent sales, or the holders of the certificates thereof, were different persons. Such a result surely was not intended by the legislature as there is no basis for granting the full period of redemption as to each sale in one case and not in the other.

But, it is urged, this construction should not be given to the provisions of sec. 75.01 (1), because of certain decisions of our court that payment of taxes includes more than payment in the ordinary sense, and especially in view of the provision of sec. 75.01 (3), expressly prohibiting the holder of a tax certificate from paying subsequent taxes on the land before the date of sale for nonpayment of such tax.

Our court has held in several cases that the purchase of property at a tax sale cancels the taxes for which the land is sold and that thereafter said taxes are not outstanding or a lien against the property, but that the certificate of sale is in the nature of an incumbrance and is the only remaining lien against the property arising out of the said delinquency in respect to said taxes. *Lindsay v. Fay*, (1871) 28 Wis. 177; *Pereles v. Milwaukee*, (1933) 213 Wis. 232, 251 N. W. 255. In another line of cases it has been held that the purchase of land at tax sale or the acquisition of tax sale certificates by one who is the owner, mortgagee, or has an interest in the property or a legal or contractual duty to pay the taxes thereon, is in effect payment of the taxes and precludes him from obtaining a title by tax deed based thereon. *Edgerton v. Schneider*, (1870) 26 Wis. 385; *Hackett v. Van Dusen*, (1907) 132 Wis. 204, 111 N. W. 1097; *Olson v. McDonald*, (1914) 156 Wis. 438, 145 N. W. 1078; *Paetz v. Kenney*, (1934) 214 Wis. 158, 160, 252 N. W. 594; *Bankers Farm Mortgage Co. v. Christofferson*, (1936) 221 Wis. 148, 266 N. W. 220; *Marawalt Realty Co. v. Greene*, (1937) 224 Wis. 1, 271 N. W. 648.

These cases, however, turn upon the particular situation involved therein and must be read in light thereof. As the court said in *Marawalt Realty Company v. Greene*, *supra*, "payment of taxes" may mean one thing under one situation and something else under another. That is a clear rec-

ognition that this language should be construed strictly or in its usual and common meaning, dependent entirely upon what appears to have been the intent in using it, which is determined from the way it was used, its relationship to other statutes, and the situation it was aimed at or intended to cover. As previously stated, it is our conclusion, after giving consideration to the purpose of the provision in question in sec. 75.01 (1), Stats., and giving it effect as a coordinate part of the statutes respecting tax sales, that the words thereof were not used in a technical or strict sense, but rather with their ordinary and commonly understood meaning. The above cited cases are thus entirely beside the point and applicable only to the particular matters there involved.

A rather extensive investigation discloses that it has been well understood and universally recognized by the members of the bar and persons familiar with and dealing in real estate during the years sec. 75.01 (1) has existed that it provides for a separate period of redemption from each tax sale independent of and apart from sales in other years, and irrespective of whether the certificates thereof were purchased or held by the same or different persons. Furthermore, during all that time this language has been interpreted as requiring payment upon redemption of merely the subsequent taxes paid by the certificate holder after delinquency but before sale, plus interest and charges thereon, and not payment of the amounts represented by subsequent certificates of sale held by the person holding the certificate of sale sought to be redeemed.

During all of those years and prior to about 1930 practically all tax sales were to private persons and it is only in recent years that it has been otherwise. It was only in the later years that shrewd investors in tax certificates, recognizing that such was the accepted and well understood interpretation of this statute, came to realize that if they purchased at the subsequent sales separate redemption periods were operative upon each certificate but that they could secure an advantageous position by paying the subsequent taxes after delinquency and before sale, thereby giving the owner in effect only one period of redemption as he would be required to pay all of the taxes in order to redeem

from the prior certificate they held. In the depression years many persons were unable to pay their taxes and it appeared likely that they would lose their property in such cases because they could not pay all at once, whereas if they could redeem each certificate separately, thereby keeping caught up sufficiently so none could be made the basis of a tax deed, there was still an opportunity for them to save their property by paying up the arrearages separately and eventually become current.

It was to remedy this situation that the first sentence of subsec. (3) was enacted by ch. 87 of the laws of 1933. This enactment rather than being intended to restrict or cut down redemption rights of the owner, which would be the effect if it were considered as changing the effect of subsec. (1) as it had previously operated, had for its objective the elimination of a method by which separate redemption as to each year's tax delinquency might be negatived. When subsec. (3) is thus understood there can be little question that it was not intended to and did not change the operative effect of the language in question in sec. 75.01 (1) as it had previously been construed and operated under for many years prior thereto.

We do not see that it makes any difference in respect to the question here under consideration whether the certificates are held by the county or a private individual. Sec. 74.44 (1) Stats., in substance provides that all the laws relating to the sale and purchase of lands for nonpayment of taxes shall apply to the county, the same as to individual purchasers. Sec. 74.42 requires that the county purchase where there is lack of other bidders. Sec. 75.32, Stats., provides that where the county holds a tax certificate it shall be the exclusive purchaser of the land at all subsequent tax sales. Sec. 75.34 (1), Stats., provides that a sale by the county shall include all the certificates held by the county on the land. None of these provisions have any bearing upon the rights of the owner to redeem and do not affect the same, but merely relate to the rights, powers and duties of a county in reference to tax sales and tax certificates.

By the last sentence of subsec. (3) of sec. 75.01, Stats., which came into the statutes by ch. 146 of the laws of 1933, at the same session but later than the enactment of the first

sentence of subsec. (3), the county holding a tax certificate does not need to go through putting it up for sale in subsequent years, and bidding it in, sec. 75.32 making it the exclusive purchaser thereof, but may merely attach the subsequent delinquent taxes to said certificate without any sale. The object thereof seems obvious and further shows that the purpose of the first sentence of subsec. (3) is as previously concluded. Subsec. (3) in its entirety thus takes away from private purchasers the previously existent opportunity of operating in a manner that was harsh and in effect gave the owner only one period of redemption. Without the last sentence of subsec. (3) this would have equally been applicable to a county. But recognizing that there might be instances in which the nonpayment of taxes was not due to financial distress so that the giving of only one period of redemption did not work harshly, opportunity was provided by the last sentence by which the county could protect itself and deal with these situations if need be, assuming, however, that the county would not exercise this right except in those instances. This is unquestionably what the legislature had in mind in so providing.

It is therefore our opinion that under the provisions of sec. 75.01 (1), Stats., the owner of property in order to redeem from a certificate of sale is not required to pay and redeem all other subsequent certificates of sale held by the owner of the certificate which he is seeking to redeem, whether the holder there is the county or a private individual.

HHP

Banks and Banking — Delinquent Banks — Trustees of segregated trusts created in connection with stabilization and readjustment or reorganization of state banks may, upon approval of banking commission and court, enter into certain agreement with Wisconsin Properties Bureau, Inc., nonprofit corporation.

June 14, 1941.

BANKING COMMISSION OF WISCONSIN.

You have requested our opinion relative to the power of trustees of segregated trusts, which trusts were created upon the stabilization and readjustment or reorganization of various state banks, to enter into a certain agreement with a corporation known as Wisconsin Properties Bureau, Inc., a nonprofit corporation organized under the laws of Wisconsin. You attach to your request a copy of the proposed agreement.

As a preliminary, we may consider briefly the circumstances under which these trusts were created and their nature. Segregated trusts have been created in connection with various state banks throughout the state which were stabilized and readjusted or reorganized under statutes providing therefor. Under the law as presently constituted, a bank may be reorganized only after it has been placed in the hands of the banking commission and upon approval of a reorganization plan by the commission. Sec. 220.08, subsecs. (15) and (16), Stats. From January 24, 1932 to July 17, 1935, a so-called stabilization statute, enacted by ch. 15, Laws Special Session 1931-1932, was in effect which provided that whenever the commissioner of banking should approve a stabilization and readjustment agreement entered into between a bank and its depositors and unsecured creditors, upon certain terms and conditions, the bank might then be stabilized and might continue in business. These provisions, during the time they were in effect, were contained in subsecs. (16) to (21), inclusive, of sec. 220.07, Stats. It was under either of the foregoing two statutory plans that the segregated trusts whose powers are now under consideration were created. The creation of the

trusts was an incident to the stabilization and readjustment or reorganization of the banks, and the terms of such agreements, as well as any other agreements affecting the stabilization, were subject to the approval of the banking commission.

Under the provisions of subsec. (19) of sec. 220.08, Wis. Stats., it is provided that segregated trusts created in connection with the stabilization and readjustment or reorganization of banks shall be administered and liquidated under the supervision of the banking commission and the circuit court of the county in which the bank is located. It is further provided in said subsection that the administration and liquidation of such trusts shall be subject to the supervision of the banking commission and, as far as practicable, shall be subject to the approval of the circuit court of the county wherein such bank is located in the same manner and to the same extent as the administration of banks in liquidation under the provisions of sec. 220.08, Stats. Under these circumstances it will be readily seen that segregated trusts arising out of the stabilization and readjustment or reorganization of state banks are in a somewhat different category than private trusts created for private purposes.

Without examining each of the trust agreements in question it would, of course, be impossible to determine the precise extent of the powers therein granted. However, since, as we understand, it is intended to have the approval of the banking commission and the court in each case where trustees of segregated trusts contemplate signing the agreement, we believe that, considering the jurisdiction of the banking commission and the court over such trusts as above described, the power of the trustees to act after securing such approval of the banking commission and the court can not be doubted. The purpose of the agreement in question appears to be to secure the multiple listing of the trust realty and, as a result thereof, to effect its sale within a reasonable time and for an adequate price. The fact that, in order to secure these benefits, the trust estates will pay a fee for listing and the trustees during the time the agreement is in force will surrender their rights to sell property except through a broker, does not in our opinion affect the validity of the agreement. In so far as we are able to ob-

serve, the agreement would appear to be in furtherance of the purpose of the trusts which is, generally speaking, to secure the liquidation of the trust property within a reasonable time and at an adequate price so as to best serve the interests of the beneficiaries thereof. Under such circumstances the validity of such agreements, even in the case of private trusts, is sustained. See 3 Bogart, Trusts and Trustees, page 2103.

Upon trustees of segregated trusts securing the approval of the banking commission and the authorization of the court we are of the opinion that such trustees may lawfully enter into the agreement.

RHL

Banks and Banking — Delinquent Banks — Manner of signing petitions by banking commission and court in bank liquidations and segregated trusts discussed.

June 14, 1941.

BANKING COMMISSION OF WISCONSIN.

Attention Robert K. Henry, *Commissioner*.

In your letter of May 26, 1941, you state that in connection with banks in liquidation and segregated trusts it has been customary upon the submission of a petition to the banking commission, signed by a deputy commissioner of banking or the trustees of a segregated trust, to have such petitions signed in triplicate by the banking commission. You ask whether it would be permissible for the banking commission or the commissioners of banking to sign only one petition and on the other two copies of the petition to type in or rubber stamp the name of the banking commission or the commissioner of banking, as the case might be. We understand by your request that you refer to petitions presented by special deputy commissioners of banking or

trustees of segregated trusts, which require the approval of the banking commission and are then to be presented to the court having jurisdiction of the particular matter in order that the court may enter an order authorizing the compounding of a debt, the sale of property, or some other action which the special deputy or trustees of a segregated trust deem in the best interests of the depositors of the closed bank or trust certificate holders.

An examination of the statutes does not indicate that any particular forms or procedures are outlined therein with respect to such petitions and orders by the court. Ordinarily, it would seem that if one signed "original" petition was submitted to the court and the court then signed the order the purpose of the petition would be fulfilled. The commission could then retain in its files and the special deputy or trustees could retain in their files copies of the petition and order with the space for signatures on the part of the commission and the court copied in. If an original of the court's order was desired it would, of course, be necessary to have the court execute its order in duplicate or triplicate, as the case might be, or in lieu thereof, have a copy of the order certified by the clerk of court.

RHL

Minors — Child Protection — Boy over eighteen but under twenty-one years of age may be committed to industrial school for boys upon violation of probation based on finding of delinquency made before he was eighteen, since jurisdiction of juvenile court continues until he becomes twenty-one years of age under sec. 48.01, subsec. (5), Stats. XXIV Op. Atty. Gen. 103 followed.

Remedy of person illegally committed to industrial school for boys is by proper court action, and neither attorney general nor department of public welfare can set aside such commitment.

June 16, 1941.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

You submit with your opinion request a file of the Wisconsin industrial school for boys from which it appears that on January 24, 1941 a seventeen-year-old boy was adjudged to be delinquent by the circuit court of Milwaukee county, sitting as a juvenile court, and was placed on probation. It appears further that on May 15, 1941, after attaining the age of eighteen years, the same boy was again brought before the juvenile court, where it was made to appear that he had committed the offense of automobile larceny in Wichita, Kansas. This offense was committed after the boy's eighteenth birthday. At that time an officer from Kansas was present in court with a fugitive warrant. It also appeared that the stolen automobile in question had been transported by the boy in interstate commerce, but that officials of the federal bureau of investigation had dropped the case in favor of the jurisdiction of the Milwaukee county juvenile court.

After a hearing, the juvenile court made an order reciting that the boy had been adjudged delinquent and placed on probation on January 24, 1941,

“and said matter again having come on to be heard before this Court on the 15th day of May A. D. 1941, R——R—— being present, and it being established that said R—— R—— violated said probation

"IT IS ADJUDGED that said R——R—— be and is hereby committed to the care and custody of the Wisconsin industrial school for boys until he attains the age of twenty-one years or unless sooner discharged pursuant to law."

Pursuant to this order, the boy was taken to the Wisconsin industrial school for boys and thereafter a certified copy of a state warrant charging him with stealing the automobile, issued by the city court for Wichita, Kansas, was filed with the superintendent of that institution, together with a request from the said court that a detainer be placed on the boy.

The superintendent now inquires whether the commitment from the juvenile court is valid and, if not, whether the boy should be turned over to the Kansas authorities.

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

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

In XXIV Op. Atty. Gen. 103 this office ruled that if a child is adjudged delinquent before the age of eighteen and placed on probation, his probation may be revoked at any time before he attains the age of twenty-one, under the above quoted statute. In view of that ruling, and the clear and unequivocal language of the statute, it is considered that the commitment by the juvenile court in this case is valid.

In any event, the superintendent of the institution is bound to honor the commitment until such time as it has been vacated or set aside by proper court action, and cannot expect the department of public welfare or the attorney general to reverse the order of the juvenile court. XXIV Op. Atty. Gen. 103, 104, X Op. Atty. Gen. 1004.

WAP

Courts — Contempts — Criminal Law — Arrest and Examination — In proceedings for civil contempt of court where attachment has been issued, defendant is not entitled to be released on bail unless court issuing attachment has endorsed thereon amount of such bail pursuant to sec. 295.06, Stats. Where no bail is thus provided for or not recognizance is given by defendant, sheriff is required to hold defendant in custody pending return date of attachment, pursuant to sec. 295.07 but is not required to keep him physically imprisoned.

In proceedings for criminal contempt of court, where warrant or attachment has been issued, prosecution is regarded as criminal action and hence defendant has constitutional right to be released on bail under Wis. Const., art. I, sec. 8. At request of defendant he must be taken before magistrate, pursuant to sec. 361.04 for purpose of giving recognizance for his appearance before court which issued attachment, on return date thereof.

In case warrant or attachment for either civil or criminal contempt is returnable forthwith and no bail is given, sheriff is required to take prisoner before court as soon as he reasonably can, and unreasonable delay may constitute false imprisonment.

June 16, 1941.

S. RICHARD HEATH,

District Attorney,

Fond du Lac, Wisconsin.

You have inquired as to the duties of a sheriff, who has arrested a person on a bench warrant for contempt of court at a time when the court is not in session, with reference to holding such person in the jail pending such time as he may be able to take him before the court. You desire an opinion covering both civil and criminal contempts.

A "bench warrant" is simply a process issued by the court itself for the attachment or arrest of a person, either in cases of contempt committed out of court or where an indictment has been filed against him. *Oxford v. Berry*, (1918) 204 Mich. 197, 170 N. W. 83, 88; *Ex parte Lowe*,

(1923) 94 Tex. Cr. 307, 251 S. W. 506, 507; Bouv. L. Dic.; Black L. Dic.

The statutes prescribing the procedure to be followed in cases of civil contempts are the following:

“295.05 Such an order to show cause can only be made in an action or special proceeding in the same court, but it may be made either before or after the judgment in the action or the final order in the special proceeding, and is equivalent to a notice of motion; and the subsequent proceedings thereon shall be taken in the action or special proceedings as upon a motion made therein. When an attachment shall be issued it shall be deemed an original special proceeding against the accused in behalf of the state upon the relation of the complainant.”

“295.06 When an attachment shall be issued according to the provisions of this chapter the court or judge issuing the same may, in its or his discretion, direct by indorsement thereon the sum in which the defendant may give an undertaking for his appearance to answer.”

“295.07 Upon arresting any person upon an attachment to answer for any alleged misconduct the officer shall keep such person in his actual custody and bring him personally before the court to which the same is returnable, and keep him in his custody until such court shall have made some order in the premises unless such defendant entitles himself to be discharged as prescribed in section 295.08. But when, from sickness or any other cause, the defendant is unable to attend court that fact shall be a sufficient excuse for not bringing him before the court. *The officer need not in any case confine any person so arrested in any prison or otherwise restrain him of his liberty, except so far as shall be necessary to secure his personal attendance.*”

“295.08 Such defendant shall be discharged from arrest upon such attachment, when there is an indorsement thereon as prescribed in section 295.06, upon executing and delivering to the officer making the same at any time before the return of the writ an undertaking, with two sufficient sureties, in the sum indorsed upon such attachment, to the effect that the defendant will appear on the return of such attachment and abide the order and judgment of the court thereupon.”

“295.10 Upon the return day of an attachment or of such writ of habeas corpus the officer executing the same shall file the same and the undertaking, if any, taken by

him of the defendant, together with a written return stating the manner in which he has executed such attachment or writ."

The case of *People v. Tefft*, (N. Y. Sup. Ct. 1824) 3 Cow. 340, involved a contempt proceeding against a justice of the peace for failure to make a further return to a writ of certiorari and the question was whether the justice could properly be taxed with the expense of the sheriff in accompanying him to the court on the return of the attachment. The justice argued that the sheriff should have taken him before a magistrate for the purpose of setting bail, so that it was unnecessary for the sheriff to accompany him to the court. The court held that the justice's contention was correct and disallowed the sheriff's expenses as an item of the costs taxed against the justice, stating as follows, p. 341:

"* * * the books of practice say, the Sheriff should, in all cases of contempt, indiscriminately, take the defendant before a Judge, who will exercise a solemn discretion, under the circumstances of the case, *whether the defendant shall be let out on bail at all*, and upon what terms, whether upon his own recognizance alone, or with a surety or sureties, and in what amount." (Italics supplied.)

See also *The People v. Lownds*, (N. Y. Sup. Ct. 1828) 1 Hall 225. From the foregoing it appears that the defendant had no absolute right at common law to be admitted to bail, though he was entitled to be taken before a magistrate for that purpose.

So far as civil contempts in this state are concerned, the statute, which supersedes the common law rule on this point, is quite explicit as to the procedure to be followed in fixing the bail and taking the recognizance; Under sec. 295.06 the court issuing the attachment has discretion to fix the amount of the bail by an indorsement on the attachment. Under sec. 295.08 the sheriff is required to accept an undertaking with two sureties in the amount so fixed, conditioned for the appearance of the defendant upon the return date of the attachment. If no such indorsement is made on the attachment by the court issuing the same, then it would appear that under sec. 295.07 the sheriff must keep

the prisoner in actual custody until the return date and then bring him personally before the court to which the attachment is returnable. There is no procedure provided whereby the defendant can be taken before any other magistrate for the purpose of fixing bail, nor is the sheriff required to take him immediately before the court which issued the attachment. But the last sentence of sec. 295.07 indicates that "actual custody" does not require that the defendant be kept in the jail, but the sheriff apparently has authority to release him on parole if he deems it safe to do so.

However, if the attachment is made returnable forthwith, the sheriff is required to take the prisoner before the court as soon as he reasonably can, and in case of unreasonable delay he may be liable for false imprisonment. *Oxford v. Berry*, (1918) 204 Mich. 197, 170 N. W. 83, 88; 25 C. J. 491. Compare *Schoette v. Drake*, (1909) 139 Wis. 18, 21.

Sec. 256.03 defines what acts constitute criminal contempts. The only provision relating to the procedure to be followed is sec. 256.04, which reads as follows:

"Contempts committed in the immediate view and presence of the court may be punished summarily; in other cases the party shall be notified of the accusation and have a reasonable time to make his defense."

The Wisconsin supreme court has held that proceedings for the punishment for criminal contempts should be "carried on from their inception as criminal prosecutions, with all the incidents of such actions, in the name of the state against the defendant." (Italics supplied.) *Emerson v. Huss*, (1906) 127 Wis. 215, 227; *State ex rel. Rodd v. Verage*, (1922) 177 Wis. 295, 316. Accord *Nichols v. State*, (1913) 8 Okl. Cr. 550, 129 Pac. 673, 675.

Some of the incidents of a criminal prosecution which are held to apply to prosecutions for criminal contempt are that "the defendant is presumed to be innocent; he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *State ex rel. Rodd v. Verage*, (1922) 177 Wis. 295, 317; *Gompers v. Bucks Stove & Range Co.*, (1911) 221 U. S. 418, 444. If it be accepted that a prosecution for a criminal contempt is a true

criminal action, then there becomes applicable the constitutional provision that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Wis. Const., art. I, sec. 8. *Baldwin v. State* (1890) 126 Ind. 24, 25 N. E. 820, 822.

However, there is authority in this state to the effect that while the proceedings are in the form of a criminal action, they do not constitute a criminal prosecution in the ordinary sense. In *Farrell v. Phillips*, (1909) 140 Wis. 611, 617, the court held that a conviction for a criminal contempt was not such a conviction as might be shown to impeach the credibility of the contemner as a witness in a subsequent case. The basis of this decision is stated to be that the action cannot be regarded as a true criminal prosecution because the defendant may, notwithstanding, be indicted or informed against for the same offense under sec. 256.07. The court apparently felt that if the contempt proceedings were regarded as a true criminal prosecution, a subsequent information or indictment would necessarily constitute second jeopardy (although this reasoning is not expressly stated in the opinion). If that is the basis of the decision in the *Farrell* case, it is doubtful that it was correctly decided on that point, because sec. 256.07 apparently means only that if the act constituting the criminal contempt amounts also to a substantive crime (as for example in the case of an assault and battery committed in the courtroom) the prosecution for the contempt would not bar a subsequent prosecution for such substantive offense. This would clearly not amount to second jeopardy, since the offenses would not be identical. Thus, for example, a single transaction may be both adultery and lewd and lascivious conduct, but a prosecution for lewd and lascivious conduct does not bar a subsequent prosecution for adultery. *State v. Brooks*, (1934) 215 Wis. 134.

It is our opinion, therefore, that regardless of what was said in the *Farrell* case *supra*, a prosecution for criminal contempt is in fact as well as in form a criminal prosecution. This being true, the defendant would have a constitutional right to be released on bail pending trial and, at his request, the procedure prescribed by sec. 361.04, Stats., should be followed after the arrest is made.

You are advised, therefore, that when a sheriff receives a bench warrant or attachment for contempt of court, he should carefully examine it to determine whether the action is brought in the name of the state *on the relation of some private person*, in which case the proceeding is for a civil contempt (sec. 295.05, Stats.) or is in the name of the state alone, in which case it is a proceeding for criminal contempt. If the proceeding appears to be for a civil contempt, the sheriff must accept a recognizance with two sufficient sureties in the amount endorsed on the attachment, and release the prisoner, but if no recognizance be given or if no amount of bail be endorsed on the attachment, then he must keep the prisoner in custody until the time fixed for making return of the attachment to the court. On the other hand if the proceeding appears to be for a criminal contempt he must, upon the prisoner's request, take him before a magistrate for the purpose of giving a recognizance with sufficient sureties for his appearance before the court which issued the warrant, pursuant to sec. 361.04, Stats. But in either case, if no bail be given and the attachment or warrant be returnable forthwith, he is required to take the prisoner before the court as soon as he reasonably can.

WAP

Fish and Game — Deer — Conservation commission order No. M-40, which prohibits possession of certain types of firearms and ammunition in areas frequented or inhabited by deer, in certain counties, during closed season for those animals, applies to person who transports such firearms or ammunition on highways crossing such deer-inhabited country.

June 16, 1941.

JAMES F. HORAN, JR.,
District Attorney,
Friendship, Wisconsin.

You state that X was riding along the highway in his car through territory covered by conservation commission order No. M-40, and stopped and parked along the edge of the highway. In his car he had a rifle of a caliber or bore larger than a .22 rim-fire, which was knocked down and unloaded, and in his pocket he had some slugs. He said he was on his way to a farm to butcher a hog. You inquire whether X is guilty of a violation of order No. M-40 (promulgated by authority of sec. 23.09 (7), Stats.), which provides in part as follows:

“(3) (a) It shall be unlawful for any person or persons to carry in any manner or have in their possession or under their control any rifle of a calibre or bore larger than a .22 rim-fire, or any shotgun loaded with shot larger than No. 1 fine shot, divided or cut shells of any variety or any shells loaded with single ball or bullet, or to have in their possession or under their control any shotgun shells loaded with shot larger than No. 1 fine shot or any divided or cut shells or shells loaded with single ball or bullet from April 1 to a period of time beginning five days prior to the opening of the deer season during each year when there is an open season for deer *while being in or on or traversing any forests, fields or other areas frequented or inhabited by deer* during the closed season for deer in the counties of Adams,
* * *”

Your specific question is whether the words “other areas” used in the above quoted portion of the order includes the highways crossing deer-inhabited country. This cannot be

solved by a legalistic examination of the status of a highway in relation to the abutting lands, but is a question of the commission's intent in promulgating the order.

The purpose and intent of order No. M-40 is stated by sec. 1 thereof to be to "provide white-tailed deer better protection and allow them to breed and replenish themselves unmolested and thereby secure the perpetuation and maintenance of an adequate supply of them," and by sec. 2 "to properly provide better general protection for white-tailed deer during the closed season for these animals." It is at once apparent that the purpose of the rule would be to a large extent nullified and enforcement made difficult if it applied only to forests and fields, and if persons could with impunity carry firearms on the highways. This fact is entitled to considerable weight in determining the proper construction of the order. Compare *State ex rel. Dorst v. Sommers*, (1940) 234 Wis. 302, 307.

The order contains certain exemptions which cast some light upon the extent of the application of the order itself. Sec. 4 provides for the issuance of "a permit to carry specified firearms and ammunition into and onto any such deer-frequented or inhabited areas hereinbefore mentioned in this order wherein the applicant or applicants for such permit can show there is good and sufficient reason for the issuance of such a permit to them." Thus the commission has provided a means whereby a person may lawfully transport firearms and ammunition of the prohibited type through the areas included within the order. If the highways were intended to be excluded from such areas, such permits would be to a large extent unnecessary. If X found it necessary to take a rifle to a farm for the purpose of butchering a hog, he would doubtless have been issued a special permit for that purpose.

Even more significant is sec. 5, which provides in part as follows:

"Nothing in the provisions of this order shall apply to * * * the lawful possession or transportation of unloaded guns as merchandise by manufacturers or merchants."

Such transportation would almost certainly take place exclusively on the highways and railroads and if these were not intended to be included within the prohibited areas this exemption would not have been necessary.

For the foregoing reasons, you are advised that the highways crossing deer-inhabited lands are included within the areas affected by order No. M-40.

WAP

Appropriations and Expenditures — County Park Commission — Public Lands — Parks — County has no power to appropriate general funds to county park commission for use, in addition to proceeds of special tax under sec. 27.06, Stats., in operation and maintenance of county parks.

June 16, 1941.

JOHN P. MCEVOY,

District Attorney,

Kenosha, Wisconsin.

Attention K. T. Savage, *Assistant District Attorney.*

You request our opinion upon the question of whether your county, which has a county park commission and a county park system pursuant to secs. 27.02 *et seq.*, Stats., may annually provide funds, in addition to those raised by the imposition of the special tax authorized by sec. 27.06, Stats., for use by the park commission in operating and maintaining its parks, by making an appropriation therefor out of its general fund.

It is very clear from the exception in sec. 27.06, Stats., expressly permitting counties of population greater than two hundred fifty thousand to make a larger levy thereunder than one-tenth of a mill, that the special tax which counties of lesser population may levy thereunder is intended to be limited to a maximum of one-tenth of a mill. But there is

nothing in the language used which itself indicates whether such limitation is intended as operative only on the tax levied pursuant thereto, the proceeds of which must be kept separate and constitute a fund in trust for park purposes only, or as a general restriction on the amount a county may raise and expend for county parks annually.

In *Sidney Spitzer & Co. v. Monroe Co.*, (1921) 274 Fed. 819, it was held that where a statute limited a special tax for public buildings, bridges or roads to a certain amount, the county had no power to raise additional funds by general taxation and expend its general fund in excess thereof. Likewise in *Raton Waterworks Company v. Town of Raton*, (1897) 9 New Mex. 70, 49 Pac. 898, it was held that a city might not exceed the rate limit specified by a tax for water supply purposes, by means of an additional levy under its general taxing powers. An opposite result, however, was reached in *Ferguson v. Gardner*, (1927) 86 Calif. App. 421, 260 Pac. 961, where it was held that a county might levy the maximum special tax for a road fund as authorized by a specific statute and in addition also levy a portion of its general tax for the same purpose. This case, however, is not in conflict with the *Spitzer* case and was distinguished therefrom on the difference that existed in the statutory provision. The decision in the *Ferguson* case was predicated upon the fact that there were two statutes, one authorizing the special tax and the other authorizing the county to charge the cost of certain highway improvement work to "the general county fund." The case of *Hixon v. Oneida County*, (1892) 82 Wis. 515, 52 N. W. 445, in so far as it holds that a town may provide funds under its general taxing power for a purpose within its governmental authority, even though a statutory provision is made for special revenues for the same purpose, lays down a rule along the same line. In the *Spitzer* case there was a statute comparable to the provision in sec. 59.07 (5), Stats., authorizing the levy of taxes for general county purposes, but the court held that, in accordance with the rule *expressio unius est exclusio alterius*, the implication that such general language was sufficient to show a legislative intent to thereby grant full power to tax was repelled by the special provision.

The rendering of this opinion has been delayed due to the pendency of the case of *Holzworth v. State* in the Wisconsin supreme court.

The law is well settled in Wisconsin as elsewhere that the state and its political subdivisions are not liable for damages arising out of personal injuries caused by negligence of their officers and employees committed while engaged in the performance of a governmental function. *Apfelbacher v. State*, 160 Wis. 565; *Narloch v. Church*, 234 Wis. 155; *Connor v. Meuer*, 232 Wis. 656, 663. So far as the state is concerned, the supreme court has now held that rule of nonliability applies irrespective of whether the activity of the official or employee was performed in connection with a governmental or proprietary function — in either case, the state is not liable for his negligence. *Holzworth v. State*, 238 Wis. 63 (decided May 20, 1941). It is clear that the operation of tuberculosis sanatoria, being in the interest of the public health and not for pecuniary profit, is a governmental rather than a proprietary function of the counties, and it follows that the rule of nonliability above stated applies to such institutions.

The same rule of nonliability for negligence of officers and agents applies to private charitable corporations. *Bachman v. Young Women's Christian Asso.*, 179 Wis. 178; *Waldman v. Young Men's Christian Asso.*, 227 Wis. 43.

It is therefore clear that neither the state, counties nor private charitable corporations are subject to any liability whatever caused by negligence of officers or employees in connection with the operation of tuberculosis sanatoria. (But this immunity does not extend to the officers and employees, who are liable personally for their negligence.)

There remains to be considered the question of liability for injuries caused by the unsafe construction of institution buildings under the safe-place statute, sec. 101.06, Stats.

The court has now held that the safe-place statute creates no liability against the state and that in any event the state has not consented to be sued on such liability even if it existed. *Holzworth v. State*, *supra*.

But the contrary rule prevails so far as municipal and private charitable corporations are concerned. In case of

personal injuries caused by unsafe conditions existing in buildings owned by a municipality or private charitable institution, it is held that such municipality or charitable organization is liable for damages the same as a private individual would be. *Heiden v. Milwaukee*, 226 Wis 92; *Wilson v. Evangelical Lutheran Church*, 202 Wis. 111. These cases were not mentioned in the decision in *Holzworth v. State*, *supra*, but the language of that opinion indicates that they are still the law and have not been overruled.

Accordingly, it follows that the county and private tuberculosis sanatoria are subject to liability for personal injuries caused by unsafe conditions of construction. Whether they should obtain insurance against such liability is a matter of policy for the county boards and corporate trustees in charge of such institutions to decide for themselves, subject, in the case of county institutions, to the provisions of sec. 59.07 (23), Stats.

WAP

These cases show that whether a county which has a county park commission may raise money for county park purposes under the general taxing power of sec. 59.07 (5), Stats., depends upon whether such county board has authority to operate and maintain a county park system, other than that conferred in secs. 27.02 to 27.065, Stats. It is well established in this state that counties, being auxiliaries of the state, have only the authority conferred upon them by statute and can exercise only such powers as are expressly granted to them by the statutes or are necessarily implied therefrom. *Spaulding v. Wood County*, (1935) 218 Wis. 224, 228, 260 N. W. 473. In this recent case the court reiterated the rule that if there is a fair and reasonable doubt as to an implied power it is fatal to the existence thereof.

The powers of the county board are expressly enumerated in secs. 59.07 and 59.08, Stats., and we find therein no authorization to establish or maintain county parks. Neither do we find anything, other than secs. 27.02 to 27.065, elsewhere in the statutes that touches in any way upon that subject, excepting possibly the provisions relating to rural planning in sec. 27.015 Stats. Subsec. (13) of sec. 27.015 provides that no county rural planning committee shall be created when a county has a park commission, but that then the county board or the county park commission shall exercise and be possessed of the powers and duties imposed by that section on the county planning committee. This would appear upon casual consideration to give such a county the general authority conferred by subsec. (10) of sec. 27.015 to acquire, develop and maintain parks. However, upon closer analysis, it appears that subsec. (10) grants such power, and the language is explicit in this respect, only to a county in which there does not exist a county park commission.

The provisions of secs. 27.02 to 27.065, Stats., indicate that the legislature intended them to be comprehensive and exclusive in reference to county park systems. Under sec. 27.05, Stats., the county park commission has charge and supervision of *all* county parks including the laying out, improvement, maintenance and governing of the same. Sec. 27.04, Stats., apparently contemplates that no county park system shall exist until established in the manner therein

provided, since it sets up the procedure for the establishment of such system in the first instance.

The provisions of sec. 59.08 (11), Stats., authorizing county boards to exercise the functions and powers of a park commission with respect to airports, negative an intent to permit them to exercise such functions in respect to parks generally. For, if the county had the general power to operate parks and exercise the functions which are given to a county park commission by secs. 27.02 to 27.065, Stats., such provisions of sec. 59.08 (11) would be wholly unnecessary.

The special provisions authorizing the expenditure of general tax funds by a county, by sec. 27.065 (2) (c) for the cost of condemnation proceedings, by sec. 59.07 (23) for the cost of liability insurance, by sec. 59.08 (34) for the maintenance and erection of dams in parks, and by sec. 59.07 (17m) for the purchase of land to be donated for state park purposes, as well as the provisions of sec. 59.08 (11) for the taking over by the county board of the powers and authority of a county park commission in respect to an airport, are all likewise indicative that without such special provisions the county would not have the power so to do.

In addition it appears that when the law relating to county parks, now secs. 27.02 to 27.065, inclusive, was originally enacted by ch. 250, Laws 1907, it contained express provisions directing payment of the cost of establishing and maintaining county parks out of the general funds of the county and authorized the county to make the necessary appropriation. See secs. 17870-4 and 17870-5, Stats. 1911. These provisions were repealed by ch. 454, Laws 1913, when a similar section to that now contained in sec. 27.06 was enacted. The implication is that the legislature, when the law was first adopted, felt that the general authority theretofore conferred on counties did not authorize them to expend for county parks the funds raised by general taxation, otherwise it would not have deemed that the express authorization to that effect was necessary. But in any event, the later repeal of such express authorization negatives the continuation of such power and indicates rather an intent to substitute and limit the funds to be used for county park purposes to the revenue derived from the special tax levy under sec. 27.06.

It is therefore our opinion that a county having a county park system and a county park commission may not raise funds by general taxation and expend them for general park purposes (except in the instances covered by the express special provisions above mentioned), and is limited in raising taxes and make expenditures for that purpose to the special tax provided by sec. 27.06 and in the manner therein set forth. As the tax provided thereby is to be used "for the purchase of land and the payment of expenses incurred in carrying on the work of the [county park] commission" it necessarily applies to all of the work of the commission which includes not only supervision but laying out, improving, maintaining and governing all county parks.

We agree with your conclusion that, notwithstanding the foregoing, the county is authorized under the provisions of sec. 59.07 (4), Stats., to pay the cost of insurance on park buildings out of the general fund. County parks and all buildings thereon, even though they are operated and maintained by the county park commission, are nevertheless county property. The language of this subsection, being in general terms and containing no restriction whatsoever, is a grant to the county of full authority to insure any and all county buildings for the benefit of the county.

HHP

Fish and Game — Fur Dealers — Order No. M-1 of conservation commission, requiring fur dealers licensed under sec. 29.134, Stats., to keep complete record of all transactions carried on by them, was made pursuant to authority contained in sec. 23.09, subsec. (7) and violation thereof carries penalty provided by sec. 23.09 (11).

Conviction of violation of conservation commission order made pursuant to sec. 23.09 (7) does not, pursuant to sec. 29.63 (3), cause forfeiture of any license held by violator under ch. 29, Stats., nor prevent issuance of such license to such violator for period of one year thereafter.

June 16, 1941

JOHN A. MOORE,
Acting District Attorney,
Oshkosh, Wisconsin.

You state that a certain fur dealer duly licensed under sec. 29.134, Stats., is charged in the municipal court of the city of Oshkosh with the offense of failing to keep a proper book record of purchases and sales of raw furs, contrary to conservation commission order No. M-1. You inquire under what penalty section of the statutes a violation of order M-1 is punishable.

Order No. M-1 requires that all fur dealers licensed under sec. 29.134, Stats., shall keep a correct and complete book record in English of all transactions in the buying, selling, dressing, dyeing or tanning of raw furs carried on by them. It further provides what information concerning such transactions must be shown in such book record. *The order recites on its face that it is made pursuant to sec. 23.09, Stats., and recites further that the commission "from the results of investigations that have been made by them, verily believe that in order for said commission to provide an adequate and flexible system for the protection and development of game it is essential and necessary that a further regulation or order be passed by them for the better administration of the section of the law known as 29.134 of the Wisconsin statutes that will require any person" etc. (Italics supplied.)*

Sec. 23.09, referred to above, provides in part as follows:

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

“* * *

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

“* * *

“(11) Any person violating any rule or regulation of the state conservation commission shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.”

The only other grant of rule-making power to the conservation commission is found in sec. 29.174, subsec. (2), which empowers the commission to “establish open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish and game.” Passing the question whether order No. M-1 would be authorized by sec. 29.174, it does not comply with subsec. (5) of that section, which requires orders made thereunder to have the approval of the governor. Moreover, it recites on its face that it is promulgated pursuant to authority conferred by sec. 23.09, and for the purposes stated in sec. 23.09 (1). It is clear therefore that the penalty for a violation of the order is that provided by sec. 23.09 (11), not that provided by sec. 29.134 or 29.63.

You inquire further whether a conviction on the aforesaid charge would cause a forfeiture of the fur dealer's license issued to the defendant and his two sons jointly, and also have the result of making it impossible for any of the

three to be again licensed within a period of one year ensuing after conviction. The provision for revocation of licenses reads as follows:

"29.63 (3) (a) Conviction for a violation of this chapter, in addition to all other penalties, revokes any license theretofore issued pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter.

"(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter."

Since, as pointed out above, the violation is not a violation of ch. 29, the foregoing provision does not apply to this case. Hence a conviction on the charge now pending will not cause a forfeiture of the license or disqualifying defendant from receiving other licenses within a year.

WAP

Courts — Witness Fees — Public Officers — State Employees — Witness fees and mileage provided by sec. 325.05, Stats., are not intended as compensation for testifying but to pay expenses of witness; and where state employee is subpoenaed to appear in court to testify concerning matters relating to his employment he should keep such fees rather than turn them over to state, but he is entitled to no further expense money from state if such fees are insufficient. He should not be removed from pay roll when so testifying.

June 16, 1941.

PUBLIC SERVICE COMMISSION.

Attention R. W Peterson, *Chairman*.

You have asked a number of questions relating to witness fees of members of your staff subpoenaed in court actions where their testimony, as members of the commission's staff, is desired. The fee amounts to two dollars and fifty cents per day, plus mileage at the rate of five cents per mile.

The questions are as follows:

"1. Are there any restrictions about accepting a witness fee in the first place?

2. If a staff member accepts the fee and turns it over to the commission, may the commission

(a) pay his salary for time consumed in answering the subpoena?

(b) pay his traveling expenses?

3. If the answer to 2 in both sections is affirmative, to which fund should the commission deposit the fee:

(a) to the general state fund?

(b) to its own appropriation as refund of travel and salary expenditures connected with the staff member's appearance in response to the subpoena?

4. May he retain the fee and make no claim to the commission for travel expenses

(a) if the fee approximates his expenses?

(b) if the fee exceeds his expenses?

In calculating what the expenses for the trip would be if he retains the fee and if he uses his personal car, should the mileage for the trip (which would in all likelihood be under 600 miles) be considered as a unit by itself and not be incorporated with other mileage for the commission during the month? This question is raised in order to determine on what basis the expense of the trip should be figured—on the flat rate per mile for travel under 600 miles, or for gas and oil plus the flat sum for use of car for 600 miles and over.

5. May he retain the fee and make a claim for the difference if it does not cover his expenditures for the trip?"

The general rule seems to be that where it is not a part of an officer's duty to act as a witness in a case, he may recover witness fees, but that where it is his duty to prosecute and act as a witness in the performance of his official duty, he cannot recover compensation. Op. Atty. Gen. for 1910 666, Op. Atty. Gen. for 1912 894, XII Op. Atty. Gen. 52, XVI Op. Atty. Gen. 385, 388, XVIII Op. Atty. Gen. 644, 28 R. C. L. 662-663. See also sec. 325.05, subsec. (2), Stats.

Assuming that the cases you have in mind are not state cases in which members of your staff have an official duty

to appear, it is our opinion that they are entitled to witness fees, the same as any other witness.

Before proceeding to answer in detail the remainder of your questions, it might be well to analyze the nature and purpose of witness fees, since an understanding of these factors is necessary to reach any proper determination as to the disposition of such fees.

A statutory provision of compensation for witnesses is not intended to compensate them for testifying, but simply to pay their expenses while away from home. 70 C. J. 67, *Healy v. Hillsborough County*, 70 N. H. 588, 49 Atl. 89. This is further illustrated by the fact that a party to a case being tried is entitled to have a person already in court sworn as a witness to testify without tendering to him his fees and mileage. 70 C. J. 67; *Rozek v. Redzinski*, 87 Wis. 525.

Hence the statutory provision of two dollars and fifty cents per day for attendance at court, and the provision of five cents per mile for travel going to and returning from the place of residence, provided by sec. 325.05, Stats., are not intended as compensation, but as expense money. This is true of both items, and they should, therefore, be considered and treated in the same category, as far as your questions are concerned. The five cents per mile is intended to cover travel, and presumably the two dollars and fifty cents per day is intended to cover meals, lodging and such other expense as may be incurred by the witness.

This money may or may not be sufficient to reimburse the witness for his actual and necessary expenditures, and, of course, as is indicated in your letter, it is not computed on the same basis as are traveling expenses for state employees.

In view of the foregoing, it is obvious that the employee should use this expense money for himself so far as it will go towards covering his expenses, and that in no event should the state pay any part of his expenses where he is appearing in private litigation. If his expenses should not equal the fees he receives under sec. 325.05, he is the gainer. Conversely, he must bear the loss if his expenses exceed the fees provided by law.

So far as we know there is no statutory provision which directs or authorizes a state employee to turn over his witness fees to the state under the circumstances discussed here, although there are special statutory provisions designed to cover particular situations; i. e., sec. 23.14 (2), requiring conservation wardens to pay their witness fees into the conservation warden pension fund. Sec. 14.68 requires moneys received for or in behalf of the state, or which are required by law to be turned into the state treasury, to be deposited with the state treasurer and credited to the general fund, unless otherwise specifically provided by law. However, a witness fee received by a state employee in private litigation for the purpose of paying his expenses cannot be said to have been received for or in behalf of the state, nor, so far as we can find, is it required by law to be turned into the state treasury.

We believe the foregoing disposes of all of the questions you have raised, except as to the payment of the employee's salary during the time he is testifying.

The statutes furnish no direct answer to this question. All pay rolls are certified by the director of the bureau of personnel under sec. 16.27 (1), Stats., and we are informed by that office that to the best of their knowledge, no state employee has ever been taken off the pay roll during the time he has been testifying in court pursuant to subpoena on matters relating to his employment.

This doubtless reflects the realization on the part of department heads that the administration of justice being a course of mutual benefit to everyone in the state, each is under obligation to aid in furthering it as a matter of public duty, including the state itself as an employer, and that the state should not, therefore, penalize its own employees by withholding their compensation when they are compelled to be absent from their duties to testify in court on matters relating to such duties.

Sec. 14.65 (1) directs the several state officers, commissions and boards to co-operate in the performance and execution of state work. We consider that this extends to co-operating with the courts, the third branch of our state government, in the administration of justice, and that it was not intended that any particular employee should neces-

sarily be removed from the pay roll because it so happened that for the moment his services inured more to the benefit of some other branch of the state government than the one regularly employing him.

WHR

Prisons — Prisoners — Parole — When convict has been at liberty on parole under sec. 57.06 or sec. 57.07, Stats., or by reason of escape and is returned to prison with additional sentence imposed either for new offense or for escape, new sentence runs concurrently with remainder of original one only if sentencing court does not provide otherwise, but court has authority to provide that new sentence shall run consecutively with original one.

Convict who violates parole has same status for most purposes as escaped prisoner. Running of his sentence is tolled from time of such violation and time spent in prison in another state or in hiding cannot be counted toward service of Wisconsin sentence under which he was paroled.

June 17, 1941.

A. W. BAYLEY, *Executive Secretary,*
Department of Public Welfare.

In your letter you state as follows:

“One L. P. was committed March 14, 1934 from Marinette county for assault regardless of life to serve a term of 1 to 8 years. Commitment was made to the state reformatory. He was released on parole June 12, 1935 and violated by committing forgery July 11, 1936. He was returned to the state reformatory July 16, 1936 and again paroled on June 22, 1938. He violated this second parole by absconding June 25, 1938 and his parole was revoked five days later.

“It now appears that the same L. P. was received at the state prison, Marquette, Michigan, on July 6, 1938 from Delta county for terms of 3 to 4 years and 3 to 10 years con-

currently for assault to do great bodily harm etc. He was transferred to the state house of correction and prison branch on July 9, 1938 and is there at the present time.

"According to the records of our state reformatory, he has one year and four months left to serve at this institution. * * *"

You inquire whether the time spent by L. P. in the Michigan prison is to be credited on his term in the Wisconsin reformatory, so that upon his release from the Michigan prison he will have no further time to serve on his Wisconsin sentence.

You state that there has been a ruling of this office "that when a person violates parole or escapes from an institution, is apprehended and sentenced to the prison on another charge, the last sentence runs concurrently with the balance of his first sentence." No opinion to that effect has been discovered, nor is it a correct statement of the law. An additional sentence under such circumstances *may* run concurrently with the balance of the original sentence—and in the absence of language to the contrary in the last sentence itself, it *will* be construed as a concurrent sentence—but the court undoubtedly has authority to provide that execution of such additional sentence be stayed until expiration of the original sentence, so that they would run consecutively. See *Application of McDonald*, (1922) 178 Wis. 167, 171. In fact, under the federal criminal practice, the sentences are held to be consecutive. *Zerbst v. Kidwell*, (1938) 304 U. S. 359. Information from your office is that the opinion which you have in mind is the one reported at XXIX Op. Atty. Gen. 290, which dealt with the method of calculating good time under sec. 53.11, Stats., in case an escaped prisoner or parole violator was returned to the prison with an additional sentence to run concurrently with the original sentence. The question of the court's power to impose an additional sentence to run consecutively was neither raised nor passed on in that opinion. The foregoing remarks have no bearing on the principal question dealt with in this opinion since a Michigan sentence could not in any event run concurrently with a Wisconsin sentence, but are included here to correct an apparent misunderstanding on your part as to the effect of the opinion in XXIX Op. Atty. Gen. 290.

Returning to the question whether service of a term in the Michigan prison counts toward the previous sentence of L. P. to the Wisconsin reformatory, you are advised that the law is clear that it does not. Although the law in this state is to the effect that the time elapsing while a prisoner is on parole counts toward his sentence (*Application of McDonald*, (1922) 178 Wis. 167; XXVI Op. Atty. Gen. 292), the grounds of that rule are that the prisoner remains in custody and subject to restraint, directions and orders of the parole board of this state. But he is not in such custody or under such restraint when he is imprisoned in another state for a crime committed there. Compare *Zerbst v. Kidwell*, (1938) 304 U. S. 359.

In *People ex rel. Patterson v. Bockel*, (1936) 270 N. Y. 76, 200 N. E. 586, 587, it appeared that the relator was convicted in Connecticut on September 13, 1928, and committed to the state prison for two consecutive terms, one of two to four years and the other of four years, the maximum expiring February 19, 1935. On July 5, 1934, he was paroled and allowed to go to New York, where he violated his parole October 12, 1934. His parole was immediately revoked, but he could not be found and arrested until March 5, 1935. On habeas corpus, the court held that the relator owed the state of Connecticut the remainder of his sentence, that the running thereof was tolled from the time that he violated his parole and that he could not avoid serving it by remaining in hiding outside Connecticut until after the original expiration date of his sentence. The court quoted as follows from the opinion in *People ex rel. Newton v. Twombly*, 228 N. Y. 33, 36, 126 N. E. 255, 256:

“A prisoner who has broken his parole is in the same plight for most purposes as one who has escaped.”

This is the general rule prevailing throughout the country, as shown by other cases cited by the court in *People ex rel. Patterson v. Bockel*, (1936) 270 N. Y. 76, 200 N. E. 586, 587. The rule was first announced in *Drinkall v. Spiegel*, (1896) 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486, where its rationale is cogently stated.

A case presenting the exact question raised by your letter is *Anderson v. Corall*, (1923) 263 U. S. 193, 196-197. On November 15, 1914, Corall was convicted in a federal court and sentenced to three years in Leavenworth prison. On February 24, 1916, he was paroled. On June 28, 1916, a warrant was issued for his recapture as a parole violator. In October 1916, before his recapture, he was convicted in an Illinois court and sentenced to Joliet prison, where he remained until December 1919. He was then retaken on the federal warrant and in January, 1920, the parole board took appropriate action to revoke his parole. Corall commenced habeas corpus proceedings, alleging that his term expired in 1917 and that he could not be retaken thereafter. The United States supreme court held as follows:

“Corall’s violation of the parole, evidenced by the warden’s warrant and his conviction, sentence to and confinement in the Joliet penitentiary, interrupted his service under the sentence here in question, and was in legal effect on the same plane as an escape from the custody and control of the warden. His status and rights were identical with those of an escaped convict. * * * His claim that his term expired in 1917 before he was retaken and while he was serving his sentence at Joliet cannot be sustained * * *”

The same rule was applied in a case where a person was placed on *probation* in a federal court and subsequently violated his probation in another state by committing a crime as the result of which he was sentenced to the state prison. His probation would normally have expired according to its terms during the time that he was in the state prison, but the court held by analogy to the parole rule that such period of probation was tolled during the period following the escape from the federal probation officer, and that he could be retaken after the expiration of his term in the state prison. *United States v. Farrell*, (C. C. A. 8th, 1937) 87 F. (2d) 957 (motion denied, 302 U. S. 683; rehearing denied, 302 U. S. 775).

The general rule prevails in Wisconsin that the time when a prisoner is at liberty by reason of an escape cannot be counted toward the service of his sentence. *In re*

McCauley, (1904) 123 Wis. 31. Since L. P., being a parole violator, is in the same situation as an escaped prisoner, it is clear that the time elapsing since June 25, 1938—the date he violated his parole—does not count on his sentence, and a detainer should be placed on him at the Michigan prison so that he may be returned to Wisconsin for service of the remainder of his sentence upon the expiration of his term in Michigan.

WAP

Counties — County Board — Insurance — Power of county to enter into group insurance contract with insurance company on behalf of county employees is limited to Milwaukee county by virtue of sec. 59.08, subsec. (14), Stats.

June 17, 1941.

DONALD W. GLEASON,
District Attorney,
Green Bay, Wisconsin.

You state that the Brown county board is contemplating entering into a contract of group insurance for county employees, and you ask whether the county possesses the power necessary to participate in such a contract. We are informed further that the insurance company has offered its group plan of insurance only on the condition that it be effectuated through a contract between the insurance company and the county.

It is established that counties are purely auxiliaries of the state and can exercise only such powers as are conferred upon them by statute, or such as are necessarily implied therefrom. *Spaulding v. Wood County*, 218 Wis. 224, 260 N. W. 473. No statute of this state expressly authorizes any county other than Milwaukee county to enter into a contract of this nature. Moreover, we are unable to discover any statute from which this power is necessarily implied.

Sec. 59.08, Stats., confers certain special powers upon county boards. Subsec. (14) empowers them to:

“Provide, in counties having a population of two hundred and fifty thousand or more, for group insurance for officers and employes of such counties and to make the necessary rules and regulations therefor.”

This express power could as readily have been granted to all counties. However, since the statute operates so as to include only Milwaukee county, the natural conclusion follows that the legislature intended not to grant a similar authority to other counties. The legislature by granting the power to only one county has by inference excluded all others from exercising it under the familiar doctrine of statutory construction—*expressio unius est exclusio alterius*.

As you point out, it seems inequitable that Brown county employees should be excluded from the benefits of an insurance plan available to employees of Milwaukee county and to employees of private industries. However, this argument goes to the question of legislative policy involved and not to the question of statutory interpretation with which we are concerned here.

It might well be contended that the county is a purely nominal party to the contract, acting only in an administrative capacity as agent of the employees. From the facts which you have presented, it appears that the county does not participate financially, but that the employees in signing a pay roll deduction card assume voluntarily the entire responsibility for the deduction and can terminate the coverage individually at will. Under the terms of the proposed contract which you have submitted to this office, premiums are payable solely by the employer, who is also required to furnish reports containing certain necessary information about employees. It may well be that the insurer demands participation in the contract by the county for the sole reason of more efficient administration.

On the other hand, the fact remains that the proposed contract *is* between the county and the insurance company. Furthermore, it appears that under the contract the county may terminate the policy as of any policy anniversary

merely by giving notice of thirty days prior to such policy anniversary. Under these circumstances, we cannot say that the county would be acting solely in a representative capacity.

It is our opinion, therefore, that Brown county is without the power necessary to enter into the proposed contract.

WHR

Courts — Municipal Court, Sawyer County — Chapter 18, Laws of Wisconsin 1903, creating municipal court of Sawyer county, when read to harmonize with constitutional provisions was not intended to deprive courts of record of Sawyer county of jurisdiction to issue warrants and conduct examinations in criminal cases. County court of Sawyer county may issue such warrants and conduct such examinations.

June 17, 1941.

RALPH STELLER,

District Attorney,

Hayward, Wisconsin.

You have requested our opinion relative to ch. 18, Laws of Wisconsin 1903, which chapter established the municipal court of Sawyer county. You call attention to that portion of ch. 18 which reads as follows:

“* * * No justice of the peace within said county shall exercise jurisdiction in any criminal cases, except misdemeanors, over which they shall have concurrent jurisdiction and power with said municipal court, and except that justices may, in the manner prescribed by law, issue warrants wherein the commission of a felony is charged, which warrants are to be made returnable before the said municipal judge, but all such jurisdiction is vested in said municipal court and the judge thereof. * * *”

Assuming this language to vest exclusive jurisdiction to conduct examinations in criminal cases in the municipal court of Sawyer county to the exclusion of all other courts of that county, you ask the opinion of this office as to whether this law is constitutional. You also ask whether, in view of this law, a county judge may conduct a criminal examination in Sawyer county.

We do not believe a reading of ch. 18, Laws 1903, will bear out the assumption that the language of that chapter intended to exclude all courts other than the municipal court of Sawyer county from jurisdiction to conduct examinations in criminal cases. The chapter gives the municipal court the same jurisdiction as justices of the peace and in addition thereto gives the municipal court jurisdiction to institute and conduct examinations in criminal cases that may occur in the county. Under the language above quoted the jurisdiction of the justices of the peace of the county is taken away in all criminal cases except misdemeanors with the exception that a justice of the peace may issue warrants in felony cases, which warrants are to be made returnable before the municipal judge. We believe the phrase of the language quoted reading, "but all such jurisdiction is vested in said municipal court and the judge thereof," was merely inserted to indicate that in reserving power in justices of the peace to issue warrants in felony cases the legislature meant to limit absolutely the jurisdiction of justices of the peace in felony cases to that action only. The phrase last quoted could also be construed as indicating that even though the justices of the peace had power to issue warrants returnable before the municipal judge, the municipal court may itself issue such warrants, and this is perhaps the most logical explanation of the language in question. If any of the language of ch. 18 be read so as to deprive the circuit courts of jurisdiction to conduct criminal examinations, that portion at least of the law would, of course, be unconstitutional under the provisions of art. VII, sec. 2 of the Wisconsin constitution.

In accordance with familiar principles, laws are to be construed in such a manner as will reconcile them to the constitution and make them effective according to the intention of the legislature. *The Attorney General v. The City of Eau*

Claire and others, 37 Wis. 400. This principle may be easily applied in the present case since, as we have indicated, the most reasonable construction of the language in question would sustain the constitutionality of ch. 18, Laws 1903.

Construing the law as we do and in harmony with constitutional provisions, there is nothing therein which would deprive courts of record of Sawyer county of the right to exercise their powers to conduct examinations in criminal cases. In accordance with the provisions of sec. 361.01, Wis. Stats., the county court, being a court of record, clearly has jurisdiction to issue warrants and conduct examinations in criminal cases.

RHL

Education — Teachers Retirement — Where member of retirement system properly designates beneficiary pursuant to sec. 42.50, Stats., but does not direct how payment of death benefit shall be made, retirement board having jurisdiction under sec. 42.48 may make payment of death benefit to beneficiary in any one of ways enumerated in sec. 42.50, subsec. (2) agreed upon by said board and beneficiary.

June 17, 1941.

ALBERT TRATHEN, *Director of Investments,*
State Annuity & Investment Board.

You have inquired concerning the authority of the public school retirement board or the state annuity and investment board, or both, to enter into an agreement with a beneficiary providing for the payment of a death benefit in some way other than a single sum in a case where the member has properly designated a beneficiary having an insurable interest in the life of the member but has not directed the method of payment.

Sec. 42.50, Stats., provides as follows:

“(1) Any member may, by written notice to the retirement board having jurisdiction, in such form as it shall approve, designate any person or persons having an insurable interest in the life of the member as a beneficiary to whom any death benefit payable at the death of the member shall be paid. The member may, from time to time, by a like written notice, change the beneficiary. If no beneficiary shall have been named by the member, such death benefit shall be payable to the estate of the member. Such death benefit shall be the full amount of the accumulation in the retirement deposit fund to the credit of the member from all member’s deposits and all state deposits and interest thereon.

“(2) Such death benefit payment shall be made, as the member shall have directed, either

“(a) As an annuity payable monthly during the life of a beneficiary;

“(b) As an annuity payable monthly during the life of a beneficiary with additional payment, if any, to another beneficiary until one hundred eighty monthly payments in all have been made; or

“(c) To such beneficiary or to the estate of such member in a number of instalments during a time certain or in a single sum.”

In XI Op. Atty. Gen. 746 the same factual situation was presented and the question was asked:

“To what extent may the board legally direct the method of payment * * *?”

Basing the conclusion on the last sentence of sec. 42.50, subsec. (1), it was held that the board could legally direct payment to the beneficiary only in a single sum. However, the opinion concluded:

“It is my opinion, therefore, that at least in the absence of a contrary agreement or consent of the * * * beneficiary, * * * the board has no discretion in the matter, but must direct payment as indicated above.”

This concluding sentence implied that possibly the board and the beneficiary could enter into an agreement whereby payment of the death benefit could be made in some way

other than in a single sum. We concur in the implication of the concluding sentence of that opinion but disagree with the conclusion reached in that opinion as to the meaning of the words:

“* * * Such death benefit shall be the full amount of the accumulation in the retirement deposit fund to the credit of the member from all member’s deposits and all state deposits and interest thereon.”

It is our opinion that this portion of the statute means only that the death benefit payment shall include the accumulation from state deposits as well as the accumulation from member’s deposits, and that it does not constitute a direction as to the method of payment, a subject which is covered by subsec. (2) of sec. 42.50.

Sec. 42.50, subsec. (1), gives the member the right to designate a beneficiary to whom any death benefit payable at the death of the member shall be paid.”

“* * * 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 * * *.” *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 335, 193 N. W. 499.

If the member designates a beneficiary and directs which of the payment methods enumerated in paragraphs (a), (b) and (c), subsec. (2), sec. 42.50, shall be used, that method must be used.

If the member designates a beneficiary but does not direct the payment method, it is still the duty of the retirement board having jurisdiction to make payment of the death benefit to which the *Levitan* case, *supra*, indicates that the member had title. In other words, the benefit does not fail, and the only question remaining is as to the method of payment thereof. It follows that either the beneficiary or the retirement board having jurisdiction under sec. 42.48 has the right to elect which of the payment methods specified in sec. 42.50 (2) shall be used. If the retirement board

and the beneficiary agree upon the method of payment, that method may be used, and it is unnecessary to determine, and we do not decide, whether the retirement board or the beneficiary has the right of such election.

JRW

Elections — Intoxicating Liquors — Municipal Corporations — Beer Licenses — Signatures of electors on petition for local option under sec. 66.05, subsec. (10), subd. (d), par. 3, and sec. 176.38, Stats., are insufficient unless affixed in handwriting of petitioners themselves or in alternative manner provided for electors unable to write, under sec. 370.01 (19).

Where such petition for local option election is insufficient, results of election held thereon cannot be given effect, at least where such results leave any doubt as to will of electors.

June 18, 1941.

C. B. PETERSON,
District Attorney,
Prairie du Chien, Wisconsin.

You have submitted certain questions with respect to a local option election held in the village of Mt. Sterling pursuant to secs. 66.05, subsec. (10), subd. (d), 3, and 176.38 of the statutes, to determine the following questions:

(a) Shall any person be licensed to deal or traffic in any intoxicating liquors as beverage?

(b) Shall municipal liquor stores, as provided for in section 176.08, Wisconsin statutes, be established, maintained, or operated by the village of Mt. Sterling?

(c) Shall Class "B" license (taverns, hotels, restaurants, clubs, societies, lodges, fair associations, etc.) be issued for the retail sale of beer for consumption on or off the premises where sold?

The results of the vote on the foregoing questions are reported as follows:

- (a) For: 64; Against: 56
- (b) For: 40; Against: 63
- (c) For: 58; Against: 61

You state that only the minimum number of signatures required by statutes appeared on the petition for the election, and that it has been established that two of the signatures were affixed by the wives of the petitioners, in the absence and without the authority of the latter.

Your first question is whether, under the foregoing facts, the petitions were insufficient and, if so, whether the election was invalid.

As you have pointed out, petitions filed under secs. 66.05 (10) (d) 3 and 176.38 of the statutes are required to be "signed" by a certain percentage of the electors. Sec. 370.01 (19) of the statutes reads in part:

"* * * in all cases where the written signature of any person is required by law it shall always be the proper handwriting of such person or in case he is unable to write, his proper mark or his name written by some person at his request and in his presence."

The case of *DeBauche v. Green Bay*, 227 Wis. 148, 151-152, 277 N. W. 147, held that the above quoted section of the statutes applies to a petition for annexation, under sec. 62.07 of the statutes, which is required to be "signed" by a certain percentage of electors, and that the signatures of a husband for a wife or a wife for a husband are not a sufficient signing even though the signatures are affixed in the presence of the other parties and with their knowledge and consent. The ruling was based in part on the theory that where the privilege of signing a petition is extended by the government to an elector, it is a right which cannot be delegated any more than the right to vote. The court said:

"* * * the authorization to act in this particular is by the government to a being that can have ability to act only by reason of the peculiar relation between the government and citizen. The term 'elector' is descriptive of a citizen having certain constitutional and statutory qualifications. Acts in this matter are by permission of the legisla-

ture, and sec. 62.07, Stats., does not authorize the delegation to a deputy of responsibility as an elector. * * * We are referred to cases where wills, mortgages, and other writings, peculiarly private or commercial in character, have been held valid although the signature upon the instrument was placed there by authorization and not in the handwriting of the principal. * * * They serve to point out a distinction which must be recognized between cases where the common-law rule governing the affixing of signatures applies, and those situations falling in the class that have been taken out from under that rule by statutes, between the cases where authorization is consistent with the purpose sought to be effected and those cases in which delegation of authority would be likely to defeat the purpose for which the statute was enacted. Clearly one may nominate another to act for him under some circumstances, as in the exercise of a private right, while under other circumstances the impropriety of permitting him as an elector to delegate his participation in governmental matters to another would be as plain."

Where the necessary number of signatures to a petition has not been affixed in the handwriting of the petitioners themselves, or, in the case of a petitioner who cannot write, by another in his presence and at his request, the petition is insufficient under the rule of the case above cited.

There still remains the question of the effect of the insufficiency of the petition upon the results of the election. Sec. 5.01 (6) of the statutes reads:

"This title shall be construed so as to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions."

While the sections under which the petitions for local option elections were filed are not a part of the title referred to in the provision quoted, village elections held under ch. 10 of the statutes as a result of such petitions are governed by such provision. See *State ex rel. Baxter v. Beckley*, 192 Wis. 367, 212 N. W. 792, and *Commonwealth Telephone Company, et al. v. Public Service Comm., et al.*, 219 Wis. 607, 263 N. W. 665.

Even if it should be determined that sec. 5.01 (6) is applicable to the situation here involved, however, there are

two reasons why its provisions could not validate the results of the elections described in your letter.

1. The Wisconsin courts, in applying sec. 5.01 (6) have distinguished between jurisdictional defects and defects in the performance of ministerial duties. The cases in which it has been held that the results of an election should be given effect even though there has not been strict compliance with the statutes have involved defects in some such ministerial requirement as the giving of notice of the election. See *Commonwealth Telephone Co. v. Public Service Comm., supra*. The giving of notice is for the benefit of the electors, to acquaint them with the question to be voted upon, and if the results of the election show that the electors had knowledge of the question and clearly expressed their will by their vote, the failure of some public official to perform his ministerial duties will not be permitted to thwart their wishes.

The petition of the electors for submission of a question, on the other hand, is a jurisdictional requirement. The filing of a sufficient petition in compliance with the statutes is an essential prerequisite to the election. In *State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N. W. 50, the court said with reference to the effect of sec. 5.01 (6), p. 579:

"It is also apparent that there are so-called jurisdictional requirements which must be complied with or the proceeding never reaches the election stage. It is considered under the statutes referred to that when a petition has been filed which complies with the provisions of the statutes, the necessary jurisdictional step has been taken."

See also *State ex rel. Baxter v. Beckley*, 192 Wis. 367, 212 N. W. 792, where it was held that sec. 5.01 (6) does not permit the disregard of positive language of a statute as to what must appear on a petition before the machinery for an election may lawfully be set in motion.

2. The provisions of sec. 5.01 (6) apply only where the will of the electors can be ascertained. The results of the election which you report leave considerable doubt as to what the electors really intended. The fact that they voted against issuance of beer licenses and in favor of the issuance of intoxicating liquor licenses which, under sec. 176.05

(10) (b), Stats., can be issued only to the holders of beer licenses, indicates that at least some of the electors were probably confused about the questions upon which they voted. The situation is not comparable to a case where there is an "overwhelming affirmative result" which "so convincingly demonstrates the will of the electors" that it should be given effect in spite of the informality of the procedure or the failure to comply with all requirements of the election statutes, as was true in *Commonwealth Telephone Company v. Public Service Com.*, 219 Wis. 607, 263 N. W. 665.

You have indicated that there was also some question as to the sufficiency of the certificate of the village clerk which the statutes require to be attached to the petition. Even if we assume that the clerk's certificate meets the statutory requirements, it is not conclusive, but only presumptive, evidence of the facts recited therein. Sec. 327.10 of the statutes provides:

"When a public officer is required or authorized by law to make a certificate or affidavit touching an act performed by him or to a fact ascertained by him in the course of his official duty and to file or deposit it in a public office such certificate or affidavit when so filed or deposited shall be received as presumptive evidence of the facts therein stated unless its effect is declared by some special provision of law."

The clerk's certificate as to the sufficiency of the petition is somewhat analogous to the certificate of the results of an election which is required to be made by the board of canvassers. Such a certificate has been held to be only prima facie and not conclusive evidence of the facts stated. *Atty. Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567; *Atty. Gen. ex rel. Carpenter v. Ely*, 4 Wis. 420; *State ex rel. Jones v. Oates*, 86 Wis. 634, 57 N. W. 296; *State ex rel. Field v. Avery*, 14 Wis. 122.

From the foregoing authorities, it follows that the results of the election reported in your letter cannot be given effect where the petition of the electors was insufficient. It is unnecessary to discuss the other questions submitted.

BL

Bridges and Highways — State highway commission should not reimburse counties for assessments paid by such counties for benefits assessed against state trunk highways.

June 27, 1941.

W. E. O'BRIEN, *Chairman,*
Highway Commission.

You state that the Norway and Dover drainage district, organized in 1908, levied assessments for benefits at that time against town highways located in the towns of Norway and Dover, Racine county. Subsequently, on September 18, 1940, the circuit court for Racine county levied an additional assessment against these highways. Since the original assessment certain of said highways have been made a part of the county and state trunk highway system. The towns have requested Racine county to reimburse them for assessments against those highways which are now county and state trunk highways. The county in turn has asked the state highway commission to reimburse it for assessments against state trunk highways in the towns of Norway and Dover.

You ask whether such payments should be made by your commission.

Drainage districts are purely statutory and all rights and liabilities of such districts must be found within the statute creating them. *In re Dancy Drainage District*, 199 Wis. 85, 94. Drainage districts in the state of Wisconsin are created by and exist under the provisions of ch. 89, Wis. Stats., and we can find no provision in said chapter of the statutes making the state liable for assessments authorized thereunder and conclude that no such liability exists. This is in accord with the well settled rule of statutory construction that general statutes are not to be construed in a manner which operates to the detriment of the state. *Sandberg v. State*, 113 Wis. 578, 589; *Milwaukee v. McGregor*, 140 Wis. 35, 37; II Op. Atty. Gen. 836.

You will note that sec. 89.02, Stats., among other definitions, describes a corporation as follows:

“* * *

“‘Corporation’ shall include all corporations, both private and public, counties, towns, cities, villages, other drainage districts and all other drainage corporations;”

You will also note that sec. 89.28 provides for the assessment of benefits under the provisions of said ch. 89, Stats., and that at no place does it mention assessments against the state of Wisconsin. It simply refers to lands and corporations within the district and clearly the corporation referred to is the corporation defined by sec. 89.02, which does not include the state of Wisconsin. Therefore, it is our opinion that the language of said sec. 89.28 is not sufficiently broad to include the state of Wisconsin or the state highway commission. In fact, the following of the rule of statutory construction *expressio unius est exclusio alterius* as laid down by our supreme court in *State ex rel. Owen v. McIntosh*, 165 Wis. 596, 598, compels us to assume that it was not the intent of the legislature that the state of Wisconsin should be liable for assessments because the legislature saw fit to include public corporations, to wit, counties, towns, cities and villages, but did not include the state of Wisconsin. It also should be pointed out that the legislative intent is further shown by the fact that county and state lands are mentioned specifically in secs. 89.30 and 89.31, but that liability for assessments are imposed upon the county but not upon the state.

In IX Op. Atty. Gen. 534, this department held that state lands were not subject to assessments levied pursuant to ch. 89 by reason of sec. 70.11, Stats. We believe that opinion to be correct and that the reasoning therein is applicable here.

The only possible reasoning that could in any way justify the payment of the assessment in question by the state highway commission is that the state highways are benefited by the drainage of the particular district and that therefore it should pay its proportionate share of such assessment. It appears that our supreme court in the case of *In re Door Creek Drainage Dist.*, 172 Wis. 431, applied reasons along that line when it held that the county was liable

for such an assessment. Therefore, we feel that such case should be distinguished by us. A careful reading of said case will disclose that the court first found that the county was made liable by the express terms of the statute and that the only real question involved was whether the assessment could be collected because the legislature had not provided any means of enforcing the payment thereof. The court simply determined that it was the legislative intent that the county should be liable for such an assessment and, in arriving at its decision that the legislature had such an intent, it reasoned that the county roads were benefited by the drainage project because it decreased the county's cost of maintenance of the highways in question. However, in that case as pointed out above, the court first found that the legislature, in enacting the statutes, specifically mentioned that counties were liable for such assessments. A careful reading of said case, we believe, will disclose that the court would have reached an entirely opposite conclusion in the event the legislature had not mentioned counties.

You are therefore advised that the state highway commission should not reimburse the county for assessments levied against state trunk highways in the Dover and Norway drainage district.

In view of our answer to your first question, it is unnecessary to answer your second question.

AGH

Criminal Law — Rape — Prisons — Prisoners — Parole — Person convicted of “carnal knowledge and abuse” of female under age of eighteen under sec. 340.47, Stats., is required to be sentenced to fixed term of imprisonment, since crime of carnal knowledge is “rape” within meaning of exceptions to indeterminate sentence law secs. 359.05 and 359.07, Stats., notwithstanding enactment of ch. 77, Laws 1939.

June 30, 1941.

A. W. BAYLEY, *Secretary,*
Department of Public Welfare.

You state that P. S. was convicted of carnal knowledge and abuse of a female under eighteen years of age, contrary to sec. 340.47, Stats., and sentenced to the Wisconsin state prison on October 20, 1939, for a term of not less than six years nor more than six years. The offense took place after the enactment of ch. 77, Laws 1939, which amended the title of sec. 340.47 as will be hereinafter discussed. P. S. has now applied for a parole, and the question arises whether he is eligible for parole at this time or whether he must serve one half of the maximum term before being eligible under sec. 57.06.

The question is whether the sentence of P. S. should be construed as a determinate sentence of six years or as an indeterminate sentence of not less than one nor more than six years. If the offense is not within the indeterminate sentence law so that the sentence imposed is required to be for a fixed term, then the sentence must be construed as a determinate sentence of six years. XIX Op. Atty. Gen. 604. On the other hand, if the offense is within the indeterminate sentence law, then the minimum term must be that fixed by law, which in this case is one year, and the fact that the court fixed the minimum term at six years—the same as the maximum—is immaterial, since the sentence is automatically corrected by operation of law under sec. 359.05, Stats.

The applicable sections of the indeterminate sentence law are as follows:

Sec. 359.05. "In every case in which the punishment of imprisonment in the state prison is awarded against any convict, except persons convicted of treason, murder in the first degree as defined by law, *rape*, kidnaping, or of any crime for which a minimum penalty is fixed by statute at twenty years or more, the court may fix a term less than the maximum prescribed by law for the offense, and the form of the sentence shall be substantially as follows:

"You are hereby sentenced to the state prison at Wau-pun at hard labor for a general indeterminate term of not less than * * * (*the minimum as fixed by the law for the offense*) years, and not more than * * * (*the maximum as fixed by the court*) years' and shall have the force and effect of a sentence of the maximum term, subject to the power of actual release from confinement by the board of control or actual discharge of the governor upon recommendation of the board of control by pardon as provided by law. *If, through mistake or otherwise, any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section.* Persons convicted of treason, murder in the first degree as defined by law, *rape*, kidnaping, or in the case of any other crime for which a minimum penalty is fixed by statute at twenty years or more, shall be sentenced for a certain term of time. Nothing herein shall be construed to extend or modify the term of imprisonment of any person sentenced prior to the enactment of this statute."

Sec. 359.07. "The sentence of any convict found guilty of treason, murder in the first degree as defined by law, *rape*, kidnaping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time. In all other cases the sentence shall be for a term not less than one year and shall be for a general or indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. * * *

The ultimate question is whether the offense of "carnal knowledge and abuse" as defined by sec. 340.47, Stats., is included within the term "rape," as used in the foregoing statutes so as to require a determinate sentence, in view of the amendment of sec. 340.47, by ch. 77, Laws 1939. Before the enactment of that chapter, secs. 340.46 through 340.48,

Stats. 1937, read as follows:

"340.46 Rape. Any person who shall ravish and carnally know any female of the age of sixteen years or more, by force and against her will, shall be punished by imprisonment in the state prison not more than thirty years nor less than one year; but if the female shall be proven on the trial to have been, at the time of the offense, a common prostitute, he shall be so punished not more than seven years nor less than one year.

"340.47 Same. Any person over eighteen years of age who shall unlawfully and carnally know and abuse any female under the age of eighteen years shall be punished by imprisonment in the state prison not more than thirty-five years nor less than one year, or by a fine not exceeding two hundred dollars; and any person of the age of eighteen years or under who shall unlawfully and carnally know and abuse any female under the age of eighteen years shall be punished by imprisonment in the state prison not more than ten years nor less than one year, or by fine not exceeding two hundred dollars.

"340.48 Assault intending to rape. Any person who shall assault any female with intent to commit the crime of rape shall be punished by imprisonment in the state prison not more than ten years nor less than one year."

These sections are derived from secs. 39, 40 and 41 of ch. 133, R. S. 1849. Sec. 39 was entitled in the margin "Rape"; sec. 40, "Rape and abuse of child" and sec. 41, "Assault with intent to commit a rape." With the exception of changes from time to time in the age of consent—commencing with ten years in 1849 and since raised to eighteen years—and in the penalties, the form of these three sections remained substantially the same until the enactment of ch. 77, Laws 1939.

The offense of carnal knowledge and abuse of a child under the age of consent as defined by law has always been held by the Wisconsin supreme court to be "rape," (*Fizell v. The State*, (1870) 25 Wis. 364, 368-369), being sometimes distinguished from forcible rape by the use of the term "statutory rape." See, e. g.: *Lanphere v. State*, (1902) 114 Wis. 193; *Haley v. State*, (1932) 207 Wis. 193; *Cleveland v. State*, (1933) 211 Wis. 565; *State v. Fischer*, (1938) 228 Wis. 131. In a case arising after the enactment of ch.

77, Laws 1939, the court still referred to the offense as "rape" although its attention had been called to the amendment of the title of sec. 340.47. *State v. Crabtree*, (1941) 237 Wis. 16, 21.

The same appears to be true in most states, although there are some which do not regard the statutory offense as a form of rape. See 36 Words & Phrases (perm. ed.) 87-89.

This terminology is of very ancient origin. In *Commonwealth v. Roosnell*, (1886) 143 Mass. 32, 8 N. E. 747, 750, defendant was charged under a statute, similar to sec. 340.48, prohibiting assault with intent to rape. The proof was that he had had relations with two nine-year-old girls but without actual penetration. He argued that since the children had consented to these relations he was not guilty of an assault with intent to commit rape. The question turned on whether the statutory offense of "carnal knowledge and abuse" of a female child under the age of ten was "rape" in the meaning of the assault statute. The court held—in accord with *Fizell v. The State*, (1870) 25 Wis. 364—that it had been so considered in Massachusetts for upwards of two hundred years and stated as follows with reference to the term as used in England:

"In England, the definitions of 'rape' have sometimes included the statutory offense of carnal knowledge of a young child. Thus: 'Rape is felony, by the common law, declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years, against her will, or of a woman child under the age of ten years, and with her will or against her will.' 3 Coke, Inst. 60. 'Rape is the carnal knowledge of any woman above the age of ten years, against her will, and of a woman child under the age of ten years, with or against her will.' 1 Hale, P. C. 628. See, also, page 631. In East, P. C. 436, it is said: 'This last offense [viz., unlawful abuse of a child] is not, properly speaking, a rape, which implies a carnal knowledge against the will of the party, but a felony created by this statute, [18 Eliz. c. 7, sec. 4] under which the consent or non-consent of the child, under the age of ten years, is immaterial.' Other writers have directly, or by implication, included the statutory offense within the term 'rape.' See 4 Bl. Comm. 212; 1 Gabb. Crim. Law, 832; Roscoe, Crim. Ev. (7th Ed.) 289, 851. But, however it may have been elsewhere, in Massachusetts the offense of unlawfully and carnally know-

ing and abusing a female child under the age of 10 years is, and for more than 200 years has been, known and designated as 'rape.' ”

The indeterminate sentence law above quoted was first enacted by ch. 359, Laws 1925. Every statute must be read in the light of conditions existing at the time of its enactment (25 R. C. L. 959) and there can be no question that in 1925 the word “rape” included carnal knowledge and abuse of a female under the age of consent. Clearly, then, at that time a person convicted under sec. 340.47 was required to be given a determinate sentence since the offense was specifically excluded from the indeterminate sentence law.

This leads to a consideration of ch. 77, Laws 1939, the material portions of which amended the title of sec. 340.47 from “Same” (*i. e.*, referring to the title of the preceding section,—which was “Rape”) to “Carnal knowledge and abuse” and amended the title of sec. 340.48 to read as follows: “Assault intending to rape *or carnal knowledge and abuse.*” It also amended the body of sec. 340.48 to read, “Any person who shall assault any female with intent to commit the crime of rape *or of carnal knowledge and abuse* shall be punished” etc.

It is claimed that the effect of this change in the title of sec. 340.47, together with the amendment of sec. 340.48, discloses a legislative intent that carnal knowledge and abuse of a female under the age of consent shall no longer be dominated “rape” and therefore is brought within the terms of the indeterminate sentence law. It is considered that this contention is incorrect.

The ultimate end to be sought in the construction of any statute is a determination of the intent of the legislature which enacted it. All other rules of construction are subordinate and look to that ultimate goal. 25 R. C. L. 956, 960. Ch. 77, Laws 1939, had for its principal purpose the conferring of additional jurisdiction upon the juvenile courts. Prior to that time, the juvenile courts had exclusive jurisdiction of delinquent children under the age of sixteen and concurrent jurisdiction with the criminal courts of delinquent children between the ages of sixteen and eighteen. Sec. 48.01, Stats. 1937. Sec. 1 of ch. 77, Laws

1939, amended sec. 48.01 (1) (c) to include in the definition of the words "delinquent child" the following: "*if below twenty-one years of age, [who] shall unlawfully and carnally know and abuse any female under the age of eighteen years, or assault intending carnal knowledge and abuse.*" The same section also amended sec. 48.01 (5) (a) to extend the concurrent jurisdiction of the juvenile court to "*cases wherein a male minor child between eighteen and twenty-one years of age is charged with having unlawfully and carnally known and abused any female under the age of eighteen years or with assault intending carnal knowledge and abuse,*" and wherein the criminal court having jurisdiction thereof waives its jurisdiction in favor of that of the juvenile court. (Note: This last amendment does not appear in the 1939 statutes, although it has never been specifically repealed. See, however, ch. 524, sec. 2, Laws 1939, and sec. 10 of Bill No. 40, S., 1941 Legislature.) Sec. 2 of ch. 77, Laws 1939, created sec. 48.07 (1) (d) which provided as follows:

"In any case involving a male minor between eighteen and twenty-one years of age where the criminal court shall have waived jurisdiction in favor of the juvenile court as provided in paragraph (a) of subsection (5) of section 48.01 the court may place such minor on probation, as provided in this section, until twenty-five years of age or commit him to such institution and for such term as he might have been committed to by the criminal court."

Reference to the original Bill No. 211, S., reveals that the amendments of the *titles* of secs. 340.47 and 340.48 above noted were not included therein (although the amendment of the text of sec. 340.48 was included). These amendments (of the titles) were first introduced in Substitute Amendment No. 1, S., to Bill No. 211, S., which was eventually passed and became ch. 77.

It will be observed that the subject matter of ch. 77, Laws 1939, had nothing to do with the indeterminate sentence law, but dealt exclusively with the jurisdiction of the juvenile courts. It was obviously the intention to bring within that jurisdiction male offenders between the ages of eighteen and twenty-one who were guilty of "statutory

rape" or assault with intent to commit "statutory rape," but not those of the same age who committed forcible rape or an assault with intent to commit forcible rape. The only apparent purpose of the amendments of secs. 340.47 and 340.48 was to clarify the references to "carnal knowledge and abuse" and "assault intending carnal knowledge and abuse" in the amendments of sec. 48.01.

As pointed out above, both forms of rape were excluded from the indeterminate sentence law at the time of its enactment in 1925. To construe ch. 77, Laws 1939, as bringing statutory rape within the indeterminate sentence law amounts to saying that ch. 77 constituted an implied amendment of secs. 359.05 and 359.07. It is well established that implied amendments are not favored and occur only where there is an irreconcilable conflict or repugnancy between an earlier statute and a later one. 59 C. J. 857. There is no irreconcilable conflict or repugnancy between the statutes involved here.

Moreover, if there were repugnancy, it would be resolved in this case by sec. 370.02 (2), which provides as follows:

"In addition to the rules of construction specified in section 370.01 the following rules shall be observed in the construction of these statutes:

"* * *

"(2) If the provisions of different chapters of these statutes conflict with or contravene each other the provisions of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter."

Thus the word "rape" as used in ch. 359, Stats., may retain its original meaning even though it has acquired a more restricted meaning as used in ch. 340.

No legislative intent to amend the indeterminate sentence law can possibly be spelled out of the enactment of ch. 77, Laws 1939. It makes no change in the substantive law relating to statutory rape (except, of course, to confer jurisdiction on the juvenile court), but merely changes the name of the offense for certain limited purposes which are apparent on the face of the act. Both the supreme court and this office have recognized the validity of Shakespeare's dictum:

“What’s in a name? that which we call a rose
By any other name would smell as sweet.” Romeo
and Juliet, act II, scene 2;

Kopplin v. Quade, (1911) 145 Wis. 454; XXVI Op. Atty. Gen. 386. Furthermore, “section, * * * titles, * * * constitute no part of the section.” Sec. 35.19.

“Carnal knowledge and abuse” has always been recognized in this state as a form of rape, just as manslaughter is a form of homicide. It is significant that neither sec. 340.46 nor sec. 340.47 contains the word “rape” except in the title of sec. 340.46, which is no part of the statute. Sec. 35.19.

You are therefore advised that the sentence of P. S. is in legal effect a determinate sentence of six years and that he will not be eligible for parole under sec. 57.06 (1) until he has served three years thereof without deductions for good time.

WAP

Public Health — Nursing — Anaesthetists — Person employed as anaesthetist in hospital is not required to be registered nurse under ch. 149, Stats., so long as she does not hold herself out as being registered, graduate, certified or trained nurse and practice as such.

July 11, 1941.

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

You inquire whether anaesthetists are required to be registered nurses under ch. 149, Stats. You state that a certain woman now employed as an anaesthetist in a Milwaukee hospital is a registered nurse under the laws of Indiana but claims that she is not required to register in Wisconsin as a condition to the performance of the duties of an anaesthetist.

Ch. 149 does not require anyone to be a registered nurse in order to practice nursing in Wisconsin. It merely prohibits practicing as a registered or graduate nurse by persons who are not registered. *Nickley v. Eisenberg*, (1931) 206 Wis. 265, 270. Accordingly, unless the person in question is holding herself out as a registered, graduate, certified or trained nurse, she is not violating ch. 149.

The precise question has been previously ruled on by this office in XX Op. Atty. Gen. 136, where the conclusion was reached that an unlicensed person may administer an anaesthetic under the supervision of a licensed dentist or surgeon. See also VI Op. Atty. Gen. 800.

WAP

Public Health — Optometry — Osteopathy — Although osteopaths are permitted to practice optometry without license, pursuant to sec. 153.01, Stats., this does not authorize use of "drops" in eyes as aid in refraction, since that is not included in optometry but constitutes practice of medicine. Osteopaths may not use drugs for any purpose except incidentally to practice of surgery.

July 16, 1941.

DR. H. W. SHUTTER, *Secretary,*
Board of Medical Examiners,
 Milwaukee, Wisconsin.

You inquire whether an osteopathic physician may use "drops" in the eye in refraction work where they are used solely as a mechanical aid in the measurement of refractive errors.

Sec. 153.01, Stats., provides in part as follows:

"* * * No person shall practice optometry without a certificate of registration properly filed. This shall not apply to physicians and surgeons * * *"

This office has ruled that osteopathic physicians may practice optometry under the foregoing statute. XXX Op. Atty. Gen. 4.

Sec. 153.01, Stats., provides in part as follows:

"The practice of optometry is the employment of any means, *other than the use of drugs*, for the *measurement* of the powers of vision and the adaption of lenses, prisms and mechanical therapy for the aid thereof. * * *"

It is clear from these words that the use of drugs in the measurement of the powers of vision and the adaption of lenses is outside the scope of the practice of optometry as defined by sec. 153.01. The permission to practice optometry given to osteopaths by this section does not, therefore, empower them to use drugs in the measurement of the powers of vision and the adaption of lenses, as a function of the practice of optometry. It has been held under a sim-

ilar statute of Massachusetts that a physician who fits glasses *without the use of drugs* is not practicing medicine but is merely practicing optometry without a license, under the statutory exemption of physicians. *Sachs v. Board of Registration in Medicine*, (1938) 300 Mass. 426, 15 N. E. 2d 473, 475.

There remains the question whether the use of "drops" solely as a mechanical aid in the measurement of refractive errors is a function which is within the scope of the "practice of osteopathy" independently of the fact that it is not included in the legislative definition of the practice of optometry, or whether the use of such "drops" constitutes the practice of medicine and as such is prohibited to osteopaths unless they are also licensed to practice medicine. (See X Op. Atty. Gen. 837; XIV Op. Atty. Gen. 231; XVIII Op. Atty. Gen. 6; XXI Op. Atty. Gen. 163 to the effect that an osteopath may not practice medicine unless he is also licensed to practice medicine and surgery.)

Neither the term "practice of medicine and surgery" nor the term "practice of osteopathy and surgery" is defined by the present Wisconsin statutes. In XXIX Op. Atty. Gen. 148, the term "medicine" in secs. 147.13 to 147.18, Stats., was interpreted as being used in the narrow sense as 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, but including "medication" through administration of drugs, serums, etc., and excluding surgery and osteopathy.

Definitions and opinions are uniform in pointing out that osteopathy is a method of treatment without the use of drugs. V Op. Atty. Gen. 470; XXIX Op. Atty. Gen. 148; Words & Phrases. In Wis. Laws 1903, ch. 426, sec. 3, where osteopathy is for the first time mentioned in the Wisconsin statutes as a separate branch of the art of treating the sick, this statement appears:

"* * * Osteopaths, when so licensed, shall have the same rights and privileges and be subject to the same laws and regulations as practitioners of medicine and surgery, *but shall not have the right to give or prescribe drugs or to perform surgical operations.*"

This is a clear indication that the application of drugs to the human body for any purpose was reserved to those who were licensed to practice medicine, and was in accord with the common understanding of osteopathy as a form of treating the sick without the use of drugs. This prohibition was omitted when the statutes relating to treating the sick were revised by ch. 438, Laws 1915, and it does not now appear in the Wisconsin statutes. There is no reason to regard the omission of this prohibition as having any greater effect with respect to the right of osteopaths to use drugs in *detecting* or *diagnosing* than with respect to *treating* disease. Clearly, the omission did not give osteopaths the right to use drugs in *treating* disease. V Op. Atty. Gen. 470, XVIII Op. Atty. Gen. 6. The same must be said for the use of drugs by osteopaths in *detecting* or *diagnosing* disease.

The right to become licensed surgeons was given to osteopaths by specific statutory provision, Laws 1915, ch. 438, sec. 2. There has, however, been no expression of legislative intent to alter the general meaning of "osteopathy" which prevailed prior to 1915 and which is still generally accepted today. The omission of the express prohibition cannot be regarded as a grant of permission to osteopaths to use drugs, but must be considered as a recognition of the fact that the common understanding of the term "osteopathy" excluded the application of drugs to the human body for any purpose. Encyclopaedia Britannica (14th ed. 1929, 1930); "Osteopathy" Dorland, American Illustrated Medical Dictionary, (18th ed. 1938); Gould's Medical Dictionary, (4th revised ed. 1937); Stedman's Medical Dictionary, (14th revised ed., 1939); "The Osteopathic Catechism", Osteopathic Health, Vol. XXVII, No. 3, (Sept. 1914, The Osteopathic Publishing Co.).

Moreover, applicants for licenses in osteopathy and surgery are not examined in *materia medica*, and hence there is no assurance that they have the requisite knowledge of the use of the drugs commonly employed in refracting eyes.

You are therefore advised that the application of drugs to the human body for any purpose is not included in the "practice of osteopathy", but that such use of drugs constitutes the "practice of medicine", and as such is not permitted to osteopaths under secs. 147.13 to 147.18, Stats., except

where the use of drugs is incidental to the practice of surgery.

WAP

Appropriations and Expenditures — Legislature — Resolutions — Joint resolution directing state highway commission to make survey and prepare plans for construction of road and directing that cost of said survey be charged to allotment due county under sec. 20.49, subsec. (4), Stats., does not have force and effect of law and cannot operate to amend those provisions of statutes which would otherwise be controlling.

July 21, 1941.

HIGHWAY COMMISSION.

You have made several inquiries respecting Joint Resolution No. 87, A., of the 1941 legislature, which resolution directs the state highway commission to make a survey and prepare preliminary plans for the construction of Lincoln Memorial Drive in the city of Milwaukee extending south-erly from the present Lincoln Memorial Drive bridge across the Milwaukee river harbor entrance to East Russell street. The resolution further provides that the cost of the survey and preparation of the plans shall be charged to and paid from the allotment due Milwaukee county under sec. 20.49 (4), Stats., and that such survey and report shall be submitted to the legislature.

We are first asked whether a joint resolution has the effect of law in directing the actions of the state highway commission and the disbursement of state appropriations and allotments.

The legal effect of a joint resolution has been considered by this office on a number of occasions. In IV Op. Atty. Gen. 1076 the view was expressed that a joint resolution does not have the force of law. We quote from page 1078 of that opinion:

“Art. IV, sec. 17, Const., provides:

“The style of the laws of the state shall be “The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:” and no law shall be enacted except by bill.’

“Art. V, sec. 10, provides in part:

“Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections,’ etc.

“It also provides the method for such a bill becoming law despite such veto.

“Art. VIII, sec. 2, provides in part:

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

“So far as I have found, our constitution makes no reference whatever to legislative resolutions.”

The opinion then goes on at some length to point out and discuss authorities on the subject. In VI Op. Atty. Gen. 329 it was held that an appropriation may not be made by joint resolution but must be by a bill.

In VIII Op. Atty. Gen. 663 it was stated that a joint resolution merely expresses the opinion of the legislature and hence does not constitute “business” within the meaning of art. IV, sec. 11, Wisconsin constitution, and that consequently any subject might be considered by joint resolution in a special session even though not enumerated in the governor’s call.

Again in XXI Op. Atty. Gen. 52 we express the opinion that an existing law of the state could not be changed by joint resolution but could only be amended by a bill.

In XXII Op. Atty. Gen. 589 the rule was stated in the form of the following quotation from a Texas case, p. 590:

“The chief distinction between a resolution and a law seems to be that the former is used whenever the legislative

body passing it wishes to merely express an opinion as to some given matter or thing, * * * while by the latter it is intended to permanently direct and control matters applying to persons or things in general.' *Conley v. Texas Div. U. D. of Confederacy*, (Tex.) 164 S. W. 24, 26."

In *State ex rel. Fulton v. Zimmerman*, 191 Wis. 10, it was held that the legislature could pass a resolution giving force and effect to another resolution which did not attempt to perform the function of a law but was confined to the single function of designating a question to be submitted to the voters. The resolution imposed no duty on the secretary of state to submit the question to the people, since the statutes involved required him to submit such questions when their submission was directed by resolution as well as by act of the legislature.

Manifestly the situation in the *Zimmerman* case differs greatly from the present one. The resolution in question purports to perform the functions of a law in that it is a positive direction to the highway commission to make a certain survey and prepare plans not otherwise required by law. Nor under the distinction between a resolution and a law as set forth in the Texas decision above is this enactment merely an expression of legislative opinion.

In substance, the situation seems to be that our constitution prescribes a definite method of enacting laws, and any attempt on the part of the legislature to express its wishes in a form falling short of compliance with the procedure outlined in the constitution is ineffective as far as becoming a law is concerned. Consequently a joint resolution, not being in accordance with the prescribed constitutional procedure, is not a law but in this instance amounts merely to an advisory request by the legislature expressing its wishes or opinion upon the subject covered by the joint resolution.

You further ask whether in view of subsecs. (2) and (3) of sec. 84.03 the survey and preliminary plans as described in the resolution may be charged to and paid from the allotment due Milwaukee county under sec. 20.49 (4).

For purposes of answering this question, we will assume that the commission decides to act upon the resolution al-

though it is not mandatory, and that the commission has the power to proceed with such a survey.

Sec. 20.49 (4) appropriates an annual sum to meet the provisions of subsecs. (2) and (3) of sec. 84.03. Sec. 84.03 (2) allots part of this sum in certain ratios to counties for the construction, repair and maintenance of county trunk highway systems. Sec. 84.03 (3) allots the remainder in like fashion to counties for the construction, reconstruction and improvement of state trunk highway systems.

Except for the resolution, no authority appears for the allocation of cost of the survey as suggested. Neither sec. 20.49 (4) nor subsecs. (2) and (3) of sec. 84.03 contemplates such a procedure, since the appropriations therein provided are to the counties and not to the state highway commission which, under the resolution in question, is directed to make the survey and prepare the plans. The resolution would therefore effect an amendment of the statutes which would otherwise govern the situation and, as pointed out above, a joint resolution cannot change existing law.

It is therefore our opinion that the resolution is ineffective in attempting to charge the cost of such a survey to the allotment due Milwaukee county under sec. 20.49 (4). Possibly such procedure would be proper if authorized by the county board of Milwaukee county, since the county is the recipient of the allotment under the statutes and a survey and preparation of plans would constitute a necessary incident of the "construction" of a highway within the meaning of sec. 84.03 (2) and (3), Stats.

The disposition of the foregoing questions renders moot your remaining inquiries.

WHR

Taxation — Tax Sales — Last sentence of sec. 75.01, subsec. (2), Stats. 1939, as added by ch. 503, Laws 1939, is applicable and valid as applied to reduction in valuation under said subsection taken after it went into effect but in reference to taxes assessed and returned delinquent prior thereto.

July 21, 1941.

HAROLD W. KRUEGER,
District Attorney,
Oconto, Wisconsin.

You state that certain industrial property in a city in your county was assessed at \$200,000.00 for the years 1937 and 1938 and the taxes thereon for those years, being unpaid, were returned delinquent to the county, which purchased the same at the tax sales and thereby became the owner of the tax certificates thereon. Subsequently proceedings were had under sec. 75.61, subsec. (2), Stats., resulting in a finding by the city council reducing the assessed valuation thereon for said years to \$150,000.00. Our opinion is requested as to whether the difference between the taxes as returned delinquent under the original assessments and the taxes paid upon the basis of the reduced assessments may be charged back by the county to the city in which the property is located.

Prior to the enactment of ch. 503, Laws 1939, a county had no authority to charge back to the town, city or village the loss in taxes occasioned by a finding under sec. 75.61 (2), Stats., by the town or village board or city council, as the case may be, of a value on tax delinquent land less than the assessed valuation. We so ruled in XXVII Op. Atty. Gen. 724. But thereafter sec. 75.61 (2), Stats., was amended by ch. 503, Laws 1939, which took effect upon its publication on October 9, 1939, by adding the following sentence at the end thereof:

“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.”

You do not state when the reduction proceedings in question took place, but by reason of your reference to this amendment and to our opinion in XXVII Op. Atty. Gen. 724 we assumed they occurred after the effective date of said ch. 503, Laws 1939. As was stated in the opinion in XXVII Op. Atty. Gen., 724, the question is whether the county has the power or authority to make the charge back. We then held that the county possessed no such power or authority because there was no statutory provision granting it. But, when the reduction proceedings were had in the instant case, the amendment to sec. 75.61 (2), Stats., was in effect. There was thus at that time express statutory authority to the county to make a charge back and therefore it possessed the power to do so when the reduction in valuation was made by the city council in this case.

There can be no question but that the provisions of this amendment to sec. 75.61 (2), Stats., are applicable to reduction proceedings taking place after the effective date thereof, even though in reference to delinquent taxes that were levied and returned delinquent prior to such amendment. Such amendment, as so applied, is not invalid for there is no question of depriving the town, city or village of its property without due process of law in contravention of the constitution by giving the county the power and authority to charge back the resulting tax loss in reference to taxes which were assessed and returned delinquent at a time when it possessed no such power. There is no proprietary interest of a county or a town, city or village in taxes, even after collection thereof, which is subject to constitutional protection. *Town of Bell v. Bayfield County*, (1931) 206 Wis. 297, 239 N. W. 503; *Richland County v. Richland Center*, (1884) 59 Wis. 591.

It is therefore our opinion that last sentence of sec. 75.61 (2), Stats. 1939, is applicable to the case which you present and the county may charge back the resulting tax loss. For the amount that may be charged back see our opinion in XXIX Op. Atty. Gen. 476.

HHP

Taxation — Tax Collection — Lands purchased by United States subsequent to May 1 are subject to taxes assessed and levied for that year.

July 21, 1941.

CLARENCE OLSON,
District Attorney,
Ashland, Wisconsin.

Certain land was assessed by the town for 1940 general taxes. On October 11, 1940, it was purchased by the United States by warranty deed from the estate of the deceased owner, which was recorded October 16, 1940. It is not so stated, but, because you relate that said 1940 taxes thereon have not been canceled and it is contended upon behalf of the United States that the land is not subject to this tax, we assume that the 1940 tax was returned delinquent to the county and the property was sold therefor at the tax sale. Our opinion is requested as to whether this property is subject to said unpaid 1940 tax.

In XXVIII Op. Atty. Gen. 523 we concluded that under the provisions of sec. 70.10, Stats., real estate is assessable in this state on May 1st and no change in ownership thereafter affects its taxability for that year. Our court has held a tax on real estate relates back to the time of the assessment thereof and constitutes a lien thereon as of such date. *Peters v. Myers*, (1868), 22 Wis. 602; *Nicolet Securities Co. v. Outagamie County*, (1935) 217 Wis. 439, 259 N. W. 621. Under the rule of *Erie R. Co. v. Tompkins*, (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, this construction of our statutory scheme is as effective and binding as though the statutes so stated expressly, as was the case in the recent case involving the Alabama law, which we mention later herein.

It has been debated for some time, and able counsel in reliance on cases such as *United States v. Pierce County*, (1912, D. C. W. D. Wash.), 193 Fed. 529, have been of the opinion that, even though such is the rule as applied to ordinary situations, it could not validly be applied so as to subject land purchased by the federal government between the assessment date and the time the amount of tax thereon

is determined by the county board and the tax completed to the payment thereof, because to do so would be taxing land when it was owned by the federal government and violative of the rule that a state may not tax the federal government or its property. However, a recent case decided by the United States supreme court, *United States v. Alabama*, (May 26, 1941) 61 Sup. Ct. (adv. sheets) 1011, 85 L. ed. (adv. sheets) 896, is controlling upon the question and holds that an inchoate tax lien as of the assessment date is good against the United States acquiring land after that date. There the state statutory scheme expressly provided that the lien of the tax attached to the land on the assessment date but the amount of the tax was not determined and fixed until subsequently and by proceedings some time later. The court expressly held that there was nothing in the federal constitution invalidating such scheme as applied to land purchased by the federal government after the assessment date but before the tax was complete, and that such land was subject to the tax for that year and it constitutes a lien thereon.

The provision of sec. 74.62, Stats., that when there is no express agreement between the grantor and the grantee as to which shall pay the taxes for the year in which the conveyance is made, the grantee shall pay the same if the land is conveyed after December 1 but if before that date then the grantor shall pay them, has no bearing upon the question here considered. That statute merely specifies a method for determining the obligation as between grantor and grantee for the payment of the taxes to fall due in January of the year following the conveyance.

It is therefore our opinion the land you mention is subject to the 1940 unpaid taxes as assessed and levied thereon and that said taxes constitute a lien thereon.

HHP

Taxation — Tax Collection — Ch. 294, Laws 1937, amended ch. 426, Laws 1933.

July 22, 1941.

E. E. BROSSARD,
Revisor of Statutes.

Ch. 426, Laws 1933, providing for a system of instalment payment of real estate taxes as enacted was to take effect October 1, 1935. By amendments thereto, passed in 1935, 1937 and 1939, the effective date of said chapter was postponed for successive two-year periods, so now it will go into effect on October 1, 1941. In view of the direct conflict between the provisions of ch. 294, Laws 1937, which provides that

“* * * the two per cent penalty, advertising fee, selling fee, redemption fee and the interest charge of eight per cent per annum now in force are abolished. In lieu thereof a flat interest charge of eight-tenths of one per cent per month or fraction thereof on the principal sum of the tax from the first day of January succeeding the year of the tax levy shall be charged. All laws or parts of laws inconsistent herewith are repealed and the revisor of statutes is directed to amend the applicable sections of the statutes in accordance with this act,”

and said ch. 426, which literally carries the “two per cent penalty, advertising fee, selling fee, redemption fee”, abolished by ch. 294, and also has an interest charge of one per cent per month, you have requested our opinion as to whether said ch. 294 is controlling and you should proceed accordingly.

While some of the cases cited in 59 C. J. sec. 673, p. 1137, in support of the general rule that a statute speaks from the time it goes into effect and not otherwise, use language that until the effective date of a statute it is no law at all, it must be read in light of the problems there considered. In our view, ch. 426, Laws 1933, has been a law ever since it was enacted even though no rights could or do arise under it until the date when the legislature says it shall be effective. At least it was a law to the extent that it could be amended

expressly, for such was done when the provision thereof as to its effective date was successively amended in 1935, 1937 and 1939. If it was a law to the extent that it could be expressly amended it was a law to the same extent for the purpose of implied amendment. Ch. 294 clearly implied that all laws subject to amendment were thereby amended by abolishing the previously existing penalty, charges and interest and substituting a flat interest charge of eight-tenths of one per cent per month.

But the controlling rule of statutory construction would appear to be that the last expression of the legislature upon a subject shall be controlling. Surely, as between ch. 426, Laws 1933, and ch. 294, Laws 1937, the last expression of the legislature upon the question of interest, penalties and charges in relation to delinquent real estate taxes is ch. 294, Laws 1937. The legislature thereby intended, and the very language used and the adoption and choice of this all inclusive, general and unusual type of amendatory procedure shows that such was its object, to abolish the "system" or "plan" of penalties, charges, fees and interest then "in force" as embodied in the Wisconsin statutory scheme for collection of real estate taxes and to substitute therefor in such scheme an entirely new and different arrangement of just one flat interest charge all the way through. As so viewed, the provisions of ch. 426 in respect to the same are within the purview of the words "now in force" in said ch. 294, and so within the abolition of the first sentence and the substituting effect of the second sentence. The last sentence of ch. 294 is sweeping and unlimited, and clearly covers ch. 426 if it is within the effect of the prior sentences, and we are of the opinion that it is.

In 25 R. C. L. 916 it is stated:

"* * * It has been held that the later of two inconsistent statutes will prevail, although the prior one is not to take effect until a time subsequent to the passage and taking effect of the later one."

The California cases there cited are directly in point and support one conclusion, that ch. 294, Laws 1937, amended ch. 426, Laws 1933, the former being the last expression of

the legislature upon the subject involved. The latest case on the point is *Ex parte Sohncke*, (Cal.) 82 Pac. 956, which cites certain other California cases to the same effect which are directly in point and almost parallel to the instant situation.

You are therefore advised that it is our opinion that ch. 294, Laws 1937, amended ch. 426, Laws 1933, which will become effective October 1, 1941.

HHP

Counties — County Board — Taxation — Tax Collection
— Resolution of county board fixing interest rate payable upon delinquent taxes and certificates of sale of tax year 1940 is invalid as beyond power of county.

July 26, 1941.

S. RICHARD HEATH,

District Attorney,

Fond du Lac, Wisconsin.

You state that your county board on December 6, 1940, adopted a resolution fixing the interest rate at seven per cent per annum on delinquent taxes and tax certificates beginning with the tax year of 1940 and request our opinion as to the validity thereof.

While it was formerly true that there were two types of interest as pointed out in the opinion in XXIII Op. Atty. Gen. 529, that was at a time when the face amount of the tax sale certificate included the unpaid tax, penalties, charges and interest to the date of sale, and the certificate thereafter bore what was termed redemption interest, computed upon the face amount thereof. This has now been changed and the face amount of the tax certificate as set out in sec. 74.46, Stats. 1939, is the amount of the unpaid tax and then it is specified therein that interest thereon is to be computed at the rate of eight-tenths of one per cent per

month from January first after the tax year, which is as provided by sec. 75.01, Stats. 1939, for redemption from tax sales. Thus, under the present statute the interest payable upon delinquent taxes is fixed at eight-tenths of one per cent per month and the county has no authority to change it.

However, sec. 75.01 (1m), Stats. 1939, does give the county the power to fix the interest it will accept in redemption of certificates of sale which it owns at any rate less than eight-tenths of one per cent per month. That is something quite different from fixing the interest rate on delinquent taxes and tax certificates generally which the resolution attempted to do. But, even that general power given by sec. 75.01 (1m) is restricted and limited by sec. 75.015, Stats., so that the power given under sec. 75.01 (1m) may be exercised, beginning with the 1937 levy, only in respect to the interest accruing after two years therefrom. As special legislation it is controlling over the general law, sec. 75.01 (1m), and takes precedence if there is any conflict between them.

Similarly sec. 74.205, Stats. 1939, applies only to grant power to the county in respect to certificates which it holds, and furthermore is specifically applicable only to taxes of the years 1931 to 1936, inclusive. By ch. 160 Laws 1941, effective June 4, 1941, it was intended to also include the years 1937 and 1938.

Viewed in light of the foregoing, the resolution in question is too general. Under the well recognized rule a county is a creature of the legislature and has only such power as is specifically granted to it by statute or is necessarily implied therein. Therefore the county has no power to fix or change the interest rate payable on tax delinquencies because there is no provision of the statutes giving the county such power and that is fixed by statute. The only power a county has is to fix the interest it will accept on certificates owned by it, which may amount almost to a waiver thereof, by fixing only a nominal rate, but subject to the limitations of sec. 75.015, Stats., of a two-year waiting period, or to waive the interest entirely on such certificates if for any of the years 1931 to 1936 (now also 1937 and 1938) by virtue of sec. 74.205, Stats. The resolution in question is not pointed to either of these objectives but endeavors to change

the interest rate on all delinquent taxes and tax certificates of the tax year 1940. It is our opinion that the resolution in question is invalid as being beyond the power of the county.

HHP

Bridges and Highways — Counties — County board is not empowered to act under sec. 83.03, subsec. (6), Stats., in construction of bridge on prospective state highway maintainable by town. Sec. 87.01, Stats., is controlling.

July 28, 1941.

E. E. HOHMAN,

District Attorney,

Wausau, Wisconsin.

You have submitted to us for examination a resolution adopted by the county board of Marathon county and ask whether the board was empowered to adopt such resolution.

The resolution states that the town of Spencer petitioned the county board under sec. 87.01, Stats., for county aid in the construction of a bridge on a prospective state highway, and that said highway is a part of the county trunk highway system of Marathon county. Pursuant to the provisions of sec. 83.03, subsec. (6), the resolution then allocates two-thirds of the cost of such bridge to the county and one-third to the town.

We are informed that the road referred to is a prospective state highway but is not designated as a county trunk highway.

The status of the highway appears to be the determining factor in the apportionment of cost between the county and the town.

Sec. 87.01, Stats., provides for the construction and repair of bridges on highways "maintainable by the town." Under this section, the cost is apportioned between town

and county according to the valuation of the town. This department has held that sec. 87.01, being limited to highways maintainable by the town, is inapplicable to county trunk highways. XXIV Op. Atty. Gen. 297.

Sec. 83.03 (6), Stats., provides in part:

“The county board may construct or improve or repair or aid in constructing or improving or repairing any road or bridge in the county. If any county board shall determine to improve any portion of the system of county trunk highways with county funds, it may assess not more than forty per cent of the cost of such improvement against the town, village or city in which the improvement is located as a special tax, * * *.”

Apparently the county may assess against the town under this statute only if the road is a county trunk highway, since that portion of the enactment relating to assessment refers only to county trunk highways. So in XIX Op. Atty. Gen. 202, 203, it was held with reference to this question:

“* * * If the county board shall determine to improve a portion of the system of *county trunk highways* with county funds, it may, under certain conditions, assess a part of the cost, not more than forty per cent, of such improvement against the town, city or village in which the improvement is located as a special tax. But if the county board constructs or improves or aids in constructing or improving any road or bridge in the county not on the system of county trunk highways, then the county board may not assess any of the cost of such improvement against the town, village or city in which the improvement is located.”

Sec. 83.14, Stats., empowers any town “to improve a designated portion of the system of prospective state highways.” If the prescribed procedure is followed, the county is required to pay at least one-half of the cost. Sec. 370.01 (5) states:

“The word ‘highway’ may be construed to include all public ways and thoroughfares and all bridges upon the same.”

However, it seems doubtful that by empowering towns to “improve” prospective state highways, the legislature in-

tended thereby to provide for the construction of bridges. It is to be noted that when the legislature intends to grant general, all-inclusive power in the development of roads, it ordinarily adopts language similar to that utilized in the first sentence of sec. 83.03 (6). In addition, it is true that where the legislature has provided a statute specifically dealing with a certain subject, as, for example, bridges, its provisions are controlling over any general statutes which might otherwise be applicable. However, in answering the question submitted to us it is unnecessary to determine here whether or not sec. 83.14 is applicable.

Furthermore, it is apparent that a "prospective state highway" has no independent status of its own but continues to be a town or county highway as the case may be until it is accepted by the state highway commission under sec. 83.01 (5), which provides in part:

*"All portions of the systems of prospective state highways including the bridges thereon improved pursuant to the provisions of this chapter shall become state highways when the improvement shall have been accepted by the state highway commission and the improved portions declared by the commission to be state highways, * * *."*

Moreover, there are no independent statutory provisions for the maintenance of "*prospective state highways*" and obviously the burden of such maintenance must rest with some governmental body.

We assume that the highway in question was a town highway before its designation as a prospective state highway. In this connection we quote the following language from VIII Op. Atty. Gen. 353, 354, relating to the placing of a town highway on the county system of prospective state highways:

*"The placing of a highway on that system makes no present or immediate change as to the political subdivision which is bound to keep the highway in condition for travel. The change made by adopting that system is wholly prospective. * * **

*** * * The obligation of the county to maintain a highway arises only when the highway passes from the con-*

dition of being part of the prospective system and actually becomes a state highway. * * *”

To the same effect see X Op. Atty. Gen. 1134.

Since the burden of maintenance is with the town, it is our opinion that the county board was without the power to allocate the cost of such bridge pursuant to sec. 83.03 (6), and that the provisions of sec. 87.01 properly apply to the situation.

WHR

Building and Loan Associations — Members of building and loan association who sign waivers of dividends in excess of stipulated percentage, excess, if any, being assigned to association, are entitled upon voluntary dissolution of such association to share assets of association, including those resulting from earnings, on same basis as are shareholders who did not sign such dividend waivers.

August 1, 1941.

BANKING COMMISSION.

In your letter of July 8, 1941, you request the opinion of this office relative to a question arising regarding waivers of dividends by members of building and loan associations. You state that some time ago a building and loan association went into voluntary liquidation and upon such liquidation paid out to its members 170% of the par value of stock held by such members, the additional 70% being made up of earnings, undivided profits and contingent fund. Some of the members of the association had signed dividend waivers and with your letter you enclosed the waiver form, which is as follows:

“Received the certificate described and for good consideration by me received, I hereby waive and release all right, claim and demand to dividends, interest or profits earned by said _____ Building and Loan Association,

in excess of — per cent, per annum, on the par value of my stock, and assign such excess, if any, to said Association.”

The question is whether members signing such a waiver should, in a voluntary liquidation of the association, share in all profits, earnings and other assets of the association on the same basis as members who did not sign such waivers or whether the signing of the waiver bars them upon such voluntary liquidation from sharing in funds accumulated through earnings in excess of the amount which they would have received in dividends during the life of the association under the waiver.

It is our opinion that a waiver executed in the form as illustrated did not constitute a waiver of the right of any shareholder signing the same to an equal participation with other members in all of the assets of the association, including those resulting from earnings, upon a voluntary liquidation of the association. In the waiver form itself it is expressly stated that while the shareholder waives dividends in excess of the stipulated percentage, such excess is nevertheless assigned to the association. The shareholders are, of course, the owners of the association and all of them, including those signing such waivers, are entitled to share in the association's property, in accordance with their respective share interest, on the same basis upon dissolution. There is nothing in the waiver form to indicate that members signing the waiver intended to transfer the waived portion of the association's earnings to other members of the association. Yet this would be the result if those signing the waivers were not permitted to share in all assets of the association upon an equal basis with non-signing members in case of voluntary dissolution.

RHL

Bridges and Highways — Public Lands — School Districts — XXIX Op. Atty. Gen. 458, holding, among other things, that power of condemnation does not extend to property owned by school districts, re-examined and reaffirmed.

August 1, 1941.

OLIVER L. O'BOYLE,

Corporation Counsel,

Milwaukee, Wisconsin.

Attention C. Stanley Perry, *Assistant Corporation Counsel.*

You have asked us to re-examine our opinion in XXIX Op. Atty. Gen. 458, holding that the power of condemnation does not extend to state or municipally owned property in so far as school districts are concerned.

You have called to our attention several reasons for modifying the opinion, and you state first that the limitation in sec. 32.03, subsec. (1), Stats., does not extend to a school district because such a district is not a "municipality" as that term is used in sec. 32.03 (1), and cite cases to that effect.

While this may be true, it does not follow that the limitation is inapplicable. This statute reads:

"The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board of commission * * *."

Obviously, not only municipalities are covered by this language, but public boards and commissions as well. To determine what is meant by "public board or commission" reference may be made to the preceding section, 32.02, which provides in part:

"The following municipalities, boards, commissions, public officers and corporations may acquire by condemnation any real estate * * *"

"(1) Any county, town, village, city including villages and cities incorporated under general or special acts, school district, the state board of control, the regents of the University of Wisconsin, the board of regents of normal schools, or any public board or commission, * * *."

According to the usual rules of statutory construction, terms used in one part of a statute will be given the same meaning in another part of the same statute. School districts having been included in the term "municipalities, boards, commissions" in sec. 32.02, it plainly follows that this must also be included in the term "the state, a municipality, public board or commission" when used in sec. 32.03 (1). It is not necessary here to determine which of the three terms it comes under, since it is necessarily included in one or the other, and, in any event, the prohibition as to condemnation would apply.

This would dispose of the matter unless ch. 83 broadens the scope of persons and agencies against whom condemnation proceedings may be had. There is no specific reference in that chapter as to against whom the proceedings may be brought. Therefore, the proper inference to be drawn, in the absence of any specific language, is that no general broadening of the scope of condemnation was intended. In those portions of ch. 83 relating to condemnation proceedings there are frequent cross references to ch. 32, and the legislature must have known of the limitations existing in that chapter when it enacted the later statute.

"Statutes in *pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. * * *." 59 C. J. 1051-2, sec. 621.

If the language used in secs. 83.07 and 83.08 be taken to mean that there is no restriction on the persons or agencies against whom condemnation proceedings may be brought, then that statute is in conflict with the provisions of ch. 32. The presumption as set forth above is against such a conflict, and a harmonious construction is readily possible, and, of course, is preferable.

If the language in secs. 83.07 and 83.08 is unrestricted in scope, then, obviously, county highway committees could

condemn "property owned by the state, a municipality, public board or commission" as well as the property of a school district. To allow this, is to effect an almost complete repeal of the limitations in ch. 32, by implication. The presumption is strongly against this, and since a consistent interpretation may be readily had, it should be taken. As intimated in our prior opinion, secs. 83.07 and 83.08 are merely procedural, and are not intended to change in any way the substantive law of eminent domain, as set forth in ch. 32.

We believe the foregoing discussion renders unnecessary any further consideration of other arguments advanced in your correspondence, and we are, therefore, taking this occasion to specifically reaffirm the holding of XXIX Op. Atty. Gen. 458, as applied to school districts.

WHR

Automobiles — Law of Road — Courts — Justice Courts — Fish and Game — Words and Phrases — Punishment —
After effective date of ch. 206, Laws 1941, justices of peace will have jurisdiction of all violations of ch. 85, Stats., punishment for which does not exceed six months imprisonment in county jail or fine of one hundred dollars or both such fine and imprisonment, notwithstanding fact that such conviction may require commissioner of motor vehicles to revoke or suspend driver's license of person convicted.

Sec. 85.08, Stats., created by ch. 206, Laws 1941, applies to all convictions occurring after it goes into effect, regardless of whether offense took place before or after effective date.

Violations of ch. 29, Stats., punishment whereof does not exceed six months imprisonment in county jail or one hundred dollar fine or both such fine and imprisonment, are within jurisdiction of justices of peace notwithstanding fact that under sec. 29.63, subsec. (3), such conviction revokes any license held by convicted person pursuant to ch. 29 and makes him ineligible to receive any such license for period of one year.

Word "punishment" as used in sec. 360.01 (5), Stats., refers only to penalty imposed by court, not to incidental results automatically following from conviction.

August 16, 1941.

RALPH STELLER,

District Attorney,

Hayward, Wisconsin.

You refer to the opinion of this office reported in XXX Op. Atty. Gen. 110—in which it was ruled that the provision of sec. 85.91, subsec. (3), Stats., authorizing a revocation of drivers' licenses as part of the "punishment" for certain offenses under ch. 85, Stats., ousted justices of the peace of trial jurisdiction in such cases—and inquire whether the same rule operates to oust justices of the peace of jurisdiction over game law offenses under ch. 29, Stats., by reason of the following provisions of sec. 29.63 (3) :

“(a) Conviction for a violation of this chapter, in addition to all other penalties, revokes any license theretofore issued pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter.

“(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter.”

In connection with the offenses involving revocation of drivers' licenses, your attention is invited to ch. 206, Laws 1941, effective September 1, 1941, which makes necessary a reconsideration of the rule announced in the earlier opinion to which you refer. Because of the great importance of the question it is deemed advisable to give consideration to that matter in this opinion, although you have not raised it in your letter. It will be more convenient to discuss the drivers' license law first before turning to your question relating to the game laws.

The opinion in XXX Op. Atty. Gen. 110 was founded on certain language in sec. 85.91 (3) which indicated that the revocation of the driver's license of a person convicted of drunken driving was part of the “punishment” for the offense and hence was beyond the trial jurisdiction of justices of the peace as defined by sec. 360.01 (5). The language referred to in sec. 85.91 (3) was repealed by ch. 206, sec. 8, Laws 1941.

Sec. 2 of said chapter repeals and recreates sec. 85.08, relating to drivers' licenses. Sec. 85.08, as reenacted, confers the sole authority to revoke or suspend drivers' licenses upon the commissioner of motor vehicles. By subsecs. (25) and (25c), *revocation* of licenses is mandatory following conviction of the licensees of certain offenses.

Subsec. (24) (a) makes it the duty of the court having jurisdiction of such offenses, to “require the surrender to it of all licenses, certificates of registration and license plates then held by the person so convicted, and the court shall thereupon forward the same, together with a record of such conviction, to the department.” Subsec. (24) (c) contains the following language:

“It shall be the duty of the clerk of such court *or the justice of the peace*, judge or magistrate of such court not hav-

ing a clerk, to comply with the provisions of paragraph (a) * * *.” (Italics supplied.)

Thus it appears that the legislature considered that justices of the peace and other courts not of record would have trial jurisdiction of such offenses. *Cf. State v. Miller*, (1869) 23 Wis. 634.

Subsec. (27) authorizes the commissioner to *suspend* the driver's license of a person convicted of certain other offenses.

Under subsec. (30) the period of *suspension* may not exceed one year and a person whose license has been *revoked* may not obtain a new license until the expiration of one year after revocation. In either case, under subsecs. (26) and (29), the person may not be granted a new license or reinstatement of the old license, as the case may be, until he has (a) filed proof of financial responsibility, (b) filed application for a new license or reinstatement and (c) demonstrated ability to operate a motor vehicle.

It will be observed that after the effective date of the new law (September 1, 1941) suspension or revocation of a driver's license is no longer to be regarded as a punishment of the offender. The new law contemplates such revocation as a means of protection of the public rather than as punishment, on the theory that the conviction shows that the defendant is not a fit person to hold a driver's license. Indeed, if it were considered a punishment there might be a serious question whether such power could be vested in an administrative officer, but if regarded as a revocation of a privilege held by an unfit person, the power of revocation may properly be delegated to the licensing officer or body. *Mandel v. Board of Regents*, (1928) 250 N. Y. 173, 164 N. E. 895. *Cf. State ex rel. Bluemound Amusement Park v. Mayor*, (1932) 207 Wis. 199. This being true, the jurisdiction of justices of peace appears to be reinstated so far as concerns offenses which are otherwise within the limits of sec. 360.01 (5). Accordingly, the ruling announced in XXX Op. Atty. Gen. 110 will not apply after September 1, 1941. It should also be observed that the new law will apply to convictions after September 1, 1941, of offenses committed before that date and no question of *ex post facto* laws

arises, since the revocation or suspension is not punishment for the offense. *Hawker v. New York*, (1898) 170 U. S. 189.

The foregoing conclusion is supported by the case of *Commonwealth v. Burnett*, (1938) 274 Ky. 231, 118 S. W. 2d 558, 560, where it appeared that the power to revoke a driver's license was vested by statute in the circuit court or the department of revenue, upon recommendation of the inferior court before which the offender was convicted. It was there held that since the inferior court had no power to revoke the license and the revocation was not for the purpose of punishment but in the interest of the public safety, the offenses were not beyond the jurisdiction of the justice court by reason of such possible revocation. See also *State v. Parks*, (1937) 199 Minn. 622, 273 N. W. 233.

Returning to your question relating to game law violators, it will be noted that sec. 29.63 (3) provides that the conviction of a violation of ch. 29 revokes any license theretofore issued under that chapter to the person convicted and also makes such person ineligible to receive any license for a period of one year following the conviction. Revocation of existing licenses and disability to receive further licenses are therefore an automatic result of the conviction. They do not form any part of the sentence of the offender, but attach by law as an inevitable result of the conviction. They are analogous to attainder under the former English law, which formed no part of the judgment but followed inevitably upon pronouncement of a death sentence, 4 Bl. Comm. 380, and to disfranchisement, which follows in this state from a conviction of treason or felony. Wis. Const., art. III, sec. 2.

It appears that a sensible construction of sec. 360.01 (5) requires that its effect be limited to *the judgment or sentence which the court may impose* rather than including incidental results attached by law to the conviction. The supreme court in *Miller v. Stats*, (1937) 226 Wis. 149, 152-153, used language indicating that it is the power of the justice to sentence the defendant which controls his jurisdiction, although the present question was not involved in that case.

In *State v. Larson*, (1889) 40 Minn. 63, 41 N. W. 363, 364, it appeared that persons convicted of violating the liquor laws were ineligible for a period of one year after conviction to receive a license to sell liquor. It was contended that this disability took such cases out of the constitutional jurisdiction of justices of the peace. The court held this contention without merit, stating as follows:

“ * * * The constitutional inhibition * * * bears upon and controls *the matter of fine and imprisonment to be imposed by the court, and not the consequences of its judgment.* Nor is the disability which attaches for a specified period of time, during which a party declared guilty of violating the law is unable to secure a license, a part of the punishment in any greater or other sense than is that loss of social or financial standing and reputation which is the usual result of conviction of crime.” (Italics supplied.)

It appears therefore that in determining whether or not the punishment for an offense exceeds the statutory jurisdiction of a justice of the peace it is necessary to determine whether the maximum penalty *which the court may impose* for the offense exceeds the limit fixed by sec. 360.01 (5) for justice courts, but no consideration will be given to incidental results of the judgment such as revocation of licenses or ineligibility to be granted a license during a specified period of time following conviction. Applying this test, you are advised that nothing contained in sec. 29.63 (3) operates to oust justices of the peace of jurisdiction of violations of ch. 29 which would otherwise be within their trial jurisdiction.

WAP

Physicians and Surgeons — Osteopaths — Public Health — Wisconsin General Hospital — Word "physician" as used in sec. 142.03, subsec. (2), Stats., includes licensed osteopathic physicians.

August 21, 1941.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

You inquire whether the word "physician" as used in sec. 142.03, subsec. (2), Stats., includes a licensed osteopath.

Sec. 142.03, first enacted by Laws 1920, Special Session, ch. 17, relates to the admission of indigent persons to the Wisconsin general hospital. It confers jurisdiction upon the county judge to investigate the facts and determine whether or not such indigent person should be admitted to the Wisconsin general hospital or the Wisconsin orthopedic hospital or rehabilitation camp. Subsec. (2) provides as follows:

"The judge if satisfied that the required facts exist, shall appoint a physician personally to examine the person. The physician shall make a verified report in writing, within such time as the court shall direct, setting forth the nature and history of the case, and such other information as will be likely to aid in its treatment, and giving his opinion whether the condition of the person can probably be remedied, or should be treated, at a hospital, and whether the person can receive adequate treatment in the county, at home or in a hospital, and any information within the knowledge of the physician relative to his financial situation. The physician shall be paid by the county, five dollars, and actual and necessary expenses. In the case of a crippled person for whom recommendation has been made for hospital treatment, by a recognized orthopedic surgeon, such recommendation may be accepted by the county judge as a reason for commitment of the crippled person to the designated or selected hospital."

This office recently ruled that the word "physician" as used in sec 153.01, exempting "physicians and surgeons" from the operation of the optometry law, includes licensed

osteopaths. XXX Op. Atty. Gen. 4. It is considered that the reasons there announced apply as well to the construction of the word "physician" as used in sec. 142.03, and you are therefore advised that osteopathic physicians may be appointed to make the examination contemplated by that section. See also *Corsten v. Industrial Comm.*, (1932) 207 Wis. 147.

The wisdom of appointing an osteopathic physician to make a determination whether the patient is in need of medical treatment may be open to question, but that is a matter within the discretion of the county judge.

WAP

Public Officers — County Pension Director — District Attorney — Social Security Act — Old-age Assistance — Under secs. 49.26 (3), 59.47 (1) and 49.25, Stats., it is duty of district attorney and county pension director without additional compensation to take steps necessary to recover from estate of deceased beneficiary of old-age assistance amounts paid for such assistance, and in case of such officers serving full time for county any extra fees earned by them inure to benefit of county. Part-time district attorney or county pension director would be entitled to retain fees allowed to them for performance of services in closing estate where such services are not required to be rendered on behalf of county.

August 23, 1941.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

Attention Patrick A. Dewane, *Assistant District Attorney.*

You have referred to an unofficial opinion of this office to the Wisconsin pension department under date of September 7, 1939, to the effect that the district attorney is entitled to

no compensation for probating the estates of old-age pensioners where the county has a claim for old-age assistance, and that the county pension director is entitled to no compensation for acting as administrator of such estates. We are asked whether this ruling would apply where there is sufficient property in the estate to be distributed among the heirs after the county's claim is paid.

The case considered in the unofficial opinion to which you refer was one where the only property owned by the deceased beneficiary consisted of forty acres of land of small value which was sold but did not bring enough to take care of the claims of the two counties involved and the expenses of administration. Consequently what was said there is to be read in connection with the particular facts then under consideration.

The question which you have asked, therefore, calls for a further analysis of the problem.

It is the official duty of the district attorney under sec. 49.26, subsec. (3), and sec. 59.47 (1), Stats., and of the pension director under sec. 49.25, Stats., to perform the necessary acts to recover amounts due the county from the estates of recipients of old-age assistance, including, if necessary, the administration of such estates on behalf of the county as a creditor. We think it is clear that neither the district attorney nor county pension director is entitled to additional compensation out of the estate for such services as are performed on behalf of the county in obtaining payment of its claim. They take their offices like any other public officers, *cum onere*, and are entitled only to such compensation as is allowed by law. *Henry v. Dolen*, 186 Wis. 622, 624; XXVI Op. Atty. Gen. 204.

Moreover, in the case of the full-time district attorney and full-time county pension director any extra fees earned would inure to the benefit of the county under the ruling of *Gregory v. Milwaukee County*, 186 Wis. 235, 238-239, where the court said:

“* * * The time of a salaried public official consumed in work incidental to his official duties and done during office hours belong to his employer and not to him, and if a charge is made for such work it inures to the benefit of the employer and not to that of the public employee. Any other

rule would tend to make a salaried public office a place for private gain in addition to the salary. It was to abolish the difficulties connected with the fee system that salaries were substituted. Fees should not be allowed to creep in again except by express legislative direction."

However, a somewhat different situation presents itself in the case of the part-time district attorney and also in the case of the part-time county pension director, if there be any.

In so far as they are not working for the county, their time is their own, and they would be permitted to keep whatever they earn in performing services that are clearly not rendered on behalf of the county. There is, of course, the question of conflicts of interest in these probate cases which as a matter of policy should be avoided wherever possible by having the estate probated by others or by enforcing the county's claim by foreclosing the lien as a mechanics' lien under sec. 49.26 (4). But if for any reason this should prove inexpedient, there would seem to be no good reason why the district attorney and the county pension director should not probate the estate after making a full disclosure to the heirs of the fact that in so far as the county is the claimant they will owe undivided loyalty to it in enforcing its claim and will be precluded from asserting any defenses to the claim which might otherwise be made by an independent administrator or attorney, or from offering any disinterested advice in connection therewith.

In so far as the county is concerned, the duties and obligations of the district attorney and county pension director will have ended upon payment of the county's claim, and there would appear to be no good reason why they should not be compensated in the case of part-time officials out of the residue of the estate for performing the remaining services incidental to closing the estate in the usual manner, subject, of course, to allowance by the county court.

WHR

Prisons — Prisoners — Probation — Period of probation does not count toward service of sentence imposed on probationer under sec. 57.01, 57.04 or 57.05, Stats., and is not deducted from sentence to be served in case probation is revoked according to law.

August 23, 1941.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley.

You state that it is being claimed that the case of *State ex rel. Currie v. McCready*, (1941) 238 Wis. 142, holds that time served by an adult probationer during his probation period is counted toward the service of his sentence and deducted from the total time to be served by him in the state prison in case probation is revoked. You inquire whether this contention is correct.

The contention is one hundred per cent incorrect. In the first place, the *Currie* case involved a *minor* probationer subject to sec. 57.05, Stats., whereas *adult* probationers are subject to secs. 57.01 (felonies) and 57.04 (misdemeanors). Accordingly the decision in that case does not concern adult probationers one way or the other.

In the second place, the decision in fact implies that the probation period of minor probationers under sec. 57.05 does not count toward service of the sentence. The court distinctly held that the words "suspend sentence" as used in sec. 57.05 are the equivalent of the words "suspend the judgment or stay the execution thereof" as used in sec. 57.01. It is plain that the sentence imposed on a defendant does not run during the period of probation, since the execution of the sentence is stayed during that time. The court quoted the following definition of the word "suspend" in *Black's Law Dictionary* (3d ed.):

"To interrupt; to cause to cease for a time; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption * * * To postpone, as a judicial sentence * * * To stay, as a decree,—not synonymous with vacate."

It is elementary that the term of a sentence does not run while execution is legally stayed.

Besides, under sec. 57.03, subsec. (1), when the probation of an *adult* felon is revoked the statute clearly provides that "the term of said sentence shall be deemed to have begun at the date of his first detention at such institution." Likewise, sec. 57.04 provides that when probation of an adult convicted of a misdemeanor is revoked, commitment on the sentence shall be issued by the court "without deduction of the period of probation."

The principal point decided in the *Currie* case was that sec. 57.03, which empowered the board of control (now department of public welfare) to revoke probation in cases where sentence had previously been imposed by the court, does not apply to minors placed on probation under sec. 57.05, but is restricted to adults placed on probation under sec. 57.01.

WAP

School Districts — Under sec. 40.19, subsec. (1), Stats., power of school board to contract with teacher is limited to present and next ensuing school years, and board may not make contract for term of years so as to deprive future boards of discretion in hiring teachers. Contract must be in writing and might be so drawn as to be automatically renewable from year to year until rescinded, although this is not advisable.

August 27, 1941.

DEPARTMENT OF PUBLIC INSTRUCTION.

Attention John Callahan, *State Superintendent*.

You have inquired whether a school board has the power to issue contracts to teachers for periods of time in excess of one year and whether written contracts must be issued each year.

Sec. 40.19, subsec. (1), Stats., provides in part:

“The common school board shall contract in writing with qualified teachers, which contract, with a copy of the teacher’s authority attached thereto, shall be filed with the clerk.
* * *”

Obviously the board would not have the right to divest itself or succeeding board members for a term of years of all control over the hiring of teachers, which would be the result that would follow if a valid contract for a term of years could be made. On the other hand, it is generally held that in the absence of a specific statute controlling the situation, a school board may contract with a teacher for a period extending beyond the term of the board, subject to the qualification that such a contract must be made in good faith, without fraud or collusion, and for a reasonable period of time, such as the ensuing school term. See 70 A. L. R. 802-803, Note, citing *Webster v. School District No. 4*, 16 Wis. 316, where it was held that the board might make a valid contract with a teacher for teaching the district school for a term extending beyond the time when the term of office of such officers would expire, and that the district would continue to be liable for services performed under such contract until the next annual meeting and thereafter, provided no contrary directions were then given by the voters or subsequently by the new board in case the voters neglected to act on matters such as the length of time the school should be taught, whether by a male or female, or both, and the application to be made of the moneys received from the school fund and the town.

We understand that in Wisconsin the practice is almost universal to hire teachers in the spring of the year or early summer for the term of school commencing in September, despite the fact that the entire membership of the board making said contract may be changed as a result of the election of school board members at the annual district meeting normally held on the second Monday of July. See secs. 40.03 (1) and 40.04 (3) Stats. Numerous reasons support the wisdom of this practice. By hiring early, school boards have greater opportunity to carefully select teach-

ers, the teachers hired can make arrangements for summer study or travel which they might not be able to make in the absence of assurance of a contract for the next year, the annual school meeting in July will have before it information as to the exact amount of money necessary to vote for a tax, in so far as teachers' salaries are concerned, etc.

In *Hemingway v. Joint School District*, 118 Wis. 294, a teacher was hired by the board on June 13th for the term commencing September 4th, and at the annual school meeting on July 3d, a resolution was passed directing the district board to cancel the contract. The board attempted to comply with this resolution, and it was held that the school district was liable for breach of the contract made by the district board.

Thus it seems clear that in Wisconsin a contract between the school board and a teacher for the ensuing year is valid, even though no part of the services to be performed under the contract are rendered during the term of office of the board making the contract. We find no Wisconsin cases, however, involving teaching contracts extending beyond the next ensuing school year, but the language used in the *Hemingway* case, indicates that the court felt that it had reached the limits to which it might be expected to go in sustaining contracts for future teaching services and that it might well have reached a contrary conclusion, except for the decision in the *Webster* case.

The hiring and supervision of a school teacher involves the exercise of judgment and discretion. It is a function vested entirely in the school board (*Leahy v. Joint School District*, 194 Wis. 530) and, since such boards are subject to change in membership annually, it would appear that one board would not be able to make a contract for a term of years so as to deprive itself or subsequent boards from exercising such discretion and judgment and that, as indicated in the *Hemingway* case, only a contract for the ensuing year would be sustained.

The answer to this question indicates the principles which must govern the answer to the second question as to whether written contracts must be issued each year. Sec. 40.19 (1) requires the contract to be in writing, but it would seem that the contract could be made for one year with a provi-

sion for automatic annual renewal as of a certain date, subject to rescission by any future board after expiration of the first year. As was suggested in the *Webster* case, the contract could run indefinitely until contrary action should be taken in the future.

We believe, however, that the better practice would be to issue written contracts each year so as to avoid any possible misunderstandings on the subject.

What has heretofore been said should not be construed to extend to the case of a city superintendent who, under sec. 40.53 (4) may be employed for not longer than three years at a time.

WHR

Minors — Child Protection — Adoption — Putative father of illegitimate child is not entitled to notice of proceedings for termination of parental rights and transfer of permanent custody of child to welfare agency under sec. 48.07, subsec. (7), Stats.

August 27, 1941.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley.

You inquire whether it is necessary, under sec. 48.07, Stats., to give notice to the father of an illegitimate child of proceedings to terminate parental rights and transfer the permanent care of the child to a child welfare agency, (a) when paternity has been established or (b) when paternity has been denied.

Sec. 48.07, subsec. (7), provides in part as follows:

“(a) Whenever in the course of a proceeding instituted under sections 48.01 to 48.07 or otherwise, it shall appear to the court that the person or child welfare agency (other than a parent) having the care, control and custody of such child is not fitted therefor or that the parents of a child

have abandoned such child or have substantially and continuously or repeatedly refused or being financially able have neglected to give such child parental care and protection, the court shall have jurisdiction to transfer the permanent care, control and custody of such child to some other person, agency or institution and in the exercise of such jurisdiction the court may terminate all rights of the parents with reference to such child, and also may appoint a guardian for the person of such child. Such transfer of the permanent care, control or custody of a child or termination of the rights of the parents with reference to a child shall be made only after a hearing before the court and *the court shall cause notice of the time, place and purpose of such hearing to be served on the parents of the such child personally at least ten days prior to the date of hearing or if to the satisfaction of the court personal service cannot be obtained, then by publication thereof in a newspaper in the county once a week for three weeks prior to the date of hearing.* In case of any minor parent the court shall appoint a guardian ad litem therefor in the manner provided for appointment of guardian ad litem in the county court. Such guardian ad litem shall be an attorney admitted to practice in this state.

“(b) If a child is abandoned or neglected by one parent only the rights of such parent with reference to such child may be terminated as provided in paragraph (a), without affecting the rights of the other parent.

“(c) Upon the application of the parents or of the surviving parent of any child, *or the mother of an illegitimate child*, the court may order the transfer of the permanent care, control and custody of such child, and if it appears wise, the termination of all the rights of a parent or the parents with reference to such child, provided the court after a hearing finds such transfer or termination to be in the best interests of the child.”

The principal purpose of terminating parental rights is to avoid the necessity of obtaining the consent of the parent in subsequent adoption proceedings under ch. 322. Sec. 322.04 provides in part as follows:

“(1) Except as otherwise specified in this section, no adoption shall be permitted, *except with the written consent of the living parents of a child.* In the case of a child fourteen years of age or over, the consent of such child also shall be required and must be given in writing in the presence of the court.

"(2) *Consent shall not be required of parents whose parental rights have been terminated by order of a juvenile or other court of competent jurisdiction; provided, however, that in such case adoption shall be permitted only on consent of the state board of control, or of the licensed welfare agency, or county home for dependent children to which the permanent care, custody or guardianship of such child has been transferred by a juvenile or other court of competent jurisdiction.*

"(3) * * *

"(4) *In the case of a child not born in lawful wedlock, the consent of the father shall not be necessary but in such case adoption shall not be permitted without the consent of the licensed child welfare agency or a county home for dependent children, if any, to which the care and custody of such child has been committed or transferred by a court of competent jurisdiction, or if there be no such child welfare agency or a county home for dependent children, then of the state board of control. If the parental rights of the mother of such child have been terminated in a juvenile or other court of competent jurisdiction and the child permanently committed to such agency, home or to the state board of control, then the mother's consent is not necessary.*"

The common-law rule appears to be that the putative father of an illegitimate child, at least where paternity has been established and the father required to contribute to the support of the child, is entitled to the custody of the child as against all persons except the mother. 7 C. J. 955; 10 C. J. S. 83. However, no parent has a property right in his children and for that reason the right of a parent to custody may be altered for the benefit of the child by any reasonable statute, without thereby invading any constitutional right of the parent. *Ex parte Wallace*, (1920) 26 N. M. 181, 190 P. 1020, 1022-1023. The foregoing case holds that in the absence of a statutory requirement no notice of adoption proceedings need be given to the father of an illegitimate child, but it should be observed that in that case the father was not required by law to contribute to the support of the child.

Under sec. 48.07 (7) (a), above quoted, notice of hearing of involuntary proceedings to terminate parental rights is required to be served on the "parents." The question is whether the father of an illegitimate child is a "parent" within the meaning of the statute. It is considered that he

is not for several reasons. It has been intimated that the father of an illegitimate child is not a "parent" in the meaning of a statute giving an action or tort for injuries to a child to a "parent or guardian" (*McNeil v. Collinson*, (1881) 130 Mass. 167, 169); nor in the meaning of adoption statutes. *In re Hardenbergh's Will*, (1932) 258 N. Y. S. 651, 654; *Appeal of Gibson*, (1891) 154 Mass. 378, 28 N. E. 296, 297. However, some cases do give consideration to the question of whether paternity has been judicially established. See, for example, *In re Clark's Estate*, (Iowa, 1940) 290 N. W. 13, 32, where it was held that the father of an illegitimate child was a "parent" in the meaning of the descent and distribution statutes.

An analysis of the various cases discloses that the courts are inclined to hold that the father of an illegitimate child is a "parent" whenever such a construction would result in a benefit to the child but hold the contrary where such construction would be detrimental to the child. Since it would be detrimental to the child to require notice to his father of proceedings under sec. 48.07 (7) and might upset many such proceedings which have been conducted in the past without notice to the putative fathers, it seems likely that the courts would construe the word "parent" as used in sec. 48.07 (7) (a) as not including the putative father.

Paragraph (c) of sec. 48.07 (7), which provides for *voluntary* proceedings to terminate parental rights, permits the mother of an illegitimate child to make such application and does not require notice to anyone. It would be anomalous to hold that the putative father has such an interest as entitles him to notice in the case of *involuntary* proceedings under paragraph (a), though not in the case of *voluntary* proceedings under paragraph (c). Construing paragraphs (a) and (c) as being *in pari materia* it would therefore appear that the putative father is not included in the term "parent" as used in either of those paragraphs. Furthermore sec. 48.07 (7) is *in pari materia* with ch. 322, relating to adoption, and under sec. 322.04 (4) the putative father is not required to consent to the adoption of his illegitimate child. This being true, it is apparent that the law gives him no substantial rights in the child which need to be terminated in proceedings under sec. 48.07 (7). In

view of this fact it appears that the common-law rule stated in 7 C. J. 955 and 10 C. J. S. 83 (noted at the beginning of this opinion)—whereby the right of the putative father to custody as against everyone but the mother is recognized—is abrogated in this state.

WAP

Prisons — State Prison — Rule of state prison requiring presence of third persons at conferences between prisoners and their attorneys is invalid since it infringes right of prisoners to assistance of counsel.

August 27, 1941.

DEPARTMENT OF PUBLIC WELFARE.

Attention A. W. Bayley, *Secretary*.

You state that under the present rules of the Wisconsin state prison no conference between any inmate and his attorney may be had except in the presence of a representative of the institution. You state, further, that it is claimed that this restriction is in violation of the constitutional rights of the inmate and request an opinion on that point.

Under article I, section 7 of the Wisconsin constitution the accused in all criminal cases is entitled to be heard by himself and counsel. Under similar constitutional provisions elsewhere it has been uniformly held that the accused is entitled to confer with his attorney in private and that refusal of the jailer to permit private conferences at reasonable times constitutes a denial of the constitutional right of the accused. 23 A. L. R. 1382; 54 A. L. R. 1225.

In the case of *Thomas v. Mills*, (1927) 117 Ohio St. 114, 157 N. E. 488, 54 A. L. R. 1220, the foregoing doctrine was applied to the case of a person in the Ohio state penitentiary who had prosecuted a writ of error to review his conviction. The court held that the constitutional right to be heard by counsel entitled the prisoner to have private conferences

with his attorney at reasonable times and granted a mandatory injunction at the suit of the attorney, ordering the warden of the penitentiary to permit such conferences. In *In re Snyder*, (1923) 62 Cal. App. 697, 217 P. 777, it was held that a jailer had no right to inquire of the attorney what the purpose of his visit was, since this would invade the private relationship between attorney and client by compelling the attorney to divulge confidential matters. The courts have pointed out that the warden can adequately fulfill his duty to prevent escape and other breaches of discipline by exercising his right to search the prisoner following the interview, without denying to the prisoner his undoubted constitutional right to confer privately with his attorney. *State v. Board of Prison Com'rs.*, (1929) 84 Mont. 14, 273 P. 1044; *Thomas v. Mills*, *supra*.

It must be added that the rule is not limited to prisoners who have commenced appellate proceedings. See *State ex rel. Chase v. Cleveland*, (1936) 130 Ohio St. 587, 200 N. E. 840. It may be just as necessary for a prisoner to confer privately with his attorney before an appeal or writ of error is taken as it is during the pendency of the appeal or writ, or the interview may relate to the matter of commencing habeas corpus proceedings, long after the time for appeal has expired. Moreover, as the court pointed out in the *Snyder* case, the warden has no right to demand that the attorney divulge the reason for the desired interview, so that it would be improper to limit the right of the prisoner to situations in which the purpose of the interview relates to an appeal from a conviction.

This leads to the further conclusion that a prisoner may interview his attorney privately regarding other legal matters not connected with the conviction under which he is presently in the institution. Such matters may be other criminal charges pending against the prisoner, either in this state or elsewhere, *State v. Board of State Prison Com'rs.*, (1929) 84 Mont. 14, 273 P. 1044, or civil matters in which the prisoner is concerned. Although the decisions are not uniform on the subject, it has been held that a person has a constitutional right to appear in civil as well as criminal cases by counsel of his own choice, apparently under the "due process" clause of the 14th Amendment. *Roberts v.*

Anderson, (C. C. A., 10th, 1933) 66 F. (2d) 874, 876-877. In this state the right is guaranteed by art. VII, sec. 20 of the constitution and by sec. 256.27 (1), Stats.

For the foregoing reasons you are advised that the present rule of the prison is invalid and that prisoners should be permitted to consult with their attorneys in private at any reasonable time without requiring either the attorney or the prisoner to divulge the purpose of the interview.

WAP

Criminal Law — Gambling — Slot machines seized in respect of violation of sec. 348.09, Stats., are subject to destruction and money contained in such machines is subject to forfeiture.

September 3, 1941.

ELIZABETH HAWKES,

District Attorney,

Washburn, Wisconsin.

We have received from you the following request:

“Referring to XXIX Op. Atty. Gen. 45 I should like to ask if it is your opinion that an arrest made under section 348.09 would carry with it the same powers as to the disposition of the money found in the machines as you have ruled takes place under 348.17.”

In our opinion slot machines, together with the money found in such machines, which are seized in respect of a violation of sec. 348.09, Stats., should be forfeited to the state. The opinion was expressed in XXVI Op. Atty. Gen. 441 that a slot machine seized under such circumstances was subject to destruction by court order. The opinion was based upon the proposition that such slot machines, being gambling devices, were contraband and that, “Being incapable of ownership in contemplation of law, no damages can be recovered for their destruction and their return cannot be obtained by means of legal process or proceeding” (p. 443).

We expressed the opinion in XXIX Op Atty. Gen. 45 that money found in a slot machine seized under sec. 348.17, Stats., was subject to seizure and forfeiture. The opinion was based upon the proposition that the money constituted a part of the gambling device and was as much subject to seizure as was the remaining part of the machine. The reasoning in XXVI Op. Atty. Gen. 441 requires the conclusion that money found in a slot machine seized under sec. 348.09, Stats., would be just as much subject to forfeiture as would the machine in which the money was found.

JWR

Appropriations and Expenditures — Trust Funds — Certificates of indebtedness owed to state trust funds under provisions of ch. 25, Laws 1866, cannot be paid except by legislative action.

September 5, 1941.

HONORABLE JULIUS P. HEIL,

Governor of the State of Wisconsin.

In a recent communication you called my attention to the existence of what has been termed the state Civil War debt. You indicated that the state was now in a position to liquidate the debt and requested my advice as to what steps were necessary in order to pay it.

I think my position with respect to your inquiry can be stated more clearly if it is stated in connection with a brief history of the obligation in question.

The debt was incurred by the state in connection with its participation in the Civil War and the moneys raised thereby were used for raising and equipping armed forces to aid the Union, payment of bounties to volunteers, temporary aid to the families of Union soldiers, and extra expense of the state government occasioned by the war.

Prior to the passage of ch. 25, Laws 1866, considerable sums of money had been borrowed by the state and for the most part this money was owing to the state trust funds established in art. X, secs. 2 and 6 of the Wisconsin constitution. In some instances the money was taken directly from the trust funds and placed in a special fund, known as the war fund. The trustees of these trust funds were issued certificates of indebtedness which purported to constitute general obligations of the state bearing seven per cent interest. By far the greater portion of this debt, however, was incurred in a more round-about manner. Bonds were issued and were in turn purchased by the trustee of the trust funds by legislative direction.

The earlier legislation relating to borrowing authorized the issuance of bonds. *Cf.* ch. 239, Laws 1861, ch. 307, Laws 1861, ch. 13, Extra Session, Laws 1861, ch. 228, Laws 1862. Later on provision was made for the purchase of

such bonds by the state trust funds. Ch. 100, Laws 1863, ch. 217, Laws 1864. The later statutes under which moneys were borrowed contained a provision authorizing the issuance of bonds and an alternative provision authorizing the issuance of certificates of indebtedness to the trust funds for such parts of the loan as the trustees might desire to take. *Cf.* ch. 157, Laws 1863, ch. 360, Laws 1864. In one instance money was taken directly from the trust funds, without any alternative provision for the issuance of bonds to the public, and certificates of indebtedness were issued to those funds. Ch. 361, Laws 1864.

Pursuant to ch. 478, Laws 1865, authorizing the issuance of certificates of indebtedness in the amount of \$850,000.00, bonds in the amount of \$611,000.00, owned by private sources, were refunded.

By virtue of ch. 25, Laws 1866, it was provided that there should be an accounting of the debts due to the various trust funds by reason of amounts invested in bonds and certificates of indebtedness. It was further provided that a certificate in the amount so found due should be issued to each fund and that such certificate should bear seven per cent interest. It is significant that the certificates of indebtedness thus substituted for the obligations then owned by the trust funds bore no dates of maturity nor provision for payment.

In the interest of accuracy, it perhaps ought to be set out here that a portion of the obligation which has been rather loosely referred to as the Civil War debt had nothing to do with the Civil War. We refer to \$100,000.00 in bonds issued pursuant to chs. 226, Laws 1862, and 108, Laws 1863, for the purpose of enlarging the capitol and erecting a hospital for the insane. The bonds so provided for were purchased and placed in the trust funds and were refinanced by ch. 25, Laws 1866, as above set out.

Pursuant to ch. 25, Laws 1866, certificates were issued to the various trust funds in the following amounts:

Common school fund -----	\$1,394,900.00
Normal school fund -----	346,000.00
The university fund -----	96,000.00

The amounts owing to the various funds, however, increased as the years went by due to a provision in ch. 25

authorizing the issuance of additional certificates of indebtedness to the trust funds upon the purchase by the trustees of state bonds then outstanding in the hands of private purchasers. The amount outstanding at the time ch. 25 was enacted was \$415,100.00 and the entire amount was retired by trust fund moneys with the exception of one bond in the amount of \$1,000.00

Beginning in the year 1861 there were various settlements between the United States government and the state of Wisconsin pursuant to which the state was reimbursed for certain of the war time expenditures above referred to, plus interest. The last of such payments was made in the year 1905 and the total amount so refunded was \$2,257,291.74. Certain of the expenditures made by the state were not reimbursed by the federal government because of a claim that they were made for purposes which were not strictly related to prosecution of the war, but in spite of this the amount refunded, because of the item of interest allowed, exceeded the entire principal expenditure made by the state.

None of the money repaid by the federal government was used for the purpose of repaying the state's obligation to the trust funds. All such repayments were used by the state for general purposes.

The state continued to pay interest on its obligations at the rate of seven per cent per annum with no provision of any kind being made for payment of the principal until the year 1915. At that time Governor Emanuel L. Philipp, in his message to the legislature, called attention to the existence of the debt and suggested that legislative provision be made for payment. Pursuant to the governor's suggestion, the legislature enacted ch. 477, Laws 1915. The law provided a continuing appropriation of at least \$100,000.00 annually beginning March 1, 1916, for the retirement of the debt and provided, in addition, that whenever there might be a surplus in the state treasury, such additional payments might be made as the governor, the secretary of state, and the state treasurer might deem proper.

It is rather significant that the governor's message came at a time when the supreme court was considering the case of *State ex rel. Owen v. Donald*, 160 Wis. 21. That case

was instituted in the supreme court in connection with a matter involving the state trust funds but, on the court's own motion, the issues of the case were broadened to include an inquiry into various other dealings with the trust funds, including those set out above. In the opinion filed in the case Mr. Justice Marshall reviewed the investments above referred to and held that the moneys so taken from the trust funds were improperly diverted. The matter was referred to the Hon. Samuel D. Hastings, as referee, with the direction that he prepare a report advising the court as to the status of the various trust funds and the amount owed by the state. Judge Hastings' report is found in 162 Wis. 609. He determined, so far as here material, that the general fund was indebted to the common school fund in the sum of \$1,563,700.00, and to the normal school fund in the amount of \$515,700.00 by reason of the diversion referred to. 162 Wis. 609, 659, 660.

It is highly significant that in approving the referee's report the court specifically modified it in the following respect.

"3d. The report is further modified so far as it would, when confirmed, otherwise require dues to the trust fund to be charged against and deplete the general fund in advance of provision being made therefor by the legislature." 162 Wis. 609, 664.

Pursuant to ch. 477, Laws 1915, various amounts were paid to the trust funds from time to time. Thus, the amount due the common school fund was, prior to the year 1933, reduced to \$1,163,700.00 and as of that time the amount owed the normal school fund had been cut down to \$20,000.00. In 1933, because of the great stress thrown upon the financial structure of the state government by the depression, the legislature repealed the provision for repayment of the trust fund principal (ch. 140, Laws 1933) but retained that part of the law (sec. 20.07, Stats.) which provided for payment of interest. No payments on principal were made thereafter, although in 1937 there was a fruitless attempt to pay the entire amount outstanding. Sec. 9 of ch. 181, Laws 1937, appropriated a sum sufficient to pay the amounts then outstanding with a proviso that the

amount appropriated should not become available until released in whole or in part by the emergency board. Pursuant to the authority thus granted, the emergency board released an amount sufficient to pay the debt. The matter came before the supreme court in *State ex rel. Zimmerman v. Dammann*, 229 Wis. 570, and it was held that the provision in question was unconstitutional as an unlawful delegation of legislative power to the emergency board.

As matters now stand, the state is indebted to the common school fund in the amount of \$1,163,700.00 and to the normal school fund in the amount of \$20,000.00. It is the repayment of these amounts concerning which you wish to be advised.

It is my opinion that the amounts in question cannot be repaid by the state except as such repayments may be provided for by legislative act. My reasoning is as follows:

First. If repayment involves the payment of moneys out of the state treasury, then there could be no such payment without a legislative appropriation in view of article VIII, section 2 of the Wisconsin constitution. It reads as follows:

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

The supreme court has held that this provision means precisely what it says, namely, that the state treasurer has no authority to pay out moneys in the state treasury unless he can point to some appropriation authorizing payment of such moneys. *State ex rel. Bell v. Harshaw and another*, 76 Wis. 230.

It might be contended that the transfer of money from the general fund to the two school funds involved would not constitute the payment of money out of the treasury since, in one respect, no money would have been removed from the treasury. Both the school funds and the general fund are in the custody of the state treasurer as deposits in the state treasury. Such a view, however, would in our judgment, be pure sophistry. The court held in *State ex rel. Owen v. Donald*, 160 Wis. 21, that the relationship of debtor and creditor existed as between the state and the trust funds. In order to satisfy the debt, it would be necessary to

pay money out of one fund in the treasury and into the other fund. And, as a matter of administrative practice, transfers from one fund to another are made by legislative appropriation. *Cf.* sec. 14.39, Wis. Stats., and the history of payments that have been made and attempted upon the obligation here considered. Other instances might be cited as well.

Second. There are certain statutory provisions relating to the expenditure of state moneys which preclude any payment in absence of legislative appropriation. Sec. 14.31, Stats., provides :

“All claims against the state, when payment thereof out of the state treasury is authorized by law, shall be audited by the secretary of state.”

Sec. 14.35, Stats., provides as follows :

“The secretary of state shall draw his warrant on the state treasurer payable to the claimant for the amount allowed by him upon every claim audited under section 14.31, specifying from what fund to be paid, the particular law which authorizes the same to be paid out of the state treasury, and the post-office address of the payee; and he shall not credit the treasurer for any sum of money paid out by him otherwise than upon such warrants.”

Since unauthorized claims against the state could hardly be paid, it appears under sec. 14.31 that all claims which are payable are subject to audit by the secretary of state. Under the provision of sec. 14.35, Stats., the warrant issued in payment of any claim must specify “the particular law which authorizes the same to be paid out of the state treasury.” Here there is a clear indication of legislative intent that payment of claims against the state shall be authorized by statute.

Third. No provision is made by statute for the transfer of money from one fund to another in the state treasury in a case such as that here being considered. Such powers as the secretary of state and the state treasurer may have in this respect are purely statutory and it could not be fairly argued that any other official possessed such authority. As

in the case of the attorney general, though the two officers named hold constitutional offices, they have no inherent constitutional powers in addition to those powers which are specifically vested in them by the constitution. *State v. Snyder*, 172 Wis. 415.

In line with this reasoning it has been held that in the absence of legislative authority money may not be transferred from one fund to another in a state treasury by officials corresponding to the secretary of state and state treasurer. *State v. McMillan*, 117 Pac. 506, 34 Nev. 264; *State v. Kositzky*, 175 N. W. 207, 44 N. D. 291.

Fourth. The fact that such payments as have been made and attempted to be made upon the obligations in question have been authorized by legislative action is at least evidence that such authorization was considered necessary for one or all of the reasons detailed above. In addition to this, as I have already pointed out, the supreme court in approving Judge Hastings' report in 162 Wis. 609 was careful to so modify his findings as to remove any possible inference that the court intended any direction for payment of the debt out of the general fund in the absence of legislative authorization. This action by the court suggests that in its view legislative action would be necessary in order to properly pay the claim.

It is my suggestion that sec. 20.07, Stats., which now provides for payment of interest on certificates of indebtedness, be amended to provide for payments on principal. The amendment could restore the provision for payment stricken by ch. 140, Laws 1933, and thus provide for the payment of at least \$100,000.00 each year and for payments in excess of that amount in the event that money was available for that purpose. Any amendment of this nature should be carefully framed in the light of the decision of the supreme court in *State ex rel. Zimmerman v. Dammann*, 229 Wis. 570. I am not so sure that the material stricken by ch. 140, Laws 1933, was not subject to infirmity in the light of this decision, and I think it would be a good thing to so redraft the language under which payments were formerly made as to remove any question of legality.

JWR

Municipal Corporations — Beer Licenses — Public Lands — State Parks — Concessionaire at state park whose lease with state permits him to sell malt beverages is subject, nevertheless, to licensing provisions imposed by municipality in which state park is located.

September 9, 1941.

Conservation Commission.

Attention H. W. MacKenzie, *Conservation Director*.

You ask whether a concessionaire in a state park whose lease with the state authorizes him to sell malt beverages is subject to any ordinances of the town within whose external boundaries such state park is located, especially with reference to the following situations:

(1) Where a state park is located in a town in which the voters, under the local option provisions of the law, have voted not to grant any licenses; and

(2) Where the voters of the town have voted to limit the number of licenses to be issued, and the number fixed have been issued.

As a general proposition, and in absence of any constitutional restrictions, one of the fundamental ideas of municipal government is that a municipality may make such laws and regulations as are necessary to the peace and good order of the community within its respective limits. See, generally: 43 C. J. 214-228; McQuillin, *Munic. Corp.*, vol. 2, p. 723.

Art. XI, sec. 3, Wisconsin Const., popularly known as the "home rule amendment," specifically gives to cities and villages the power to determine their local affairs, "subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village."

Sec. 66.05, subsec. (10), subd. (n), Stats., provides that the power of municipalities to license the sale of liquor "shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of fermented malt liquors."

In XXII Op. Atty. Gen. 551, 553, it was stated that even though the suppression of the liquor traffic may be a mat-

ter of state-wide concern and subject to regulation by the state, this does not prevent its being at the same time a local affair within the meaning of the home rule amendment, and hence subject to regulation within the limits of the municipality. It is clear, also, that if the legislature is of the view that the suppression of the liquor traffic in cities and villages should not be undertaken by local authorities, it has power to limit their authority, but it has not done so.

There is no absolute right to sell liquor, that being a matter of police regulation. True, the management and police supervision of all state parks is vested in the conservation commission, by statute.

Sec. 27.01 (2) provides that the state conservation commission shall have charge and supervision of all state parks.

Sec. 27.01 (2) (d) provides among other things that the commission is authorized to "lease parts or parcels of state park lands or properties, or grant franchises or concessions."

Sec. 27.01 (3) provides in part:

"The state conservation commission shall exercise police supervision over all state parks, and its duly appointed agents or representatives in charge of any state parks are hereby authorized and empowered to arrest, with or without warrant, any person within such park area, committing an offense against the laws of the state of Wisconsin or in violation of any rule or regulation of the state conservation commission in force in such state park, * * *."

It is extremely doubtful however, that the supervisory power vested in the conservation commission by this section would include the power to authorize the sale and distribution of malt beverages, in contravention of local licensing ordinances. In fact, while a somewhat analogous provision vesting supervisory control of the state fair grounds in the department of agriculture (sec. 93.07 (18) (a) and (b)), was construed in XX Op. Atty. Gen. 506 to mean that a county dance hall ordinance did not apply to dance halls on the state fair grounds, it was, nevertheless, decided in XXII Op. Atty. Gen. 645 that the town of Wauwatosa has jurisdiction over the sale of beer on the state fair grounds under the provisions of sec. 66.05 (10), (d) 1, Stats., which provides as follows:

"No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal or traffic in fermented malt beverages, unless licensed as provided in this subsection by the governing board of the city, village or town in which the place of business is located. * * *."

Again, in XXII Op. Atty. Gen. 621, the question raised was whether the city of DePere had any jurisdiction over county-owned property operated by the Brown County Agricultural and Fair Association, so as to refuse a liquor license to a private individual operating a tavern on the grounds. It was held therein that such individual must obtain a license from the governing body of the city, in order to comply with the law.

The power of local authorities to prescribe license requirements is provided for in sec. 66.05 (10), (d) 2, Stats., as follows:

"The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided.
* * *"

In XXIII Op. Atty. Gen. 254, the regulatory power of local authorities was again upheld, when it was decided that the sale of beer in a C. C. C. camp located on property leased by the federal government was subject to control by the local authorities.

The conclusion would seem to follow that a lessee of the state with authority to sell malt beverages in a state park is subject to the licensing provisions imposed by the local authorities. Moreover, it would appear that such concessionaire is also subject to whatever action the voters take under their statutory local option privileges.

In XXIII Op. Atty. Gen. 152, it was held that towns, village boards and city councils may issue licenses to sell liquor in all instances except where the town has voted dry. In *Bjoldal v. Town Board of Town of Delavan*, (1939) 230 Wis. 543, it was held that the provisions of secs. 176.05 and 176.43, Stats., are sufficiently broad without more to authorize the town board, in its discretion, either by ordinance

or resolution to restrict the number of liquor licenses that will be issued within the town. The court concluded, (p. 547) :

“* * * This is a normal, usual, and effective means of preventing evils incident to the abuse of intoxicating liquor, and the promotion of good order and morality within the limits of a municipality.”

WHR

Criminal Law — Gambling — Pinball machine containing no pay-off device, played solely for amusement and not actually used for gambling purposes, is not gambling device under sec. 348.07 or sec. 348.09, Stats.

September 10, 1941.

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

You inquire whether pinball machines which contain no pay-off mechanism of any kind and which are played for amusement only may be confiscated and destroyed as gambling devices. You state, however, that some of the proprietors pay merchandise or free play tokens when the player obtains a certain score. This is a clear violation of secs. 348.07 and 348.09 and will not be further considered here, the opinion being limited to cases where no pay-off exists.

In XXVI Op. Atty. Gen. 441 this office pointed out that it was not necessary that proceedings for the confiscation and destruction of gambling devices be carried on pursuant to sec. 348.17, but that if the devices were in violation of secs. 348.07 or 348.09, they would constitute contraband and could properly be seized and then destroyed by court order. Sec. 348.07 provides as follows:

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

Sec 348.09 provides as follows:

“Any person who shall knowingly suffer or permit any table, wheel or other construction, or any cards, dice or other device, scheme, contrivance or thing adapted, suitable, devised, designed or which can or shall be used for gambling purposes to be set up, kept, managed or used, or any gambling or betting therewith, thereon or by means thereof in any house, building, shed, booth or on any lot or premises by him owned, occupied or controlled shall be punished * * *.”

Sec. 348.07 contains two elements, namely, (1) the setting up of a device “adapted, suitable, devised or designed, or which can or shall be used for gambling purposes” and (2) inducting, enticing or permitting any person to gamble therewith. Sec. 348.09 is in *pari materia* with sec. 348.07 and forbids persons who own, occupy or control premises to permit gambling devices to be set up thereon or permit gambling or betting with such devices.

As a general proposition, an article which is capable of innocent uses is usually held not to be a gambling device unless expressly so defined by statute or unless shown to have been used for gambling. *Kirk v. Morrison*, (1933) 108. Fla. 144, 146 So. 215; *Commonwealth v. Mihalow*, (1940) 142 Pa. Super. 433, 16 A. (2d) 656, 659; 38 A. L. R. 73; 24 Am. Jur.—Gaming and Prize Contests, sec. 35. See *Dallmann v. Kluchesky*, (1938) 229 Wis. 169, 179. This is the majority view supported by a large number of cases collected under the heading “gambling devices” in *Words & Phrases* (perm. ed.) However, the supreme court of Ar-

kansas has held that a marble machine is a gambling device *per se*, whether used for gambling or not, on the ground that "the only reasonable and profitable use to which they may be put is use in a game of chance." *Stanley v. State*, (1937) 194 Ark. 483, 107 S. W. (2d) 532, 533. Another case holding all marble machines illegal *per se* is *One Penny Marble Machine Co. v. State*, (1937) 233 Ala. 678, 173 So. 91, but in that case it appeared that the statute prohibited any mechanical device "which is operated or *can be operated* as a game of chance."

It seems unlikely that the Wisconsin supreme court would follow the Arkansas rule noted above, in view of the decision in *Dallmann v. Kluchesky*, (1938) 229 Wis. 169, 178-179, wherein it was held that the owner of a Bally's basketball machine could maintain replevin to recover the machine from the police officers who had seized it under a city ordinance prohibiting the placing of such devices in certain kinds of places in the city of Milwaukee. In that case the court said:

"* * * However in section 1069 of the city ordinances there is no provision for the destruction of the offending machines, and since *the machine in question is of a kind permitting of lawful use elsewhere*, it ceases to be a nuisance upon its removal from the proscribed location." (Italics supplied.)

The court subsequently held that the machine was not a gambling device *per se*, and inferentially that it did not violate sec. 348.09.

In recent years, there have appeared a large number of "nickel-in-the-slot" machines of various kinds capable of being played for amusement only. Some of these, such as the basketball machine involved in the *Dallmann* case and various kinds of marksmanship or target-shooting devices, have an undoubted amusement value, while others like the pinball machines you refer to are of more doubtful utility as pure amusement devices. The Wisconsin supreme court has indicated that in its opinion pinball machines would never have been placed on the market if it were not for the appeal that they make to the gambling instinct. *Milwaukee v. Johnson*, (1927) 192 Wis. 585, 593-594; *Milwaukee v.*

Burns, (1937) 225 Wis. 296, 302. The accuracy of that statement, as well as the statement of the Arkansas supreme court quoted above to the effect that the only profitable use of pinball machines is for gambling purposes, may now be subjected to a practical test. If the machines, stripped of all pay-off features, cannot be profitably operated, they will doubtless disappear of their own accord without the necessity of seizure by the police and destruction by court order.

However, it cannot be said as a matter of law that no one would be amused by watching marbles rolling about on an inclined plane and causing electric lights to flash, doubtless in the deluded notion that they are playing a "game of skill," without the hope of winning a prize. Certainly such machines *have* been played for amusement only—they are licensed for that purpose by the city of Madison—and if so are no different in kind from the marksmanship devices and basketball, baseball and similar mechanical games which afford a real test of the skill of the operator. Certainly all such machines are capable of being used as gambling devices, and if so used may be seized, but so long as they are used for amusement only, they are not gambling devices within the meaning of the law. If everything which *could be* used for gambling were contraband, regardless of its actual use, there is practically no article of personal property which could not be seized and destroyed.

The foregoing is not intended to indicate that devices such as you mention cannot be declared a nuisance and made subject to seizure and destruction, either by statute or by municipal ordinance. In fact, *Dallmann v. Kluchesky*, (1938) 229 Wis. 169, appears to be authority for the validity of such a law or ordinance on the ground that the suppression of such devices is necessary for the efficient suppression of gambling. However, the statutes in their present form do not condemn a machine which is not a gambling device *per se*, unless it is actually used for gambling.

WAP

Municipal Corporations — Municipal Budgets — Under sec. 65.90, Stats., as created by ch. 221, Laws 1941, proposed budget may be prepared by duly authorized committee of county board. No other action by governing body required prior to hearing.

Hearing must be before governing body and not committee thereof.

Budget after hearing is adopted by majority vote. Two-thirds vote required only for changes made after such adoption.

County board of "governing body" cannot be compelled to make changes suggested or demanded by citizens or taxpayers at such hearing.

Two-thirds vote of county board is required in order to transfer funds from one county department to another, or to transfer funds within department from one purpose to another, or to transfer funds from contingent fund to some other fund.

"Summary" published need not provide details. Lump sum proposals by department or function or any other practical method is all that is required.

With reference to towns, proposed budget could be set up at annual or special meeting, or by town board at least fourteen days in advance of annual meeting.

Sec. 65.90, subsec. (4), requiring hearing to be held not less than fourteen days after notice, controls over sec. 65.90 (3), requiring notice of not less than ten days to be given.

September 11, 1941.

NORRIS E. MALONEY,

District Attorney,

Madison, Wisconsin.

You have submitted a number of questions relating to the proper construction of sec. 65.90, Stats., as created by ch. 221, Laws 1941, and which requires that public hearings shall be had upon "proposed budgets" of counties and other public bodies.

You first ask whether this public hearing must be held upon a tentative budget which has already been approved

by the county board, or whether it may be held upon a proposed budget set up by the finance committee or any other committee of the county board properly endowed with authority to set up such a proposed budget.

Sec. 65.90, subsec. (1), provides:

“Each county other than counties having a population of 300,000 or more, each city, village, town, school district and all other public bodies that have the power to levy or certify a general property tax or budget shall annually, prior to the determination of the sum to be financed in whole or in part by a general property tax, formulate a budget and hold public hearings thereon.”

The county board ordinarily manages the county's affairs, and is its representative. 20 C. J. S. 848-849. The board may delegate purely ministerial and executive powers to a committee.

The mechanics and work of compiling a proposed budget are matters which have customarily been dealt with by all municipal bodies through committees. There would seem to be no doubt but that these matters are matters proper to be dealt with by a committee within the rule above stated. There is no language in ch. 221, Laws 1941, requiring county board action upon a proposed budget prior to hearing thereon. It would take rather compelling language to warrant conclusion that ch. 221, Laws 1941, intended action by the board as a body with respect to the proposed budget prior to hearing thereon. We find no such compelling language in the chapter.

Furthermore, the legislative history of ch. 221, Laws 1941, is consistent with such interpretation. The original bill was No. 64,A. Ch. 221, Laws 1941, is an adoption by the legislature of substitute amendment No. 3,A. (with slight modifications not material) to Bill No. 64,A. Both the original bill No. 64,A., and substitute amendment No. 1,A., specifically provided that the proposed budget might be set up by either the governing body or a committee thereof. There were no requirements for action by the governing body in relation to such proposed budget prior to the hearing provided for in said bills. None of the amendments

offered made any provision requiring action by the governing body (as a body) prior to the hearing.

A careful comparison of ch. 221, Laws 1941, with the original bill and the various substitute amendments offered thereto leads to the conclusion that it was the intent of the legislature to adopt the major premises and objectives of the original bill and of substitute amendment No. 1,A., offered with respect thereto in the matter of adoption of a budget by a governing body, but to leave some more latitude with the governing body with respect to change or alteration of the budget after adoption than was permissible under the original bill and substitute amendment No. 1,A.

Ch. 221, Laws 1941, does not appear to have been intended to be more restrictive in any of its provisions than the original bill. On the contrary the bill ultimately enacted as ch. 221, Laws 1941, seems to have been a deliberate legislative attempt to liberalize upon some of what the legislature must have deemed restrictive and perhaps unworkable provisions of the original bill. We conclude that no action by the governing body as a body is necessary with respect to a proposed budget prior to hearing upon said budget.

You inquire whether the public hearing may be held by a duly constituted committee of the governing body or whether it must be held by the county board sitting as a body.

This question presents some difficulty. We do not think it can be answered by a mere analysis of the character of such a function—that is, whether the hearing is inherently a ministerial function and therefore delegable. In this connection it may be noted that the function of conducting hearings of a quasi-judicial nature by administrative bodies is not a mere ministerial function and is a non-delegable power in the absence of specific legislation. *State ex rel. Ruemmele v. Haugen*, 160 Wis. 494, cited with approval in *State ex rel. Mayer v. Schuffenhauer et al.*, 213 Wis. 29. These cases may not be controlling as the hearing in question is not of a quasi-judicial nature. It partakes of the nature of a legislative hearing. We do not deem it necessary to determine whether a hearing of that nature is inherently ministerial in function and therefore delegable in the absence of some legislative intention to the contrary. After all, the problem is one of construction of this particular law

and its particular aims and purposes. Here again the legislative history is important.

Both the original bill and substitute amendment No. 1,A., specifically provided that the hearing must be before the governing body as a body. The prime intent and purposes of the law as enacted and of original Bill No. 64,A., were to give publicity to budgets and expenditures proposed or to be made by public bodies, to provide by contact (hearing) or opportunity therefor, a more direct responsibility in relation to finances between governing bodies and those whom they represent and to make it more difficult to deviate from a budget enacted or adopted after hearing. The law was the result of a bill sponsored by the Wisconsin Citizens' Public Expenditure Survey. The law is obviously aimed at making public bodies more responsive to the concern of taxpayers and for the purpose of checking in some measure the trend in increased taxes. Whether the bill was wise,—whether it was needed,—whether it will accomplish its purpose *et cetera* is no concern of ours. We should not by construction attempt to whittle it away and thus prevent the measure from accomplishing its obvious design and purpose. We think that a construction of this law which would permit of a delegation of the function of "hearing" upon the proposed budget to a committee of the governing body would defeat the obvious design, purpose and intent of the law.

Certainly a major objective of the original bill No. 64,A., and substitute amendment No. 1,A., offered in relation thereto, was a public hearing on the proposed budget before the governing body as a body. We find nothing in the intent, purpose and objectives of ch. 221, Laws 1941, which would lead us to conclude that the legislature intended to abandon such major objective. Certainly there is no compelling language indicating such intent.

Sec. 65.90 (5), as created by ch. 221, provides :

"The amount of tax to be levied or certified, the amounts of the various appropriations and the purposes for such appropriations stated in such budget, after any alterations therein made pursuant to the hearing required by this section, shall not be changed thereafter unless authorized by a vote of two-thirds of the entire membership of the govern-

ing body of such municipality. Any municipality, excepting towns and one room school districts, which make such changes shall give notice thereof by publication, within 8 days thereafter, in a newspaper in general circulation in such municipality."

You ask whether this section requires a two-thirds vote for final adoption by the county board, or whether it merely requires that changes made after the final adoption following the public hearing on the proposed budget require a two-thirds vote.

Until the time of final adoption by the governing body, all matters are in relation to a "proposed" budget. The budget may be adopted by a majority vote. It then becomes the budget as adopted by the governing body. From that point on the two-thirds provision is applicable. Neither Bill No. 64,A., nor substitute amendment No. 1,A., in relation thereto, required original adoption of a budget after hearing by the governing body by a two-thirds vote. There is no language in the subsection above quoted which would indicate that original adoption by the governing body after hearing must be by two-thirds vote.

We are then asked whether any inference can be attached to the phrase "after any alterations made pursuant to the hearing" to the effect that the board could be compelled to make such changes as citizens may have suggested at the hearing. It is our opinion that it would require a positive legislative declaration to so shackle the county board. It seems clear that the intent was merely to provide for the expression of public opinion on a matter of public interest to the county, leaving the board free to act as it determines to be in the public interest. As applied to counties, any other construction would render the statute of extremely doubtful constitutionality. *Marshall v. Dane County Board of Supervisors*, 236 Wis. 57 (1940). There is nothing in the legislative history of the bill, or any of the provisions in the original bill and substitute amendments, which would indicate that the legislature ever intended to deprive the county board of its constitutional power to act as the governing body or to deprive any other public bodies of their statutory duty of acting as the governing body, after giving due consideration to the arguments made pro and con at the hearing.

You also ask whether a proper construction of subsec. (5) requires a two-thirds vote to transfer funds from one county department to another, or to transfer funds within a department from one purpose to another, or for expenditures from the contingent fund.

All three situations present changes in the amounts of the various appropriations and the purposes for such appropriations stated in such budget. As such, such transfers apparently demand a two-thirds vote under subsec. (5). This seems to be a major purpose of the law. Both the original bill and substitute amendment No. 1,A., required public hearings before such transfers could be made except in cases of emergencies. The language of the bill, as enacted (ch. 221, Laws 1941) is a legislative compromise.

As the contingent fund appears in the budget, it may be urged that residents and taxpayers have had an opportunity to express themselves in relation to that fund and that hence the legislature did not intend that a two-thirds vote would be necessary in augmenting appropriations from that fund. We do not think the argument sound. Transfer from a contingent fund to any other appropriation obviously does augment the appropriation to which the transfer is made and thus increase the amount of money or purpose for which any budgeted amount is expendable as per the original budget. It is a change of the "amounts of the various appropriations and the purposes for such appropriations" within the meaning of that language in subsection (5) of the act. Furthermore, a contingent fund in a budget does not mean that there has been any determination either by taxpayers, residents or county board members that it is necessary or desirable to expend the amount of that fund in addition to appropriations for specific purposes. Such an item in a budget simply means that the governing body deems it desirable that it levy taxes for the purpose of having funds on hand to meet unforeseen circumstances or to meet situations where time has proved estimates to be inadequate. Certainly if there is any reason for requiring a two-thirds vote to transfer funds appropriated for one purpose to another purpose in the same department, which transfer does not augment a departmental appropriation, there is every reason for requiring a two-thirds vote to aug-

ment a departmental appropriation by transfer to it from the contingent fund.

In connection with transfers from the contingent fund you ask whether the county board could authorize its finance committee, acting as an emergency board, to make transfers. In view of our conclusion that it requires a two-thirds vote, pursuant to the provisions of subsection (5) to authorize a transfer from the contingent fund, it would seem apparent that the board may not delegate such authorization to a committee.

Sec. 65.90 (2) requires that the proposed budget list all anticipated revenue and proposed expenditures for each department or activity. Sec. 65.90 (3) provides that "a summary of such budget" must be published at least ten days prior to the hearing. You ask us to interpret the word "summary" and inquire whether it would suffice merely to show the lump sum appropriated to the particular county department or whether the functions within such department for which the appropriation is made, must be shown.

We think that the public bodies in question are given the very widest sort of discretion with respect to the "summary" to be published. Publication is an expensive matter. If the "summary" contains itemization of each departmental activity it would not be a summary,—it would be the budget, as the budget is not required to be broken down beyond that point. On the other hand, the summary might well show a total of administrative expenses which might not appear at any one place in the budget, that is, the summary might be by function rather than by departmental totals. We do not suggest by this that departmental totals or functional totals are the only means of compiling a summary. The method in which the political unit keeps its books may conceivably have something to do with the most feasible summary. It is our thought that the summary should not involve any great amount of detail. Whatever figures are shown on the summary and whatever the breakdown thereof, it is our view that it should show comparable figures for the preceding two years. That will mean more to the public than any detailed breakdown without such figures.

You then ask who will set up the proposed budget in the case of towns and whether there will have to be an adjourned annual meeting to make final adoption of any budget proposed at the annual meeting, or whether the town board could set up a proposed budget more than fourteen days in advance of the date of the annual meeting.

Chapter 221 fails to specify as to these particulars. Apparently, therefore, the proposed budget could be prepared at an annual or special town meeting or by the town board. Under sec. 60.29 (1), the town board is given charge of all town affairs not by law committed to other officers. No reason appears why the town board could not set up the proposed budget more than fourteen days in advance of the annual town meeting. If this were done and the proper notice published, the budget hearing could be had at the annual town meeting and the budget could be adopted at that time or at an adjourned annual meeting if that should be preferable.

Sec. 65.90 (3) provides that notice of the hearing shall be published "at least 10 days prior to the time of such hearing."

Sec. 65.90 (4) provides in part:

"Not less than 14 days after the publication of the proposed budget and the notice of hearing thereon a public hearing shall be held at the time and place stipulated
* * *."

You call attention to the apparent inconsistency between these two subsections and inquire whether ten days notice of the summary budget, and time and place of hearing would suffice. Subsec. (4) demands strictly that the hearing be held not less than fourteen days after notice is given. It is our opinion that it should control over the less positive provisions of subsec. (3). Since subsec. (3) requires only that notice be given "at least" ten days prior to the hearing, a fourteen day notice would not violate subsec. (3) and would still conform to the requirements of subsec. (4), whereas a ten day notice would comply with subsec. (3) but would not meet the requirements of subsec. (4).

NSB

Bridges and Highways — Law of Road — Words and Phrases — Implement of Husbandry — Wagon or trailer temporarily propelled by farm tractor and engaged exclusively in transporting of agricultural commodities over highways is not necessarily “implement of husbandry” within meaning of sec. 85.45, subsec. (2), par. (a), Stats., unless its operation is incidental to and part of farming operations.

September 12, 1941.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Commissioner*.

You inquire whether a farm wagon or farm trailer temporarily propelled by a farm tractor, moving upon the highways engaged exclusively in transporting agricultural commodities, is to be classified as an implement of husbandry within the meaning of sec. 85.45, subsec. (2), par. (a), which, so far as applicable, provides:

“No vehicle including any load thereon shall exceed a total outside width of eight feet, except that the width of a farm tractor shall not exceed nine feet and that the limitations as to the size of vehicle stated in this section shall not apply to implements of husbandry temporarily propelled or moved upon the highway * * *.”

Whether or not a vehicle is an implement of husbandry within the meaning of sec. 85.45 (2) (a) is very much a question of fact and of degree. The legislature obviously recognized the impossibility of expressly describing every motor vehicle whose particular design and use would make it an implement of husbandry, and evidently intended that whether or not the vehicle could be so classified was to be determined by the facts of the particular case. Unfortunately, your statement does not include these essential facts.

An implement of husbandry is something necessary to the carrying on of the business of farming, without which such business could not be carried on. XXVIII Op. Atty. Gen. 311; 31 C. J. 256.

When you describe the equipment as “a farm wagon or farm trailer” we are not entirely sure whether you are re-

ferring to the ownership and use of the vehicle or whether you mean that the equipment is of the type ordinarily employed for farming purposes and as such commonly referred to as a farm wagon or farm trailer. Assuming the latter to be the case, we believe it is clear that the mere fact that the equipment is temporarily propelled upon the highway by a farm tractor, or that such vehicle is used exclusively in transporting agricultural commodities is not sufficient in itself to bring it within the meaning of the statute. While the tendency of the courts is to construe these exemption statutes as liberally as possible in favor of farmers and farm purposes, it is still, nevertheless, essential that such vehicle must be used exclusively in the business of farming, and you do not state that this is the case.

It is our opinion that being engaged exclusively in transporting agricultural commodities does not constitute the business of farming.

Two cases will serve to illustrate this point: In *Allred v. Engelman*, 61 S. W. (2d) 75, a fleet of motor trucks used to carry water to distant orchards for irrigation purposes, were held to be implements of husbandry, while in *Reaves v. State*, 50 S. W. (2d) 286, a motor truck and trailer simply engaged in transporting farm produce, was held not to be an implement of husbandry. Both cases arose under an exemption statute very similar to sec. 85.45 (2) (a).

It may well be that the equipment is "engaged exclusively in transporting agricultural commodities" on a purely commercial basis by one who is not in the business of farming in any way, shape or manner and in such cases the vehicle in question could not be considered to be an "implement of husbandry," since under the authorities cited, it would not be necessary to the carrying on of the business of farming.

WHR

Taxation — Tax Collection — Interest payable under second paragraph of sec. 74.46, Stats. 1939, is computed to end of month in which payment is made at rate of eight-tenths of one per cent per month.

September 17, 1941.

S. RICHARD HEATH,

District Attorney,

Fond du Lac, Wisconsin.

You submitted for opinion the question of whether, under the second paragraph of sec. 74.46, Stats. 1939, interest is payable up to the date of payment or to the end of the month in which payment is made.

The provision in question came into existence by ch. 409, Laws 1937, and reads as follows:

“The purchaser at any tax sale and any person taking tax certificates from the county by assignment shall pay therefor the principal of the tax and interest thereon from January first of the year following the tax levy to the date on which he pays for his certificate.”

Under date of July 18, 1941, we gave you an opinion that we were in accord with your view that the interest payable under this section is computed to the date on which the payment is made to the county treasurer for the tax certificate and not to the end of the month in which the payment is made. Subsequently, in connection with other matters we concluded that this is erroneous because of the mathematical impossibility of so using the rate specified and therefore this prior opinion is withdrawn.

We were fully cognizant that the interest rate as set forth in the form of tax certificate in the preceding paragraph of sec. 74.46, Stats., and in sec. 75.01 (1) Stats., is “eight-tenths of one per cent per month or fraction thereof.” But the mathematical impossibility of using this rate to figure interest to other than the end of a month, and that a computation of interest at this rate “to the date on which he pays for his certificate” reaches the same result as though the statute said the interest should be computed to the end of the month, were not appreciated.

As we stated in the prior opinion, the language of the second paragraph of sec. 74.46 is perfectly plain and states as clearly as it could be phrased that the purchaser is to pay interest to the date on which he pays for his certificate. Under the universally recognized principle that an unambiguous statute is not open to construction, there is no occasion for construing this language. It thus clearly provides that on whatever date the purchaser pays for a certificate he must pay the interest up to that time at the prescribed rate. This provision of the statute is mandatory and admits of no exception. Thus there is no question as to the time to which the interest is to be computed under this statute, but only as to what rate of interest is to be used in computing the interest as of the date of payment. This is answered by other provisions of the statutes which prescribe that it is at the rate of "eight-tenths of one per cent per month or fraction thereof."

While we were preparing this present opinion to you we received a request from the district attorney of Lincoln county for an opinion as to whether under the provisions of sec. 75.01 (1), Wis. Stats. 1939, the interest therein prescribed is to be computed for the entire month in which payment is made even though payment is made during and before the expiration of the month. Under the same date as this opinion we have rendered an opinion to him that said interest is computed to the end of the calendar month in which payment is made and in the interest of brevity we refer thereto. Although previously we have rendered no official opinion upon that question that has been our construction of said interest rate ever since its adoption, which has been the accepted construction followed by the majority, if not all, of the taxing officials in relation thereto. It is mathematically impossible to apply this rate as so construed to the provisions of the second paragraph of sec. 74.46 and come out with any different result than as though the interest had been computed to the end of the month.

It is, therefore, our opinion that at the time the purchaser of a tax certificate makes payment therefor to the county treasurer he must, under the provisions of the second paragraph of sec. 74.46, Stats., pay interest on the tax up to and including the month in which he makes payment therefor

at the rate of eight-tenths of one per cent per month for the full month in which he makes the payment.

HHP

Taxation — Tax Collection — Under provisions of sec. 75.01, subsec. (1), Stats., interest is computed to end of calendar month in which payment is made, even though payment is made during month and before end thereof.

September 17, 1941.

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

You have requested an opinion as to whether under the provisions of sec. 75.01, Wis. Stats. 1939, the interest therein prescribed is to be computed for the entire month in which payment is made, even though payment is made during and before the expiration of the month.

The interest therein specified is "eight-tenths of one per cent per month or fraction thereof." This statute in substance says that the rate of interest is eight-tenths of one per cent per month and that any fraction of a month is to be considered as a whole month. There being no comma after the word "month" when applied to a fraction of a month, it reads that the interest is "eight-tenths of one per cent" per fraction of a month. In the computation of interest this rate must be used in its entirety. It is mathematically impossible to use this rate to figure interest to anything other than the end of a month. Interest to a date other than the end of a month could be figured only by using merely the words "eight-tenths of one per cent per month" out of the statutory language and completely disregarding the remaining language "or fraction thereof". Obviously it is not permissible to use only a portion of the language as to the rate, but all of it must be given effect.

Prior to ch. 294, Laws 1937, which abolished the then existing system of charging two per cent penalty, advertising fee, selling fee, redemption fee and interest at eight per cent per annum, and substituted this new rate in lieu thereof throughout the statutes, each transaction involved a computation of interest for the exact number of years, months and days up to that date at the annual rate. The legislature expressly stated in said ch. 294 that it was enacted to simplify the collecting of delinquent taxes both for the convenience and information of the taxpayer and the collecting officers. Had it been intended to leave the computation of interest upon the same basis the legislature would have merely provided that the new rate should be "eight-tenths of one per cent per month." The use of the additional words "or fraction thereof" is a clear legislative expression that this old method of computing the interest is likewise abandoned and that thereafter the simpler method of treating a part of a month as a whole month is to prevail and is in harmony with its declared intention of simplification.

It is therefore our opinion that where payment is made during the month interest is to be computed under the provisions of sec. 75.01, subsec. (1), Wis. Stats. 1939, to the end of the calendar month in which payment is made.

HHP

Appropriations and Expenditures — Counties — Expenses in Actions against Municipal Officers — Public Officers — Municipal Officers — It is not necessary under sec. 331.35, Stats., that municipal officer be compensated on salary basis in order to receive reimbursement for expenses incurred in defending himself against criminal charge.

September 18, 1941.

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

You have submitted the following question for our opinion:

“Can the town board under section 331.35 pay the legal expenses of inspectors of a local election, which expenses were incurred by the inspectors in defending a criminal action, in which they were charged with a violation of the election laws in respect to their duties as such inspectors. The criminal action instituted by a special prosecutor was later dismissed by him and the three inspectors have requested the town board to pay their legal expenses in connection with defending that criminal action.”

You raise the question as to whether there is any requirement that an officer be “compensated on a salary basis” in order to receive reimbursement under the section in question and, if so, whether inspectors of a local election are compensated on a salary basis.

Sec. 331.35, Stats., reads as follows:

“(1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable ex-

penses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even through [*sic*] decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer."

We are of the opinion that there is no requirement that an officer be "compensated on a salary basis" in order to receive reimbursement under the statute in question. You will note by a careful reading of the statute that it is applicable, (1) where "charges of any kind shall be filed or an action be brought against any officer * * * in his official capacity," and (2) where an action is brought "to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, * * *." That portion of the statute relating to compensation on a salary basis does not apply except where the purpose of the proceeding is to subject the officer to personal liability. And personal liability, as here used, means financial liability as distinguished from criminal liability, since the matter of criminal liability is covered by that portion of the statute which relates to "charges of any kind shall be filed * * *."

In view of the answer thus given it is not necessary to decide whether inspectors of a local election are compensated on a salary basis since in the case at hand the inspectors seek reimbursement for expense incurred in defending themselves against criminal charges.

JWR

Counties — County Board — Municipal Corporations — Municipal Law — Bids — Existing statutes do not require that proposal for repair of county building shall be submitted for bids.

September 18, 1941.

HOWARD H. MOSS,
District Attorney,
Janesville, Wisconsin.

You have asked whether it is mandatory, under the statutes of this state, for county authorities to submit to competitive bidding a proposal for repairs to the heating system of its court house, when the cost of such repairs exceeds sixty dollars.

The county board has authority under sec. 59.07, subsec. (4) of the statutes to "build and keep in repair the county buildings." Unless there is some statute specifically restricting the manner in which county buildings shall be repaired, sec. 59.07 (4) is broad enough to permit it to be done in whatever manner the local authorities deem best, either with or without submitting the proposal for bids.

With respect to the method of letting municipal contracts, 3 McQuillin, Municipal Corporations, 862 (2d) sec. 1288, reads:

"In the absence of charter or statutory requirement, municipal contracts need not be let under competitive bid. So where a statute merely permits competitive bidding but does not require it, it is not necessary that the municipal authorities shall let the contract in that way."

To the latter proposition are cited *Yarnold v. Lawrence*, 15 Kan. 126, and *Dillingham v. Spartanburg*, 75 S. Car. 549, 56 S. E. 381. While a county is not, strictly speaking, a municipal corporation by the weight of authority, the rules of statutory construction respecting its powers are similar to those applicable to municipal corporations.

You have quoted part of sec. 59.07 (7) which makes it mandatory upon the county purchasing agent to buy from the lowest reliable bidder "books, stationery, blanks, safes,

furniture, telephone service, fuel, and lights necessary for the discharge of official business in the offices of county clerk, clerk of circuit court, register of deeds, treasurer, sheriff and county judge", which cost in excess of sixty dollars. The foregoing provision is specific, and none of its terms would cover structural repairs to the building in which the various enumerated offices are housed.

Sec. 66.29 prescribes certain procedure applicable to officers of a county or other governmental subdivision "charged with the duty of receiving bids for and awarding any public contract." The section does not contain any language which would of itself obligate counties to award contracts by the competitive bidding method. It applies only when public officers have elected to proceed by such method, or are required by the provisions of some other statute or ordinance to do so. This is made clear by the fact that various other sections of the statutes provide in what cases contracts shall be let or purchases made by submission for competitive bids. As an example, sec. 62.15 (1), relating to cities, provides:

"All public work, the estimated cost of which shall exceed five hundred dollars, shall be let by contract to the lowest responsible bidder; all other public work shall be let as the council may direct."

It seems clear that where the legislature intends that a particular class of work shall be done or particular purchases made through competitive bidding, it enacts an express provision to that effect similar to that last quoted. We find no such statute relating to construction or repair of county buildings. If there is no county ordinance on the subject, the county board or its authorized committee may make the repairs by whatever method it finds most appropriate.

BL

Municipal Corporations — Municipal Law — Taxation — Tax Collection — Razing of Buildings — Persons who destroy buildings under provisions of sec. 66.05, subsec. (5), Stats., are not subject to penalty under provisions of sec. 74.44 (2), Stats.

September 19, 1941.

BRUCE F. BEILFUSS,
District Attorney,
Neillsville, Wisconsin.

You have asked our opinion as to whether sec. 74.44, subsec. (2), Wis. Stats., as amended by ch. 185, Laws 1941, impliedly amends sec. 66.05 (5), Wis. Stats.

Sec. 66.05 (5), so far as applicable here, in substance gives municipalities authority to order the destruction of buildings which have become so old, dilapidated or out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use.

Sec. 74.44 (2), as amended by ch. 185, Laws 1941, so far as here material, penalizes persons who remove buildings, fixtures and other improvements assessed as real property from lands upon which a county holds a tax certificate.

Your question arises out of the fact that under sec. 74.44 (2) a person might be penalized for doing that which he is required to do by virtue of the action of municipal authorities under sec. 66.05 (5).

In our opinion, no such consequence is possible. We have very little difficulty in arriving at the conclusion that there is no conflict between the two sections quoted.

The supreme court has used the following language in prescribing a guide for statutory construction in cases of this kind:

“* * * In construing a statute we should consider other statutes *in pari materia*, the mischief to be corrected, and the words of the statute, in an effort to harmonize the general statutory scheme on the subject matter involved and to carry forward the legislative intent, so far as possible, without doing violence to the plain and unequivocal language of the particular statute under consideration.” *Foster v. Sawyer County*, 197 Wis. 218, 221.

Applying this rule, it is evident that the two statutes may be reconciled without doing violence to the language of either. The object of sec. 66.05 (5) is to provide a method for the removal or destruction of buildings which have become dangerous to the inhabitants of the municipality in which they may be situated. The subsection represents an exercise of the police power of the state to preserve the health and safety of the people thereof. Sec. 74.44 (2) has to do with the raising of public revenues. Its object is simple. It is aimed to prevent an impairment in the value of property upon which a municipality holds a tax lien. Both subsections represent an effort on the part of the state to provide for the better functioning of government, and it must not be assumed that the legislature intended to prevent by the one enactment the exercise of the power granted by the other, if such a result can be avoided. This would be absurd, and in addition to the foregoing rule of construction, there is another rule to the effect that absurd results should be avoided. *Pfingsten v. Pfingsten*, 164 Wis. 308; *Carchidi v. State*, 187 Wis. 438.

There is no reason why the two statutes cannot stand together and be given their full application. Neither was enacted to deal with a situation created by the other, and there is no reason why they should be so construed. Each should be considered in the light of its purpose and, when so considered, it must be evident that it was the purpose of neither to affect the operation of the other.

In view of the foregoing, we think that in the case under consideration persons removing old buildings upon the order of duly constituted municipal authority under the provisions of sec. 66.05 (5) are not amenable to penalties under the provisions of sec. 74.44 (2).

JWR

Tuberculosis Sanatoriums — Person admitted as “pay patient” under provisions of sec. 50.07, Stats., and who later fails to pay his bill is not kept as public charge within meaning of sec. 50.07, subsec. (3), Stats.

September 19, 1941.

BOARD OF HEALTH.

Attention Dr. C. A. Harper.

This is in response to your letter of July 7 with respect to a claim of Milwaukee county for reimbursement in the amount of \$17,927.15 as state aid for the care of patients at Muirdale sanatorium and Bluemound Preventorium.

In our opinion the county's claim should be rejected. Sec. 50.07, Wis. Stats., reads in part as follows:

“(1) Any person suffering from tuberculosis may be received into any such county institution and cared for upon payment of a rate which shall not exceed the actual cost of maintenance therein. There may also be admitted any person who presents symptoms of tuberculosis calling for careful observation in order to make a diagnosis, and who in the opinion of the superintendent and visiting physician, if the superintendent is not a physician, is a proper subject for treatment in any such county institution. Every applicant for admission shall furnish a certificate of a regularly licensed physician that he is suffering from tuberculosis, or that he presents symptoms of tuberculosis calling for careful observation in order to make a diagnosis.

“(2) Any such person who is unable to pay for his care may be admitted and maintained in such institution at the charge of the county in which he has his legal settlement, pursuant to subsection (2) of section 50.03. Such maintenance shall include necessary traveling expenses including the expense for an attendant when such person cannot travel alone, necessary clothing, toilet articles, emergency surgical and dental work, and all other necessary and reasonable expenses incident to his care in such institution.

“(3) Each county maintaining in whole or in part such an institution shall be credited by the state, to be adjusted as provided in section 46.10, for each patient cared for therein at public charge, * * *

The county's claim is based upon the proposition, as we understand it, that where a person is admitted as a pay

patient and the account later proves uncollectible, the patient has been cared for "at public charge" and the state is liable for reimbursement under the provisions of sec. 50.07 (3).

We are unable to agree with this reasoning. Sec. 50.07 (2), set out above, provides for the admittance of patients at public charge. The procedure set out is that provided for by sec. 50.03 (2). This last mentioned subsection provides as follows:

"(2) Any patient unable or who believes that his circumstances do not warrant his being required to pay any part of his care shall file an application with the county judge of the county within which he has a legal settlement, and if applicant has no legal settlement in any county, then with the county judge of the county where he is found, setting forth the fact that he is unable or that his circumstances do not warrant his being required to pay the cost of his care. If the patient is a minor, the said application shall be made and filed by a parent or his guardian. The said judge may designate a person or official by whom such application may be made. Said judge, upon further presentation of the report of the examining physician, and a statement from the superintendent of the sanatorium that the applicant is eligible and can be received, shall make an investigation in the manner prescribed in subsection (1a) of section 46.10, except that in such investigation, the said judge shall give due consideration to the desirability of isolating the patient because of the contagious character of the disease, to avoid jeopardizing the support of the patient's dependents during his hospitalization and their future requirements due to the patient's probable future lessened earning power after hospitalization; also to the probable length of time of such hospitalization. The chargeability of the person liable for the care of a patient shall be determined by the same rules applicable to the patient. Said judge may, whenever the facts disclosed in the hearing warrant, provide in his certification that the patient pay such part of the cost of his care as the judge deems just, which part or proportion may be increased or decreased after hearing by him whenever the circumstances warrant."

We are of the view that the procedure set up by secs. 50.07 (2) and 50.03 (2) for the admittance of patients at public charge is exclusive, and that only those people are cared for at public charge within the meaning of sec. 50.07

(3) who are admitted as provided for in the quoted subsections. We do not believe that a person is a public charge who is admitted by the hospital authorities as a pay patient and who later fails to pay his bill for some reason or other.

In addition to the foregoing, there are other considerations involved. Among such is the consideration that a considerable part of the claim covers reimbursement for periods of time that have long since elapsed. For example, part of the claim goes back to the year 1922, and varying amounts are claimed for the years from 1922 to 1934, inclusive. It is provided in sec. 46.10 (3) that claims against the state of this nature shall be made from year to year. We seriously doubt that where claims have been permitted to accumulate without being presented for such a long period of time, they now constitute a proper charge against the state. We recognize that this objection does not go to the entire amount of the claim, but it does cover a substantial part.

In view of the foregoing, we feel that the board ought not to allow the claim as presented.

JWR

Mortgages, Deeds, etc. — Public Officers — Register of Deeds — Statutory provisions relating to recording of instruments in office of register of deeds do not contemplate partial recording of any instrument and trust indenture covering descriptions of lands in other counties should be recorded in its entirety.

September 19, 1941.

DONALD W. GLEASON,
District Attorney,
Green Bay, Wisconsin.

You inquire whether a certain trust indenture covering one hundred seventy-six pages, followed by descriptions of land affecting nineteen different counties included in the

mortgage, of which the description of Brown county lands takes up approximately six pages, must be recorded at length, or whether the register of deeds may eliminate the portions not affecting Brown county. It is your opinion that the instrument must be recorded in its entirety because there is no statutory authority for partial recording of an instrument, and it would be impossible for the register of deeds to later furnish a proper certified copy of the complete instrument.

We believe you are correct in holding that such instrument must be recorded at length, regardless of the fact that portions thereof do not concern Brown county. We base our conclusions upon an interpretation of the various statutes involved and also upon the purpose for which recording statutes are enacted.

Laws dealing with the general subject of recording are interspersed throughout our statute books, yet none of them rule specifically on the point in question. With respect to the duties of the register of deeds, sec. 59.51, subsec. (1), provides that such person shall:

“Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose.”

Sec. 235.40, Stats., states that:

“Whenever any conveyance of lands situated in different counties shall have been recorded in any county within which any of such lands are situated a copy of the record of such conveyance, duly certified by the register of deeds, may be recorded in any other county in which any of such lands are situated in the same manner and with like effect as the originals.”

Sec. 235.50 defines “conveyance” to mean “every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned * * *.”

In so far as deeds of trust of public service corporations are concerned, sec. 180.25 provide:

“* * * Every such mortgage or deed of trust may be recorded in the office of the register of deeds of the county in which such corporation is located, and such record shall have the same force and effect as if the instrument were filed in the proper office as a chattel mortgage, and so remain until satisfied or discharged without any further affidavit or proceeding whatever.”

While it is seen that none of these statutes mentions specifically that such instruments must be recorded at length, it is a general rule of statutory construction that all words and phrases shall be construed and understood according to the common and approved usage of the language. See sec. 370.01 (1), Stats. The words “record” or “be recorded” mean “to write or inscribe an authentic account of.” Funk & Wagnalls New Standard Dictionary, p. 2066. Accordingly, it appears to be clearly intended by the statutes that whenever an instrument is submitted for recording, it must be recorded *in extenso*. It is not within the province of the register of deeds to determine for himself how much of an instrument is to be recorded. It is the instrument as a whole which is and necessarily must be offered for recording. His statutory duty is to record, “correctly and legibly,” all instruments authorized by law to be recorded, and it is our opinion that from this duty springs a natural implication that such recording must be made in full.

This conclusion is supported by an analysis of the purpose of recording statutes in general. The sole purpose of registration is to give constructive notice to persons who become subsequently interested in the estate. *Coe v. Manseau*, 62 Wis. 81. A purchaser of real estate, whether it be at a forced sale or otherwise, has a right to rely upon the record title, in absence of any actual notice that such title may be defective. If the property lies in two or more counties, the mortgage should be recorded in each, for the record of it in one county will affect only that portion of the premises which lies within that county. 41 C. J. 499. If it be permissible to omit all but the Brown county lands from the Brown county record, so, also, the Brown county lands should be omitted from the records in the other counties. And if this be so, how could a person know that all of the records were of the same instrument, or that all of the lands

were included in the same trust deed? It is true that sec. 59.52, Stats., provides that the register of deeds may enter in the index, the words "see record," "see deed," "see mortgage," as the case may be, and that such entry shall be a sufficient reference to the record, but this is true if, and only if, the instrument be in fact "recorded at large in the place so referred to." Moreover, there is in fact a presumption that the instrument is fully recorded as soon as it is received. *St. Croix L. & L. Co. v. Ritchie*, 73 Wis. 409. The court in this case remarked further :

"The omission from the general index of the description of the land affected by the instrument entered therein for record, is cured by correctly recording the instrument *at length* in the proper record book, and from the time the instrument is so recorded *at length* the registry is valid and effectual." (Italics ours.) (Syllabus.)

You are, therefore, advised that the instrument referred to must be recorded in its entirety.

WHR

Public Health — Wisconsin Orthopedic Hospital for Children — Wisconsin orthopedic hospital for children is not charitable or curative institution maintained by state within meaning of sec. 46.10, Stats.

September 22, 1941.

ALLEN C. WITTKOPF,
District Attorney,
Florence, Wisconsin.

You have submitted the following statement of facts :

"During the year 1937 the county judge of Florence county committed A, minor son of B, to the Wisconsin orthopedic hospital for children to receive treatment. The judge mistakenly designated Florence county as the county of legal residence, when in fact the legal residence of A was

at the time of commitment, and still is, G county. The fact of residence of A is admitted by G county and the latter still reimburses F county for all relief supplied to B and family."

You then state that F county has requested the state department of public welfare to correct and certify this error under the provisions of sec. 46.10 (6), Wis. Stats., and that the department refuses to do so upon the ground that the provisions of sec. 46.10 (6) are not applicable to commitments to the Wisconsin orthopedic hospital for children.

You request our opinion as to whether the subsection is applicable and, if not, as to what recourse F county may have in order to impose liability upon G county.

In our opinion the position of the department of public welfare is correct and F county has no recourse under the provisions of sec. 46.10 (6), Stats. The applicable provisions of ch. 46, Stats., read as follows:

"46.10 (1) Whenever any person shall be committed or admitted to any charitable, curative, reformatory or penal institutions of the state, or of any county except to tuberculosis patients provided for in chapter 50 and subsection (2) of section 58.06, the court, judge, magistrate or board before whom such matter is pending shall upon proper evidence determine the legal settlement of such person, and shall certify the same to the superintendent of the institution to which such person is committed or admitted. The county in which said legal settlement is located shall be chargeable with the support and maintenance in the manner and to the extent provided by law. If it is found that said person does not have a legal settlement in any town, village or city, in this state, the state may be chargeable with all of the support and maintenance, provided the said court, judge, magistrate or board submits a transcript of the testimony taken for such a finding with respect to legal settlement to the state board of control, and the same is approved by said board and is so certified to the superintendent of the institution to which such person is committed or admitted. Nothing in this section or elsewhere shall prevent a recovery of the actual per capita cost of such maintenance by the state board of control or by the county in counties having a population of five hundred thousand or more, or prohibit the acceptance by said board of any payment of the cost of maintenance, or a part thereof, from such a person or anyone in his behalf.

"* * *

"(2) On the first day of July in each year the state board of control shall prepare a statement of the amounts due from the several counties to the state, pursuant to law, for the maintenance, care and treatment of inmates at public charge in state or county charitable, curative, reformatory and penal institutions. Such a statement shall cover the preceding fiscal year and shall specify the name of every inmate in each state institution whose support is partly chargeable to some county, and the name of every inmate in each county institution whose support is wholly chargeable in the first instance to the state and partly chargeable over to some county; and shall further specify, with respect to each inmate, his legal settlement, the number of weeks for which support is charged, the amount due the county for any recovery of maintenance, and the amount due to the state from such county, itemized as to board, clothing, dental, burial, surgical and transfer. The president and secretary of the board shall certify said statement, file it with the secretary of state, and mail a duplicate to the clerk of each county charged; and thereupon the secretary of state shall charge to the several counties the amounts so due, which shall be certified, levied, collected and paid into the state treasury with the state tax as a special charge.

"* * *

"(4) Whenever any inmate in any charitable, curative, reformatory, or penal institution of the state or of any county is improperly charged to the state or to any county, the attorney-general on behalf of the state, or the district attorney of such county on its behalf, may make written application to the state board of control for relief from such charge. The application shall designate the county to which such inmate is chargeable, or if it be claimed that he is chargeable to the state it shall be so stated. Said board shall give reasonable notice to the parties interested of the time and place at which and when they may be heard. Such application may be supported by affidavits and other proper evidence. If upon the hearing said board shall grant the relief asked for it shall order a proper charge against the county chargeable, or against the state, as the case may be; and from and after the making of such order such inmate's support shall be charged accordingly; but the county named in such order may, in like manner apply to said board for relief from the burden thereby imposed, in which case the matter shall be heard and disposed of as herein provided.

"(5) Any party aggrieved by any such order may, within one year from the making thereof, appeal to the circuit court of Dane county, by serving a notice of the appeal upon the president or secretary of said board, the district attorney of any county which is a party in interest and

upon the attorney-general. Within twenty days after the service of such notice the secretary of said board shall transmit to the clerk of such court all the original papers used upon the hearing before it, together with a certified copy of all the proceedings, orders and decisions made thereon. When a complete determination of the controversy cannot be had without the presence of other parties than those to the original proceeding the court shall order such parties to be brought in, and for that purpose may make such order as it may deem necessary. Such appeal shall be tried by a jury unless such mode of trial is waived, in the manner in which actions originally brought in the circuit court are tried. The jury shall find a special verdict naming the county to which the support of such inmate is chargeable or whether it is chargeable to the state, and judgment shall be entered accordingly. An appeal may be taken from such judgment to the supreme court as in other cases. The prevailing party in either court shall be entitled to the usual costs. Upon the rendition of final judgment said board shall make the proper charges or credits on its books and certify the same to the secretary of state.

“(6) If any error has been or shall be committed in the accounts between the state and any county in making charges for the support of any inmate in any charitable, curative, reformatory, or penal institution, or in the amount certified to any county as due and to be assessed upon it on account of such support, and such error shall be certified by the state board of control, the secretary of state shall correct such error by a proper charge or credit on the state tax next accruing.”

✓ You take the broad position that the Wisconsin orthopedic hospital for children falls within the language “any charitable, curative, reformatory, or penal institution” of the state, and that consequently these quoted provisions are applicable. There is something to be said for your position and we note your reference to an attorney general’s opinion, XXV Op. Atty. Gen. 585, in which it was held that the Wisconsin general hospital is a state institution within the meaning of sec. 46.10 (7), Stats., providing for the recovery of the cost of maintenance of inmates in state institutions. The argument against this construction is, in our judgment, more persuasive, however, and we are frank to confess that we think the result reached in the attorney general’s opinion quoted is wrong.

You will note that ch. 46 is a part of Title VII of the Wisconsin statutes. Title VII is entitled "Charitable, Curative, Reformatory and Penal Institutions and Agencies." Ch. 46, Stats., is entitled "State Board of Control and Local Boards." Sec. 46.01 provides for a "State Board of Control of Wisconsin" "To secure the just, humane and economical administration of the laws concerning the charitable, curative, reformatory, and penal institutions of this state, * * *." Sec. 46.03, Stats., relating to the powers of the state board of control, provides that it shall have jurisdiction over certain institutions there specified (but not including the Wisconsin orthopedic hospital for children) and "all other charitable, curative, reformatory, and penal institutions that may be established or maintained by the state."

The state board of control was abolished and the functions thereof were transferred to the state department of public welfare by ch. 435, Laws 1939. *Cf.* secs. 58.36 and 58.37, Wis. Stats. For the purposes of this discussion, however, the transfer is not material since the state department of public welfare exercises the functions formerly exercised by the state board of control.

In sec. 46.10, Stats., provision is made, as set out in the portions of the statute quoted above, for the imposition upon and the division between the state and the several counties of the cost of maintaining persons in any "charitable, curative, reformatory, or penal institutions of the state" at public expense. Provision is made in sec. 46.10 (1) for a certain procedure to determine legal settlement prior to admittance. There is also provision for imposing the cost of maintenance. It is provided that the county of legal settlement shall be determined prior to admittance and that the county of legal settlement "shall be chargeable with the support and maintenance in the manner and to the extent provided by law." It is further provided that "If it is found that said person does not have a legal settlement in any town, village or city, in this state, the state may be chargeable with all of the support and maintenance," provided a certain procedure is followed.

The provisions of the Wisconsin statutes relating to the establishment of the Wisconsin general hospital and the Wisconsin orthopedic hospital for children and for the government of these institutions and the admittance of patients thereto are in no wise related to the provisions of the curative and charitable institutions, to which we have heretofore referred. The establishment of the state of Wisconsin general hospital is provided for by sec. 36.31, Stats., created by ch. 30, Laws Special Session 1920. The establishment of the Wisconsin orthopedic hospital for children is covered by sec. 36.32, created by ch. 490, Laws 1929. A reference to these sections will disclose that in each case the institution is by law established as a part of the university of Wisconsin and is placed under the control and supervision of the board of regents of the university of Wisconsin.

So far as the question of admittance and maintenance of patients in these two last named institutions is concerned, such matters are covered in the statutes under the Title XV of the statutes, entitled "Public Health" and are altogether independent of the provisions heretofore set out relating to admittance and maintenance of patients in institutions under the jurisdiction of the state board of control. It is provided in sec. 142.08, Stats., that the net cost of caring for patients in the Wisconsin orthopedic hospital for children shall be equally divided between the state and the county of legal settlement of the patient. Sec. 142.01, Stats., provides that as a condition to admittance to the Wisconsin orthopedic hospital for children a patient shall have a legal settlement within the state. Sec. 142.08, Stats., further provides for a certification of the cost of caring for patients by the board of regents of the university to the secretary of state and for the collection of the amounts due the state from the counties by the secretary of state.

In view of the foregoing the following observations are applicable:

If the Wisconsin orthopedic hospital for children is a state institution within the meaning of ch. 46 it would be under the jurisdiction of the state board of control, whereas it is under the jurisdiction of the board of regents of the university of Wisconsin. This alone would indicate that the institution could not be properly classified as a state insti-

tution under the provisions of ch. 46, Stats. In addition to this, the conclusion is well nigh inevitable that the exclusion of the Wisconsin orthopedic hospital for children from Title VII, entitled "Charitable, Curative, Reformatory and Penal Institutions and Agencies" is significant and that it was not intended to be such an institution within the meaning of that title.

If the Wisconsin orthopedic hospital for children were held to be a curative institution within the meaning of sec. 46.10, a conflict would result in those statutes relating to the admittance and the care of patients. As we have pointed out, sec. 46.10 (1), Stats., provides that the state shall pay the entire cost of maintenance in a case where a person has no legal settlement in the state. Under the provisions of sec. 142.01, as we have shown, a person may not be admitted to the Wisconsin orthopedic hospital for children unless he is legally settled in the state. Further than this, sec. 142.08 provides a complete and comprehensive method for certification of charges by the board of regents of the university covering the cost of maintenance at the hospital, whereas under sec. 46.10 the state board of control is charged with the duty of certifying the cost of maintenance in the institutions there enumerated. There can be no doubt but that the function of the state board of control in correcting certifications under sec. 46.10 is confined to the correction of certifications which it is required to make, and it is not required nor even permitted to make certifications with respect to the cost of maintenance at the Wisconsin orthopedic hospital for children.

You desire to know what, in our opinion, should be done to rectify the error in certification if it cannot be corrected by the state department of public welfare. We doubt that anything can be done. In the interest of brevity we shall not here set out in detail the various provisions of ch. 142, but we think it is a fair interpretation of those provisions that a county judge is restricted to certifying the admittance of patients settled within his county. When a certification is made it constitutes a *quasi*-judicial determination that the person so certified resides within the county from which he is certified. No provision is made by law for the correction of any erroneous certification and we very much

doubt that it may be collaterally attacked in a case where the hospital authorities have acted upon it and have furnished care and maintenance to a patient so certified. The state is certainly entitled to rely upon the certification and by statute is permitted to impose its charges upon the basis of the certification. If the certification is improper, it would seem to constitute a burden which the county from which the certification is made is required to assume. If it were not so, then the state would probably be required to assume the burden since the county of legal settlement could not be required to assume it if the certification were made by a county judge of another county in excess of his jurisdiction.
JWR

Taxation — Tax Collection — Publication of list of tax delinquent lands and notice of sale prior to second Monday in September and setting tax sale for October 7, 1941, deemed not capable of amendment by subsequent notice giving date of sale as October 21, 1941, so as to be compliance with provision of sec. 74.33, Stats.

September 23, 1941.

LAVERN G. KOSTNER,
District Attorney,
Arcadia, Wisconsin.

You state that the county treasurer of your county had published on August 28, 1941, and September 4, 1941, the list of tax delinquent lands and notice of tax sale thereof, which set the sale for October 7, 1941. This notice was given by following the provisions of ch. 1 of the laws of 1941 and in noting that subsec. (3) of sec. 74.037, amended therein, was subsequently repealed by chapter 9, laws of 1941. Because of this repeal of subsec. (3), sec. 74.037 (chapter 1, laws of 1941), sec. 74.33 is the only statute now covering tax sales, as it provided that the county treasurer shall make up a list of delinquent lands on the second Mon-

day of September, that the sale shall start on the third Tuesday in October, and that such list and notice shall be published once in each week for two successive weeks prior to said third Tuesday in October, you ask whether the error in the notice as to the date of the tax sale can be cured by publishing an amended notice, setting forth that the sale will start on October 21st without again publishing the descriptions or whether it will be necessary to make a new and complete publication in accordance with the provisions of sec. 74.33.

It is our opinion that sec. 74.33 Stats. calls for a publication of the list of tax delinquent lands as made up on the second Monday of September and contemplates a publication following that date of the list of the lands delinquent on that date, together with the notice that such lands will be sold on the third Tuesday in October and succeeding days. Thus the publication prior to the second Monday in September of a list of lands delinquent as of some previous date and setting the time of sale for a date other than the third Tuesday in October would not meet the requirements of the statute. It would, therefore, be necessary in order to fulfill the requirements of this section that the list of tax delinquent lands made up as of the second Monday in September would have to be published together with a notice that they would be sold on the third Tuesday in October and the requirements of such publication would not be met by publishing after the second Monday in September a notice amending a previously published notice. In any event, as there is plenty of time now to publish the correct notice, it is our opinion that the only safe thing to do would be to publish the proper notice so as to strictly comply with the language of sec. 74.33, Stats. To attempt to amend the previous notices by the publication of a new notice referring thereto would, in our opinion, not only be extremely dangerous, but clearly not a compliance with the requirements of the statute.

It is, therefore, our opinion that a new and correct notice should be now published in accordance with the provision of and meeting the requirements set forth in sec. 74.33 Stats.

HHP

School Districts — Transportation of School Children —
Duty of school board of common school district to transport children residing more than two and one-half miles from schoolhouse is mandatory under sec. 40.34, subsec. (1), Stats.

September 24, 1941.

PAUL W. GRIESSER,
District Attorney,
Medford, Wisconsin.

You have asked our opinion as to whether under the provisions of sec. 40.34, subsec. (1), Stats., a common school district is required to furnish transportation to children residing more than two and one-half miles from the school. The section in question, so far as pertinent, reads as follows:

“(1) The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. The board of every consolidated school district or in a district which has voted to close its school and provide tuition and transportation shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse. The board shall provide transportation to and from school for all school children residing in the district and over two and one-half miles from the schoolhouse, in case of a common school and four miles in case of a union high school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of twenty cents per day for the first child and ten cents per day for each additional child transported; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; provided further, that any child residing more than four miles from the school of his district other than a union high school district may attend the school of another district, in which case the home district shall pay the tuition of such child. The district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported.”

This subsection clearly provides that the school board of every consolidated school district or in a district which

has voted to close its school and provide tuition and transportation "shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse." It further provides that the board of a common school district shall provide transportation for children residing over two and one-half miles from the schoolhouse in case of a common school and four miles in case of a union high school. These requirements are mandatory. *Hein v. Luther*, 197 Wis. 88. The first sentence is permissive and authorizes the district to provide transportation for all children of school age residing in the district even though they may not reside beyond the specified distance from the school house. So construed, the section provides that transportation be furnished under certain circumstances and permits the furnishing of transportation even though such circumstances may not be present.

The case cited holds that the duty so imposed upon the school board to provide transportation may not be enforced by mandamus, since an adequate remedy is provided. The remedy lies in the right of the parents to furnish transportation at the stated rate of compensation. You imply in your request that the parents are not in a position to transport the children. We do not think it necessary that they themselves actually transport their children. It is sufficient that they "provide transportation." In this respect they have a right coextensive with the duty of the board. We see no reason why the parents cannot contract with any suitable person for the transportation of their children and reimburse the person so employed at the rate which is allowed for such transportation.

JWR

Counties — County Board — Public Lands — County Parks — Public Officers — County Park Commission — County board, under provisions of sec. 59.08, subsec. (8), Stats., may abolish county park commission created pursuant to sec. 27.02, Stats., but probably can not transfer functions of commission to committee of county board.

Powers granted by sec. 59.08 (8) must be exercised at annual meeting of board.

September 24, 1941.

K. T. SAVAGE,

Assistant District Attorney,
Kenosha, Wisconsin.

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We have received the following request for an opinion :

“1. Under the phrasing of 59.08 (8) Wisconsin statutes, can the county board, if it so chooses, abolish the county park commission?

“2. Can this be done at a special meeting?”

We shall answer your questions in the order in which they are submitted.

1. We assume that the county park commission referred to in your request is the commission provided for by sec. 27.02, Wis. Stats. If it is, and we know of no other provision in the statutes authorizing a commission, the comments which were made in an opinion (XXX Op. Atty. Gen. 15), January 17, 1941, are probably applicable. We there ruled that while the county board could abolish a statutory board, it could not transfer the functions exercised by the board to a committee of the county board. An opinion in XXI Op. Atty. Gen. 1036, to the effect that such function could be transferred, was overruled. In addition to the reasons set forth in the opinion of January 17, 1941, we call your attention to the fact that if sec. 59.08, subsec. (8), Stats., were to be construed to permit the abolition of the county park commission and the transfer of their functions to a committee of the county board at the pleasure of the board, a question would be raised as to the constitutionality of the statute under art. IV, sec. 23 of the Wisconsin constitution, which provides :

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

We do not consider it necessary to explore this question further, however, in view of our answer to your second question.

2. The powers granted by sec. 59.08 (8), Stats., cannot be exercised at a special meeting of the county board. The subsection in question provides that the powers may be exercised "at any annual meeting." They cannot, therefore, be exercised at a special meeting. *Stewart v. Kenosha County*, 226 Wis. 171; see also *Dandoy v. Milwaukee County*, 214 Wis. 586.

JWR

Public Officers — Register of Deeds — Where number of real estate mortgages are purported to be satisfied in one instrument, said instrument cannot be said to constitute standard form of instrument for which recording fee is fifty cents, under sec. 59.57, subsec. (1), subd. (a), Stats. Fee for recording such instrument is computed at rate of ten cents per folio under sec. 59.57 (1) (b).

September 29, 1941.

PATRICK A. DEWANE,

Assistant District Attorney,

Manitowoc, Wisconsin.

You have asked what fee is to be charged by the register of deeds for recording a satisfaction of real estate mortgage, short form, by a corporation, where the satisfaction covers not merely one mortgage, but ten different mortgages of different pieces of property by different mortgagors. It is your view that a charge of more than fifty cents should be made, because of the fact that it is necessary for the register of deeds to enter a minute of the discharge of each mortgage upon the margin of the record

thereof with a reference to the book and page containing the record of the discharge of the same. Sec. 235.62, Stats.

Sec. 59.57, Stats., provides in part:

“Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

“(1) (a) For entering and recording the following forms of standard instruments which are to be approved by the register of deeds association and thereafter filed in the approved form in the office of the secretary of state:

* * *

“Form No.	Fees
“* * *	

“56 Satisfaction of real estate mortgage, by corporation, short form -----	.50”
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Form No. 56, omitting the clause relating to execution by the officers of the corporation, signatures, witnesses and acknowledgment, reads as follows:

“The _____ a Corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, located at _____, County of _____, State of Wisconsin, does hereby certify, that the Mortgage executed by _____ to _____ dated the _____ day of _____, A. D., 19—, and recorded in the office of the Register of Deeds of _____ County, State of Wisconsin, on the _____ day of _____ A. D. 19—, at _____ o'clock — M., in Volume _____ of Mortgages, on page _____, Document No. _____, is fully paid and satisfied.”

At the outset it would seem that the fifty cents provided by sec. 59.57, subsec. (1), par. (a), for recording a satisfaction of real estate mortgage would not necessarily govern, because of the fact that the standard form was devised and worded so as to describe and cover one particular mortgage only, as is indicated in the above wording from form No. 56. When such a form is so altered as to cover the satisfaction of ten mortgages, it is no longer of the standard form contemplated by the fee schedule set up in sec. 59.57 (1) (a).

The question then arises as to what fee is to be charged.

This question is apparently covered by sec. 59.57 (1) (b), which provides:

“(b) For entering and recording *other instruments* ten cents per folio, and three cents for every necessary entry in a tract index, when kept. * * *”

It may be that even this compensation will not sufficiently cover the work involved, but the difficulty of the other alternative of charging fifty cents for each mortgage satisfied is that but one instrument is recorded. The charge is for recording the instrument offered, regardless of its legal consequences in effectuating the satisfaction of a number of mortgages.

Therefore, since the instrument offered for record cannot be said to be in the standard form, known as form No. 56, within the meaning of the fifty cents fee provided by sec. 59.57 (1) (a), it falls under the classification of “other instruments,” for which the charge is ten cents per folio under sec. 59.57 (1) (b).

WHR

Appropriations and Expenditures — Constitutional Law — Works of Internal Improvement — Navigable Waters — Where appropriation is made primarily for purpose of eliminating hazardous condition in bed of navigable lake, created by dredging performed in violation of contract entered into by state pursuant to provisions of sec. 31.02, subsec. (5), Stats., appropriation does not come within ban of art. VIII, sec. 10 of constitution, prohibiting state from engaging in or being party to work of internal improvement.

September 30, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

In your letter you state:

“We request your opinion as to whether section 20.12 (9), created by chapter 280, laws of 1941, is a valid appro-

apropriation. It appears to us that the purpose for which the appropriation is made may be a work of internal improvement and the appropriation might, for that reason, be invalid under article VIII, section 10, of the constitution."

Ch. 280, Laws 1941, appropriates \$10,000 as a nonlapsible appropriation, for the purpose of locating and mapping the dredged holes in the bed of Shawano lake in Shawano county, and filling with earth any of said holes that are dangerous to the public in the use of the lake for bathing or navigation.

Art. VIII, sec. 10 of the constitution, in so far as material, provides:

"The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; * * *"

The section further contains certain exceptions, such as improvement of lands or other property specifically dedicated by the grant to the state to particular works of internal improvement and exclusion of highways and preservation of forests. The latter two exceptions are constitutional amendments to the original provision. *State ex rel. Hammann v. Levitan*, 200 Wis. 271.

The term "work of internal improvement" as used in the constitution has been construed as including "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government." *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 38.

This line of demarcation is not always an easy one to draw. Appropriations for the state capitol, the university, schools for the blind, deaf and feeble-minded, hospitals, penitentiaries and the like, and for extensive work and improvement of the grounds appurtenant thereto, are all matters which "primarily and preponderantly merely facilitate the essential functions of government." *State ex rel. Jones v. Froelich, supra*.

In the *Froehlich* case it was held that an appropriation for the construction of levees on the Wisconsin river came under the ban of the constitutional provision. The work was one which was badly needed for purposes of controlling flood waters and for protection of lives and property. The case specifically holds:

“An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition.”

It would seem, therefore, that no appropriation may be sustained as a valid exercise of the police power if the appropriation comes within the ban of this constitutional provision. But see opinion of Justice Crownhart in *State ex rel. Hammann v. Levitan*, 200 Wis. 271, 282.

Concepts such as “those other things which primarily and preponderantly merely facilitate the essential functions of government” are not static concepts. A governmental activity deemed outside of this concept at one time and therefore within the ban of this constitutional provision, may well be deemed within the concept and therefore not within the ban at another time. As was stated by Chief Justice Rosenberry in *Allen-Bradley Local 1111, etc., v. Wisconsin Employment Relations Board*, 237 Wis. 164, 171:

“* * * Neither the state nor the federal constitution changes but the subject matter to which they are applied changes and so a new and different result is reached by the application of constitutional principles. See *Home Bldg. & Loan Assoc. v. Blaisdell* (1933), 290 U. S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1519, note, ‘Governmental powers in peace-time emergency.’”

The impact of civilization upon the social structure may well be such that by the mere passage of time, an activity once deemed within this constitutional ban becomes an activity which can no longer be said to be within it. Thus, as time goes on, experience may well teach that the building of a levee upon the Wisconsin river for the protection of lives and property of the people of the state is not such a work as “ordinarily might, in human experience, be expected to be

undertaken for profit or benefit to the property interests of private promoters." Experience may well show that if the problem is to be met at all it must be met by the government. If experience does show that then it would seem the activity becomes one which "primarily and preponderantly merely facilitate[s] the essential functions of government."

In *State ex rel. Hammann v. Levitan*, 200 Wis. 271 (1929), separate appropriations were sustained (1) for the creation of a wild life refuge, game preserve and fur farm on the Horicon marsh in Dodge county and (2) the construction and building of a dam or dams in the Rock river in and near the city of Horicon for the purpose of controlling and regulating the flood waters on the Rock river and restoring the public waters of the Rock river on the Horicon marsh to the natural levels which existed prior to the private drainage of the same. The appropriations were sustained under sec. 3a, art. XI of the constitution, which provides:

"The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works."

The appropriation was sustained as coming within the term "park" as used in the above cited constitutional provision although concededly the Horicon marsh wild life game refuge did not come within any ordinary meaning of the term. The appropriation for the dam was sustained as a mere incident to the granted power. The court closes the opinion with the following significant language, p. 282:

"* * * The acquisition of parks as well as the construction and improvement of public highways, the acquisition, preservation, and development of forests, have been

withdrawn from constitutional ban if they were ever within it, leaving no question for consideration in that respect."

In *State ex rel. Owen v. Donald*, 160 Wis. 21 (1915), the court was very definitely of the view that the acquisition, preservation and development of forests did come within the ban of art. VIII, sec. 10 of the constitution. Experience is a great teacher. The application of constitutional doctrine to the facts of a continual changing society does bring about a change in result.

If it were necessary to determine the validity of the appropriation in question by applying the test of whether the appropriation is one "which primarily and preponderantly merely facilitate[s] the essential functions of government", in which case it would not be within the ban of the constitutional provision, or whether it is one "which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters" we might have some considerable difficulty in reaching a conclusion. We may observe that we have some difficulty in concluding that the state might reasonably expect the work in question to be done by private promoters and with private gain the incentive for such work.

We have checked the factual background in relation to this appropriation. That background is as follows:

Shawano lake is a fairly large navigable lake. The water is shallow along the shore. It is possible to wade considerable distances from shore—as much as half a mile, so we are advised.

In 1932 the public service commission entered into a contract pursuant to the provisions of sec. 31.02 (5) for the removal of sand, gravel or other materials from the bed of the lake. The contract specified that removal must be from the bed in water not less than six feet deep. The contract contained other provisions intended to protect the public trust in these waters as follows:

"The removal of said materials from the bed of said lake is to be performed in such manner as will improve the navigability of said lake and promote the rights of the public therein. Particular care is to be exercised in the removal

of said materials so as to leave the bed without unexpected or unusual depressions or holes dangerous to bathers.

“The public service commission reserves full control over the manner in which said materials may be taken and over all other agreements, stipulations and conditions in said application, or herein contained.”

The provisions of this contract were largely ignored by the dredging company. There was no adequate supervision during the performance of the contract (or lack of performance of it). Large holes were dredged in the bed of the lake. The bed was left with unexpected or unusual depressions or holes, dangerous to bathers, contrary to the express terms of the contract. When the public service commission discovered the contractor's breach of duty, an action was commenced against the contractor for breach of contract. We are advised that nothing ever came of the action as it was ultimately determined the contractor was financially irresponsible. It was impossible, under the circumstances, to make the contractor perform or to recover damages from him.

We are advised that several drownings have occurred in the lake since the dredging. Whether the drownings were directly attributable to the dangerous condition of the bed of the lake is a matter with respect to which we have no information. In any event there seems to be no question but that the condition in which the bed of the lake was left after the dredging does present a hazardous situation. The public uses the lake for swimming, bathing, boating, fishing, etc.

The state owns title to the bed of this lake (the same is true with respect to the beds of all navigable lakes) in trust for the public. *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Boorman v. Sunnuchs*, 42 Wis. 233; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534; *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290; *Doemel v. Jantz*, 180 Wis. 225; *Milwaukee v. State*, 193 Wis. 423.

This public trust includes the public right of navigation and its incidents such as fishing, hunting, swimming, bathing, boating and recreational use. *Willow River Club v. Wade*, 100 Wis. 86, *Diana Shooting Club v. Husting*, 156 Wis. 261; *Doemel v. Jantz*, 180 Wis. 225; *Milwaukee v. State*, 193 Wis. 423.

The public right of navigation includes navigation for pleasure as well as commercial navigation. *Nekoosa-Edwards Paper Co. v. Railroad Comm.* 201 Wis. 40; *Att'y. Gen. ex rel. Becker v. Bay Boom, W. R. & F. Co.* 172 Wis. 363. The supreme court has always jealously guarded this trust in the navigable waters of the state and the right of the public to use and enjoy them. *Delta Fish and Fur Farms v. Pierce*, 203 Wis. 519, 234 N. W. 881.

The trust in navigable waters has been characterized as more than a passive trust. *Merwin v. Houghton*, 146 Wis. 398, 131 N. W. 838. Thus in *Milwaukee v. State*, 193 Wis. 423, 452, the court says:

“* * * Undoubtedly, when the *Houghton Case* was decided, this court was thoroughly impressed with the idea that the trust reposed in the State was an active, administrative, and governmental trust, and one which should be administered to promote not only navigation but the public health and welfare generally.”

We do not mean to infer from the foregoing language that there is any indication in these cases that the court would sanction an appropriation for state improvement of the navigable waters of the state. Such would probably constitute a work of internal improvement and come within the ban of art. VIII, sec. 10 of the constitution. The language is used with reference to administration of the trust rather than with reference to spending money for a work of internal improvement.

However, we are of the view that the appropriation in question is not an appropriation for “work of internal improvement” within the constitutional ban, in view of the particular factual situation herein referred to and which forms the background of the appropriation. The work is not one of “improvement” but rather one of *restoration* of a *status quo* that existed prior to the unfortunate contract herein alluded to. In a sense it may be said that the state has, as a result of this unfortunate contract, failed to properly administer its trust in these navigable waters. The state endeavored to meet the trust by the various protective provisions in the contract. These protective provisions proved ineffectual. An unfortunate situation has resulted.

The state, by this appropriation, merely aims at restoring the *status quo* which existed prior to the work performed under the dredging contract. Can it be said that such an undertaking is a "work of internal improvement" within the constitutional ban? We think not.

Reference to the constitutional debates on this particular provision of the constitution (much of the gist of these debates is set forth in *State ex rel. Jones v. Froehlich* and *State ex rel. Owen v. Donald, supra*) leads to the rather irresistible conclusion that what the framers of the constitution had in mind in enacting this provision of the constitution was that of barring the state from engaging in or being a party to works of internal improvement such as construction of railroads, canals, etc. Shortly prior to the drafting and adoption of our constitution many of the states had experienced financial chaos resulting from engaging in such activities. The object lessons taught by the experience of the other states were the activities aimed at and which the framers of the constitution had in mind in prohibiting the state from engaging in or being a party to a work of internal improvement. While the framers of the constitution may have intended, and undoubtedly did intend, a fairly broad coverage by use of the term "work of internal improvement", it would seem to be giving the term a comprehensive coverage considerably beyond anything that was discussed in the constitutional debates or intended by the framers of that instrument for us to conclude that they ever intended the constitutional provision in question to prevent the state from engaging in or being a party to a small work of restoration such as the one in question.

There is no case which can be considered conclusive upon the subject one way or the other. Governments exist to carry on their essential functions. To deny to the state the power to restore, under the factual background of this appropriation, would seem to us to be the equivalent of denying to the state its power to carry on the essentials of government as well as denying to it the power to properly administer its trust in these navigable waters.

We conclude that the appropriation in question is a valid appropriation.

NSB

Intoxicating Liquors — Municipal Corporations — Beer Licenses — Failure to notify beverage tax division within time prescribed by sec. 176.38, subsec. (1), and sec. 66.05 (10) (d) 3 Stats., does not render election void.

Where election resulted in voting beer out and voting intoxicating liquors in, sec. 176.05 (10) (b) prohibits issuing "Class B" intoxicating liquor license.

October 2, 1941.

HOWARD H. MOSS,
District Attorney,
Janesville, Wisconsin.

In your letter you state:

"On February 27, 1941, pursuant to sections 176.38 and 176.39, Stats., there was filed with the village clerk of the village of Orfordville a petition signed by fifty qualified electors of said village, requesting that there be submitted to the voters under sections 176.38 and 176.39, Stats., the following question:

"Whether or not any person, firm, corporation, or association shall be licensed to deal or traffic in any intoxicating liquor as a beverage within the village of Orfordville."

"On the same day a further petition under section 66.05, Stats., was filed with the village clerk requesting that this question be submitted to the voters.

"Whether or not Class "B" retail license shall be issued for the sale of fermented malt beverages for consumption on or off the premises where sold."

"The sufficiency of both of said petitions was certified to by the village clerk on March 21, 1941, and an order for referendum election was filed by the village clerk on the same day. Notice of both of such petitions was filed with the beverage tax division on or about March 21, 1941. Notices on both questions and petitions were posted by the clerk on March 21, 1941.

"Each question was submitted at the village election on April 21, 1941, on separate referendum ballots.

"The result of such election was that the voters voted *out* beer or fermented malt beverages and voted *in* intoxicating liquor.

"The village board felt that the election was invalid and proceeded to issue licenses for the sale of both intoxicating liquor and beer.

"The board contends the election invalid because in neither case did the clerk give the beverage tax division notice within five days that such petition had been filed with him pursuant to sections 176.38 (1) and 66.05 (10) (d) (3)."

You request our opinion upon the following questions:

"(1) Is the election invalid because the village clerk did not within five days of the filing of such petitions give the beverage tax division notice that such petitions had been filed?

"(2) Is section 176.05 (10) (b) interpreted to mean that if, as a result of a referendum election, the voters in a municipality vote against licensing of class 'B' retail fermented malt beverage licenses, and for the licensing of class 'B' intoxicating liquor licenses that neither license can be granted inasmuch as it would be impossible for a licensee to secure the former as it was voted out, and he cannot secure the latter without first having the former?"

With reference to your first question, sec. 176.38, subsec. (1), which deals with referendums with respect to the sale of intoxicating liquors, provides for filing of the petition with the clerk of the municipality at least thirty days prior to the first day of April next succeeding, and in so far as material provides:

"* * * and provided that within five days of the filing of such petition such clerk shall determine by careful examination the sufficiency or insufficiency of such petition and state his findings in a signed certificate dated and attached thereto, and within five days give written notice to the beverage tax division, at Madison, Wisconsin, that such petition has been filed with him relating to such question, stating the date of filing such petition, the name of the town, village or city and the county in which such town, village or city is located, and such clerk, after and not until he shall have determined that said petition is sufficient and shall have given the notice to the beverage tax division as herein set forth, shall forthwith make an order providing that such question or questions shall be so submitted on the first Tuesday of April next succeeding the date of such order. * * *"

Sec. 66.05 (10) (d) 3, which deals with the subject of referendums with respect to sale of nonintoxicating liquors, contains similar or identical provisions.

The problem is one of statutory construction. The judicial approach to the problem is stated in 20 C. J. 181, as follows, pp. 182-183:

“Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result. If the statute simply provides that certain acts or things shall be done in a particular time or in a particular manner without declaring that their performance is essential to the validity of the election, they will be regarded as mandatory if they affect the actual merits of the election, and directory if they do not. * * * But this rule must be considered in connection with another rule that a statute prescribing the duties of election officers may be held either mandatory or directory according to the time and manner in which it is questioned. Before election it is mandatory if direct proceedings for its enforcement are brought, but after election it should be held directory, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or the ascertainment of the result, or unless the provisions affect an essential element of the election, or it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission will render it void.”

It is considered that the foregoing correctly states the rules applied by our court, even before the enactment of sec. 5.01 (6), Stats. *State on complaint of Doerflinger v. Hilmantel*, 21 Wis. 567; *State ex rel. Bancroft v. Stumpf*, 21 Wis. 579; *State ex rel. Lutfring v. Goetze*, 22 Wis. 363; *State ex rel. Peacock v. Orvis*, 20 Wis. 235; *State ex rel. McManman v. Thomas*, 150 Wis. 190; *State ex rel. Kleist v. Donald*, 164 Wis. 545.

In the case of special elections, as distinct from general elections, it was held that the provision of the law with respect to notice of the election (notice to the electors) must be strictly followed or the election would be void. *Janesville Water Co. v. Janesville*, 156 Wis. 655, 146 N. W. 784;

Hubbard v. Williamstown, 61 Wis. 397, 21 N. W. 295; *State ex rel. Manitowoc v. Green*, 131 Wis. 324, 111 N. W. 519. In such cases the court was unable to conclude that failure to give the notice as prescribed by statute may not have affected the election and accordingly held that the notice must be strictly followed or the election would be void. But the rule of these cases has been changed by statute if the failure to comply is a failure to comply with some of the provisions of title II, Stats., which includes chapters 5 to 12 inclusive. See sec. 5.01 (6) and *State ex rel. Oaks v. Brown*, 211 Wis. 571; *Commonwealth Telephone Co. v. Public Service Comm.*, 219 Wis. 607. See also *Manning v. Young*, 210 Wis. 588. These cases would be conclusive upon the question if the failure to give notice were a failure prescribed in title II of the statutes (chs. 5 to 12 inclusive). But the failure in question is not one prescribed by said chapters, hence these cases are not conclusive upon the question.

But by application of the general principles of statutory construction with respect to elections and without the aid of sec. 5.01 (6), it would seem that the result must be the same. We cannot perceive wherein failure to notify the beverage tax division within the time prescribed by the statutes in question could have any effect on the result of the election. The voters had notice as prescribed by statute. An election was held and the voters expressed their will in the matter. To hold the election void for failure to strictly follow the statute, with regard to notification to the beverage tax division, would set the will of the voters at naught. Democracy functions through the election machinery. The will of the voters, as determined through that machinery, is not to be set aside lightly or for trivial reasons. It would take compelling language in the statute for us to conclude that the legislature ever intended any such consequence to follow the failure to give the notice to the beverage tax division. There is no such compelling language in the statute.

There is also applicable to this question of statutory construction the following recognized rule:

“* * * When there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be so done it may work an injury or wrong; nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all,—the courts will deem the statute directory merely.” *Appleton v. Outagamie County*, 197 Wis. 4, 9-10, 220 N. W. 393; *State v. Industrial Comm.*, 233 Wis. 461.

We conclude that failure to give this notice did not render the election void.

As to your second question, sec. 176.05 (10) (b) provides as follows:

“No retail ‘Class B’ license shall be issued to any person who does not have, or to whom is not issued, a ‘Class B’ retailer’s license to sell fermented malt beverages under subsection (10) of section 66.05.”

This section is clear and unequivocal in its terms. It prohibits issuing a “Class B” license to sell intoxicating liquors unless the licensee has a “Class B” retailer’s license to sell fermented malt beverages. We have in substance so ruled. XXIII Op. Atty. Gen. 735. The voters have apparently voted for something which they cannot have under the law.

NSB

Municipal Corporations — Municipal Budgets — Ch. 221, Laws 1941, does not require separate treatment in county budget of county advancements or reimbursable expenditures in re state-county administration of highway laws with respect to construction, maintenance and acquisition of rights of way.

October 3, 1941.

WM. E. O'BRIEN, *Chairman,*
Highway Commission.

In your letter you state:

"Section 65.90 (2) of the statutes, created by chapter 221, laws of 1941, with reference to municipal budgets provides as follows: 'Such budget shall list all anticipated revenue from all sources during the ensuing year and shall likewise list all proposed expenditures for each department or activity during the said ensuing year. Such budget shall also show comparable figures for the two preceding years.'

"The construction and maintenance of state trunk highways in Wisconsin is carried on by the state highway commission with the cooperation of the various county highway departments. Most of the maintenance work and some of the construction on state trunk highways is performed by the county highway departments and the counties are reimbursed by the state highway commission for the amounts expended and for the use of county owned equipment. The counties also purchase right of way for state trunk highway construction and are reimbursed by the state for the amounts expended for such purpose. For the statutory authority for such procedure, we refer you to section 84.07 with reference to maintenance, section 84.06 (2) with reference to construction and section 83.08 with reference to the purchase of and reimbursement for right of way.

"In the past, the amounts paid out by counties for which they are to be reimbursed by the state have been considered as 'advances' rather than county 'expenditures', and such advances have customarily been entered on the county records as accounts receivable from the state. Similarly, the reimbursements from the state have been considered as 'reimbursement of advances' rather than 'revenue.'

"Will you please inform us whether the county budgets required by section 65.90 (1) of the statutes must include the estimated advances to be made by the county for main-

tenance, construction and right of way on state highway work and the corresponding anticipated reimbursements from the state for such advances."

The question presented is whether these reimbursable expenditures or advancements require separate treatment or itemization in the county budget as a county "expenditure" within the meaning of ch. 221, Laws 1941.

In an opinion rendered to the district attorney of Dane county on September 11, 1941,* we had occasion to examine somewhat into the objectives, purposes and scope of said chapter. Among other things we concluded, p. 307:

"* * * The prime intent and purposes of the law as enacted and of original Bill No. 64,A., were to give publicity to budgets and expenditures proposed or to be made by public bodies, to provide by contact (hearing) or opportunity therefor, a more direct responsibility in relation to finances between governing bodies and those whom they represent and to make it more difficult to deviate from a budget enacted or adopted after hearing. * * * The law is obviously aimed at making public bodies more responsive to the concern of taxpayers and for the purpose of checking in some measure the trend in increased taxes. * * *"

It would seem that there would be no useful purpose served in requiring separate treatment or itemization in the budget of moneys to be used for the purposes set forth in your letter. Such reimbursable expenditures or advancements are not matters which can be of any great concern to the taxpayers. To construe the law as requiring separate itemization and treatment of such items in the budget would tend to increase rather than decrease taxes—this latter being one of the primary objectives of the law. If county finances can be handled without a separate levy for this particular purpose, it would seem entirely consonant with legislative intent and the primary objective sought to be accomplished by the law, to permit handling of such items in such manner as not to necessitate a tax levy for this particular purpose. Such levy would obviously tend in the direction of an increased budget and increased taxation

*Page 304 of this volume.

levies. The law should not be so interpreted as to *require* a result diametrically opposed to the end sought to be accomplished by the legislation in question.

We conclude that ch. 221, Laws 1941, does not require separate treatment of such items in the county budget.

NSB

Taxation — Tax Exemption — Exemption from taxation under sec. 70.11, subsec. (8), Stats., is applicable to cemetery corporations organized under ch. 180, Stats., as well as to those organized under ch. 157.

Burial grounds are exempt from taxation whether lots therein be owned by corporation or whether corporation has sold them to individuals for burial purposes. XXV Op. Atty. Gen. 106 overruled.

October 3, 1941.

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

In your letter you state:

“Arlington Cemetery was incorporated in August, 1918, under chapter 180, Wisconsin statutes. The corporation owns and operates Arlington Park Cemetery, a public cemetery. All of its real estate has been dedicated to cemetery use and can be used for no other purpose. There are a large number of interments in the cemetery on lots and burial spaces sold to private owners, there are some unoccupied lots privately owned by individual purchasers and other unoccupied lots owned by the corporation, all however, platted and dedicated exclusively to public cemetery use.”

You inquire generally (1) whether the properties and lots, ownership of which is in the corporation, are exempt from taxation, and (2) whether the lots that have been sold to individuals for burial purposes are exempt from taxation, and if not, to whom the said lots are assessable. You have accompanied your request with a comprehensive brief upon the question which has been most helpful to us in our analysis of the problem. You conclude that the lands in question, whether owned by the corporation or by private lot owners to whom lots have been sold for burial purposes, are exempt from taxation. This conclusion is reached contrary to an official opinion of this office rendered in 1936, XXV Op. Atty. Gen. 106, in which opinion this department ruled that cemetery lands owned by a corporation organized under the general incorporation laws are not exempt from general taxes.

The applicable statute is sec. 70.11 (8), which exempts from taxation:

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

This subsection took its present form, in so far as material, by ch. 398, Laws 1911, by which chapter sec. 1038, subd. 7 of the revised statutes of 1898 was amended by adding thereto the provisions above underscored.

Prior to the 1911 amendment sec. 1038 7, Stats. 1898, read as follows:

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

Prior to 1898 this exemption policy was variously stated as follows: In the revised statutes of 1849, ch. 15, sec. 4, subd. 5, the exemption was stated as "all burial grounds, tombs and rights of burial". There was no change in the wording of the exemption in the revised statutes of 1858. The language was identical with the language as used in the statutes of 1849. See title V, ch. XVIII, sec. 4, subd. 5, revised statutes of 1858.

In the revised statutes of 1871, title V, ch. XVIII, sec. 2, subd. 7, the exemption is stated as "lands used exclusively as public burial grounds and tombs and monuments to the dead therein". This language remains the same in the statutes of 1878 and 1889. See sec. 1038, subd. 7, revised statutes of 1878, and the same section and subdivision with reference to the annotated statutes of 1889.

It will be seen from the foregoing that prior to 1911 there was an uninterrupted, uniform legislative policy to exempt lands used exclusively as public burial grounds and tombs and monuments therein from general taxes. In view of such uniform, uninterrupted legislative policy, it would take compelling language to justify a conclusion that the legislature, in 1911, intended to embark upon an entirely new policy, namely that of subjecting burial places and lands dedicated to that purpose to general taxation. Does the 1911 amendment contain any such compelling language? We think not.

The tax authorities of the state apparently thought the same thing as efforts were never made to tax such properties for a period of some twenty-five years after the 1911 amendment—at least the department of taxation knows of no such effort.

In 1936 the then district attorney for Dane county requested of this department an opinion as to whether lands owned by a cemetery association, organized under ch. 180 (the general incorporation statutes), were subject to taxation. The department ruled that such lands owned by a cor-

poration so organized were subject to general taxation (XXV Op. Atty. Gen. 106). The town of Blooming Grove, Dane county (1937 and 1938), accordingly attempted to assess such property so owned for taxation. We are advised that these taxes were subsequently cancelled by action of the county board.

We have checked with the department of taxation and the said department advises that it does not know of any other instance where such properties were ever attempted to be subjected to taxation. While the foregoing observations are not controlling, a uniform administrative interpretation by those charged with the duty of administering the law over such a long period of years is of the utmost significance in arriving at legislative intent.

The conclusion arrived at in XXV Op. Atty. Gen. 106, appears to be the result of a commendable piece of research in tracing the history of ch. 398, Laws 1911, through the legislature. The difficulty with the conclusion reached appears to be that altogether too much emphasis was placed upon the following underscored words:

*“Lands owned by any cemetery association used exclusively as public burial grounds and tombs and monuments to the dead therein; * * *”*

which came into the original bill by way of an amendment and without a careful analysis of the original bill and what it sought to accomplish and the relation of the amendatory language with reference to that object in an effort to determine what purpose such words and similar words used elsewhere in the chapter were apparently meant to serve.

The original bill No. 58,A., read as follows:

“Section 1. Subdivision 7 of section 1038 of the statutes is amended to read: 7. Lands used exclusively as public burial grounds and tombs and monuments to the dead therein; *lands adjoining such burial grounds, and greenhouses and other buildings and outbuildings thereon, exclusively occupied and used by employees for cemetery purposes; all articles of personal property necessarily used in the care and management of such burial grounds, and all funds exclusively devoted to such purposes; all flowers and*

ornamental plants and shrubs raised for the decoration of such burial ground, and which may be sold in the manner and for the purposes mentioned in section 1449; also all property held by donation, bequests, or in trust for cemetery associations under the provisions of section 1447."

It will be seen that the entire tenor of this bill, which later, as amended, became ch. 398, Laws 1911, was that of extending rather than that of restricting the exemption. However, the bill was so drawn as to be subject to the interpretation that an employee of the cemetery association owning a small homestead adjoining the burial grounds would have his lands exempt from taxation and to the further interpretation that the tools and implements of trade of such employee used in the upkeep of the cemetery would likewise be exempt from taxation. The original wording of the statute was such as to permit of a construction widening the base of the exemption probably beyond anything intended by the author of the bill. If lands adjoining burial grounds were to be exempt and articles of personal property used in the care and management of such burial grounds were to be exempt, ownership as well as use was a matter of legislative concern. In the amendment of the original bill to meet this problem it must be conceded that the amendatory language "owned by any cemetery association" in line 1 of the subsection was not very adroitly placed. All of the other amendments effectuated the desired result,—met the problem of the loose language employed in the original bill.

The amendatory language "owned by any cemetery association" in line 1 of the subsection is certainly subject to the interpretation that ownership, as well as use by the association, are both conditions or tests that must be met before the exemption applies. If ownership by the association, in the sense of title in the association, was intended as a test with respect to the exemption, lots sold by the association for burial purposes (even those organized under ch. 157, Stats.) would be subject to taxation. This must be the logical result which would follow by giving to the term "owned" its ordinary meaning. This must be the logical result which follows the analysis of the import of the 1911 amendment as that analysis is set forth in the attorney general's opinion referred to.

Bearing in mind the patent defects in the language employed in the original bill to accomplish the legislative purpose with respect to broadening the existing exemption; bearing in mind that the amendments to the original bill seem to have been directed at narrowing the broadened exemption and thus keeping it within proper confines, and bearing in mind that the original purpose of the 1911 amendatory bill was that of broadening the exemption rather than restricting it, it is impossible for us to conclude that the legislature ever intended any such far reaching consequences as to make lots sold by a cemetery association for burial purposes (even those organized under ch. 157, Stats.) subject to taxation. It is impossible for us to believe that the legislature ever intended any such radical departure in legislative policy.

The purpose of all statutory construction is that of arriving at legislative intent if that intent can be arrived at. That intent should be given effect even where the language employed to effectuate the intent is inept.

We conclude that the legislature never intended by the use of the term "owned by any cemetery association" in the 1911 amendment to make ownership, in the technical sense of title in the association, a test with respect to the exemption. We think that the term is used in a descriptive sense, namely that of lands dedicated to cemetery uses. Such lands, if the other requisites of the statute are met, come within the exemption, even though the association may have parted with title to individual lot owners in consummation of the dedication. As to when lands are occupied and dedicated for cemetery purposes, see *Blooming Grove v. Roselawn Memorial Park Co.*, 231 Wis. 492.

There remains the question of what is meant by the term "cemetery association" as used in the 1911 amendment. The opinion referred to concluded that such language restricted the exemption to cemeteries organized under ch. 157, Stats. In this respect we think the opinion is clearly in error. The conclusion reached is predicated upon the proposition that the ordinary meaning of the term "cemetery association" is that of a cemetery association organized under ch. 157, Stats., and that cemeteries otherwise organized and cemeteries organized under ch. 180, Stats., do not come within

the ordinary meaning of the term "cemetery associations". We are not aware that the term in 1911, prior thereto or thereafter, ever had any such restricted, technical, ordinary meaning. On the contrary we think that the term in 1911, prior thereto and thereafter, has been generally used as a generic term referring to the corporate or other body in active charge and management of burial grounds. The term was used at least twice in that manner by our court in *Hillier v. Lake View Memorial Park*, 208 Wis. 614, 616, where the court says:

"* * * and that the only and exclusive method of incorporating cemetery associations is to be found in ch. 157 of the Statutes, * * *"

and at p. 618, where the court says:

"* * * We do not hesitate to say that so long as the statute law upon the subject so continued, said ch. 48 furnished the only method in this state by which a cemetery association could become incorporated. * * *"

In the opinion this technical and restricted meaning of the term "cemetery association" was in part justified in that the 1911 amendment contained a reference to sec. 1449, Stats. (now sec. 157.09). We do not deem this reference of any particular import. The section, prior to the 1911 amendment, had incorporated in it a reference to a section of what is now ch. 157, Stats. Reference to sections of ch. 157, Stats., is a natural legislative method of incorporating certain purposes, operations and objectives with respect to cemetery associations generally within the exemption.

Ch. 157, Stats., contains many provisions with respect to regulating cemeteries formed thereunder. Many of the measures are obviously police measures deemed necessary for the promotion of health, safety and general welfare of the citizens as a whole. Rightly or wrongly, it has generally been assumed that such regulatory provisions of ch. 157 are applicable to cemetery associations organized under ch. 180, Stats. It was never deemed that because the associations were organized under the general corporate law such associations were immune from the regulatory provisions of ch.

157, Stats. By reference to the brief in the *Hillier* case, *supra*, it will be seen that the corporation involved (one organized under ch. 180, Stats.) went to great length in its pleading to set forth that it had complied with all the regulatory provisions of ch. 157, Stats.

As the purposes, functions, legitimate operations and objectives of cemetery corporations generally, as well as regulatory measures with respect thereto, are set forth in ch. 157, Stats., it would seem quite apparent that when the legislature wishes to exempt a particular activity, operation, function or property of cemetery organizations generally from taxation the simple and obvious method of effectuating the exemption is to refer to the particular matter by reference to the applicable section of ch. 157, Stats. We are unable to concur in the conclusion that because a section of ch. 157 was referred to in the 1911 amendment, the legislature by use of the term "cemetery association" intended the term to apply only to cemetery associations organized under ch. 157, Stats., or that such reference is of any great significance in relation to the problem of interpretation.

Sec. 272.18 (20) exempts from taxation:

"Cemetery lots owned by individuals and all monuments therein, the coffins and other articles for the burial of any dead person, and the tombstone or monument for his grave by whomsoever purchased."

Sec. 157.08 (1) provides:

"After the map is so recorded, the board may sell and convey platted lots, expressly restricting the use to burials, and upon such other terms, conditions and restrictions as the board directs. Conveyances shall be signed by the chief officer of the board, and the secretary or clerk, and before delivering the secretary or clerk shall enter in a book kept for that purpose, the date and consideration and the name and residence of the grantee. The conveyances may be recorded with the register of deeds."

Sec. 157.10 provides:

"While any person is buried therein a lot shall be inalienable without the consent of a majority of the board and on the death of the owner shall descend to his heirs;

but anyone or more of such heirs may convey to any other heir his interest therein. No corpse shall be interred in a lot except the corpse of one having an interest therein, or a relative, or the husband, or wife of such person, or his or her relative, except by consent of all persons having an interest in the lot."

These sections are all more or less *in pari materia* with the ad valorem tax statutes. They are all in recognition of a tradition which hallows the burial places of the dead. (*Hillier case, supra*)

No reason is perceived why land dedicated to the burial of the dead in Arlington Cemetery, and in other cemeteries organized under ch. 180 of the statutes, is not just as hallowed ground as that dedicated to the dead by a corporation organized under ch. 157, Stats. Nor is any reason perceived why lands owned by either kind of corporation dedicated to the burial of the dead should be exempt from taxation while owned by the corporation and nonexempt when sold to individuals to consummate the dedication. It would take more express and explicit language than that used in the 1911 amendment for us to conclude that the legislature ever intended any such results.

We think the prior opinion wrong in the analysis of the problem. It should be and is overruled.

NSB

Municipal Corporations — Municipal Budgets — Machinery and equipment operations account so kept as to result in machinery and equipment fund sustained by rentals received, state aids, labor and other items, need not be set forth with particularity in county budget prepared to conform to sec. 65.90, subsec. (2), Stats. (ch. 221, Laws 1941), if budget elsewhere reflects with particularity estimated receipts to and disbursements from said fund.

October 14, 1941.

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

It seems that there is in quite general use in the bookkeeping systems employed by the various counties, an account called the "machinery and equipment operations account" so kept as to result in a machinery and equipment fund sustained by rentals received, state aids, labor and other items. When work is performed upon state trunk highways a rental is charged the state by the counties for the machinery used in the performance of such work. When work is performed upon county trunk highways a similar rental charge is made to the counties, that is, the counties charge themselves for this rental. The same is true when work is performed upon town roads — a rental is charged to the town.

The rental charges are arrived at upon a cost accounting basis which is supposed to be sufficient to cover upkeep and repair of the machinery, depreciation and replacement when the machinery is worn out. These rental charges, as well as labor and other receipts, are credited to this fund (or a departmental earnings account). Operating costs are originally charged out of this fund. Some such operating costs are reimbursable to the county by the state or town, etc. These items are eventually all allocated to particular projects and appear elsewhere in the system of bookkeeping as maintenance, construction, snow removal, bridge construction and repair, etc., and with respect to each particular

class or type of highway so that the books show how much is spent for construction, maintenance, snow removal, etc., by the county with respect to said matters and with respect to the particular type or class of highway.

The receipts going into the fund are credited as departmental earnings. Debits or charges with respect to the fund are charged up as operating items, etc. These credits and debits which are of significance in relation to this fund appear elsewhere upon the books as receipts or disbursements.

You wish to be advised whether ch. 221, Laws 1941 (sec. 65.90, subsec. (2), Stats.) requires that this machinery operating account be set forth with particularity in the budget required by said chapter. If it is set forth in the budget, you state that false totals will be reflected in the total estimated receipts and expenditures in that the receipts and expenditures are all reflected elsewhere in the budget. Thus, the sources of all receipts are reflected 'elsewhere' in the budget by reference to the particular source. Expenditures are reflected by reference to the amounts expended for particular activities with respect to the particular type or class of road involved.

A budget of estimated receipts and expenditures obviously need not contain every single bookkeeping account kept by a county. If accounts, such as the one referred to, are properly reflected elsewhere in the budget with particularity, there would seem to be no point in the budget containing an itemization of a particular bookkeeping account or accounts where such itemization is going to result in duplication of both receipts and expenditures in relation to the matters covered by the particular bookkeeping account. Thus the county may have a materials and supply account. If the estimated receipts and expenditures for that purpose are reflected in the budget there can be no point in duplicating such items in the budget by having the budget contain all data with reference to the particular bookkeeping account.

The primary purpose of the budget law is to show estimated receipts and expenditures for particular purposes. If those estimated receipts and expenditures are shown with a reasonable degree of particularity there can be no point in requiring particularity to a point where the budget re-

flects both false estimated revenues and false estimated expenditures because of duplication.

By reference to county highway reports, which have been submitted to us for examination, it appears that "new machinery" usually appears as an item in the machinery and equipment operating account. Under the method of operation herein referred to, the receipts for maintaining this account will already have been reflected in the budget and the expenditure for this purpose will be reflected in the cost for the various types of roads. Money expended or to be expended for this particular purpose, namely, purchase of new machinery, will be reflected in the budget but it will not appear in the budget as expendable for such purpose. This item for a particular year may or may not be substantial. Under sec. 82.06 (1) no new equipment of this nature may be purchased without the specific approval of the county board. This item is therefore an item of significance to the county board. If the books are so kept that this item will not appear in the budget except with reference to the machinery and equipment account, we are of the view that proposed expenditures for this purpose be set forth in the budget. The budget can set forth on the receipts side a corresponding amount to be received from the so-called "departmental earnings" account. While such itemization may result in duplication to this extent, that is not a serious matter. It may readily be explained that it is duplication by a brief footnote in the budget. This seems altogether preferable to that of having the proposed expenditure for purchase of new machinery completely hidden and lost in the budget.

The problem presented does not appear to us to be so much a legal problem as one of exercising common sense and good faith in the drafting of a proposed budget.

NSB

Taxation — Tax Collection — Ch. 426, Laws 1933, providing for semiannual payment of real estate taxes, became operative and effective on October 1, 1941; its effect upon provisions of ch. 1, Laws 1941, sec. 62.21, subsec. (1), subd. (h), par. 1a, and sec. 74.03, subsecs. (1) and (2), Stats. 1939, considered.

October 15, 1941.

OLIVER L. O'BOYLE,

Corporation Counsel Milwaukee County,

Milwaukee, Wisconsin.

Attention C. Stanley Perry, *Assistant Corporation Counsel.*

You have submitted a number of questions concerning the operative effect of ch. 426 of the laws of 1933, which provides for the semiannual payment of taxes and is commonly referred to as the "Daugs law."

1. The first question is whether the system of semiannual payment of real estate taxes as created by the provisions of ch. 426, Laws 1933, became operative on October 1, 1941? As originally enacted in 1933 said ch. 426 expressly provided that it was to take effect on October 1, 1935. This effective date was, however, expressly postponed for successive two year periods by action of the subsequent legislatures, the last of which was ch. 385, Laws 1939, providing October 1, 1941, as its effective date. There being no subsequent postponement, said ch. 426 now stands with October 1, 1941, as the date upon which it takes effect. It is thus operative as of that date to make changes in the statutes in accordance with its provisions, except in so far as it has been amended or modified by other legislative enactment.

2. You then ask to what extent ch. 426 Laws 1933, is modified by ch. 294, Laws 1937. This is answered by our opinion to the revisor of statutes dated July 22, 1941. We therein advised him that the operative effect of said ch. 294, of amending all laws by abolishing the existing system of penalties, charges and interest on delinquent taxes and sub-

stituting therein a flat interest charge of eight-tenths of one per cent per month or fraction thereof from January, applies to ch. 426, Laws 1933.

3. The next question is whether ch. 1, Laws 1941, providing for an affidavit extension of real estate taxes without penalty, is impliedly repealed by ch. 426, Laws 1933, as amended and effective October 1, 1941? This presents a most difficult problem, to which we have devoted considerable study. Ch. 1, Laws 1941, is the re-enactment, with modification so as to apply to taxes of 1940 and 1941, of the provisions of sec. 74.037, Stats., which were originally provided by ch. 7, Laws 1935, to apply to the 1934 and 1935 taxes, which created sec. 74.037 of the statutes by ch. 10, Laws 1937, as applicable to taxes of 1936 and 1937, and were amended by chs. 7 and 455, Laws 1939, to apply to the 1938 and 1939 taxes. It is to be noted at the outset that shortly after the publication of ch. 1, Laws 1941, subsec. (3) of sec. 74.037, as thus created, which related to tax sales, was expressly repealed by ch. 9, Laws 1941. This repeal was apparently occasioned by a realization that the date of tax sales as set out in sec. 74.33, Stats., having been changed by ch. 434, Laws 1939, in all cases to the third Tuesday in October, such special provisions in subsec. (3) were no longer needed and with an intention of having ch. 1 fit into and harmonize with the other tax statutes.

In XXVI Op. Atty. Gen. 274 we considered the provisions of ch. 10, Laws 1937, which are the same as ch. 1, Laws 1941, except in respect to the years to which they applied, and concluded they were not violative of the uniformity provision of art. VIII, sec. 1 of our constitution. We re-examined the question in connection with the present opinion and are of the view that the constitutionality of ch. 1, laws of 1941, is not free from doubt. We do not find that our court has ever expressed itself as adopting the proposition as stated by the text writers and mentioned in our prior opinion that the rule of uniformity has no application to the procedure of enforcing or collecting taxes and the penalties payable on delinquent taxes. Until our court does pass on the question we can and do assume that this general rule will prevail.

In doing so we must, however, recognize the possibility that the court may still hold that provisions of the type of ch. 1, Laws 1941, permit a divergence in the penalties payable by delinquent taxpayers similarly situated and in the same class but whose property is in different municipalities that may be violative of the requirement of uniformity. Our court has said there must be uniformity in the taxing district. As relates to the state tax, included in the general levy and for which the taxing district is the state, there would seem to be a lack of uniformity where one taxpayer whose property is in a municipality that does not adopt the affidavit extension plan would pay the interest penalty if he paid his taxes between March 1 and July 1, whereas a taxpayer whose property is in another local unit which has adopted the affidavit extension plan would not be required to pay any interest if he paid his delinquent taxes at the same time. Similarly in relation to the county tax, included in the general levy, there would be this lack of uniformity between taxpayers in different local units in the county some of which adopt the affidavit extension plan. It is upon these considerations that the constitutionality of ch. 1, Laws 1941, cannot be said to be free from doubt. Were the provisions for the affidavit extension generally applicable throughout the entire state instead of being optional, then it would seem that there was a uniform system of taxation which would not be violative of the constitutional provision and the general proposition set out in our prior opinion would be applicable. While we do not at this time so hold, it is to be noted that the amendment to art. VIII, sec. 1 of our constitution, effected by the election in April, 1941, probably eliminates these objections as to legislation passed subsequent thereto.

However, for the purposes of this opinion we assume that ch. 1, Laws 1941 is valid and desire merely to call attention to the fact that its constitutionality is not free from doubt. This brings us to a consideration of whether ch. 1, Laws 1941, as amended by ch. 9, Laws 1941, is so in conflict with ch. 426, Laws 1933, that the taking effect of the latter on October 1, 1941, operates as an implied repeal of the provisions of said ch. 1. Implied repeals are not favored and are

to be avoided if at all possible by so construing and giving such effect to the different statutory provisions as harmonizes one with the other and gives effect to both. If, on the other hand, they cannot be wholly reconciled then to the extent they are inconsistent, special statutes are given precedence over general statutes.

With these principles for determination of legislative intent in mind it is our opinion that ch. 1, Laws 1941, and ch. 426, Laws 1933, are not in conflict, and both should be given effect. Ch. 1, Laws 1941, applies only to taxes of the years 1940 and 1941 and was passed by the 1941 legislature as its first enactment. This is a clear indication that the legislature intended that the special provision thereof should operate for the taxes of those two particular years. In our opinion it is capable of operation along with the system of semiannual payments set up by ch. 426, Laws 1933.

The provisions of subsec. (2) of sec. 74.037 as amended by ch. 1, Laws of 1941, relate to the extension of the time of payment of taxes by the filing of an affidavit in pursuance of action by the local municipality and to an accounting between the county treasurer and the local treasurer for the collections that the county treasurer has made up to and including July 1 of taxes whose time of payment has been so extended. If the local municipality has not adopted the affidavit extension plan pursuant to this statute then, of course, the procedure effected by ch. 426 stands and is operative. If, however, the local municipality has adopted the affidavit extension plan then such taxes, the payment of which has been extended by the filing of an affidavit, will be returned to the county treasurer by the local municipality along with other taxes unpaid under the semiannual payment system. The county treasurer will then make an accounting with the local treasurer pursuant to subsec. (2) of sec. 74.037 for collections made by him prior to July 1 of taxes for which affidavits of extension have been filed. This in no way interferes with or upsets the settlement provided by subsec. (8) of sec. 74.03, as amended by ch. 426, Laws 1933. This settlement in August will include an accounting between the county treasurer and the local treasurers for taxes collected by the county treasurer other than

collections by the county treasurer in respect to taxes on which affidavits for extension of the time of payment have been filed and for which the county treasurer has accounted as provided in sec. 74.037 (2). The difference in the method of the division of the taxes collected does not make the two systems in conflict, as they can both operate at the same time and side by side, each in its respective sphere.

There is, however, one slight conflict in that subsec. (1) of sec. 74.037, as amended by ch. 1, Laws 1941, mentions March 22 as the date upon which the local treasurers are required to return delinquent taxes to the county, whereas subsec. (4) of sec. 74.03, as created by ch. 426, Laws 1933, through reference to sec. 74.17, sets the time for return of the delinquent taxes as on or before the first Monday in March. The time for return of delinquent taxes to the county treasurer is a part of the general statutes relating to tax administration. We do not believe that the legislature intended that there should be a separate and different time for return of taxes upon which affidavits for the extension of the time of payment have been filed. To this extent only there is a conflict between ch. 1, Laws 1941 and ch. 426, Laws 1933. Thus, when the latter went into effect in October, 1941, it operated to impliedly repeal the inconsistent provisions of ch. 1, Laws 1941, in reference to the time for the making of return of the delinquent taxes to the county treasurer. The fact that the legislature by ch. 9, Laws 1941, repealed the tax sale provisions of ch. 1, Laws 1941, so as to fit it into the general uniform scheme for tax sales as set out by the statutes furnishes support for our view that it was not the intention of the legislature to depart from having one uniform date for the making of return of delinquent taxes to the county treasurer.

4. Your next question is: By what date must the affidavit for extension of payment of taxes be filed, assuming that ch. 1, laws of 1941, is effective to grant the affidavit extension privilege?

The provisions of ch. 1, laws of 1941, are entirely silent as to when such an affidavit must be filed. In order for this chapter to not be in conflict with ch. 426, laws of 1933, it

would appear that the affidavit would have to be filed on or before January 31. Otherwise, under the provisions of ch. 426, the entire tax would become immediately due on February 1 if the first instalment under ch. 426 has not been paid by that time. If ch. 1 is not construed as limiting the time within which the affidavit may be filed to prior to February 1, then ch. 1 would seem to be in direct conflict and irreconcilable with the provisions of ch. 426. Therefore, in order to effect a workable system and avoid any conflict between it and the plan of the semiannual payment any local municipality which adopts the affidavit extension plan should impose as a condition that the affidavit be filed before February 1.

5. You next ask whether the local municipality may exclude any class of taxes from the operation of the affidavit extension privilege.

It is our opinion that if ch. 1, Laws 1941, is not to violate the uniformity provision of our constitution the affidavit extension privilege must be available to the owners of all real estate taxes who comply with and establish need for such extension and may not be made available only to the owners of certain types or classes of property. If the same were made available to taxpayers who owned one class of property and not to the owners of other classes of property most serious doubts would exist as to its validity under art. VIII, sec. 1 of the Wisconsin constitution.

6. The next question is whether the provisions of the statutes for the extension of the time for payment of taxes beyond February 1 and customarily to March 1 by the governing body of the local municipality, as provided in sec. 74.03 (1), Stats., is repealed by ch. 426, Laws 1933.

Sec. 1 of ch. 426 expressly states that sec. 74.03 is repealed. The effective date of ch. 426, Laws 1933, is October 1, 1941, and it is our opinion that ch. 426, Laws 1933, when it took effect on that date, operated to repeal the provisions of sec. 74.03 as of that date. It had no repealing effect until October 1, 1941 and its repealing effect being operative on that date must be to repeal the provisions of sec. 74.03 as they existed at the time it first had a repealing operation.

Furthermore, in view of our answer to a subsequent question, the provision in question would be of no significance or use as taxes upon which the first instalment is not paid before February 1 are not delinquent and subject to interest until March 1.

7. You then ask whether the provision of sec. 74.03 (2), Stats. 1939, providing for extending the time of payment of that portion of the taxes assessed for city, village or town purposes for a period of not exceeding six months from the last day of January, is repealed expressly or by implication by ch. 426, Laws 1933.

As stated in answering the previous question, sec. 1 of ch. 426, Laws 1933, expressly repeals the provisions of sec. 74.03 and this repeal is effective as and when ch. 426 became effective, October 1, 1941. It is our opinion that the provisions of sec. 74.03 (2), Stats. 1939, are expressly repealed by ch. 426, Laws 1933.

In addition, the provisions of subsec. (2) of sec. 74.03, Stats., set up a system which is wholly different from and in conflict with the semiannual instalment payment plan created by ch. 426 going into operation on October 1, 1941. The administrative difficulties that would arise in attempting to fit it into and operate along with the semiannual instalment plan are such that irreconcilable conflicts would arise. The two plans, in our opinion, are not possible of being harmonized. Therefore, even without the express repeal of sec. 74.03, as contained in ch. 426, we conclude that the effect of ch. 426, Laws 1933, taking effect on October 1, 1941, is to impliedly repeal the provisions of subsec. (2) of sec. 74.03.

8. You ask whether the amendment to art. VIII, sec. 1 of the Wisconsin constitution voted on by the people in April, 1941, has any effect on the various tax laws about which you have inquired. It is our opinion that the adoption of the amendment has no effect whatsoever as it is wholly prospective in operation. None of the legislative enactments here under consideration were passed after the adoption of said amendment. If this amendment was necessary in order to permit and authorize legislation of the types here under

consideration it operates only to grant that power to the legislature from the date of its adoption. If the constitutional provision as it stood at the time of their enactment was not such as to authorize and empower the legislature to do so, the subsequent adoption of this amendment to the constitution does not cure this lack of power in the legislature at the time of enactment, and merely grants authority to it in passing enactments after its adoption.

9. We are then asked whether under the provisions of ch. 426, laws of 1933, personal property taxes can be paid in two instalments.

The provisions of ch. 426 set up a plan of semiannual instalment payments of taxes which relates solely to real estate taxes. Sec. 74.03 (1) as thereby created specifically states that all personal property taxes shall be paid on or before the 31st day of January.

10. You ask what proportion of the real estate taxes of 1941 payable in 1942, under the provisions of ch. 426, must be paid in the first instalment. The provisions of sec. 74.03 (2) (a) as created by ch. 426, Laws 1933, specifically provide that as to the 1939 roll and each roll thereafter the first instalment shall be fifty per cent. It is our opinion that the first instalment of the 1941 tax payable in 1942 is fifty per cent.

11. You ask whether under ch. 426, Laws 1933, special assessments may be paid in two instalments.

The provisions of subsec. (3) of sec. 74.03 as created by ch. 426, Laws 1933, provide that no special assessments shall be subject to payment in instalments under that section, except special assessments provided for in sec. 62.21, which may be paid in two instalments if authorized by a two-thirds vote of the governing body of the local municipality.

12. You also inquire whether under ch. 426, Laws 1933, special assessments may still be returned in trust for collection under the provisions of sec. 62.21, (1) (h) 1a, Stats., or whether ch. 426, laws of 1933, does away with this possibility.

There is nothing in ch. 426, expressly repealing the provisions of sec. 62.21 (1) (h) 1a, Stats. 1939. Neither do we see any conflict therewith. It is, therefore, our opinion that the provisions of sec. 62.21 (1) (h) 1a are not impliedly repealed by ch. 426, Laws 1933.

13. You then inquire how a municipality which permits extension of the payment of real estate taxes to July 1 on the filing of an affidavit of inability to pay, pursuant to ch. 1, Laws 1941, should list such extended taxes in the tax roll returned to the county treasurer.

Sec. 74.17 as amended by ch. 426, Laws 1933, provides that the statement of unpaid taxes returned to the county treasurer by the local treasurer shall show separately (1) postponed real estate taxes, (2) delinquent real estate taxes, and (3) delinquent personal property taxes. Under the postponed real estate taxes should be shown the second instalment of taxes where the first instalment has been paid under the provisions of sec. 74.03 (2) (b), Stats., as created by ch. 426. As subsec. (1) of sec. 74.037, as amended by ch. 1, Laws 1941, states that taxes which have been extended by the filing of an affidavit shall be returned by the local treasurers to the county treasurers as delinquent and shall be treated in all other respects as other delinquent taxes, except that the owner of the lands shall be entitled to pay the same on or before July 1 without penalty, interest or other charges, the taxes upon which an affidavit of extension had been filed should be included under the column or listing of delinquent real estate taxes. A subdivision or column could be provided thereunder so as to separate these taxes from the taxes which are truly delinquent through failure to either pay the first instalment or obtain an extension by the filing of an affidavit. That is to say, there could be two separate columns under the heading "Delinquent Real Estate Taxes" by which a differentiation could be made between the two types of delinquent taxes. This, however, is purely a matter of administration, the details of which can be worked out in the preparation of the forms for use in returning and stating the unpaid taxes.

14. We are asked whether the county treasurer may deputize a local treasurer for the purpose of collecting the second instalment, together with other collections prior to August 1.

In the first place sec. 59.19 (1), and particularly the first sentence thereof, appears to contemplate the appointments of only one deputy county treasurer. But, even if it were to be interpreted as authorizing the appointment of more than one deputy, in our opinion this does not contemplate the appointment of a deputy except as a subordinate of and assistant to the treasurer in the carrying on the duties in his own office. It certainly does not contemplate the appointment of a local treasurer as a deputy county treasurer to act for the county treasurer solely at the office of the local treasurer. Furthermore, in our opinion, the appointment of a local treasurer as a deputy county treasurer would be wholly improper, because the duties of the local treasurer and the duties of a county treasurer are wholly inconsistent. The local treasurer represents and acts for the local municipality. Thus, by reason of the accounting and settlement between the local municipality and the county such conflicting interests would exist in reference thereto that the discharge of both duties at the same time is wholly incompatible.

15. You ask whether under sec. 74.03 (6), as created by ch. 426, Laws 1933, the delinquent interest chargeable after August 1 on the unpaid second instalments is to be computed from August 1 or from the preceding January 1st.

The revisor of statutes in the printing of the 1941 statutes in accordance with our previously mentioned opinion, has determined that the provisions of subsec. (6) of sec. 74.03, as created by ch. 426, Laws 1933, were amended by ch. 294, Laws 1937, so as to provide for interest at the rate of eight-tenths of one per cent per month or fraction thereof from the first day of January. His reason for so doing is that ch. 294, Laws 1937, amends the provisions of ch. 426, Laws 1933, by eliminating therefrom all provisions relating to penalties, charges and interest and substituting therefor, in the specific language of ch. 294, Laws 1937, in-

terest at the rate of "eight-tenths of one per cent per month or fraction thereof * * * from the first day of January." This is consistent with the legislative intent expressed in ch. 294 of abolishing the old system of penalties, charges and interest, and substituting therefor a uniform system of interest, wherever it is charged, at the rate specified in ch. 294 and from the first day of January succeeding the year of the tax levy. It is our opinion that the revisor in so printing the statutes has correctly interpreted and applied the intention of the legislature in the enactment of ch. 294, Laws 1937.

This construction of the intended amendment of sec. 74.03 (6) is consistent with the delinquent interest charged on the principal of the tax after tax sale by the provisions of sec. 74.46, Stats. It is also consistent with the date from which delinquent interest is computed under ch. 1, Laws 1941, if a taxpayer, after having his taxes extended by the filing of the affidavit, does not pay them on the due date of July 1. It is in accord with the intent of the legislature in enacting ch. 294, Laws 1937, as recited in the opening provision thereof, which was to abolish the old complicated system of computing the amounts payable by delinquent taxpayers and to substitute therefor of one uniform system that is simple of computation and is applicable alike before sale and after sale.

16. You also ask: May a taxpayer who has neither filed an affidavit for extension nor paid the first instalment of real estate taxes on or before January 31 pay the whole amount of his real estate taxes during February without interest or is interest chargeable thereon?

Here again the revisor of statutes in printing the 1941 statutes has interpreted the effect of ch. 294, Laws 1937, as eliminating the words "with a penalty of two per cent" from the provisions of sec. 74.03 (4) as created by ch. 426, Laws 1933. As this subsection now reads in the printed statutes of 1941 it provides that when the first instalment of real estate taxes is not paid on or before January 31 the whole amount of the real estate taxes becomes due and payable and shall be collected on or before the last day of February by the local treasurer and then provides that any of

such taxes which remain unpaid on the first day of March shall be declared delinquent and returned to the county treasurer, who shall thereafter collect such taxes with interest at the rate of eight-tenths of one per cent per month or fraction thereof from January 1 next preceding. In so doing the revisor has interpreted said ch. 294 of the laws of 1937 as abolishing the previously existing two per cent, penalty and modifying the interest to eight-tenths of one per cent per month or fraction thereof from January first. Under this interpretation he has substituted the new interest rate only where the statutes previously provided for interest upon delinquent taxes. Consequently the two per cent penalty in sec. 74.03 (4) no longer exists. As under the provisions thereof, the taxes do not become delinquent until March 1 and the only provision thereof in respect to interest is after the tax has become delinquent, it is in those instances that the new rate has been substituted. There was thus no occasion for substituting interest at the new rate in respect to payments during February, because there was no provision therein for charging interest during that month, but only for charging the two per cent penalty, which is now abolished. It is our opinion that the revisor of statutes has correctly applied ch. 294, Laws 1937, to the provisions of sec. 74.03 (4) as created by ch. 426, Laws 1933, in the printing of the 1941 statutes.

HHP

Banks and Banking — Liability of Stockholders — Judgments in favor of banking commissioner representing bank stockholders' statutory liability under sec. 221.42, are probably not assignable or salable by commission at final winding-up or liquidation sale; if sold they are probably enforceable by purchaser or assignee only to extent of actual purchase price paid therefor. Problem of final liquidation of said judgments discussed and analyzed.

October 17, 1941.

BANKING COMMISSION OF WISCONSIN.

Attention T. L. Herried.

You advise that in the course of liquidation of numerous banks throughout the state the commission has sued for and recovered judgment against stockholders of said banks in an effort to enforce collection of the stockholders' liability, provided for by sec. 221.42, Stats. The commission is now ready to wind up the liquidation of a number of banks. Pursuant to customary practice the commission will petition the court for the sale of all undisposed of or uncollected assets.

The question is presented as to what should be done with respect to the uncollected and unsatisfied judgments which the commission has against the stockholders of these banks in the final winding up of the affairs of said bank. Can said judgments be sold by the commission at the best price obtainable therefor, in short, may said judgments be sold and assigned in the final winding up of the liquidation of the bank the same as the unliquidated and undisposed of assets of the bank?

A stockholder's liability, under sec. 221.42, Stats., is contractual in nature. *Banking Comm. v. Hamilton*, 229 Wis. 89 (1938). It is not an asset of the bank. *Citizens State Bank v. Schmitz*, 219 Wis. 552, 557 (1935).

“* * * It accrues only ‘upon the commissioner of banking taking possession of the property and business of such bank under the provisions of the statutes,’ and, upon the occurrence of that event, the enforcement thereof by the commissioner is solely for the benefit of the bank’s credi-

tors. There is no stockholder's liability under that section in favor of the bank in the capacity of a creditor of a stockholder. (*Banking Com. v. Bitker*, 216 Wis. 497, 499, 257 N. W. 616.) * * *” *Citizens State Bank v. Schmitz*, *supra*.

One hundred per cent liability may be enforced by the banking commission when it has taken over the bank, pursuant to the statutes, but by the express provisions of the statute the ultimate liability is contingent in its nature and, as before stated, enforcement of the liability is solely for the benefit of the bank's creditors. Individual liability, by the express language of the statute, is “equally and ratably, not one for another, for the benefit of creditors of said bank to the amount of their stock at the par value thereof
* * *”

Ultimate liability depends upon a final determination of the deficit in the liquidation of a bank. That is a final determination with respect to the amount of which the liquidated assets of the bank (assets do not include the stockholders' double liability under sec. 221.42) fall short of meeting the claims filed, plus expenses of liquidation. If this deficit exceeds the outstanding capital stock of the bank at the time of liquidation it is apparent that the stockholders' contingent liability has then been determined at one hundred per cent as the one hundred per cent assessment of all stockholders will fall short of paying the deficit in full. If, on the other hand, the deficit is less than the amount of outstanding capital stock at the time of taking over, each stockholder is liable for such deficit in the ratio or proportion that the amount of his stock bears to the total of outstanding stock. *Schwenker v. Bekkedal*, 204 Wis. 546; *Cleary v. Brokaw*, 224 Wis. 408; *Banking Comm. v. Purves*, 228 Wis. 21. Stockholders are not liable for this deficit “one for another” but are liable ratably as above set forth.

It would seem from the inherent character of the stockholders' liability under sec. 221.42 that such liability is one which, from the nature of things, is nonassignable by the banking commission. It is enforceable only for the benefit of the creditors of the bank. If assigned, creditors are benefited only to the extent and to the amount actually paid for

the assignment. The ultimate liability is contingent in its nature. Consideration of these two inherent characteristics alone would seem to be sufficient to support a conclusion that the banking commission may not assign this liability.

Confusion would be piled upon confusion if, during the course of liquidation, such liabilities or judgments, representing such liabilities, were the subject of sale and assignment. It would seem almost necessary during the course of liquidation for the banking commission to keep within its own control the matter of ultimate liability with respect to these assessments or judgments representing such assessments. Furthermore, if a judgment, representing such assessment, is sold for less than the face amount thereof, it would seem apparent that collection of the judgment in excess of the amount paid therefor would be an enforcement of the liability for the benefit of someone other than the creditors of the bank. The following authorities support the foregoing analysis: *Roe v. King*, 217 Ia. 213, 251 N. W. 81 (1933); *Frederick v. Baxter Arms Corp. et al.*, 25 F. Supp. 998 (1939), affirmed 107 F. (2) 732 (1939); *Hood v. Richardson Realty*, 211 N. Car. 582, 191 S. E. 410 (1937).

The rule is stated in Braver, Liquidation of Financial Institutions, sec. 276, p. 309-310, as follows:

“* * * In the absence of special statutory authority it has been held that the double liability of stockholders is not subject to assignment as an ordinary chose in action, as it is not an asset of the bank, and that a court's approval of the banking commissioner's assignment thereof is void for want of jurisdiction, and the order of approval is subject to collateral attack. Hence, if the banking commissioner sells the assets of the insolvent bank and assigns the statutory liability of the stockholders, it has been held that the assignee or the banking commissioner for the benefit of the assignee can not enforce it, but that the banking commissioner or receiver only is authorized to collect it for the benefit of the creditors. The banking commissioner's power is limited to the enforcement of the double liability, but many courts hold that he has no authority to sell and assign it, even where the statute authorizes the banking commissioner to 'sell or compound all bad or doubtful debts, and sell the real or personal property' of the insolvent bank. This is true even where the court has entered a judgment against the stockholder for his double liability in favor of

the bank commissioner, and the judgment has been assigned. The assignee of such judgment can not enforce it. The most that he can recover is the sum he actually contributed toward payment of the bank's debts, and in order for the assignee to recover even the amount actually paid on account of such double liability, it is necessary for him to show the amount the bank commissioner or receiver actually obtained for assigning the right he sues to enforce. Unless the receiver actually received the amount in question for distribution in payment of the bank's creditors, it can not be recovered by the assignee. The burden of proving how much he paid for an assignment of the double liability of stockholders is on the assignee, and in the absence of such proof, there can be no recovery. * * *

It is stated in 9 C. J. S. pp. 176-177, that:

"The statutory or constitutional additional liability of a bank stockholder is not, in the absence of express provision therefor, subject to assignment. So, it cannot be assigned by a state bank commissioner or other similar officer empowered to enforce it, and his assignee may not maintain an action thereon nor be subrogated to his rights, and he cannot sue thereon for the benefit of his assignee. Although the official authorized to enforce the stockholders' liability is also authorized to sell or compound bad debts of the bank, it has been held that he is not thereby authorized to sell or assign such liability; but it has been held, to the contrary, that there is no reason why a bank commissioner, after assessment of the stockholders' liability has been made, cannot transfer and assign the claims therefor in the same manner as he could in the case of the other assets of the bank in final settlement of its affairs, and in such case the purchaser of the assets of the bank, including stockholders' assessments already made, would have the right to use the name of the bank commissioner in enforcing the liability, if necessary."

It is stated in a note, 82 A. L. R. 1286:

"Upon the question whether the statutory superadded liability of a shareholder in an insolvent corporation may be assigned or sold by its receiver, the cases are about evenly divided."

The cases are collected in said note. Most of the cases cited and which support the assignability by a receiver are cases where the liability is sought to be enforced by the as-

signee in the receiver's name. They are cases in which no hardship is worked against the stockholders by such enforcement.

Under the general rule above cited, that there must be express statutory authority for such assignment, we are cited to no statute, nor do we find any which confers any such power upon the banking commission. But granted that after assessment of this liability by the banking commissioner the liability then becomes an assignable chose in action by the banking commissioner or that a judgment procured for such liability is assignable, there still remains the very practical problem of the extent to which the judgment is enforceable by the assignee, bearing in mind the contingent nature of the ultimate liability of the stockholder and the fact that such chose in action or judgment is enforceable only for the benefit of creditors. Cases which have considered the latter question seem to be unanimous to the effect that if the assignee can enforce at all, he or it can enforce only to the extent that creditors have actually received benefit by virtue of the assignment. *Roe v. King, supra; Fredrick v. Baxter Arms Corp. et al., supra; Andrew v. State Bank*, — Ia. —, 242 N. W. 62, 82 A. L. R. 1280 (1932).

Application of the foregoing concept would mean that sale of the judgments in question would result in a purchaser being able to enforce the judgment only to the extent of the amount paid for the purchase or assignment. Assume a \$500 judgment against a stockholder for this liability. A purchaser at sale purchases the judgment for \$50. Creditors have been benefited to the extent of \$50. The purchaser is therefore entitled to enforce the judgment to the extent of \$50. He can never enforce it for more. The purchaser gambles on whether he can ever collect anything (presumably these judgments are uncollectible at the time of sale, as it is the banking commission's duty to collect, if collection is possible), but in any event he can never get more than his money back. People are willing to speculate upon such a purchase where there is a speculative possibility of receiving more than is paid out, but purchasers are not going to speculate with the odds all against them and where it is doubtful if they will ever get their money back

and where they never can get more than their money back. As a practical matter, therefore, if the rule above discussed is sound law (and we believe that it is) these judgments are of such nature as to offer no appeal to a speculatively minded purchaser.

We conclude that the weight of reason, if not the weight of authority, is against the power of the commission to assign such a judgment and further that as a practical matter, if the inherent limitations with respect to enforcement by a purchaser or assignee are considered, the commission has nothing to sell (if it has anything which can be sold) which would appeal to any purchaser or investor.

The factual situation may be such with respect to a particular bank that enforcement by an assignee to the extent that he has actually paid value therefor will work no hardship upon the stockholder. Thus, where the deficit exceeds the capital stock, the contingent nature of the ultimate liability drops out of the picture. It is then known that this liability is 100 per cent. Sale to and enforcement by the assignee to the extent of value paid therefor results in no equities in favor of the stockholder. But such factual considerations would seem to go to the question of equities rather than to the question of an analysis of the inherent nature or character of the liability, which analysis should determine the assignable or nonassignable character of the liability.

The question is presented as to what to do with these judgments if they are nonassignable and cannot be liquidated at final liquidation sales. It has been suggested that the commission should satisfy all such judgments even though nothing is paid by way of compromise for such satisfaction. We are of the view that the commission has no such power. This liability is a liability which accrues at the time the bank is taken over, pursuant to the statutes, and the liability exists until it is satisfied by payment or compromise pursuant to law or because the liability can no longer be enforced by virtue of some statute of limitations. 9 C. P. S. 159. (Assuming the factual situation with respect to the deficit to be such that all or some portion of the stockholder's pro rata share is needed to satisfy creditors in full.)

This brings up the question as to whether the commission has any power to compromise this stockholder's liability by accepting less than the full amount thereof and where it clearly appears that such compromise is in the interests of and beneficial to the creditors of the defunct bank. The general rule is stated in 9 C. J. S., p. 164, as follows:

"If express authority to do so has not been granted, it is usually held that a superadded liability of bank stockholders cannot be compromised or settled by the bank, or by a receiver or banking official entitled to collect or enforce the liability; and, if a banking official has no power to sell or assign the liability, an attempted compromise and settlement between an assignee from him and a stockholder is without consideration and ineffective to relieve the latter from liability. It has been intimated, however, that the receiver or banking official entitled to collect and enforce the stockholders' liability for the benefit of creditors may, with the consent of the court, compromise or settle the liability of a stockholder where such action is in the interests of creditors and done in the fulfillment of the receiver's or official's duties as a liquidating agent; * * *"

Examination of the cases cited in support of the general rule that there is no power to compromise this statutory liability upon the part of liquidating officers in the absence of a specific statute conferring such power, leads to the conclusion that the cases presented were not favorable cases for a thorough consideration of this specific problem. What is said by the court in relation to the problem is largely in support of conclusions already arrived at by the court and is therefore largely *dicta*. See, for instance, *Skinner v. Davis*, 67 P. (2) 176 (Ore., 1937).

It may be conceded that the commission as such has no power to compromise such a liability. That does not answer the question as to whether the commission, acting under the guidance and instructions of the court, has power to compromise. Upon this point the general rule is stated in *Braver, Liquidation of Financial Institutions*, pp. 1252-1253, as follows:

"A power conferred upon a receiver of an insolvent bank by statute to 'compound all bad or doubtful debts when approved by the court or judge,' includes the right to com-

promise doubtful claims against stockholders of such bank for the double liability imposed on them by the constitution or statute. Thus, where, shortly after the receiver of an insolvent bank by order of court brought suit against the stockholders to enforce their double liability, certain stockholders offered a settlement of their liabilities and thereupon the receiver, in recommending the acceptance of such settlement, reported to the court that a considerable number of the stockholders had died, that many had moved beyond the jurisdiction of the court, that others were insolvent, and that others denied their liabilities on various grounds, it was not an abuse of discretion on the part of the court in approving a compromise of doubtful claims by the receiver against such stockholders. Where the receiver of an insolvent bank petitions the court for authority to compromise claims against the stockholders and directors, the inquiry on the part of the court includes the probable validity of the claims urged by the receiver, the difficulties and embarrassment that attend an effort to enforce them by suit, the delays and expenses to be incurred, and the collectability of any judgment if recovered. Hence, where the receiver recommended the acceptance of the compromise and the creditors of the bank, the master, the chancellor, and the court of appeals approved it, it was proper for the court to order the receiver to accept the settlement. It was not an abuse of its discretion. * * *

The Iowa court seems to be definitely committed to the proposition that the commissioner may not compromise without court approval but can compromise with such approval. *Andrew v. State Bank*, 214 Ia. 1339, 242 N. W. 62 (1932), 82 A. L. R. 1280; *Roe v. King, supra*. See also, *Ellis v. Citizens Bank of Carlisle*, 218 Ia. 750, 251 N. W. 744 (1933); *Baxter v. Baxter*, 204 Ia. 1321, 217 N. W. 231 (1928); *Security State Bank v. Gannon*, 39 S. Dak. 232, 163 N. W. 1040 (1917); *Bush v. Lien*, 57 S. Dak. 501, 234 N. W. 29 (1930).

There would seem to be no question but that the various circuit courts of the state are given wide discretionary powers in relation to liquidation of banks. In fact the entire liquidation proceeds under the supervision and guidance of the circuit court where the financial institution carried on its business. If express statutory authority is needed for such a compromise it is entirely conceivable that sec. 220.08 (3) gives the banking commission, acting under

the guidance and direction of the court, ample power to compromise a stockholder's liability where it does appear that the compromise is to the best interests of the creditors of the defunct institution.

There may be situations where stockholders are so circumstanced financially as to make it impossible to collect the statutory liability from them, either in whole or in part. Interested relatives or friends may be willing to gamble some reasonable amount within their means by way of a loan to a stockholder if such amount will be accepted in full payment of the statutory liability. Such a loan, under such conditions, would serve the dual purpose of enabling the banking commission to realize something upon an otherwise uncollectible liability and would enable relatives or friends to assist the financially irresponsible stockholder in a program of economic or financial rehabilitation. We would certainly hesitate to say that under such circumstances both the banking commission and the circuit court are without authority to authorize such compromise. Such a transaction would so clearly be for the benefit of creditors of the defunct institution as to almost impel the conclusion that the court has implied or inherent authority to authorize such compromise, even if no express authority for same can be found.

The case posed is not intended as an exclusive illustration. It is merely intended to illustrate the point that the problem before both the banking commission and the court, in relation to any compromise is: Is the compromise to the best interests of the creditors under all the facts and circumstances of the case? That question having been resolved by both the commission and the court in the affirmative, we are of the view that the stockholders' liability may be compromised. We are further convinced that judgments representing such liability may not be satisfied with no consideration paid therefor and that the court would be without power to authorize such a compromise, that is, satisfaction in full without receipt of any money or consideration in payment of the satisfaction.

The banking commission can proceed with the final liquidation of the assets of the bank. As before noted, judgments for stockholders' liability are not assets of the bank. Everything in relation to the liquidation of the bank can be

cleaned up except the liquidation of these judgments. They can be disposed of over a period of years by collection, compromise, etc. When money is received in payment of a judgment of this nature the money will be distributable to the creditors within the principles herein discussed. To the extent that it is possible, it would seem advantageous to creditors to dispose of these judgments by desirable compromises. It would likewise seem advantageous to the stockholders to exert every effort in the direction of a fair and reasonable compromise. Such a compromise would be in the direction of ultimate financial and economic rehabilitation of an otherwise financially harassed stockholder.

Regardless of power to sell or assign such judgments, it would seem reasonable to assume that disposition of the judgments in the foregoing manner will result in receiving substantially more in payment of said judgments for the benefit of creditors than would be received by attempting to dispose of them at a liquidation sale (public or private).

Our advice to the commission is to be guided by and to take instructions from the various circuit courts by way of petition and order in relation to the problems herein discussed. There are no Wisconsin supreme court cases (at least we have been unable to find any) which put at rest the various problems discussed herein. Under the circumstances the law in relation thereto is necessarily uncertain. The commission should take no action without the guidance, instructions and written order of the various circuit courts and with respect to each particular defunct banking institution under consideration with respect to which the problem is presented.

We are further of the opinion that matters such as those herein discussed should be determined upon notice rather than as an *ex parte* matter. Whatever disposition is then made by the circuit court of said matter will be binding upon all in the absence of an appeal from the order entered.

We could have disposed of your submission by suggesting that you proceed in such manner. But when you do proceed in such manner, if there are no adversaries present in court at the time of the hearing, or even if there are, the commis-

sion will want to be in a position to be of some assistance and guidance to the court. This opinion may be of some assistance in that direction.

NSB

Education — School Administration — Public Officers — County Superintendent of Schools — County Supervising Teacher — County superintendents of schools and county supervising teachers are entitled to reimbursement for money expended for meals while on travel duty within county and outside municipality where each maintains respective office.

October 17, 1941.

DEPARTMENT OF PUBLIC INSTRUCTION.

Attention Mr. John Callahan, *State Superintendent*.

You submit the following question for our opinion:

“Does the county board have legal authority to deny reimbursement to the county superintendent and the county supervising teacher for moneys expended for meals while on duty within the county and outside the municipality where each maintains her respective office?”

Sec. 39.01, subsec. (3), Stats., controls the salary and expenses of the county superintendent and provides:

“* * * The county superintendent shall be allowed and shall receive (in addition to his salary) his reasonable, actual and necessary expenses for travel, stationery, postage and printing incurred in or necessary for the proper discharge of the duties of the office. * * *”

Sec. 39.14 (2), Stats., which provides for the salary and expenses of the supervising teacher, reads as follows:

“* * * The supervising teacher shall be reimbursed for actual and necessary expenses incurred in the performance of her duties. The county board shall make provision for the monthly payment of her salary and expenses.”

You will note that the county superintendent is entitled to “his reasonable, actual and necessary expenses for travel” for the proper discharge of his duties, and the supervising teacher is allowed reimbursement for the “actual and necessary expenses incurred in the performance of her duties”.

This department has held that moneys expended for meals by the county superintendent when carrying out the duties of the office of county superintendent away from the municipality where his office is located are a part of the legitimate expenses of travel. IV Op. Atty. Gen. 380.

Moneys expended for meals by the county supervising teacher while performing the duties of her employment away from headquarters are considered actual and necessary expenses. VIII Op. Atty. Gen. 767.

These opinions impress us as sound in analysis. We cannot see why they do not rule the questions that you submit. The opinions are as sound today as when rendered. We can see no point in reanalyzing the problems. Furthermore, we could add very little to the analysis in the opinions cited if we were to undertake to do so. The conclusions reached in the opinions were grounded upon a long accepted administrative interpretation of the terms “reasonable, actual and necessary expenses for travel” and “actual and necessary expenses incurred in the performance of her duties” and like terms. Time has not changed the administrative interpretation, but rather has enhanced the value thereof. If the legislature did not like the administrative interpretation placed upon such terms, it has had ample opportunity to legislate to the contrary. It has not done so, and under such circumstances the opinions take on added significance as the years go by rather than lose their force as persuasive authority. *Union Free High School District v. Union Free High School District*, 216 Wis. 102; *Will of Kootz*, 228 Wis. 306.

Upon the basis of the foregoing analysis, the only power of the county board is that of passing upon the reasonable-

ness of the claims filed for the meal items. The duties of the county superintendent of schools and of a county supervising teacher are to a great extent visitorial in nature. See secs. 39.03 and 39.14 (4), Stats. Neither the officer nor the employee can function properly without travel and plenty of it. So long as the meal items are reasonable in amount, it would seem that a county board exceeds its authority in disallowing such items.

NSB

Appropriations and Expenditures — Highway Commission — Motor Vehicle Fuel Tax — Wisconsin Statutes — Ch. 333, Laws 1941, did not repeal ch. 187, Laws 1941.

October 17, 1941.

HIGHWAY COMMISSION.

Attention Wm. E. O'Brien, *Chairman*.

In your letter you state:

“Section 60 of chapter 49, laws of 1941, amends the introductory paragraph of section 20.49 to provide that there is appropriated from the general fund to the state highway commission 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 actual costs of administration paid from the appropriations made by subsection (4) of section 20.05 and subsection (1) of section 20.051

“The introductory paragraph of section 20.49 is further amended by chapter 187, laws of 1941, to provide that there also shall be deducted the actual cost of administration paid from the appropriation made by subsection (3) of section 20.05.

“Chapter 333, laws of 1941, further amends the introductory paragraph of section 20.49 (as amended by chapter 49, laws of 1941) to provide that there shall also be deducted the actual cost of administration paid from the ap-

appropriation made by paragraphs (a) and (b) of subsection (4) of section 20.051. You will notice that chapter 333, laws of 1941, omits the provisions of chapter 187, laws of 1941, for the deduction of the costs paid from the appropriation made by section 20.05 (3).

"Please inform us whether the enactment of chapter 333, laws of 1941, repeals the amendment of the introductory paragraph of section 20.49 as made by chapter 187, laws of 1941."

If chapter 333, laws of 1941, has the effect of repealing the amendment made by chapter 187, laws of 1941, the repeal must be by implication. The rule is well settled that repeals by implication are not favored. An act of the legislature will not have the effect of repealing an earlier act unless the two are so manifestly and materially in conflict that they cannot reasonably stand together. *The Attorney General v. Railroad Companies*, 35 Wis. 425 (1874); *Milwaukee County v. Halsey*, 149 Wis. 82, 136 N. W. 139 (1912); *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78 (1912).

The presumption against implied repeal is even stronger where two acts are passed at the same legislative session relating to the same subject matter. 59 C. J. 929.

Rules of construction are used merely as aids in arriving at legislative intent. Legislative intent is the cardinal aim of all rules of statutory construction. A rule of statutory construction is not sacred. The intent of the legislature is. *State ex rel. Board of Regents v. Donald*, 163 Wis. 145, 147-148. There is certainly nothing inconsistent in chapter 187 and chapter 333. The legislature, by chapter 187, extended the deductions to be made pursuant to section 60 of chapter 49, laws of 1941. The legislature, by chapter 333, again extended those deductions. There is no indication in chapter 333 that the legislature, by further amending chapter 49, laws of 1941, intended to abandon the amendment proposed by Bill No. 68, S which ultimately became chapter 187, Stats.

Chapter 187 was published June 5, 1941. Bill No. 884, A., which ultimately became chapter 333, laws of 1941, was introduced in the assembly the same day that chapter 187 was published. Had it been the intention of the legislature

to abandon the amendment proposed by the bill which ultimately became chapter 187 and which was published as such the same day that chapter 333 was introduced, it would have been a simple thing for the legislature to say so in the latter act.

The legislature did not say so, and as there is nothing inconsistent in the two chapters, we conclude chapter 333 did not effect any implied repeal of chapter 187. This conclusion is consistent with prior opinions of this office in relation to analogous situations and with decisions of our own court cited in said opinions. See XXV Op. Atty. Gen. 179, XX Op. Atty. Gen. 558.

NSB

Appropriations and Expenditures — Legislature — Hospital and medical expenses incurred by member of assembly in injury sustained upon his return to legislature is not proper expenditure to be made from contingent appropriation provided by sec. 20.01, subsec. (10), Stats.

October 17, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

In your letter you state:

“On June 6, 1941, the assembly passed resolution No. 64, A., authorizing payment of the sum of \$200.00 out of the contingent fund of the assembly, provided under section 20.01 (10), to Assemblyman _____, for hospital and medical expenses incurred in an injury sustained upon his return to the legislature. Will you kindly advise us whether or not, in your opinion, this is a proper expenditure to be made from the appropriation for contingent expenditures.”

Sec. 13.08, Stats., provides :

“Each house of the legislature, at the commencement of each session, shall designate a committee of its members to act as a committee on its contingent expenditures, and, by a standing rule, prescribe the duties of such committee.”

We do not have the benefit of any standing rule that there may be upon the subject, but certainly the standing rule, whatever it may be, cannot authorize expenditures for purposes other than those specified in the appropriation itself. Sec. 20.01 (10), Stats., provides as follows :

“For contingent expenses of the senate and assembly, each \$1,000, subject to the following conditions :

“(a) Any such proposed expenditure for either house shall be reported to the house by its committee on contingent expenditures, together with a statement of the name of the person who is to receive the money and the purpose for which it is to be expended.

“(b) Such expenditure shall not be made unless it is authorized by a yea and nay vote of such house, to be entered on its journal; nor for any other purpose than to enable the house authorizing such expense to discharge its lawful functions.

“(c) Whenever such expenditure is authorized, the chairman of the committee on contingent expenditures shall certify to the secretary of state a copy of the statement prescribed in paragraph (a) and of so much of the journal as may be necessary to show affirmative action under paragraph (b).”

It takes two houses of the legislature to make a valid appropriation and to specify the purposes for which the appropriation may be expended. You will note that expenditures cannot be made, by the express language of the appropriation, “for any other purpose than to enable the house authorizing such expense to discharge its lawful functions.” You will further note that the appropriation for each house is not very large in amount. The purpose of the appropriation is just as specified. The purpose obviously contemplates the expenditures for expenses incurred by the various members of the legislature, legislative committees, etc., in the performance of their legislative duties as members of the

legislature or as members of a committee thereof—any purpose which may reasonably come within the scope of the language “nor for any other purpose than to enable the house authorizing such expense to discharge its lawful functions.”

The appropriation in question is for hospital and medical expenses of a member. We cannot see how such expense can, under any stretch of the language quoted, come within the purpose of the appropriation.

You are accordingly advised that the item is not a proper expenditure to be made from the appropriation.

NSB

Taxation — Tax Sales — It appears that legislature intended, in amending sec. 75.28, subsec. (2), Stats., by ch. 93, Laws 1941, to permit service on nonresidents by registered mail. Since question is one of statutory construction and there may be some doubt whether proper method is service by registered mail or by publication, safer course is to serve both ways.

October 20, 1941.

WILLIAM W. STORMS,
Assistant District Attorney,
Racine, Wisconsin.

You have asked how a nonresident of the state should be served, under sec. 75.28, subsec. (2) of the statutes, as amended by ch. 93, Laws 1941, which reads:

“The tax deed grantee or his assigns may, at any time after the tax deed is issued and recorded, serve a notice on the owner of record of the original title, stating that he

holds a tax deed on the land of such original owner and giving a description of the land so deeded and a reference to the volume and page where such deed is recorded, which notice shall be served in the same manner as a summons in a court of record *or by registered mail with return receipt demanded, addressed to such owner of record* and proof of which service shall be filed in the office of the county clerk of the county in which the lands are situated. If the owner of record of the original title is a nonresident of this state, or his residence is unknown, or is a foreign corporation, such tax deed grantee, or his assigns, may, upon making and filing in the office of such county clerk an affidavit showing that he is unable, with due diligence, to make service *personally* of such notice *or by registered mail with return receipt demanded* upon such former owner within the state and also showing the post-office address of such former owner, or that he is unable after due diligence, to ascertain it, publish such notice in a newspaper published in the county where the land described in the tax deed is located, once a week for 6 successive weeks and proof of such publication shall be filed in the office of such county clerk." (Italicized portions added by ch. 93, Laws 1941.)

The question is strictly one of statutory construction, inasmuch as whatever obligation there is on the grantee of a tax deed to give further notice after its issuance exists only by force of statute. Procedure for issuance of tax deeds did not include such notice prior to 1913.

The notice does not initiate proceedings to cut off the property rights of the former owner or to subject him to personal liability. Presumably, his property rights have already been cut off by the issuance of a tax deed. The provision for notice is merely an additional protection afforded to the former owner to call his attention to his right to bring action to challenge the regularity of previous proceedings, before such right is cut off by the limitation contained in section 75.27, Stats.

Provision for notice was first made by ch. 440, Laws 1913, which permitted service only in the manner in which summons in a court of record may be served. Service by publication was later made permissible in a restricted class of cases, by ch. 165, Laws 1919. The provision for service by registered mail was added by ch. 93, Laws 1941.

The legislative intent in the enactment of the latter law appears to have been to permit service by registered mail in all cases where it could be obtained, on an equal footing with personal service. The first sentence of the statute as so amended contains no exceptions, and its terms are broad enough to include service on either residents or nonresidents of the state. There would be no question that nonresidents whose post-office addresses are known could be served by registered mail if the second sentence did not expressly permit service upon nonresidents by publication under certain circumstances. Service by publication was originally made permissible as a supplementary or secondary method, for the convenience of the tax deed grantee, rather than to supersede or exclude the primary method of service where the latter could be obtained with equal or greater convenience. Had sec. 75.28 (2) been enacted as a whole instead of piecemeal, it is probable that the legislature would have included in the second sentence only those former owners whose post-office addresses were unknown so that they could have been served neither personally within the state nor by registered mail. The statute as it now reads, however, leaves the following two questions in some doubt:

1. Was it intended by expressly including nonresidents within the second sentence of section 75.28 (2) to exclude them from the general terms of the first provision?

2. Is service upon nonresidents by registered mail service, "within the state" so as to exclude it from the second provision, permitting service by publication?

The second sentence of the statute permits service by publication only when personal service or service by registered mail "within the state" is impossible. It has generally been held that where service by mail is permissible, the service is complete upon completion of the acts prescribed by statute: that is, where service by ordinary mail is permitted the service is complete upon deposit of a correctly stamped and addressed notice in the post office; where service by registered mail is prescribed, it is complete when the notice is registered. A number of cases illustrating the general rule are cited in the following excerpt from *Dairy Distributors, Inc., v. Dept. of Agr. & Markets*, 228 Wis. 418, 421, 280 N. W. 400:

"Appellant relies upon the general rule that service by mail when authorized by statute is complete when mailed, *Hurley Bros. v. Haluptzok*, 142 Minn. 269, 171 N. W. 928; *MacLean v. Reynolds*, 175 Minn. 112, 220 N. W. 435; that this is true even though not received until a day or two after the time required for service, *Reed v. St. John*, 2 Daly, 213; or not received at all, *Griffin v. County Commissioners*, 20 S. D. 142, 104 N. W. 1117; that the rule is the same when the statute provides for registered mail, *Ross v. Hawkeye Ins. Co.* 83 Iowa, 586, 588, 50 N. W. 47; *Halbrook v. Mill Owners' Mut. Ins. Co.* 86 Iowa, 255, 53 N. W. 229; *Ross v. Hawkeye Ins. Co.* 93 Iowa, 222, 61 N. W. 852; and that it is immaterial that service may otherwise be made, *Palmer-Stevenson Construction Co. v. Circuit Judge*, 176 Mich. 326, 142 N. W. 343."

See also *Jacobs v. Hooker*, 1 Barb. (1 N. Y.) 71; *Elliott v. Kennedy*, 26 How. Pr. 422; and *Batchoff v. Butte Pacific Copper Co.* (Mont.), 198 Pac. 132. The following reasoning from *Palmer-Stevenson Const. Co. v. Withey*, illustrates one of the bases for the rule:

"* * * With improved and perfected mail facilities, attended by prompt distribution or prompt delivery, service by mail can now well be recognized as reasonably safe and satisfactory, when the message is plainly addressed and postage prepaid. * * *." (142 N. W. 343, 344.)

If the service is complete upon registry, it would seem to follow that it can be made "within the state" wherever the post-office address of the former owner is known, since the notice can always be registered at any official post office. If this be true, the affidavit required for service by publication can not be made, and service by the latter method is precluded.

The case of *Dairy Distributors, Inc. v. Dept. of Agri. and Markets*, *supra*, shows that the rule is not uniform, and that a statute permitting service by mail may show an intent that the service shall not be complete until the notice is received. The court said:

"The question is one solely of statutory construction, and, this being true, cases construing other and differently worded statutes must necessarily be of limited assistance to the court." (228 Wis. 418, 421.)

As we have previously indicated, we believe it to have been the intent of the legislature to make service by registered mail adequate in any case where the former owner's post-office address is known, but since the question is one of statutory construction and the statute here involved has not been construed by a court of final jurisdiction, the safest course to pursue is to serve nonresidents both by registered mail and by publication.

BL

School Districts — Boundaries of city school districts of cities of second, third and fourth classes may be altered under provisions of sec. 40.30, Stats.

October 24, 1941.

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

Inquiry is made as to whether the boundaries of city school districts of cities of the second, third and fourth class can be legally altered under the provisions of sec. 40.30, Stats.

Sec. 40.30, subsec. (1), received its present form in 1939, and, so far as applicable, provides as follows:

“Upon the filing of a petition by an elector or upon their own motion town and village boards and councils of cities of the second, third and fourth class may, by order, create, alter, consolidate or dissolve school districts. * * *.”

Formerly a provision somewhat similar to this appeared in sec. 40.01 (1), and read as follows:

“Town boards of supervisors, village boards of trustees and city councils are hereby given power, * * *, to alter school district boundaries, and to create school districts, or to dissolve school districts * * *.”

In 1923 this provision was construed in *State ex rel. Hermanson v. Callahan*, 179 Wis. 549, to mean that a free high school district may be enlarged so as to charge added or outlying territory with the maintenance of the high school. The court said, at p. 553:

"We assume it was the legislative purpose to authorize a method by which the boundaries of any school district might be changed. Sec. 40.01 is general and by its terms applies to every school district except town free high school and union free high school districts, which are expressly excepted."

It should be noted that at this time the statute referred to the general term "school districts," and, in this sense the court held it applied to all school districts except those expressly excluded. In 1927 the legislature classified school districts into common, city, and high school districts. Sec. 40.01 (1), and other related statutes were also consolidated to form sec. 40.30, of which subsec. (1), in part, reads as follows:

"* * * Town and village boards and councils of cities of the fourth class, may, by order, create, alter, consolidate or dissolve common school districts."

Note particularly that the statute made no reference to city school districts, or high school districts, in spite of the fact that the legislature had just made these three distinct classifications. Instead, the general term "school districts" was dropped, and the particular term "common school districts" was substituted for it. Accordingly, it was held in XX Op. Atty. Gen. 707 that a city operating under the city school plan as provided by secs. 40.50 to 40.60, Stats., is a "city school district" and not a "common school district" nor "high school district," and that neither sec. 40.30 nor sec. 40.68 authorized alteration of such "city school district." It was stated therein, p. 709:

"* * * While it may be that an ordinary school district maintaining a high school still remains a common school district, * * * yet a city under the city school

plan * * * does not, in our opinion, constitute a common school district. Common school districts are recognized as separate municipal entities."

In 1938 you requested a reconsideration of the above opinion of 1931, and it was our conclusion, in XXVII Op. Atty. Gen. 591, that inasmuch as the legislature had made no changes in the statute, the opinion rendered in 1931 was still essentially sound. In other words, the problem of alteration and consolidation of school districts is predicated entirely upon statutory authority, and when the statute permits changes in only one particular class of school districts, it excludes, at least by implication, any other class, in view of the specific statutory meaning attached to each class.

The situation since 1939, however, is materially different. The legislature has seen fit to revise sec. 40.30 (1), by eliminating the particular term "common school district" and by substituting the general term "school districts" once again. Accordingly, circumstances under which rulings in XX Op. Atty. Gen. 707, and XXVII Op. Atty. Gen. 591, *supra*, were made, no longer hold true. While the specific classification of school districts into common, city, and high school districts is still preserved by sec. 40.02 (3), the generic term "school district" may include any one of the three classes. There is no reason why the term cannot be construed in the same general sense that the court did in the *Hermanson* case, to mean every school district; and hence there is no reason why it cannot, in a particular case, be construed to include city school districts.

It is our opinion, therefore, that sec. 40.30 (1) does authorize the alteration of boundaries of city school districts of the second, third and fourth class.

WHR

Insurance — State Insurance — County board is only county agency which has authority to insure county property in state insurance fund under sec. 210.04, Stats. No part of county property may be insured in such fund unless all of property owned by county is so insured. No board or committee in charge of any county property may insure it with any privately managed insurance company after county board has voted to insure in state insurance fund, unless such vote is rescinded by county board.

October 24, 1941.

MORVIN DUEL,

Commissioner of Insurance.

You have asked a number of questions relating to insurance of county property in the state insurance fund, all of which involve an interpretation of sec. 210.04 of the statutes. While the county board has express authority under sec. 59.07, subsec. (1), and 59.20, subsec. (6), Stats., to obtain insurance on county property, it may insure in the state insurance fund only under the provisions of sec. 210.04, Stats. A valid insurance contract requires not only the capacity of the insured to contract, but also the authority of the insurer to issue the coverage. The office of commissioner of insurance and the state insurance fund exist only as creatures of statute. The insurance commissioner has no inherent power, but must look to the statutes for authorization of his every act. *Ex parte Goodwyn*, 149 So. 216, 227 Ala. 173; *Bell v. Louisville Board of Fire Underwriters*, 143 S. W. 388, 146 Ky. 841; *Allin v. American Indemnity Co.*, 55 S. W. (2d) 44, 246 Ky. 396; *American Motorists' Insurance Co. v. Central Garage*, 86 N. H. 362, 169 A. 121; *N. J. Fidelity & Plate Glass Insurance Co. v. Van Schaick*, 259 N. Y. S. 108, 236 App. Div. 223, aff. 185 N. E. 721, 261 N. Y. 521.

It follows that the insurance commissioner may not provide insurance on any property, whether owned by the county or other agency, except as he is authorized by statute to do. No statute other than sec. 210.04, Stats., purports to authorize him to insure county property. Since the dis-

cussion revolves around the wording of section 210.04, we are for convenience setting out here the more pertinent provisions:

“(1) No county or village board or common council, and no officer or agent of any county, city or village having charge of any public buildings or property of any county, city or village, and no city council, village, town or school district or library board having charge of any public building or property of a school district located within any incorporated city or village, shall contract for or pay out any money or funds for insurance, against fire or any other risk upon property, on and after a vote of such board or council to insure under this section, except as may be certified by the commissioner of insurance to be necessary.

“(2) After such decision by such board or council, the clerk thereof shall report to the commissioner of insurance each policy of insurance which shall then be in force upon any property of any kind belonging to the county, city or village or to the school district, whether under the control of such board or council or any other board, officer or agent, stating the property covered by such policy, the date of the issue and the expiration thereof, the amount and rate of insurance and premium thereon.

“(3) After such decision by such board or council, the insurance on all property of any such county, city, town, village or school district shall be provided for, and adjustment of losses made by the commissioner of insurance, in the manner provided by sections 210.02 and 210.03 for the insurance of property of the state * * *

“* * *

“(8) Any county, city, village, school district, or library board may terminate its insurance in the ‘state insurance fund’ by a majority vote of its board or council, and upon certifying such action to the commissioner of insurance, the insurance remaining in force in that fund shall terminate upon expiration of the policy contract.”

Underlying a number of your questions is the necessity for determining what agency is authorized by the above provision to make the determination on behalf of the county to insure in the state insurance fund. The first subsection above quoted has a twofold effect upon local officers and agents:

1. It authorizes certain officers to determine by a vote to insure in the state insurance fund;

2. It prohibits another group of officers and agents from insuring elsewhere when the determination has been made and while it remains in force.

All of the officers included in the first group are also included within the second, but the reverse is not true. In other words, all of the officers who are empowered to participate in making the decision are prohibited from acting in contravention of it, as are a large number of other officers and agents who have no voice in making the decision.

The agencies entitled to make the determination are referred to in subsection (1) as "such board of council." The same term is used in the second and third subsections, and presumably means the same thing wherever used throughout the section. The second subsection requires the clerk of the board or council making the decision to report each insurance policy upon any property belonging to the county, city or village, or to the school district, "whether under the control of such board or council or any other board, officer or agent." It is clear from the quoted phrase that it is contemplated that not all boards having charge of public property are to have a voice in making the determination by which they are bound under sec. 210.04, Stats.

In ascertaining the meaning of the term "such board or council," the use of the word "such" restricts the application to boards or councils previously named. The only "board" having authority over county property, which is specifically mentioned before the term "such board or council" first appears, is the county board.

As originally enacted by ch. 603, Laws 1911, the plan for insurance in the state insurance fund did not include local units other than counties. The first section created by that law, which has become subsec. (1) of sec. 210.04, read:

"No county board, officer or agent of any county, having charge of any public buildings or property of any county, shall contract for or pay out any money or funds for insurance, against fire or any other risk upon property on and after the first day of July, next after a vote *of the county board* of such county to insure under this section, except as may be certified by the commissioner of insurance to be necessary." (Italics supplied)

The foregoing provision was amended by ch. 714, Laws 1913, sec. 2, so as to include cities and villages. The additional words appearing in sec. 210.04 (1) were added solely to extend the applicability of the provision to other governmental units. There is no indication that the legislature intended by the change to alter the plan with respect to counties, or to empower any other county agency than the county board to vote to insure county property in the state insurance fund.

The power to decide to insure county property in the state insurance fund having been expressly conferred by statute upon the county board and upon no other county agency, other officers and agents are impliedly excluded from the exercise of such power. See *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N. W. 401, which reads in part:

“* * * The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. * * *”

None of the separate boards or officers in charge of county property mentioned in your letter such as asylums, sanatoriums, poor farms, highway department property, normal schools, fair grounds, etc., constitutes a separate corporate entity. They are all agencies of the county with no power except such as is conferred by statute or by the county board. The sections governing the powers of such agencies do not deal specifically with the subject of insurance. Their powers and duties are essentially specialized, and while they may, in the absence of action by the county board, have authority to insure property in their charge in private companies as an incident to their statutory duties, they are expressly precluded by sec. 210.04 from taking such action when the county board has decided to insure in the state insurance fund. The legislature has in sec. 210.04 recognized the matter of insurance of county property as one of general application which affects the fiscal affairs of the county as a whole, and as one appropriate to be dealt with by the

central fiscal authority of the county instead of by the specialized agencies. The desirability of this type of division of functions was recognized in *State ex rel. Board of Education v. Racine*, 205 Wis. 389, 236 N. W. 553.

The other primary problem underlying your questions is a determination of what property is affected by the decision of a county board to insure in the state insurance fund. All references to the property to be insured under sec. 210.04 are inclusive of all property belonging to the governmental unit as a whole. Subsec. (1) prohibits any officials in charge of "any" public buildings of the county, city or village from contracting or paying out "any" money or funds for insurance upon property. Subsec. (2) requires the clerk to report to the commissioner of insurance each policy of insurance on "any property of any kind belonging to the county, city or village." Subsec. (3) provides that insurance on "all property of such county, city, town, village," etc. shall be provided in the state insurance fund.

It appears that the legislature intended, through the state insurance fund, to furnish insurance only upon the property of a county, city, village, or school district as an entirety. Whatever reasons it may have had for this requirement doubtless relate to the efficiency and economy of administering the fund. For one thing, the legislature probably wished to prevent the segregation of property and the placing of less desirable risks in the state insurance fund while the better risks are handled by private agencies. It may have believed that the overhead expense of the fund would be proportionately smaller by having property insured in substantial blocks rather than in separate pieces. It may have wished to avoid the administrative inconvenience of requiring the commissioner of insurance to deal with many local agencies instead of a few, and to determine questions of overlapping jurisdiction of various local boards.

The commissioner of insurance is given no discretion, at least in express words, to refuse to provide insurance when the conditions prescribed by sec. 210.04 have been met, regardless of the desirability of the risk. Since the statute creates liability, not only against counties for premiums,

but also against the state-administered insurance fund for adjustment of losses, such reciprocal liabilities may be effectuated only in strict accordance with the statute.

The property to be insured is specified under section 210.04 (3) as "all property of any such county, city, town, village or school district." In order to effect compliance with the statute, the insurance must extend to all of the property owned by one of the units named.

In accordance with the foregoing discussion, your questions are specifically answered as follows:

"1. Does section 210.04 of the statutes and its subsections require that after a county board votes to insure in the state (fire) insurance fund all the properties in the county, on which they wish insurance, be insured in the fund?"

Answer: Yes.

"2. Under the provisions of section 210.04 and its subsections may a county board designate that certain property be insured with the state (fire) insurance fund and permit other county properties to be insured in privately-managed companies?"

Answer: No.

"3. If a county board creates, according to law, a board of asylum and poor farm trustees, sanatorium trustees, county normal school trustees, highway committee, or fair-ground committee, can these individual committees or trustees assume authority to place insurance on the properties under their control with privately-managed companies in those counties where the county board has voted that the insurance be placed with the state (fire) insurance fund?"

Answer: No.

"4. Is there any obligation on the part of the state (fire) insurance fund to refuse insurance on properties controlled by such committees or boards of trustees created by the county board unless all the insurance on all the properties controlled by all the groups are placed in the fund?"

Answer: The statute obligates the commissioner of insurance to provide for insurance on "all property" of the county, city, town, village or school district, and to adjust

losses thereon, to certify premiums to the appropriate clerk, and to certify losses to the secretary of state. Upon receipt of an appropriate resolution from a county board, this duty extends to all of the property owned by such county. If the resolution of the county board is not one which meets the requirements of section 210.04, the commissioner of insurance is not authorized by the statute to provide insurance on the property of such county.

"5. May the state (fire) insurance fund accept insurance on properties under the control of one or more groups of a county without having the insurance on properties controlled by the remaining boards of the county?"

Answer: Insurance may not be provided by the state insurance fund except in the manner authorized by statute. The commissioner of insurance may not insure county property except upon a vote of the county board to insure under sec. 210.04, which means that all of the property of such county shall be insured in the fund.

"6. Would the state (fire) insurance fund be violating the law if it accepted insurance from any board of trustees of a county controlling various groups such as asylums, etc., if the other boards of a county were insuring their property in privately-managed companies?"

Answer: If the commissioner of insurance provides insurance on part of a county's property without the prescribed conditions having been met, he may be guilty of a violation of sec. 348.28, Stats., which provides a penalty for any officer, agent or clerk of the state who shall "do any other act in his official capacity or employment, or in any public or official service, not authorized or required by law." If he fails to provide insurance on all of the county property after the prescribed conditions have been met he may be guilty of a violation of sec. 348.29, which provides a penalty for any state officer, agent or clerk "who shall wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, or who shall refuse or wilfully neglect to perform any duty in his office required by law * * *."

You have also asked what penalty may be imposed for violation of sec. 210.04 (1), Stats.

Sec. 348.28, Stats., provides a penalty for "any officer, agent, or clerk of the state or of any county, * * * or any officer * * * clerk or agent of any * * * institution instituted by or in pursuance of law within this state, or any member of any body or board having charge or supervision of such institution" who shall "do any other act in his official capacity, or in any public or official service not authorized or required by law." The penalty is "by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by fine not exceeding five hundred dollars." Sec. 348.29, Stats., provides for punishment "by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars" for any such person "who shall wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, or who shall refuse or wilfully neglect to perform any duty in his office required by law."

BL

Mothers' Pensions — Under sec. 48.33, subsec. (5), par. (d), Stats., applicant is eligible for pension if husband has in fact abandoned his wife for period of one year and is legally charged with such abandonment, regardless of date of making criminal charge.

XX Op. Atty. Gen. 237 and XXIV Op. Atty. Gen. 158 clarified and approved.

October 24, 1941.

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

In your letter you state:

"The state department of public welfare has experienced difficulty in applying par. (d) of sec. 48.33 (5) relating to aid to dependent children where eligibility rests upon abandonment under the following requirement: 'the wife of a husband who has continuously deserted her for one or more years, if the husband has been legally charged with abandonment for a period of one year.'"

* * *

"Certain technicalities involved in determination of eligibility under this provision of the statutes occur in cases typified by the following:

"Example 1. Where the husband has been apprehended for desertion, and, after serving sentence, has continued to desert. It would seem that the social objectives of the aid to dependent children provisions remained unsatisfied, where legal compulsion under the criminal statute had not resulted in the support of the children.

"Example 2. Where the husband deserts on October 1, 1940, and the wife promptly complains on October 2, 1940, if she has still been continuously deserted for one year when she applies for aid on October 1, 1941; or where she complains and a warrant is issued at any time during or after the year of continuous desertion. * * *"

Your difficulty in the application of that part of the sec. 48.33, subsec. (5), par. (d), Stats., above quoted, arises in part because the subsection is none too clear in legislative intent and in part from two opinions rendered by this department construing such subsection to which you refer,

namely, XX Op. Atty. Gen. 237 (1931) and XXIV Op. Atty. Gen. 158 (1935). We are in substance requested to clarify the two prior opinions.

In XX Op. Atty. Gen. 237, with respect to said subsection, a district attorney posed the following question :

“Supposing A is arrested on the 10th day of March, 1931 and in the complaint he is charged with desertion and failure to support his wife on the 15th day of December, 1930. When will the mother be entitled to aid? A year from the 15th day of December, or a year from March 10, 1931?”

The question was answered as follows, p. 238 :

“Under the last clause above the husband must have continuously deserted the wife for a year, and in addition he must have been legally charged with a year’s abandonment; that is, there must have been a full year’s desertion, and a legal charge of a year’s abandonment. The time begins to run at the beginning of the desertion and abandonment, not at the time of the complaint or arrest, but the abandonment charge must be of a year’s abandonment.”

In XXIV Op. Atty. Gen. 158, in relation to a similar question submitted by a district attorney, the above language was quoted with approval and the opinion concluded :

“We see no reason for changing the conclusion arrived at. You are therefore advised that it is not necessary that the abandonment charge must have been made a year before mother’s pension is granted. It is merely necessary that the abandonment shall have taken place for a period of one year and that he is legally charged with abandonment.”

The language of the subsection involved is by no means clear as to legislative intent. At least three plausible interpretations seem possible, as follows :

(1) An applicant is eligible for aid if, at the time of application, she has been deserted or abandoned for a year or more and criminal charge of abandonment has been made by her, regardless of the date of making complaint for abandonment and regardless of whether the criminal complaint charges an abandonment which at the time of making

had continued for a year. This construction makes abandonment in fact which has continued for a period of a year at the time of application plus a criminal complaint made regardless of date upon which criminal complaint is made, the test of eligibility.

(2) An applicant is eligible for aid one year after having made complaint for abandonment and not until such time, even though abandonment in fact has been continuous for one year, two years, three years, or more, at the time of making application for aid.

(3) An applicant is eligible for aid if, at the time of application, there is abandonment in fact which has existed for one year or more, plus a criminal complaint made which, upon its face, shows an abandonment for a period of a year at the time of making the criminal complaint.

Construction (2) above was definitely ruled out by the two attorney general opinions above referred to. We cannot say that such interpretation was clearly wrong. We therefore do not feel at liberty at this time to adopt such a construction. This administrative interpretation acquiesced in by the legislature for a decade, while not controlling, is entitled to great weight. *Union Free High School District, etc. v. Union Free High School District, etc.*, 216 Wis. 102; *Will of Kootz*, 228 Wis. 306.

The quoted language from XX Op. Atty. Gen. is probably subject to the interpretation of construction (3) above. However, when the quoted language is read in relation to the question submitted (and presumably the attorney general intended to answer the question submitted) it would seem that what the attorney general did was to use ambiguous language in intending to express construction (1) above. Were it not for the quoting of approval of this language in the second opinion, XXIV Op. Atty. Gen. *supra*, the actual language of the second opinion is a definite adoption of construction (1) above.

Construction (2) above appeals to us as a more plausible construction than construction (3). Construction (3) obviously places a premium upon non-diligence with respect to using the legal process to rectify the abandonment. Under such construction, a charge of abandonment to be of any

significance in relation to the application for pension cannot be made until the abandonment has existed for a year or more. We do not think that the legislature ever intended to place any such premium upon non-diligence.

Construction (2), heretofore ruled out by the attorney general, does have the advantage of placing a premium upon diligent use of the criminal machinery to attempt to rectify the abandonment. Upon the whole, we consider construction (1) the probable legislative intent. It fits the general pattern of the subsection,—one year's imprisonment, one year's incapacitation, one year's divorce, etc. We further think that this construction is the construction which was intended in both of the two prior opinions, although some rather ambiguous language is used in the first opinion to convey the idea or construction meant to be expressed and adopted.

Applying construction (1) to the examples which you pose, the applicant in each instance is eligible for the aid in question.

NSB

Automobiles — Law of Road — Motor Vehicle Operators' Licenses — Applicants for drivers' licenses under sec. 85.08, Stats. 1941, who have previously been licensed in this state but who failed to renew their licenses before November 1, 1941, as required by sec. 85.08, subsec. (17), par. (a), need not be examined in view of provisions of sec. 85.08 (12) (a) but must pay reinstatement fee of one dollar provided by sec. 85.08 (18) (b) rather than renewal fee of 25¢ provided by sec. 85.08 (18) (c).

October 24, 1941.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Commissioner*.

You have inquired as to how applications for drivers' licenses are to be handled with respect to examination of applicants, and fees to be charged in cases where the appli-

cants have been previously licensed in Wisconsin but have failed to renew their licenses prior to November 1, 1941.

Sec. 85.08, subsec. (12), par. (a), 1941 Stats., provides:

“That it shall be the policy of the department to issue an operator’s license without examination to a person previously licensed in this state or holding a valid license to operate a motor vehicle in another state or country.”

Sec. 85.08 (17) (a), 1941 Stats., reads:

“All licenses validly outstanding and issued under section 85.08 repealed by this act (1941 c. 206) shall be renewed between September 1 and November 1, 1941.”

Sec. 85.08 (18), 1941 Stats., provides for license fees as follows:

“* * *

“(a) For any person not previously licensed in this state, for each 4 years or part thereof, \$1.

“(b) For reinstating a license, \$1.

“(c) For a license renewal, 25 cents.

“(d) For an instruction permit, 50 cents.

“(e) For a duplication license, 25 cents.

“* * *”

It seems clear under sec: 85.08 (12) (a), quoted above, that no examination need be required where the operator has been previously licensed, even though the application is made subsequent to October 31, 1941. The policy stated in this section contains no express time limitation and we see no sound basis for implying any such limitation.

Also it is apparent that the fee to be charged on applications made on and after November 1, 1941, is \$1.00 under sec. 85.08 (18) (b). The 25¢ fee provided for a license renewal under sec. 85.08 (18) (c) cannot apply, because there is no authority for renewal of a license unless the application is made prior to November 1, 1941, in view of the limitations imposed by sec. 85.08 (17) (a). The legislature has said that the old licenses “shall be renewed between September 1 and November 1, 1941.” By implication this excludes any later renewals. Thus if an old license has

lapsed by failure to renew within the prescribed time it can only be reinstated by payment of the \$1.00 fee under sec. 85.08 (18) (b).

This is the only one of the license fees provided by subsec. (18) which could apply, since par. (a) relates to persons not previously licensed, par. (c) relates to renewals, the time for which expires on October 31, as explained above, par. (d) relates to instruction permits and par. (e) relates to duplicates.

WHR

Automobiles — Law of Road — Motor Vehicle Operators' Licenses — Public Officers — Commissioner of Motor Vehicle Department — Functions, powers, duties, etc., of commissioner of motor vehicle department and of judges and magistrates analyzed with respect to sec. 85.08, subsec. (25c), Stats., created by ch. 206, Laws 1941.

October 30, 1941.

HUGH M. JONES, *Commissioner,*
Motor Vehicle Department.

In your letter you request our opinion upon several questions which you state have arisen with respect to interpretation of sec. 85.08, subsec. (25c), Stats., created by ch. 206, Laws 1941. You submit seven questions. The questions will be taken up and disposed of in the order of submission.

Before discussing the questions it may be observed that (25c) was an amendment to the original bill. In relation to the specific type of offenses covered by the amendment, the amendment introduces a method of handling revocations of licenses entirely at variance with the method of handling revocations elsewhere manifested in the statute. In spite of this fact there was no legislative effort to clarify other provisions of the bill in relation to this specific amendment.

The result is that the legislative intent has to be gleaned by the process of construction,—a difficult task in view of the lack of legislative effort to manifest its intention by adjustment of the other provisions of the bill to the amendment.

Your questions and our opinion in relation thereto follow:

"1. Can a judge or magistrate who has forwarded to the motor vehicle department their standard form of notification of conviction of an operator for operating a motor vehicle while under the influence of intoxicating liquor at a later date issue an order directing the department to issue such convicted person a restricted occupational operator's license? Note: The motor vehicle department revokes an operator's license within 24 hours after receipt of the judge or magistrate's report of conviction."

It is our view that (25c) grants a power to the judge or magistrate which is exhausted when action is taken in relation thereto. Refusal to suspend revocation either in whole or in part is action pursuant to the authority conferred. Such action exhausts the power to act as well as affirmative action.

If the power conferred by (25c) is judicial rather than administrative in its nature (we doubt that the power is judicial as the power is conferred upon the magistrate or judge and not upon the court) it would seem that by analogy to judicial power with respect to alteration or modification of sentences, the power is exhausted once it has been exercised. The general rule is that a court of record may, during the term in which sentence is imposed and not thereafter, alter or modify a sentence provided execution of the sentence has not commenced. In so far as revocation of license can be deemed any part of the sentence, the sentence is executed promptly by the commissioner upon receipt of the required information from the magistrate or judge. When this information is received by the commissioner from the magistrate or judge the matter is then out of the hands of the magistrate or judge and in the hands of the commissioner. Courts, under analogous circumstances, then have no power in relation to change, modification or alteration of the sentence. *State ex rel. Zabel v. Municipal Court*, 179 Wis. 195.

If the power is administrative, as we think it is, rather than judicial, the result is the same. The administrative official has no power beyond that conferred by the statute and when that power is once exercised it is exhausted in the absence of legislative conference of additional power in relation thereto. *Superior W. L. & P. Co. v. Public Service Comm.*, 232 Wis. 616.

With respect to the foregoing it may be well to point out that (25) does not deprive the courts as such of such powers as they may have with respect to stay of judgments pending an appeal, or deprive defendants of such rights as they may otherwise have to have a judgment stayed pending appeal.

"2. When a judge or magistrate stays the revocation of an operator's license under the provisions of 85.08 (25c) shall the department accept a restriction order from such judge or magistrate stating 'for occupational purposes only', or must such judge or magistrate specifically state the places and time of operation in such order?"

The language is:

"* * * In such case the judge or magistrate may in his discretion order that the convicted person may operate a motor vehicle for occupational purposes with such restrictions as to places and time of operation as the judge or magistrate shall prescribe, * * *"

This is not a grant of discretionary power to the judge or magistrate to permit operation for occupational purposes in the exercise of which power the magistrate or judge may, or may not, in his discretion, restrict as to time and place. The grant of power is tied in with the restriction. If this power is going to be exercised by the judge or magistrate it must be exercised in terms of the grant which is occupational use with restrictions as to time and place. The judge or magistrate has the very broadest sort of discretion with respect to these restrictions so long as they can qualify as occupational purpose restrictions. If the legislature intended to grant the power to permit occupational purpose operation with or without restrictions as to time and place,

it would have been a simple matter to say so. The legislature did not say so. The legislative grant of power is operation for occupational purposes with restrictions. This construction is further borne out by language elsewhere used in (25c) which seems to take it for granted that an occupational purpose order will have restrictions attached to it. Magistrates or judges acting under (25c) have no power other than that which the law gives them. The commissioner is charged with the duty of administering this law. The commissioner is charged with the duty of issuing a lawful, restricted license. The commissioner need not accept a restriction order "for occupational purposes only" unless the order is in some way restricted as to time and place.

"3. Can a judge or magistrate order restrictions other than as to places and time of operation?"

We think not. The statute confers the power and the power must be exercised pursuant to the provisions of the statute. By application of the rule of *expressio unius est exclusio alterius* the restrictions must be conformable to the statute.

"4. If the answer to No. 4 is yes, can a judge or magistrate require such person to file financial responsibility, and in the event that the judge or magistrate has such authority must the motor vehicle department receive and regulate such proof of financial responsibility as prescribed in section 85.09?"

This question need not be answered as it is predicated upon an affirmative answer to question 4.

"5. When a person who has operated under an occupational restricted license violates the same and it is in turn revoked, is his original operator's license revoked for one year from date of conviction or for one year from date of revocation of the occupational restricted license? Note: 85.08 (30) states: 'After revocation the department shall not grant a new license until the expiration of one year after the date of such revocation.'"

Sec. 85.08 (30), above quoted, is not limited as to type of operator's license revoked with respect to which the subsec-

tion applies. It accordingly applies to all revocations within the year period. No operator's license may be issued by the commissioner until expiration of a year after revocation of an occupational restricted license.

"6. Is the commissioner of the motor vehicle department authorized under section 85.08 (2) (b) to order any or all persons operating under an occupational restricted license to comply with the provisions of section 85.09?"

Under sec. 85.08 (2) (b) "the commissioner is authorized to adopt and enforce such rules and regulations as may be necessary for the administration of this section."

The rules adopted must be within the legislative policy of the act. Sec. 85.09 relates to requirements with respect to proof of financial responsibility. We find no provision in ch. 206, Laws 1941 which establishes any policy that persons operating under an occupational restricted license shall so operate only upon proof of financial responsibility. The foregoing is necessarily true or you would not have asked the question whether you could establish the policy by your rule making power. The legislature establishes policy. The commissioner makes rules within that policy. It follows that this question must be answered in the negative.

NSB

Municipal Corporations — Municipal Law — Trade Regulation — Money and Interest — Usury — Provision of municipal code of city of Milwaukee regulating pawnbrokers and permitting same to charge higher rate of interest than that permitted under state usury laws, is invalid in so far as such municipal ordinance conflicts with state laws regulating rates of interest.

November 10, 1941.

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

In your letter of October 3, 1941, you requested the opinion of this office relative to the effect of sec. 1312.22 of the municipal code of the city of Milwaukee, this section of the Milwaukee code being in apparent conflict with subsec. (3) of sec. 115.07, Wis. Stats.

The section of the code referred to provides that the rate of interest charged or received by any licensed pawnbroker shall not be more than three per cent per month on any loan or balance thereon in addition to certain other permitted charges. The charging of the full amount permitted under this section of the Milwaukee code would be in excess of that permitted under the provisions of subsec. (3) of sec. 115.07, which comprises a part of the statutes defining usurious rates of interest and prescribes penalties therefor in the state of Wisconsin. In so far as the section of the Milwaukee code in question conflicts with the laws of the state regulating rates of interest, we believe that such section would be ineffective, and it is possible that a pawnbroker charging the rates permitted under the city of Milwaukee code might be subject to prosecution of the state under sec. 115.07, Stats.

It is well established that municipal regulations must not, either directly or indirectly, contravene the general laws of the state and any ordinance which assumes to permit acts or occupations which the state prohibits is uniformly declared invalid. *State ex rel. Torres v. Krawczak*, 217 Wis. 593; *Wisconsin Association of Master Bakers v. City of*

Milwaukee, 191 Wis. 302; *City of Baraboo v. Dwyer*, 166 Wis. 372. In *Lockwood v. Muhlberg*, 124 Ga. 660, 53 S. E. 92, it was held that while municipalities had power to regulate and license, provisions of an ordinance permitting pawnbrokers to charge usurious rates of interest were invalid.

The regulation of interest rates has long been a subject of state legislation, and we believe there can be no question but that such statutes are enacted with reference to a matter of state-wide concern. Whether a particular matter relates to the local affairs and government of a city, so that the city, exercising the powers granted by sec. 66.01, pursuant to the home rule amendment to the constitution, might declare that state laws affecting such a matter should cease to be in effect in such city is, of course, a question for the courts to determine. *Van Gilder v. Madison*, 222 Wis. 58. However, we have no doubt that statutes regulating rates of interest are enactments of state-wide concern and that such enactments may not be set aside by municipal ordinance.

RL

Criminal Law — Offenses against Health — Cigarettes — Word "cigarette" as used in sec. 352.49, Stats., was repealed by Laws 1905, ch. 82, sec. 2.

Words "tobacco in any form" in sec. 352.63 do not include cigarettes, since sales of cigarettes to minors are expressly forbidden by sec. 352.50, subsec. (1) and specific statutes always control over general ones.

Only statute under which prosecution for sale of cigarettes to minors may be brought is sec. 352.50.

November 10, 1941.

S. RICHARD HEATH,
District Attorney,
Fond du Lac, Wisconsin.

You inquire as to what law is applicable to the sale of cigarettes to minors and call attention to apparent conflicts between secs. 352.49, 352.50 and 352.63 of the statutes. The applicable parts of those sections are as follows:

"352.49. Any person who shall sell or give to any minor a cigar, *cigarette* or other tobacco in any form, after having been forbidden to so do by the parent or guardian of such minor, shall be punished by fine of not more than twenty-five dollars nor less than ten dollars."

"352.50 (1) Any person who shall, by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device, sell, give away or otherwise dispose of to any minor any cigarettes, cigarette paper or cigarette wrappers, or any substitute therefor, or any paper made or prepared for the purpose of making cigarettes or any substitute therefor, or for the purpose of being filled with tobacco for smoking shall be guilty of a misdemeanor and upon conviction thereof shall be punished in the manner hereinafter provided."

(Subsec. (5) of sec. 352.50 provides a penalty of a fine of not more than \$100 nor less than \$25 for the first offense, and not more than \$200 nor less than \$25 for each subsequent offense and provides further that if the person vio-

lating subsec. (1) "shall have been personally guilty of a failure to exercise due care to prevent violation thereof," he shall be punished by a fine of not more than \$300 nor less than \$25 or by imprisonment of not over 60 days in the county jail or both such fine and imprisonment.)

"Sec. 352.63. Every person who shall sell to or give to any person under the age of sixteen years, a cigar, or *tobacco in any form*, without the written consent of the parent or guardian of such minor, shall be punished by a fine of not less than ten dollars nor more than twenty-five dollars for each offense, and every person under the age of sixteen years who shall smoke or use cigarettes, cigars or tobacco on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in the company of a parent or guardian, shall be punished by a fine of not more than ten dollars or by imprisonment for not exceeding thirty days."

There is certainly an apparent conflict on the face of the foregoing sections, but a study of the history thereof shows that sec. 352.50 is the only one which applies to sale of cigarettes or cigarette papers or wrappers to minors. The word "cigarette" in sec. 352.49 has been repealed and the words "tobacco in any form" as used in the first clause of sec. 352.63 must be construed as not including cigarettes.

Sec. 352.49 was originally enacted in substantially its present form by ch. 434, laws of 1891, and reduced to its present form, became sec. 4608e, Stats. 1898.

Sec. 1 of ch. 329, laws of 1897 became sec. 4608f, Stats. 1898, and read as follows:

"Any person who shall sell, vend or in any way deal, traffic in or otherwise dispose of or give away any cigarettes or cigarette paper in any quantity whatsoever to or with a minor shall be punished by a fine of not less than five dollars or more than twenty-five dollars for each offense or by imprisonment in the county jail not less than five days or more than thirty days; and in case of a second or any subsequent conviction of the same person the punishment shall be by a fine of not less than twenty-five dollars or more than one hundred dollars or by imprisonment in the county jail not less than thirty days or more than three months."

It will be observed that at that time the sale of cigarettes to minors was punishable under sec. 4608f, Stats. 1898, by a fine of from \$5 to \$25, but if aggravated by the fact that the minor's parent had forbidden such sale, then it was punishable under sec. 4608e by a fine of not less than \$10 or more than \$25. A second offense under sec. 4608f increased the fine to not less than \$25 or more than \$100 or imprisonment in the county jail not less than 30 days or more than three months.

By ch. 82, laws of 1905, a new section 4608f was enacted, which prohibited the manufacture and sale of cigarettes and cigarette papers altogether. Sec. 2 of that act provided as follows:

"Section 4608f of the statutes of 1898 and all other acts or parts of acts in conflict with the provisions of this act are hereby repealed."

The new sec. 4608f so enacted is printed in the statutes, Supp. 1906, pages 1390-1391. It provided a penalty for the first offense of a fine of not less than \$5 nor more than \$50 or imprisonment in the county jail not exceeding 30 days, and for subsequent offenses by a fine of not less than \$100 nor more than \$500 or imprisonment in the county jail not less than 30 days nor more than six months.

It seems clear that if sec. 4608f, Stats. 1898, was in conflict with the cigarette prohibition act, then the word "cigarette" as used in sec. 4608e, Stats. 1898, (now sec. 352.49) was also in conflict with that act and was repealed by virtue of the provisions of sec. 2 of ch. 82, Laws 1905, above quoted. In other words, since the new sec. 4608f prohibited all sales of cigarettes whatever and provided a substantial penalty therefor, it is clear that the legislature could not have intended that the sale of cigarettes to minors should be a lesser offense, and then only if expressly forbidden by the parent or guardian of the minor. Hence, sec. 4608e (352.49) could thereafter apply only to cigars or forms of tobacco other than cigarettes.

By ch. 463, Laws 1907, the *second* clause of sec. 352.63, forbidding public smoking of "cigarettes, cigars or tobacco" by minors under the age of 16, was first enacted as sec.

4608*v*, Stats. By ch. 78, laws of 1913, the *first clause* of sec. 352.63, forbidding the sale or gift to any person under 16 of any "cigar, or tobacco in any form," without the consent of his parents or guardian was added to sec. 4608*v* as an amendment. Since sec. 4608*f*, Stats., specifically dealt with *all* sales of cigarettes and cigarette papers, for bidding such sales entirely, the words "tobacco in any form" as used in sec. 4608*v* (352.63), being general in form, must be construed as not including cigarettes, under the rule that a specific statute always controls over a statute of general application covering the same subject matter. *Wisconsin Gas & E. Co. v. Fort Atkinson*, (1927) 193 Wis. 232, 241; *Fox v. Milwaukee Mechanics' Ins. Co.*, (1933) 210 Wis. 213, 216.

By ch. 139, Laws 1915, sec. 352.50 was first enacted in substantially its present form as sec. 4608*f*, Stats. 1915. Old sec. 4608*f* (the cigarette prohibition law) was amended to be subsec. 1 of new sec. 4608*f* and to *apply only to sales to minors*. Newly enacted subsecs. 2 to 6, provided for licensing cigarette dealers, etc., in substantially the same form as now provided by subsecs. (2) to (6) of sec. 352.50. The only other amendment of that law occurred in ch. 385, laws of 1919, which has no application to the problem here under discussion.

To recapitulate then, sec. 352.49 does not apply to the sale of cigarettes since the word "cigarette" in that section has been repealed by laws of 1905, ch. 82, sec. 2. Sec. 352.63 does not apply to the sale of cigarettes because it is a law of general application and is therefore subordinate to sec. 352.50, which specifically applies to sales of cigarettes. This leaves sec. 352.50 as the only statute under which a prosecution may be maintained for sale of cigarettes to minors.

WAP

Automobiles — Law of Road — Auto Registration — Corporations — Motor Transportation — Motor Carriers — Where motor vehicle registration fee of common or contract carrier is paid on annual basis under ch. 85, Stats., tax to be collected under sec. 194.48, subsec. (2), Stats., as repealed and recreated by ch. 276, Laws 1941, must be for full year; but where election is made under sec. 85.01 (1), Stats., as amended by ch. 276, Laws 1941, to pay motor vehicle registration fee on quarterly basis tax under sec. 194.48 (2) may also be paid on quarterly basis but extra one dollar is to be charged for quarterly registration fee.

November 10, 1941.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Commissioner*.

You call our attention to the following language added to sec. 85.01, subsec. (1) by ch. 276, Laws 1941:

“* * * The motor vehicle registration fee for any vehicle registered under this chapter as a bus, truck, trailer or semitrailer may be paid on a quarterly basis when the registered gross weight of such vehicle is 8,000 pounds or more, or any vehicle operated in conjunction with another such vehicle as a unit having an aggregate combined registered gross weight of 8,000 pounds or more. The quarterly registration fee for each quarter shall be one-quarter of the annual fee plus \$1. The quarters are the three-month periods commencing on July 1, October 1, January 1 and April 1; * * *.”

By the same chapter sec. 194.48 (2) was repealed and recreated to read:

“The tax herein referred to shall be a quarterly tax assessed and levied for all operations taking place during the 3-month periods commencing on July 1, October 1, January 1 and April 1. The quarterly tax for any vehicle permitted under a common carrier certificate or a contract carrier license shall be paid for the same number of quarters as registration fee is paid under chapter 85.”

In administering this law the department is requiring all common and contract vehicles to pay the tax under the provisions of sec. 194.48 for the same period for which registration fees are paid for such vehicle under ch. 85. To illustrate, if motor vehicle registration fees are paid on a motor vehicle for the license year 1941-1942, tax is required to be paid for a year, whereas, if only a quarterly registration fee is paid, only a quarterly tax is required to be paid by the department, although the registration fee has \$1 added to it in such instances.

The contention has been raised that under sec. 194.48 (2) as revised by ch. 276, common and contract carriers should be permitted to make coincidental quarterly payments of registration fees and taxes with \$1 added to the quarterly registration fee, and that in the alternative they should be permitted to pay the full annual license fee and make quarterly tax payments without penalty of any kind just as private carriers do.

We are asked if this contention is correct.

The statutory provisions in question are clear and unambiguous, so that under familiar rules of construction they are not open to interpretation. *State ex rel. Associated Indemnity Corp. v. Mortensen*, 224 Wis. 398.

Sec. 194.48 (2) says:

"The quarterly tax for any vehicle permitted under a common carrier certificate or a contract carrier license shall be paid for the same number of quarters as registration fee is paid under chapter 85."

Obviously where the full year's registration fee has been paid there would be no authority under the above language for accepting payments of less than the full year's tax. However, where the registration fee is paid on an annual basis, there would be no occasion for charging the extra \$1 per quarter which is charged where an election is made under sec. 85.01 (1) to pay such registration fee on a quarterly basis.

WHR

Automobiles — Law of Road — Counties — Traffic Ordinances — Scope of county highway traffic ordinance is limited to highways maintained at expense of county and state or either of them by virtue of sec. 59.07, subsec. (11), Stats., although in other respects authority of county in adopting highway traffic ordinance has been broadened by sec. 85.84, Stats.

November 12, 1941.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You call our attention to secs. 85.84, 85.85, 85.86 and 59.07 (11), all dealing with highway traffic regulations, and inquire whether a county traffic ordinance may be enforced on a highway in a city where such highway is maintained at the expense of the city.

Sec. 59.07 (11), empowers the county board to:

“Enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, *in the county* which is maintained at the expense of the *county and state, or either thereof*; declare and impose forfeitures, and enforce the same against any person, for any violation of such ordinances or by-laws; provide fully the manner in which forfeitures shall be collected; and provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used.”

This statute strictly limits the scope of county traffic regulations to highways maintained by the county or state, or either of them, and would clearly exclude a case where the highway is maintained at the expense of the city, unless it can be said that the other sections which you mention have in some way impliedly broadened the scope of sec. 59.07 (11).

In our opinion, the only one of the three sections in ch. 85 to which you have referred which calls for any discussion in this connection is sec. 85.84. This section provides, among other things, that its provision “shall not prohibit any local authority from passing any ordinance, resolution,

rule or regulation in strict conformity with the provisions of this chapter and imposing the same penalty for a violation of any of its provisions except the suspension or revocation of motor vehicle operators' licenses."

In XVIII Op. Atty. Gen. 616, this section was construed as authorizing a county to enact a highway traffic ordinance in strict conformity with the state traffic law and to impose the same penalties, despite the fact that sec. 59.07 (11) authorized the imposition of forfeitures only, instead of penalties as provided for violations of ch. 85. It was considered that such a construction was necessary in order to avoid an irreconcilable conflict between secs. 59.07 (11) and 85.84, and in order to comply with the manifest legislative intent of making uniform the traffic law of the state and of all local units of government.

However, there is no language in sec. 85.84 which implies that counties are to be given jurisdiction over highways previously under the jurisdiction of cities. Consequently, the broadening by sec. 85.84 of the power of the county in adopting a county traffic ordinance is still restricted to such highways as were already subject to the county's jurisdiction under sec. 59.07 (11). Highways which otherwise would be subject to city ordinances remain under the city's jurisdiction, and are not transferred to the jurisdiction of the county by virtue of sec. 85.84, 85.85 or 85.86.

WHR

Public Officers — County Board Member — County Radio Operator — Under sec. 66.11, subsec. (2), Stats., member of county board may not, upon resigning his office, be legally appointed to position as radio operator which is created by such board during his term; nor may he legally be appointed deputy sheriff where duties to be performed under such appointment will be those attached to new position created by board.

November 19, 1941.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

You have asked whether a member of the county board may, upon resigning his office as supervisor, accept an appointment by the sheriff to the position of radio operator, where the position is created by the county board during the term of such member.

Sec. 66.11, subsec. (2), Wis. Stats., reads:

“No member of a town, village, or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, provided that the governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives.”

The express provisions of the foregoing section make a member of the county board ineligible for a position created by such board during the term of his office, regardless of whether the appointing power is in the board or in some other officer. The disability extends for the entire term for which the member was elected, regardless of whether he resigns or continues to hold office. This rule is the basis of the opinions to which you refer, i. e., XXI Op. Atty. Gen. 209 and 1020, XXVI Op. Atty. Gen. 52 and 349.

You have further asked whether it would be possible for a member of the county board to resign and accept the po-

sition of deputy sheriff and to perform the duties assigned to the new position instead of those of a deputy sheriff. It appears to us that this arrangement would be a subterfuge contrary to the policy behind the enactment of sec. 66.11 (2) of the statutes, and within the inhibition of its terms.

The purpose of the enactment of such a statute as ours is explained in *Kimble v. Bender*, 196 A. 409, 415 (Md.) :

“* * * In *Westernport v. Green*, 144 Md. 85, 88, 124 A. 403, 404, the court made this clear statement of the reason and purpose of the inhibition: ‘In the discussion of a provision of the same nature in the Constitution of the United States it is said in Story on the Constitution, sec. 867: “The reason for excluding persons from offices who have been concerned in creating them or increasing their emoluments is to take away, as far as possible, any improper bias in the vote of the representative and to secure to the constituents some solemn pledge of his disinterestedness.” Construing such a provision in the Constitution of Wisconsin, the Supreme Court of that state said that it had the effect of “forbidding the election or appointment of members of the Legislature to offices created or rendered more lucrative by themselves during the term for which they were elected such members.”’ ”

The following cases hold that a mere change in title of a position is ineffective to alter the status of the position when the duties remain the same. *State ex rel. Rawlings v. Kansas City*, (1923) 250 S. W. 927; *Gilmur v. City of Seattle*, (1912) 69 Wash. 289, 124 Pac. 919; *State ex rel. Sonnenberg v. Bd. of Com'rs. of Port of New Orleans*, (1922) 149 La. 1095, 90 So. 417; *State ex rel. Exnicios v. Bd. of Com'rs of Port of New Orleans*, (1923) 153 La. 705, 96 So. 539; *Nickerson v. Bd. of Com'rs. of City of Wildwood*, (1933) 111 N. J. L. 169, 168 A. 142; *State ex rel. Wettrick v. City of Seattle*, (1921) 115 Wash. 548, 197 Pac. 782.

The member of the county board appointed to the position of deputy sheriff would in substance be filling the new position created by the county board, in performing the duties assigned to such position, even though he might be designated as a deputy sheriff. The purpose of the statute, to remove any improper bias in the vote of county board members relative to the creation of a new position, would be de-

feated as effectively in carrying out such an arrangement as by a direct appointment to the new position under any other title which might be assigned to it.

The supreme court of the United States has ruled in *Bullen v. State of Wisconsin*, 36 S. Ct. 473, 474, 240 U. S. 625, 60 L. ed. 830, that an arrangement which keeps on the legal side of a line expressly drawn by statute is not an evasion even though the purpose of such arrangement is to obtain the full extent of the privileges or immunities available under the statute. The court said, however:

“* * * When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.
* * *”

In the situation you have described, the filling of the new position of radio operator by a member of the county board, even though the appointment is made under the title of deputy sheriff, is on the wrong side of the line drawn by the legislature. It would be contrary to the policy of the statute and would be within the prohibition imposed by its terms.

In view of the foregoing opinion respecting the applicability of section 66.11 (2) there is no necessity for a discussion of the effect of sec. 59.03 (3), Stats.

BL

Taxation — Tax Sales — County is liable to local municipality under sec. 75.36, Stats., upon any excess rolls involved for proceeds realized from sale of timber or stumpage from tax deed lands.

November 19, 1941.

MISS ELIZABETH HAWKES,
District Attorney,
Washburn, Wisconsin.

You have submitted a request for an opinion that we interpret as asking whether a county, which sells stumpage

or timber from county-owned land acquired by purchasing it at the tax sale and ultimately taking tax deed thereto, is accountable to the local municipality upon such excess delinquent tax rolls as may be involved for the proceeds of the stumpage or timber, where at the time of the cutting and sale thereof the land:—

(1) is under the forest crop law, ch. 77, Stats., having been put thereunder by the county after it took tax deed thereto,

(2) is not under the forest crop law.

The first situation, in which the land is forest crop land at the time of the cutting of the stumpage or timber, is specifically covered by the last two sentences of sec. 75.36, Stats. 1941. It is there provided that the taking of a tax deed to land by the county does not make it accountable to the local municipality for any delinquent or outstanding taxes, or the redemption value of any outstanding tax certificates, thereon "until the land is sold by the county, or *in the case of lands registered as forest crop lands, until the forest crop is taken off.*" Then, it is further provided that if the amount realized on the sale of the land or from the severance of the forest crop is insufficient "the amount realized shall be applied" to the payment of the taxes, delinquent taxes, certificates and interest or charges, but that the county's liability to account is limited to the amount that it actually realizes. In so providing, these last two sentences of sec. 75.36, Stats., clearly contemplate that when the county realizes money from the taking off of the forest crop from such land such proceeds shall be applied the same as if the proceeds were derived from the sale of the land itself. It is, therefore, our opinion that in the first situation where the land is forest crop land at the time of the cutting of the stumpage or timber, the county is accountable under sec. 75.36, Stats. 1941, to the local municipality for the proceeds realized from the sale of its stumpage or timber cut from the land, but, of course, only in reference to and upon any excess delinquent rolls that may be involved.

The last sentence of sec. 75.36, Stats., uses the words "the sum realized * * * from the severance of such forest crop" and limits the liability of the county thereunder to "the amount realized". By thus using the words "sum re-

alized" and "amount realized" the liability of the county is limited to the amount of money that it actually realizes. This is the net amount received from the sale of stumpage or timber which is the total proceeds therefrom, less any severance taxes which the county is required to pay by reason of the taking off of the forest crop. Under the provisions of sec. 77.06 (5), Stats., the severance tax payable by the county where the state has paid the forestry aid on said lands pursuant to sec. 59.98 (5), Stats., is fixed at 50% of the value of the stumpage or timber cut from the land, but in other instances the county severance tax is 10%. The amount for which the county is accountable under sec. 75.36, Stats., is only the amount of the proceeds from the sale of stumpage or timber which remains after deducting therefrom the severance tax which the county is required to pay under sec. 77.06 (5), Stats.

In the second situation, where the land is not under the forest crop law at the time the stumpage or timber is cut, the provisions of sec. 75.36, Stats., making the county liable for the amount realized from the severance of the forest crop, are not applicable because the land is not forest crop land. The liability of the county to account to the local municipality is purely statutory and sec. 75.36 is the only pertinent statute. Therefore, for the county to be liable in this second situation the sale of the stumpage and timber must constitute a sale of the land within the meaning of the provision of sec. 75.36, making the county liable therefor. The word "land" is not used in sec. 75.36 in its restrictive or narrow sense as meaning only the actual land itself, but rather in the more general sense as meaning the entire real estate which includes not only the actual land itself but also all buildings, appurtenances and the like that are attached to and inhere in the land constituting a part and parcel of the real estate. Thus, when the county sells any part of that which comprises the land in this general sense, it is accountable for the proceeds received therefrom as being the sum realized on the sale of the land. There can be no question but that the county would be liable to account for the proceeds realized from the sale of any part of the land itself. Likewise, if it sold a building off of the land it would be accountable for the proceeds realized therefrom as being an

amount realized from the sale of a portion of the "land", in the sense that the word is used in the statute.

At the time the stumpage or timber was cut it was a part of the land and therefore the sale thereof by the county was a disposition of a portion of the land. That the timber is a part of the land out of which the tax is to be collected is recognized by the provisions of sec. 74.01, Stats., specifying that the lien of the tax extends to all "logs, wood and timber" cut from the land after the tax lien has attached on May 1. This carries out the objective of the system of tax sales. The sole purpose thereof is to provide a method of enforcing and collecting real estate taxes in order to provide the various units of government with the revenue to carry on their activity. If the taxes are not paid, then the land is to be sold and the proceeds provide the revenue.

Frequently, the bare land itself does not make up the value upon which the tax has been based, but the major portion of the value comes from the buildings, improvements, timber or the like on the land. In view of the purpose of the sale of lands for nonpayment of taxes and that the provisions for purchase and taking of tax deeds by the county are in furtherance thereof, there is no reason why the county should not be accountable for the proceeds from selling off the timber or buildings, which may contribute substantially to the value of the property taxed, but accountable for the proceeds from the sale of a portion of the land itself. Likewise, there is no reason why the county should be accountable for the sale of the timber when the property is under the forest crop law but not accountable if it is not. In each instance there is a reduction in the value of the property out of which the unpaid taxes are to be collected. It is our opinion, therefore, that when the legislature provided in sec. 75.36, Stats., that the county should be accountable for the sum realized when the "land is sold" it intended to include therein the proceeds from the sale of any part of the land itself or anything, such as the buildings, appurtenances, improvements, timber or the like thereon, which are a part of and constitute the "land" in the general sense.

The provision of sec. 75.36, relating to accountability upon the severance of the forest crop from lands that are

under the forest crop law does not indicate that the sale of timber or stumpage from the land is not a sale of the land within the other language of the section. The inclusion of this provision was not intended as a restriction or limitation upon the language providing for accountability upon the sale of the land. The last two sentences of sec. 75.36 were added by ch. 405, Laws 1929. The purpose thereof, as stated by the court in *Bell v. Bayfield County*, (1931) 206 Wis. 297, 239 N. W. 503, was to relieve the counties from liability to the local municipalities under the rule of *Spooner v. Washburn County*, (1905) 124 Wis. 24, 102 N. W. 325. This amendment was at a time when the legislature was greatly concerned with fostering and promoting reforestation and particularly through the medium of the forest crop law. This same 1929 legislature had just previously by ch. 343, Laws 1929, overhauled the forest crop law, ch. 77, Stats. (created at the last previous session in 1927) and in so doing made the counties for the first time eligible to put their lands thereunder. Quite obviously this was in the interests of reforestation and it was then only natural for the legislature to put the special provision relating to forest crop lands in the amendment to sec. 75.36 so as to encourage the counties to put their lands under the forest crop law. In order to do so this specific provision dispels any doubt that by putting their lands under the forest crop law the counties do not become liable under any rule similar to or the same as laid down in *Spooner v. Washburn County*, *supra*. Without it the question could still be raised, which would deter the counties from putting tax deed lands thereunder. If, on the other hand, the specific provision were construed as excluding the sale of timber from being a sale of the land, then it would be more advantageous for the counties not to put their tax deed lands under the forest crop law. To give it such effect would ascribe to the legislature an intent directly opposite and contrary to their primary purpose in reference to the forest crop law. It is therefore our opinion that the county is liable to account under sec. 75.36, Stats., to the local municipality upon any excess rolls involved for the proceeds received from the cutting and sale of timber or stumpage on tax deed lands not under the forest crop law.

For the method to be followed in the application of the proceeds realized in the foregoing situations see XXVIII Op. Atty. Gen. 74.

HHP

Indigent, Insane, etc. — Poor Relief — Public Officers — County Clerk — Failure or neglect of county clerk to forward nonresident relief notice, as required by sec. 49.03, subsec. (4), Stats., to county wherein nonresident relief recipient claims legal settlement renders clerk and his bondsmen liable to county for damage resulting to it.

November 21, 1941.

SAMUEL H. BLUTHE,
District Attorney,
Wautoma, Wisconsin.

You have inquired whether the failure or neglect of a county clerk to forward a nonresident relief notice as required by sec. 49.03, subsec. (4), Stats., renders the clerk or his bondsmen liable to the county injured by such failure or neglect.

In the case which gives rise to your inquiry an indigent had applied for relief in a certain village in Waushara county.

Pursuant to sec. 49.03 (3), Stats., the village clerk ascertained the municipality of legal settlement, which was in Milwaukee county, and served a nonresident notice of dependency on the county clerk of Waushara county in accordance with the above statute. In a proceeding under sec. 49.03 (8a), Stats., before the state department of public welfare in which Waushara county sought to recover from Milwaukee county for the assistance granted the indigent, recovery was denied on the grounds that the county clerk of Waushara county failed to prove that he had served the written notice on Milwaukee county required by sec. 49.03 (4).

Sec. 49.03 (4) provides that the county clerk shall file in his office the notice from the clerk of the municipality furnishing the relief "and shall within ten days after the receipt thereof serve a written notice, containing the information so received, upon the county clerk of the county in which such person claims a legal settlement, * * *."

Sec. 19.01 (2) specifies that every official bond required of any public officer shall be in substantially the following form:

"* * *

"We, the undersigned, jointly and severally, undertake and agree that, who has been elected (or appointed) to the office of, *will faithfully discharge the duties of his said office according to law*, and will pay to the parties entitled to receive the same, such damages, not exceeding in the aggregate . . . dollars, as may be suffered by them in consequence of his failure so to discharge such duties.

"* * *"

Sec. 19.01 (3) provides:

"The official duties referred to in subsections (1) and (2) *include performance to the best of his ability by the officer taking the oath or giving the bond of every official act required*, and the nonperformance of every act forbidden, by law to be performed by him; also, similar performance and nonperformance of every act required of or forbidden to him in any other office which he may lawfully hold or exercise by virtue of his incumbency of the office named in his official oath or bond. Except as provided otherwise by subsection (3) of section 59.22 the duties mentioned in any such oath or bond *include, further, the faithful performance by all persons appointed or employed by such officer* either in his principal or his said subsidiary office, of their respective duties and trusts therein."

We believe it is clear from the statutory language underscored above that the bond covers nonfeasance, as well as malfeasance and misfeasance.

Failure to serve the notice required by sec. 49.03 (4) would constitute a breach of an official duty and would not be excused under the wording of sec. 19.01 (3) even though

the duty in question had been delegated to some subordinate appointed or employed by the county clerk.

In *The Town of Crandon v. Forest County*, 91 Wis. 239, 244, the court said:

“The powers and duties of the county treasurer in respect to taxes returned as delinquent are prescribed by law, and he is required to advertise and sell the lands charged with such taxes, if payment is not made before the time fixed for such sale. The county board has no power to alter or modify the law, or to absolve him from the performance of any of his official duties. In case of a failure to perform his duty as thus prescribed, he and his sureties on his official bond are liable for all damages that may ensue, * * *.”

Likewise it may be said that the powers and duties of the county clerk with respect to the service of nonresident relief notices are prescribed by law; that the county clerk may not be absolved from the performance of his official duties, and that in case of a failure to perform his duty thus prescribed, he and his sureties on his official bond are liable for all damages that may ensue.

See also XXIII Op. Atty. Gen. 841 and *Johnson v. Brice et al.*, 102 Wis. 575.

Aside from the express statutory provisions heretofore discussed, the conclusion here reached is in accord with the general rule which is to the effect that:

“* * * The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the *mere negligence*, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion.” (Italics ours.) 46 C. J. 1068.

WHR

Indigent, Insane, etc. — Poor Relief — Sec. 49.03, subsec. (3), Stats., does not provide for notice from one municipality to another until such time as relief has been given to some person who claims to be settled in municipality to which notice is to be addressed.

November 22, 1941.

J. KYLE ANDERSON,
District Attorney,
Waupaca, Wisconsin.

You have presented the following question for our opinion:

“On December 6th 1939 the chairman of township A took a nonresidence application from a relief applicant who had a legal residence in township B. Township B does not deny but, as a matter of fact, admits that the legal settlement of the indigent is in township B. No relief was granted upon said application until May 6th 1941, approximately one year and a half after the application was taken.

“Section 49.03 (3) of the statutes says that ‘within ten days after such person *becomes a public charge*, shall serve upon the county clerk of his county a written notice, etc.’ Does that necessarily mean that the indigent shall have applied and received aid before the notice if filed with the county clerk and thereafter served upon the clerk of the municipality in which the indigent has a legal settlement or does that mean that the municipality in which the indigent has a legal settlement is liable for such relief even if granted approximately eighteen months after the notice of dependency and application for aid is made and filed?”

Sec. 49.03, subsec. (3), Wis. Stats., reads as follows:

“The clerk of the municipality furnishing such relief shall ascertain, if possible, the municipality in which such settlement is located, and within ten days after such person becomes a public charge, shall serve upon the county clerk of his county a written notice which shall state the name of the person who has received public aid, the name of the municipality where such person claims a legal settlement, or, if such place could not, after due diligence, be ascertained, a statement of such fact, and the date on which the first aid or support was furnished. In case such notice is not given within ten days, the same may be given at any other

time, but the county shall be liable only for the expense incurred for the support of such person from and after the time of the giving of such notice."

You will note the statute quoted contains the provision that the notice shall set out "the date on which the first aid or support was furnished." Moreover, it seems to us that the person has not become a "public charge" until relief has been furnished. The mere fact that a person applies for relief does not constitute him a public charge. The application may be denied. The object of the statute providing for the notice was to give notice to the municipality of legal settlement in cases where persons settled therein were being aided by other municipalities. Until such aid has been furnished there is no occasion for a notice and the statute does not provide for any such notice.

JWR

Bridges and Highways — Where land owner constructs or maintains artificial drainage ditch for benefit of his own land and such ditch crosses existing highway, land owner is liable for construction and maintenance of bridge over such ditch. Liability extends to grantee of person who constructed ditch if grantee continues ditch.

If land owner fails to meet his obligations authorities charged with maintenance of highways may, upon due notice, make necessary repairs and collect cost from land owner.

November 22, 1941.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

You inform us that the owner of a certain cranberry swamp in your county constructed an artificial drainage ditch across a town highway pursuant to a resolution adopted by the town board in 1920. The minutes relating to the resolution of the board read:

"Supervisor Gums offered the following resolution for adoption:

Resolution authorizing construction and maintenance of ditch in drain across highway.

Resolved by the town board of Rusk township, Burnett county, Wisconsin

That McKenzie Lake Cranberry Company, a corporation, be and hereby is authorized to lay out, construct and maintain at or near the north quarter corner of section 12, township 39, range 14 in Burnett county, Wisconsin, a ditch or drain across the highway which runs in an easterly and westerly direction at or near said point, for the purpose of conducting water in the operation and maintenance of its cranberry marshes from the opposite side of said highway to Lipsett Lake.

Provided, however, that said McKenzie Lake Cranberry Company shall construct at its own cost and expense a suitable bridge upon said highway across said ditch or drain, so that the traffic will not be interrupted by the construction of said ditch or drain.

Resolved by R. J. Kemp.

Resolution adopted by unanimous vote.

The said bridge to be built with concrete abutment and still 'I' beams with a plank floor and a 16 foot road way."

You state that the town road has become a county trunk and that it is necessary to reconstruct the bridge in order to place the highway in proper condition for travel. You also indicate that the cranberry swamp has been conveyed to a different owner, who is unwilling to construct a new bridge. You wish to know the rights and liabilities of the present owner of the swamp.

You have not referred to any records relating to the construction of the ditch other than the minutes above quoted, and for purposes of this opinion we are assuming that no deed or other instrument of conveyance has ever been executed by town officials.

Under such assumption no interest in land passed by the action of the town board to the original owner of the swamp or his successors, since no conveyance was ever executed in accordance with the requirements of secs. 60.04 and 240.06 of the statutes. Under the rule of *McCaffrey v. Lake*, 234 Wis. 251, the proceedings taken did not constitute such a written contract as is required for agreements which are

not to be performed within one year. Sec. 241.02 (2), Stats. The action of the town board, therefore, could amount to nothing more than a license or permission to construct a drainage ditch across the highway. It has been repeatedly held in this state that such a license is revocable at will. *Schmoldt v. Loper*, 174 Wis. 152; *Fryer v. Warne*, 29 Wis. 511; *Clute v. Carr*, 20 Wis. 531; *French v. Owen*, 2 Wis. 250.

The law governing the liability of a person who constructs an artificial watercourse for private purposes across an existing highway appears to be uniform at common law and in the various American states. A review of the cases relating to this subject is continued in the note to *Franklin Co. v. Wilt & Polly*, 126 N. W. 1007, 87 Neb. 132, in 31 L. R. A. (n.s.) 243. Wisconsin has adopted the general rule, which is to the effect that a property owner who constructs an artificial watercourse under such circumstances is liable for the construction, maintenance and repair of a bridge over the watercourse and that such liability extends also to the grantee of the person who originally built the waterway. *The President and Trustees of West Bend v. Mann and another*, 59 Wis. 69. The fact that the artificial waterway is constructed with the license or acquiescence of public authorities does not affect the question of liability. *Haines v. The People*, 19 Ill. App. 354.

Where the person liable for the construction or maintenance of the bridge fails to perform his obligation after due notice, the authorities who are charged by statute with maintenance of the highways may make the necessary repairs and maintain an action against the property owner for the cost of such repairs. See *The President and Trustees of West Bend v. Mann and another*, 59 Wis. 69. The court said at page 74:

“Such being the duties and liabilities of the respective parties, we must hold that the defendants, being primarily liable to maintain and keep in good repair the bridge in question, so long as they continue their raceway beneath the same, and having neglected and refused to so repair and maintain the same after being duly notified, the plaintiffs had the right to restore the bridge to a safe condition; and, having done so, the defendants are justly liable to them for

the amount of money so expended by the plaintiffs for that purpose. * * *.”

The possibility of another course of procedure is suggested in *Town of Levis v. Black River Improvement Co.*, 105 Wis. 391, 394-395, in which the court said:

“* * * The town has no proprietary interest in its roads. Its obligations with reference to them are statutory, and rest upon its duty to the public to keep them in a reasonably safe condition for travel. Its liability in that regard existed before the contract was made, and was not increased or diminished by reason thereof. If through the act of another they become out of repair, the town may make the necessary repairs and collect the expense from the offending party (*Oconto v. C. & N. W. R. Co.* 44 Wis. 231; *West Bend v. Mann*, 59 Wis. 69); or the town might maintain a suit in equity for a mandatory injunction to compel the restoration of the roads to their former condition (*Jamestown v. C., B. & N. R. Co.* 69 Wis. 648; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534). See *Waukesha H. M. S. Co. v. Waukesha*, 83 Wis. 475; *Neshkoro v. Nest*, 85 Wis. 126; *Eau Claire v. Matzke*, 86 Wis. 291; *Madison v. Mayers*, 97 Wis. 399.”

You have also asked whether it would be possible for the county to fill up the ditch so as to make the bridge unnecessary.

Under the circumstances described by you, the question of adverse rights is not involved since the ditch has been maintained under a license rather than under an adverse claim of title. *Schmoldt v. Loper, supra*; *Fryer v. Warne, supra*. In the *Schmoldt* case it was held that a mere license to drain water is revocable at will and is not assignable. Since the original licensee has apparently abandoned whatever rights it had under the action of the town board, by relinquishment of the property for the benefit of which the license was obtained, there appears to be no reason why the county authorities may not fill in the ditch if the present owner of the property indicates that he is unwilling to assume the common law obligations arising out of its maintenance.

Certain rights are granted to owners of cranberry lands by secs. 94.26 to 94.32 of the statutes, with respect to con-

struction of canals and ditches upon their own property. These provisions do not in terms apply to the maintenance of ditches across the property of others; but even if it should be held that the sections are broad enough in scope to apply to such a situation, it has been held in *Cranberry Creek D. Dis. v. Elm Lake C. Co.*, 170 Wis. 362, 367, that whatever rights are thereby granted to cranberry growers are subordinate to rights involving the public health or welfare. In that case it was held that the rights created by the above sections of the statutes could not be invoked against a drainage district.

BL

Banks and Banking — Delinquent Banks — Where bank was stabilized under provisions of sec. 220.08, subsec. (15), Stats. 1931, action of commissioner of banking in approving stabilization cannot lawfully be reviewed either by banking commission as his successor or by banking review board. Facts disclose that during period in question stabilized institution operated upon basis of completed reorganization, and it is to be assumed that important rights must have become fixed upon supposition that there had been completed reorganization.

November 27, 1941.

BANKING COMMISSION OF WISCONSIN.

You have submitted the following statement of facts and request for an opinion:

In 1932 a certain Wisconsin bank became insolvent. On July 20, 1932, it suspended business, and was reopened on January 9, 1933, under a stabilization plan approved by the then commissioner of banking. You do not indicate as to the section under which the agreement was approved, but we assume that it was sec. 220.08, subsec. (15), Wis. Stats. 1931. The stabilization agreement was in the usual form

of such agreement, and so far as material here conforms closely to the agreement set out in the opinion of the court in *Corstvet v. Bank of Deerfield*, 220 Wis. 209.

Under the stabilization agreement, each of the depositors was allowed to retain 50% of his deposit in the stabilized bank and was given a participating certificate in a segregated trust to the extent of the remaining 50%. The segregated trust has declared dividends to the extent of 15% of the amount of the participating certificates and it is estimated that another 10% dividend will be declared. The depositor, therefore, will have suffered a loss of approximately 37½% of his original deposit. At the time of the stabilization agreement, the stockholders imposed upon themselves a voluntary assessment of 100% on the capital stock. The holders of 390 shares paid the voluntary assessment. The balance of 503 shares were sold on the open market. The amount of the assessment was paid into the trust.

Immediately following a stabilization agreement the bank was solvent. The stockholders could have liquidated the institution, paid all claims in full and received back 100% of the amount of their investment. Thus, while the stockholders paid in 100% as an assessment they immediately became the beneficiaries of that 100% by reason of the fact that immediately following the stabilization there were assets in the bank sufficient to pay all claims and to repay the amount of the contributions made. The stock at the present time has a book value of \$170.00 per share of \$100.00 par value. The questions submitted for our opinion are all based upon the assumption that by reason of the foregoing the stabilization agreement was inequitable to depositors in that their rights were subordinated to the rights of the stockholders. As stated in your request for our opinion, the questions are as follows:

“1. Has the operation of the segregated trust agreement in this case been a violation of the Wisconsin statutes, with particular reference to the preferring of the rights of stockholders over those of depositors when as a final result the stockholders are now the owners and holders of the original number of shares held by them prior to the stabilization,

which shares have now a value of 170%, whereas the depositors have sustained a loss of 37½%?

"2. Can the depositors of this bank now in process of stabilization be relieved from the terms of the depositors' agreement, either by court action, or by an order of the banking commission so as to rectify the preference of stockholders over depositors, which has been the result of the operation of this segregated trust agreement?

"3. Can banking commission legally order all present stockholders of the bank to place their shares of stock, or a proportionate part thereof, in trust or escrow with the provision that the increment therefrom shall be applied on the loss sustained by the depositors?

"4. Can banking commission further legally require that the above shares of stock be sold and the proceeds used to make up the loss of the depositors in the event that the increment therefrom shall be insufficient for such purpose?"

We do not consider it necessary to discuss each question in the order submitted since our answer is of such a nature that certain conclusions would apply as well to one question as to another. We shall, accordingly, not attempt to consider the questions separately.

In the case of *Corstvet v. Bank of Deerfield*, 220 Wis. 209, the supreme court laid down certain legal principles relating to stabilization agreements which in our judgment are determinative of the questions submitted. The claim was there made by a nonassenting depositor that a stabilization agreement was inequitable in that it preferred the rights of stockholders to the rights of depositors. The court held that unless such a claim were directed to the banking review board by way of a requested review of the banking commissioner's approval of the stabilization agreement, it could not thereafter be raised by a nonassenting depositor by way of collateral attack upon the agreement.

In the present case no claim is made that an interested person attempted to obtain a review of the commissioner's approval by the banking review board. Consequently, a nonassenting depositor, not having availed himself of the statutory provision for review, could not now collaterally attack the agreement on the ground that it was inequitable. So far as an assenting depositor is concerned, he would be so bound and in addition would be precluded by his assent

to the agreement from attacking it after it had been executed and placed into operation.

The banking commission could not now in substance rescind the prior approval of the then commissioner of banking and require the stockholders to place the stock in the bank in escrow for the benefit of depositors. The statutes in force at the time of this agreement relating to approval of agreements by the commissioner of banking, as stated in the case cited, required the exercise of judgment and discretion on the part of the commission. The commissioner exercised his discretion and approved the plan. The parties to the agreement thereafter proceeded to carry out the agreement and have given it effect for a period of time of around eight years or so. Undoubtedly certain very important equities have arisen in favor of persons not parties to the agreement and such persons as were parties to the agreement have no doubt acted upon the assumption that their rights were fixed by the agreement.

It would require very strong statutory language in our judgment under such circumstances to permit a commissioner of banking to rescind an approval previously given. Such language is not to be found in the relevant statutes. To the contrary, we think that the statutory jurisdiction of the banking commissioner was lost following his approval of the agreement and its acceptance by the parties and that the present commission, as successor to the then commission, has nothing before it upon which it could act. The commissioner was a statutory officer and the present banking commission is a statutory body. The power and jurisdiction of the commissioner and of the present commission must be found within the four corners of the statutes creating the office of the commissioner or the banking commission and the statutes relating to the exercise of the official duties of the commissioner and of the commission as his successor. Cf. *Monroe v. Railroad Comm.*, 170 Wis. 180; *Union Indemnity Co. v. Smith*, 187 Wis. 528. The applicable statutes provide neither expressly nor impliedly that authority is retained to rescind an approval once given after it has been acted upon and the reorganization has been completed.

Nor could the banking review board now upon its own motion review the approval given by the commissioner. Assuming that the board could have reviewed the approval upon its own motion under the statutes in force at the time of the agreement, sec. 220.035 (3), created by ch. 10, Laws Special Session 1931, its authority to do so should have been exercised within a reasonable time after the approval had been given by the commissioner. No time for review was provided and, in the absence of any such provision, a reasonable time is to be implied. *Cf. Corstvet v. Bank of Deerfield, supra.* It could hardly be claimed that after the agreement had been approved and the stabilization completed, and after all parties had for eight years given the agreement full effect, the board could still exercise jurisdiction to review the approval. We have found nothing in the statute which would indicate that the commission has authority at this time to require the stockholders of the stabilized bank to place the stock in escrow for the benefit of those who were depositors at the time of the reorganization. And, as we have already indicated, the banking commission is a body of statutory creation and jurisdiction and its authority to act must be found within the four corners of the statutes relating to its jurisdiction.

The same observation could be made with respect to the question as to whether the commission could order the stock of the stabilized bank sold for the purpose of applying the purchase price to payment in full of such claims as the depositors may have had.

But one further question remains to be considered. It may be that if fraud could be shown in the execution and approval of the agreement a court of equity could intervene at the present time to redress any wrong that was perpetrated. There is no basis, however, under the facts as submitted, for any such claim. In view of that fact we do not think it necessary to discuss the question upon the assumption that a court could intervene in such circumstances.

JWR

Insurance — Fire Insurance — By reason of sec. 203.06, subsec. (2), Stats., commissioner of insurance is authorized to insert in lieu of provision in standard fire insurance policy "Space for description of property" words "Space for description of property, riders, forms and endorsements".

November 28, 1941.

MORVIN DUEL,

Commissioner of Insurance.

You have requested our opinion as to whether it is proper to approve a form of standard policy under the provisions of ch. 203, Wis. Stats. 1941, which contains the following: "Space for description of property, riders, forms and endorsements," in lieu of the words "Space for description of property" set out in the standard fire policy under the provisions of sec. 203.01, Stats.

Your question arises out of two considerations: (1) In *Home Mut. B. & L. Asso. v. Northwestern Nat. Ins. Co.*, 236 Wis. 475, the court, in referring to the "space for description of property" as printed on the face of the standard fire insurance policy, said that "* * * The only matter that can lawfully be inserted in this space is matter which is purely descriptive, *i. e.*, data to identify the property. * * *." (Page 482.) (2) Ch. 108, Laws 1941, which was enacted subsequent to the decision of the court referred to, amended sec. 203.06 (2) to read in part as follows:

(a) "There may be inserted in the space indicated therefor or added to the policy by agreement in writing thereon or by endorsement thereto, the following:

[Here follows certain matter which may be inserted or added by agreement or endorsement.]

"* * *

"(c) Indorsements may be added to the standard fire insurance policy whereby the property described in such policy may be insured against any other risk authorized by statute which the insurer is empowered to assume under its charter, in addition to the risk of loss or damage by fire and lightning. * * *."

We think that the language in the opinion referred to, when considered with reference to the change in the law pointed out, should not be construed to prevent your making the suggested addition to the standard policy if you feel that the addition is necessary or desirable.

In the case in question the supreme court was careful to point out that as the statutes then stood, no provisions, agreements, conditions or clauses relating to a restriction on the use of property, as was contended for by the company, could lawfully be inserted or added to the policy and that the only reference to use of property that could lawfully be inserted in the space for description of property must necessarily, therefore, relate to description and must be construed as descriptive. The only additions to the policy that could be made at the time the case was decided were those additions referred to in sec. 203.06 (1), Stats. No such addition referred to the use of property. Had one of the permitted additions been inserted in the space reserved for description of property, we doubt very much that the court would have condemned the practice. We think the language in question was intended to do nothing more than to point out that any language relating to the use of property by way of addition to the standard policy would be improper and that it could not lawfully be inserted in the space reserved for description of property except by way of description.

Since the adoption of the amendment to sec. 203.06, it is obvious that additional agreements of the nature provided for may be inserted in the policy in appropriate spaces or may be added by agreement or endorsement. The standard policy as it is found in sec. 203.01, Stats., contains no provision for a space to be devoted to special insertions or additions. The failure of the legislature to provide such a space, however, certainly should not be held to invalidate the legislative intent that insertions and additions may be made.

Under well established rules of law the language of the statute last enacted must govern and the standard policy provision must be affected to the extent that there may be indicated upon it a space for the insertion of language or the addition of agreements or endorsements of the kind re-

ferred to by sec. 203.06 (2) (a), Stats. The logical way in which to provide for such a space would be to do as you contemplate doing, namely, by insertion of appropriate language in the space formerly devoted to the description of property.

JWR

Fish and Game — Sec. 29.63, subsec. (3), par. (a), Stats., relating to revocation of licenses, applies to one convicted of violating conservation commission hunting order issued pursuant to sec. 29.174 (2), Stats.

December 1, 1941.

JOHN A. MOORE,
Acting District Attorney,
Oshkosh, Wisconsin.

You inquire whether conviction of violating a conservation commission order relating to the open season for rabbits, issued under sec. 29.174, subsec. (2), Stats., results in the revocation of the defendant's hunting license, under sec. 29.63 (3) (a), Stats., in addition to the penalties provided by sec. 29.63 (1) (c).

Sec. 29.174 (2), provides:

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

Sec. 29.63 (1) (c), provides:

"For the violation of any provision of the statutes or any conservation commission order relating to the hunting or taking of game or game birds of all kinds, except deer, bear and sturgeon 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."

We understand that the defendant in the case you mention was fined pursuant to this provision.

Sec. 29.63 (3) (a) provides:

"Conviction for a violation of this chapter, in addition to all other penalties, revokes any license theretofore issued

pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter.”

This office on two occasions has ruled that violations of conservation commission orders issued under sec. 23.09, Stats., does not result in revocation of licenses under sec. 29.63 (3) (a). XXII Op. Atty. Gen. 74; and XXX Op. Atty. Gen. 212. However, we do not find that the question of violation of conservation commission orders issued under sec. 29.174 has heretofore been considered by this department in so far as this problem is concerned.

It is to be noted that sec. 29.63 (1) (c) prescribes a penalty for the “violation of any provision of the statutes or *any conservation commission order* relating to the hunting or taking of game or game birds. * * *”, etc. On the other hand, sec. 29.63 (3) (a), relating to the revocation of licenses, applies only to a “conviction for a violation of this chapter.”

Prior to 1939 conservation commission orders were not specifically mentioned in the penalty provisions of sec. 29.63. Ch. 502, Laws 1939, among other things repealed and recreated par. (c) of subsec. (1) of sec. 29.63, so as to include for the first time a specific reference to violations of conservation commission orders, although it is apparent from a study of the legislative history of ch. 502 that it was introduced solely for the purpose of reducing the minimum penalties previously provided by sec. 29.63.

To trace further the legislative history of the statute involved, ch. 668, Laws 1917, created ch. 29 of the statutes, and sec. 29.21, as so created, gave the conservation commission authority to issue orders regulating the taking of game. It was provided that such orders should have the force of law, and that the penalties prescribed for violations of ch. 29 should be applicable to such orders to the same effect and extent as though such orders had been enacted a part of ch. 29. However, ch. 191, Laws 1923, repealed these provisions. Prior to such repeal, revocation of licenses ensued under sec. 29.63 (3), which then applied to “conviction of any person for any violation under any license issued to such person.”

Sec. 29.174 (2), under which the order here in question was issued, was created by ch. 152, Laws 1933. This greatly enlarged the powers of the commission. *State v. Sorenson*, 218 Wis. 295, 298. Up until this time, with the exception of the brief period when ch. 668, Laws 1917, was operative, the regulation of the taking of fish and game was by legislative action. The legislature doubtless came to realize that by delegating this power to a commission, the matter would be handled more scientifically and with greater flexibility than it could be by a legislature meeting once in two years and occupied with many other, and perhaps more important matters than the open and closed season for rabbits in this county or that, bag limits, size limits of game and fish, and the other myriad of details relating to their taking that are now covered by conservation commission orders.

Thus, since 1933, the various statutory regulations concerning these matters have been superseded by commission orders. This is demonstrated by ch. 438, Laws 1939, which was an act to repeal provisions of the statutes found in ch. 29 which had expired or been superseded by orders of the conservation commission.

However, it is clear that the legislature by enacting ch. 152, Laws 1933, did not intend that there should be any change in the penalties which had hitherto prevailed for violating fish and game laws. Sec. 29.174 (12), as created by ch. 152, provided:

“Nothing in this section shall be construed to confer upon the conservation commission the power to alter any provisions of the statutes relating to forfeitures, penalties, license fees or bounties.”

See also *Olson v. State Conservation Commission*, 235 Wis. 473, at 487.

Since, as a result of ch. 152, Laws 1933, all statutory regulations regulating the open and closed seasons, bag limits, size limits and the like have been superseded by commission orders and are no longer to be found in ch. 29, sec. 29.63 (3) (a), relating to the revocation of licenses, would be practically emasculated if it were held not to apply to conviction of violating a commission order.

As indicated above, there is nothing to show that the legislature intended any such result, and, as a matter of fact, the evidence is all to the contrary, as shown by sec. 29.174 (12) above.

We are not unmindful of the ambiguity which exists by reason of the wording of sec. 29.63 (1) (c), which specifically covers both statute and commission order violations, as contrasted with the wording of sec. 29.63 (3) (a), which mentions only convictions "for violation of this chapter." Neither do we overlook the principle that penal statutes are to be strictly construed. *Minneapolis Threshing Machine Co. v. Haug, et al.*, 136 Wis. 350. However, a penal statute which is open to construction is to be limited in favor of the person sought to be penalized, provided such construction does not defeat the obvious intention of the legislature. *Miller v. C. & N. W. Ry. Co.*, 133 Wis. 183.

We believe that it is clear from the foregoing discussion of the statutes involved that to limit the construction of sec. 29.63 (3) (a) in favor of the violator would result in the defeat of the obvious intention of the legislature and that consequently this statute must be construed as extending to convictions for violations of orders issued pursuant to ch. 29.

WHR

Constitutional Law — School Districts — Tuition — Ch. 123, Laws 1941, is constitutional. It imposes upon county clerk mandatory duty to file certificates for recovery of amounts paid by county to school districts on account of tuition for indigent pupils. County clerk may not be relieved of such duty by county board.

December 2, 1941.

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

You have asked two questions about ch. 123 of the laws of 1941. First: Is the law violative of any constitutional provision?

Ch. 123 provides in effect that the amount of any claim paid to a school district after May 23, 1941, by a county, city, village or town, under sec. 40.21, subsec. (2), Stats. 1939, to cover tuition of indigent pupils, shall be deducted from the school aids thereafter accruing to the school districts and turned back to the county, city, village or town which originally made the payment, unless the claim was reduced to judgment prior to that date.

It does not appear that any constitutional right of the school districts or other governmental divisions involved is invaded by the law. While it would deprive school districts of aids to which they would otherwise be entitled by reason of prior enactments, these aids are gratuities given by statute which the legislature may take away or divert to other purposes as it sees fit. None of the governmental agencies named in ch. 123, Laws 1941, is entitled in its proprietary right to the funds which are reallocated by the 1941 enactment. As public agencies created by statute, they are merely trustees of the public funds, and may disburse them only to such extent and for such purposes as the legislature specifies. *Town of Bell v. Bayfield County*, 206 Wis. 297; *Will of Heinemann*, 201 Wis. 484; *Richland County v. The Village of Richland Center*, 59 Wis. 591; *State ex rel. Voight v. Hoeflinger*, 31 Wis. 257.

If any private property or contract right which arose under the law as it existed prior to the enactment of ch. 123

has been invaded contrary to the constitution, the validity of the law could be challenged on that ground only by a person whose rights are so impaired.

You have also referred to art. X, sec. 5 of the constitution, providing how the school fund shall be distributed, and ask whether ch. 123 violates that section. The school fund is defined in art. X, sec. 2 of the constitution, and does not include funds raised by general taxation. The restrictions imposed by art. X, sec. 5 do not apply to public funds except those designated in art. X, sec. 2. *The Village of Platteville v. Bell*, 43 Wis. 488.

The school aids affected by ch. 123 are those appropriated from the general fund under ch. 20 of the statutes. Ch. 123 contains the following provision:

“* * * Any school district or municipality making claim for any state school aids *except from the trust fund* shall be conclusively deemed to have accepted the provisions hereof. * * *.” (Emphasis supplied.)

Provision for distribution of the income from the school fund is made in ch. 25 of the statutes entitled “Trust funds”. The quoted exception in ch. 123 refers to the school fund, which is set up by the constitution in trust for the purposes enumerated in art. X, sec. 2 and which is dealt with in ch. 25 of the statutes. Since the legislature has indicated its intention of excepting from the provisions of ch. 123 the school fund dealt with in art. X of the constitution, the statute is not repugnant to that section.

Second: Is it mandatory upon the clerk of a county having paid a claim for tuition of indigent pupils in accordance with Wisconsin statutes, sec. 40.21 (2), to file with the state superintendent of schools a claim for refund on such payments made after the effective date of ch. 123, Laws 1941?

Such duty as is imposed by ch. 123 is directed to the clerk of the county, city, village or town. Where a statutory duty is imposed upon a county officer, no other county agency has authority to supersede the statute or to relieve such officer of the obligation which the state imposes. In *Reichert v. Milwaukee County*, 159 Wis. 25, our supreme court said, at page 35:

“* * * The county acts through its officers as agents, but agents not of its own choice or creation. Those officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. * * *”

The county clerk must comply with the provisions of ch. 123, Laws 1941, unless the law can be interpreted as directory rather than as mandatory. The provision that the county clerk “shall” file certificates with the state superintendent is in terms mandatory. While the use of the word “shall” is not conclusive, it indicates that the officer must perform the act described unless other language of the law manifests an intent to leave the matter to his discretion. Where there is a question whether a statute is mandatory or directory, the following guide has been prescribed in *Wendel v. Durbin*, 26 Wis. 390, 392:

“* * * Directory statutes are such as are not of the substance of the thing provided for. *McCune v. Weller*, 11 Cal. 54 et seq., and cases cited. That which a public officer is directed by law to do for others, and which is intended for their benefit, and is beneficial to them, the law holds must be done. *Mason v. Fearson*, 9 How. U. S. 249. Statutes imposing a duty, and giving the means of performing such duty, are to be regarded as mandatory. * * *”

Ch. 123 provides in part:

“* * * When the county, city, village or town receives such funds it shall reduce the general county, city, village or town tax levy in a corresponding amount. * * *”

By inclusion of the foregoing phrase, the legislature has created a tangible right in favor of taxpayers of the unit

entitled to funds under the provisions of the act. While the interest of any individual taxpayer may be infinitesimal, it has been held in *Wagner v. Milwaukee*, 196 Wis. 328, that such fact does not prevent a taxpayer from enforcing his right in an appropriate action. The court said in that case, at pages 330-331:

"It clearly appears in this case that the payment restrained would result in an illegal disbursement of the money of the taxpayers of Milwaukee. The illegal disbursement of this money would constitute an invasion of the funds of the city in which each individual taxpayer has a substantial interest, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation. The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal is not controlling. Every taxpayer, great or small, has an interest in the disposition of the funds belonging to the city. 'Courts will not stop to balance differences or to enter into computations to ascertain just how much the taxpayer will be likely to suffer, and then grant or deny relief according as they find his loss will be great or small.' *Mueller v. Eau Claire County*, 108 Wis. 304, 311, 84 N. W. 430."

BL

Corporations — Securities Law — Transactions had between issuer of securities and holders thereof pursuant to recapitalization or reorganization plans whereby rights existing under securities originally held are exchanged for new rights, held, unless specifically exempted therefrom, subject to securities law, ch. 189, Stats.

December 2, 1941.

DAVID G. OWEN, JR., *Deputy Director*,
Department of Securities.

You have requested our opinion as to whether certain transactions described in your request are subject to the securities law, chapter 189, Wisconsin statutes 1941. The transactions in question comprise the extension of maturity

or reduction of rate of interest on evidences of indebtedness, or, with respect to preferred stock, the reduction of dividend rate, alteration of redemption requirements, change of provisions as to cumulative dividends or other modifications. You state that the different obligation or agreement is usually evidenced (a) by a new certificate of evidence of indebtedness or of stock to be exchanged for the old, (b) by printing with a rubber stamp on the old certificate, or (c) by a separate document in the form of an extension or reduction agreement.

It is our opinion that these transactions, except as exempted from the operation of the securities law by some specific provision therein, are subject to that law as constituting the issuance or sale of securities within the meaning thereof. The transactions which you describe are those which commonly take place between a corporation or other entity which desires to extend the maturity of its outstanding bonds or desires to otherwise modify or change the rights and relations existent between it and the holders of its securities pursuant to recapitalization or reorganization plans. The holder of the original security exchanges the rights acquired by reason of the original purchase of the security for new and different rights under the security as modified. The transaction results in the acquisition of a new security by the holder, assuming his rights as modified are within the definition of the term "security" as found in sec. 189.02. In applying this definition, the particular form which the certificate or other instrument used to evidence the newly acquired rights of the holder may take is, we believe, not of great importance.

That such transactions are by the securities law itself recognized as falling within its provisions is, it would seem, made clear by subsec. (13) of sec. 189.07, which provides an exemption from the registration requirements of chapter 189 for such transactions on the condition that the issuer at least thirty days prior to the solicitation of the exchange shall file with the department detailed information concerning such issuance, exchange or solicitation. Had the legislature not considered such transactions as falling within the law it of course would not have provided this conditional exemption from registration. An examination of the entire

law will show that it could not sensibly be otherwise. Sec. 189.13 provides for a detailed examination by the securities department into all of the circumstances surrounding the issuance and sale of securities, and the securities may be registered only after the department has ascertained that the sale of the securities will not be against public interest or against the interest of investors and that all of the other detailed requirements specified therein are met. To set up these safeguards for the investing public and to apply them only upon the original sale of securities for cash would have been wholly inadequate to achieve the obvious purposes of the law. The original surveillance by the department of the issue and sale of the securities would be futile if the rights secured to the investors by reason of this surveillance could be modified or nullified by subsequent transactions had between the issuer and its security holders entirely free from the supervision of the department. As we have shown, the legislature has unequivocally brought these transactions within the scope of the law. In so far as the opinion found at XXIII Op. Atty. Gen. 76 holds such transactions to be beyond the scope of the securities law as not constituting the sale of securities, it must be rejected. See *Securities and Exchange Commission v. Associated Gas & Electric Co.*, 99 F. (2d) 795.

RHL

Appropriations and Expenditures — Civil Service — Public Officers — State Employees — Deceased employee had earned around nine days accrued vacation under secs. 14.59 and 16.275, Stats., but had not been granted vacation. His right to receive compensation as employee of state was terminated and his personal representative is not entitled to receive pay for employee's accrued vacation.

December 3, 1941.

FRED R. ZIMMERMAN,
Secretary of State.

You have requested our opinion as to whether you are required to audit and pay a certification of salary covering vacation accrued to a state employee at the time of his death. The vacation accrued amounts to nine days or so at the statutory rate of three weeks for each full year to which an employee is entitled. The employee had not been granted a vacation at the time of his death and he was not then on vacation.

The right of a state employee to obtain a vacation under the provisions of secs. 14.59 and 16.275, Stats., is a right to remain away from his work for the vacation period and at the same time to receive his usual compensation. The only justification that exists for the expenditure of public moneys as payment of salary to one on vacation is that the vacation contributes to make the employee more efficient or more industrious in the discharge of his duties during that portion of the year when he is not on vacation. If this were not so — if it were simply a question of paying a public employee when he is not performing public services — we doubt very much that public moneys could be expended in payment of salary to one on vacation.

The right of a state employee to receive his salary is incident to his employment by the state. Ordinarily where an employee's employment is terminated, his right to receive compensation is likewise terminated. The situation becomes rather confused, however, where, by virtue of its grant of a vacation earned or by virtue of its obligation to grant a vacation earned, the state may place itself in a po-

sition where it cannot by terminating his employment deprive an employee of that which he has earned pursuant to the terms of his employment. Thus, the right of an employee to receive a vacation might well under certain circumstances ripen into a right to be retained on the state pay roll until such time as he has enjoyed the vacation which he has earned under his employment.

The question propounded to us in XXVIII Op. Atty. Gen. 249 involved a situation in which a vacation had been granted. Thereafter the employing department was abolished and a question arose as to whether the employees of the department were entitled to their vacations. We were of the opinion that they were. We took the view that they were enjoying a right which they had been lawfully granted and that the right which they had thus acquired was not terminated by abolition of the employing department.

In the present case no such question arises. The state was not legally obligated to grant the employee a vacation as of the time of his death. A vacation had not been granted. Upon his death the employee was no longer an employee of the state and his right to receive compensation was thereby terminated.

We express no opinion upon what might have been the obligation of the state to pay a salary had a vacation been granted at the time of the employee's death. We point out, however, that the situation in that case would be unlike a situation where an employee's services are terminated by the act of the state while he is enjoying a vacation.

In the latter case there is a question as to whether the state may lawfully deprive one, in the absence of some fault on his part, of a right to continue in the employment of the state until he has enjoyed his statutory vacation. No such question is presented in the case of one who dies while on vacation.

JWR

Public Health — Sewage Systems — Where either of two cities operating joint sewerage commission under sec. 144.07, Stats., fails to approve commission's annual budget, commission will be without funds and cannot operate sewerage system and disposal plant.

December 4, 1941.

DR. C. A. HARPER,
State Health Officer.

You state that a joint sewerage commission operating under the provisions of sec. 144.07 (4), Stats., has prepared and submitted to the governing bodies of the two cities which it serves, its annual budget for the year 1942. One of the two cities has approved the budget as submitted to it but the other city has declined to approve it and has appropriated for the use of the commission a sum in an amount which is \$5,000 less than its share of the commission's total budget. You inquire "whether or not the sewerage commission can legally incur any obligation whatever under this law when the council of either city involved fails to approve the budget submitted to it."

In XXX Op. Atty. Gen. 1 this department ruled that under the provisions of sec. 144.07, subsec. (4), (d) "the expenses to be incurred by the commission must be approved in advance by the common councils of both cities involved * * *." It is apparent that, in the case you state, but one of the cities has approved the budget submitted to it and the other city has refused such approval. It seems quite clear that the action taken by the second city in approving a lesser amount does not satisfy the requirements of the law for the reason that the statute contemplates that the commission and the governing bodies of both cities must all three agree upon a budget in the same amount. It is not possible under the act for one city to approve the full budget and the other city to approve a lesser amount, since this would result in the second city paying less than its proportionate share of the cost of maintenance and operation, contrary to sec. 144.07 (4) (e).

The sewerage commission has no source of revenue except the amounts paid to it by the respective cities involved. It

has no power to levy a tax of its own but must obtain its revenues through the action of the two city councils. This is made clear by the following language in sec. 144.07 (4) (e) :

“* * * Each municipality may, if it so desires, proceed under subsection (22) of section 66.06 in financing its portion of the cost of the construction, operation, and maintenance of the joint sewage disposal plant or system.”

Sec. 66.06 (22) (b) and (j) provide that cities may establish rates to be charged for sewage service sufficient to meet the expenses of operating its sewage disposal plant. It follows that the method of raising the money in each city is to be determined by its own governing body and need not be done by a general tax levy.

It follows that until the commission's budget has been approved by both cities the commission is without any funds legally appropriated to it for the year 1942 and is without power to incur any obligations for that year. Since the commission has no borrowing power, it cannot raise the necessary money by a loan, nor may it anticipate any future appropriation since, as a general proposition, no municipal contract may be made or obligation incurred until there is money appropriated to pay for it. 5 McQuillin, Municipal Corporations, (2d ed. 1928) sec. 2347. See, for example, sec. 62.09 (10) (f), Stats. Therefore, unless the two cities and the commission can agree upon a budget, the commission will be unable to operate the sewage system and disposal plant during the year 1942.

WAP

Criminal Law — Gambling — Pinball machine containing no pay-off device whereby coins or tokens are emitted but which through its own internal mechanism awards free play upon making certain score is gambling device *per se*, since right to replay machine is "thing of value." XXV Op. Atty. Gen. 731 overruled in view of *Milwaukee v. Burns*, (1937) 225 Wis. 296.

December 9, 1941.

CHARLES CURRAN,
District Attorney,
Mauston, Wisconsin.

You refer to the opinion of this department dated September 10, 1941*, which rules that a pinball device which contains no pay-off mechanism and is played for amusement only is not a gambling device within the meaning of secs. 348.07 and 348.09, Stats. You direct our attention to a type of pinball device which has no pay-off mechanism of any kind by which coins or tokens are delivered to the player but which does contain an internal mechanism whereby if the player achieves a certain score the machine will automatically give one or more free plays without the insertion of an additional coin or token. You state that it is now claimed that such pinball machines are not gambling devices under the reasoning of the above mentioned opinion and inquire whether that contention is correct.

For purposes of this opinion, it may be assumed that the elements of consideration and chance exist in the machines in question and your question is directed to the issue as to whether the additional element of a prize exists so that the machines would constitute gambling devices.

The supreme court of Wisconsin has held in the case of *Milwaukee v. Burns*, (1937) 225 Wis. 296, 303, that a machine substantially similar to those here in question, except that it had a pay-off device which delivered tokens which could be used only for additional plays on the machine, was a gambling device *per se*, contrary to the opinion in XXV Op. Atty. Gen. 731. The court stated as follows:

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“* * * Defendant’s guilt is established by his own testimony. Whether he redeemed the chips which the machine gave out either in cash or any form of merchandise is wholly immaterial. In the first instance, the person playing the machine had to insert a nickel for which he received ten balls. If, upon playing the balls, he should happen to win, he received one or more chips which could be used to play the machine further in place of the nickels, so that in playing the machine, the chip had a value which would constitute it a gambling device.”

This decision is in accord with the great weight of authority which recognizes that a token entitling the holder to an additional play on the machine is a “thing of value” in the meaning of the gambling laws even though it may not be redeemed in cash or merchandise. *Kraus v. City of Cleveland*, (1939) 135 Ohio St. 43, 19 N. E. (2d) 159, 160-161 and cases cited. XXV Op. Atty. Gen. 731 can no longer be followed in view of this decision.

If the right to replay the machine is a “thing of value” then it would seem to be immaterial whether the player receives a token for that purpose or whether the machine automatically sets itself so that it can be replayed without the insertion of another coin or token. To say that the question whether the machine is a gambling device *per se* depends on whether it delivers a token would be to subordinate substance to form. It cannot be denied that in either case the player has received the right to replay the machine without paying for it and that that right is a “thing of value”. The possibility that he may receive one or more free plays is the lure which attracts him to play the machine, by an appeal to his gambling instincts. Possibly because machines of this type have been recently developed as a dodge to evade the decisions holding the machines to be gambling devices *per se* if they emit tokens, there have not been many decided cases as to their legality. However, two of the three cases which have been found hold them to be gambling devices *per se*:

In *Alexander v. Martin*, (1939) 192 S. C. 176, 6 S. E. (2d) 20, 23, the court held such a device illegal, stating as follows:

“* * * contingent upon the score recorded for a player, free games are awarded. Therefore, it is clear that the lure and inducement to the player to operate the machine is the chance of occasionally being allowed to play a game or games without additional cost. This feature, we think, clearly pertains to a game of chance. And this is true, whether the machine is played for amusement or for other returns, such as money.”

After quoting from *Kraus v. City of Cleveland*, (1939) 135 Ohio St. 43, 19 N. E. (2d) 159, the court stated, p. 24:

“* * * the fact that petitioners' machines do not dispense tokens or checks does not render this decision inapplicable.”

In *People v. Cerniglia* (N. Y. Mag. Ct. 1939) 11 N. Y. S. (2d) 5, 7, the court stated:

“This Court is not misled by the apparent harmlessness of awarding a free game. This is but an incentive that fosters the gambling spirit similar to that awarding tokens, prizes, etc. The element of chance is always present. ‘Combining the element of chance with the inducement of receiving something for nothing results in gambling.’ *Green v. Hart*, D. C., 1930, 41 F. 2d 855, 856; cf. *State v. Baitler*, 131 Me. 285, 286, 287, 161 A. 671. ‘A “thing of value” to be the subject of gaming may be “any “thing” affording the necessary lure to indulge the gambling instinct.” ’ ”

A case to the contrary is *Commonwealth v. Kling*, (1940) 140 Pa. Super. 68, 13 A. (2d) 104, but it appears from the decision that a mere right to replay the machine is not regarded in Pennsylvania as a “thing of value,” contrary to the decision in *Milwaukee v. Burns*, (1937) 225 Wis. 296.

You are therefore advised that the machines in question are gambling devices *per se*.

WAP

Dairy and Food — Wisconsin Statutes — Omission of words "or by imprisonment in the county jail not less than thirty days nor more than sixty days" in amendment of sec. 97.72, subsec. (4), by ch. 183, Laws 1939, was mere clerical error and did not repeal those words. Hence sentence of imprisonment in county jail may still be imposed for all offenses covered by that statute in addition to or in lieu of imposition of fine.

December 16, 1941.

JOHN C. DANIELSON,
District Attorney,
Manitowoc, Wisconsin.

You request an opinion as to the proper construction of sec. 97.72, subsec. (4), Stats., in view of an alteration in the language of the statute which occurred by virtue of ch. 183, Laws 1939, wherein the provision for a jail sentence was in part omitted, apparently by inadvertence. To show what happened, we here quote the section as it existed in 1937 and as it now exists in the statutes, the portion in brackets having been omitted in the 1939 amendment, and the portion in italics having been added by that amendment:

"Any person who shall violate any of the provisions of this chapter for which a specific penalty is not prescribed in subsection (1), (2) and (3) of this section, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, [or by imprisonment in the county jail not less than thirty days nor more than sixty days,] or by both such fine and imprisonment. Any person who shall violate any of the provisions of section 97.03, *97.035*, 97.04, 97.05 or 97.09 shall, in addition to the foregoing penalty, suffer a revocation of his license issued under these sections."

You inquire whether it is still possible under this section for a defendant to be sentenced to a term of thirty to sixty days in the county jail in addition to or in lieu of the imposition of a fine of \$25 to \$100.

Neither Bill No. 579,A., (1939) nor ch. 183, Laws 1939, contains on its face any evidence of an intent to repeal the

language set out in brackets in the above quotation. Sec. 35.08 (2), Stats., relating to the printing of bills and resolutions pending in the legislature, provides as follows:

"Except as otherwise provided in subsection (3) any bill or resolution proposing an amendment to any existing statute or to the constitution *shall have matter to be stricken out printed with a line drawn through the same and new matter printed in italics.* The provisions of this section shall govern the printing of amendments to bills, resolutions, joint resolutions and memorials, so far as applicable."

Sec. 35.09, Stats., relating to printing of bills and resolutions for enrollment, provides in part as follows:

"* * * Any bill or resolution so printed except bills proposed by the revisor, shall, when amendatory, *indicate omissions by asterisks and new matter by italics.*"

The requirements of secs. 35.08 (2) and 35.09 with reference to the indication of omitted matter in amendatory bills were also included in the assembly rules for 1939. See *Assembly Manual* (1939) pp. 277-279.

Sec. 2 of ch. 183, Laws 1939, as well as sec. 2 of Bill No. 579, A., from which it was derived, commenced as follows: "Subsection (4) of section 97.72 of the statutes is amended to read:" Thereafter the subsection was set out *exactly as it appears in the statutes of 1939* (except that the figures "97.035" were printed in italics). There was nothing to indicate the omission of the words "or by imprisonment in the county jail not less than thirty days nor more than sixty days," as they appear in that section in the 1937 statutes, either by printing them with a line drawn through in the bill or by insertion of asterisks in the act.

The rule of construction applicable to this situation is stated as follows in *State ex rel. Board of Regents v. Donald*, (1916) 163 Wis. 145, 147-148:

"Undoubtedly, also, the general rule of construction is that, where a statute rewrites a former statute and states that the same 'is amended so as to read as follows,' all provisions in the original statute not found in the amending statute are repealed. *Ashland W. Co. v. Ashland Co.* 87 Wis. 209 58 N. W. 235, and cases cited.

"This is because the inference is necessarily strong that such was the legislative intention. The rule, however, is not ironclad. The idea of all such rules is to carry out the legislative intention, and if it appear that the legislative intention was otherwise the rule must go and the intention prevail. The rule is not sacred, but the intention is. The intention 'is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case.' *Bank of Metropolis v. Faber*, 150 N. Y. 200, 44 N. E. 779."

It is well established that in case of ambiguity in a statute its legislative history and the reasons for its enactment may be considered in arriving at the legislative intent. *Mahan v. Herreid*, (1933) 211 Wis. 79, 83; *State ex rel. Board of Regents v. Donald*, *supra*.

It is apparent from an examination of ch. 183, Laws 1939, that its principal purpose was to create sec. 97.035, taking the manufacture of limburger cheese out from under the license requirements of sec. 97.03 and providing a special license law for it.

The title of ch. 183 reads as follows:

"An Act to create section 97.035, subsection (7) of section 97.03, and subsection (24) of section 20.60, and to amend subsection (4) of section 97.72 of the statutes, to improve the quality of Limburger cheese, providing a penalty, and making an appropriation."

It is therefore apparent that the only intended amendment of sec. 97.72 (4) was to include violations of the new sec. 97.035 with the offenses for which licenses shall be revoked. There is no apparent reason on the face of the act why the legislature would have intended to repeal the jail sentence provision of sec. 97.72 (4). This is especially clear since the language "or by both such fine and imprisonment" was retained. The clinching argument is that neither secs. 35.08 (2) nor 35.09 was followed so that members of the legislature and the governor could see on the face of the bill and the enrolled act that the jail sentence provision was being repealed. It is therefore perfectly clear that the omission of the jail sentence provision was a clerical error in drafting the bill, in copying sec. 97.72 (4) as it existed in the 1937 statutes.

This being true, the rule that clerical errors in drafting bills will be ignored in the construction of amendatory acts becomes applicable and sec. 97.72 (4) must be read as it stood in the 1937 statutes, with the addition of the figures "97.035" in their proper place. See *Custin v. Viroqua*, (1886) 67 Wis. 314; *State v. Stillman*, (1892) 81 Wis. 124; *Svennes v. West Salem*, (1902) 114 Wis. 650; *State ex rel. Lotz v. Hull*, (1920) 172 Wis. 126. Compare, *State v. Lee*, (1873) 37 Ia. 402.

This opinion does not overlook the general rule that penal statutes must be strictly construed. That rule also yields to the paramount rule that statutes must be so construed as to effectuate the manifest legislative intent. *State v. Peterson*, (1930) 201 Wis. 20, 23.

Moreover, it would seem that the rule of strict construction also leads to the result reached herein. The argument runs as follows: Sec. 97.72 (4) still contains the words "or by both such fine and imprisonment" thus indicating that imprisonment may be added to the fine, but does not provide where or for how long such imprisonment shall be suffered. Sec. 353.27 provides as follows:

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

This section has been construed as supplying a defect in a statute which provides for imprisonment for one year but does not name the place of imprisonment, in the case of *Veley v. State*, (1927) 194 Wis. 408. By a parity of reasoning it might be construed as supplying *both the length and the place* of imprisonment provided by sec. 97.72 (4) if that section itself were held merely to provide for imprisonment without stating the duration or place thereof. Hence the repeal of the words "or by imprisonment in the county jail not less than thirty days nor more than sixty days" in sec. 97.72 (4) might result in increasing the possible jail sentence from a maximum of 60 days to a maximum of one year. Therefore the rule of strict construction supports a

holding that those words were not repealed but are still a part of the statute.

WAP

Prisons — Prisoners — Probation — Pursuant to sec. 57.03, subsec. (1), Stats., probation violator already sentenced may be taken to penal institution pursuant to interlocutory order revoking probation and there held for hearing before parole board at its next session at institution. After such hearing, order of revocation may be made final, but statute does not require that hearing be held before probationer is taken to institution, since he may be taken and detained without any order or warrant whatever by probation officer, and issuance of interlocutory revocation order does not prejudice him but on contrary works to his benefit since his sentence commences to run when he is received at institution instead of being delayed until such time as board might be able to act on his case.

December 16, 1941.

DEPARTMENT OF PUBLIC WELFARE.

You have raised a question concerning the proper procedure to be followed under sec. 57.03 (1), Stats., the material part of which reads as follows:

“Whenever it appears to the board of control that any such probationer in its charge has violated the regulations or conditions of his probation, the said board may, upon full investigation and personal hearing, * * * or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and *the term of said sentence shall be deemed to have begun at the date of his first detention at such institution.* A copy of the order of the board shall be sufficient authority for the officer executing it to take and convey such probationer * * * to the prison; but *any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the probationer and bring him before the board for its action.*”

(Under sec. 58.36 (5), Stats., all functions of the board of control have been vested in the state department of public welfare. The parole board is a division of that department under sec. 58.35 (2).)

You state that it has been the practice in cases of probation violations, where the violator has already been sentenced, that an order is drawn requiring him to be immediately sent to the institution to which he was sentenced. Then, at the next meeting of the parole board held at such institution, the violator is brought before the board and given a personal hearing as to his guilt or innocence of the alleged violations of his probation. You inquire whether this practice is in compliance with the law or whether the law requires that a personal hearing be had before the man is taken to the institution.

The only court decision which we have found dealing with this question is the case of *State ex rel. Alfred Bronson v. Oscar Lee, Warden of Wisconsin State Prison*, decided July 16, 1931, by the circuit court for Dane county, Hon. August C. Hoppmann, circuit judge presiding, in which it appeared that Bronson had been convicted and placed on probation, with sentence imposed and stayed, on February 6, 1931. On March 21, 1931, the board of control had entered an order committing him to the state prison for violation of probation. At its next meeting at the state prison for the purpose of parole hearings, on May 18, 1931, the board of control had called Bronson before it for a hearing and at that time he admitted that he had violated his probation. The question raised on *habeas corpus* was whether his imprisonment under such condition was legal and the court held that it was and remanded him to the custody of the warden. The court stated as follows:

“Counsel contends that the order by the board committing Alfred Bronson could not be entered before the hearing. This contention cannot be sustained in law or practical administration of the theory of probation. The Board of Control is entrusted with great responsibilities and heavy burdens. Of necessity its time is fully occupied in the performance of its many duties. The Board cannot possibly be in readiness to hold a hearing promptly upon the violation of the rules by any probationer, no more than can the courts be in readiness to try an accused person immediately

after he is arrested on the charge of having committed a crime. During the meantime the probationer can no more be allowed to go on and continue his violations until the hearing is had than can the person accused of a crime be allowed to continue to be at large until the day of his trial."

The decision as thus announced seems clearly correct. The only alternative procedure would be for the violator to be held in some place of confinement pending such time as he might be brought before the board for its action, which might involve a considerable delay. Under the practice as it has been followed for many years, the violator is benefited by the fact that his term at the prison commences to run as soon as he is received, whereas if he had been held in confinement elsewhere until such time as his case could be heard by the board, his term would not commence to run until the board has acted and he had been sent to the prison, reformatory or other institution.

Sec. 57.03 (1) says, "any such officer may, without order or warrant, * * * take and detain the probationer and bring him before the board for its action." Since the probationer is subject to being taken and detained without any order or warrant, he cannot complain if the officer obtains an interlocutory order revoking his probation, which order will become final only after a hearing. He cannot complain on constitutional grounds, because, having accepted the benefits of the probation law, he must also submit to its burdens. *Bennett v. Bradley*, (1933) 216 Iowa 1267, 249 N. W. 651, 652. Compare: *In re Anchor State Bank*, (1940) 234 Wis. 261, 273-274 and cases cited.

Nor is there anything in the law requiring the hearing to be held at the capitol in Madison. The parole board holds hearings at the various penal institutions at regular intervals and it is entirely proper for it to take up probation violation cases at such sessions, meanwhile holding the probationer in custody at the institution.

(We assume that the function of revoking probation has been duly allocated to the parole board pursuant to sec. 58.35 (1) (e), Stats. If it has not been delegated it remains in the director of public welfare—where it was originally vested by sec. 58.34 (1)—who is a member of the parole board.)

WAP

Social Security Act — Old-age Assistance — County board may not compromise claim for old-age assistance existing under sec. 49.25 and 49.26, Stats.

District attorney may not compromise such claim except under direction of county judge, pension director or other officer designated to administer old-age assistance in accordance with sec. 49.51, Stats.

Such claim may be released by county officer charged with administration of old-age assistance only upon full payment thereof unless there is honest dispute and reasonable doubt as to its validity, amount due thereon, or other questions affecting its enforceability. In such cases county judge or other officer designated under sec. 49.51 to administer old-age assistance may release claim upon partial payment under compromise settlement, provided settlement is made in good faith.

December 16, 1941.

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

You have asked for an opinion outlining the conditions under which the county board, county judge, pension director or district attorney may compromise claims arising under secs. 49.25 and 49.26 of the statutes, from payment of old-age assistance.

The Wisconsin courts have established the general principle that the officers of a county or similar governmental subdivision who have authority to manage its corporate affairs and to sue or be sued in its behalf have the power to surrender a claim existing in its favor upon partial payment thereof, under a compromise settlement made in good faith, where there is an honest dispute as to the validity of the claim or the amounts due thereon (*Dekorra v. Wisconsin River Power Co.*, 188 Wis. 501; *State ex rel. Jordan v. Bechtner*, 132 Wis. 632, 636; *Hall v. Baker*, 74 Wis. 118); or where the claim is uncollectible by reason of the insolvency of the debtor (*Washburn County v. Thompson*, 99 Wis. 585). County officers may not discharge a claim in favor of the county without payment in full if there is no reasonable doubt as to the validity of the claim or the

amount due and if there are assets from which it could be collected. This rule rests upon the principle that public officers are merely agents or trustees of the people and have no right to give away government property for private purposes. *Kircher v. Pederson*, 117 Wis. 68; *Quayle v. Bayfield Co.*, 114 Wis. 108; *Endion Improvement Co. v. Evening Telegram Co.*, 104 Wis. 432; *The Town of Butternut v. O'Malley, et al.*, 50 Wis. 329. Whether there is a reasonable doubt as to the validity of a claim or the amount due thereon so as to render it a proper subject of compromise, and whether the compromise agreement is made in good faith, are questions of fact which can be determined only in relation to specific cases.

The right to compromise is said to be an incident of the right to contract. 11 Am. Jur. 259, sec. 12. Whether a particular officer has authority to compromise a claim under the general rules above outlined depends upon the scope of his statutory authority. Sec. 59.07, subsec. (6), gives to the county board authority to "represent the county and have the care of the county property and the management of the business concerns of the county *in all cases where no other provision is made.*" Where the legislature by specific enactment authorizes a different officer to deal with a particular subject, the county board is divested of authority with respect to such subject. In such a case, the right to compromise a claim arising in connection with the specific subject lies only with the officer designated by statute, without control by the county board. *State ex rel. Carter v. Graass*, 234 Wis. 677.

The whole matter of old-age assistance is dealt with by specific enactment. As to that subject these specific enactments supersede the general provisions relating to county government. See sec. 370.02 (2), Stats. Sec. 49.20 provides that the old-age assistance system shall be administered "by the county judge, under the supervision of the state pension department." Sec. 49.51 authorizes the county board to transfer these functions to an administrative department set up for that purpose but the latter section expressly provides:

"The administration in counties of all laws of this state relating to old-age assistance, * * * shall be vested in

the officers and agencies *designated in the statutes* to administer these forms of public assistance."

The collection of old-age assistance claims is part of the administration of old-age assistance, which secs. 49.20 and 49.51 vest in the county judge or other agency set up expressly for that purpose. Furthermore, sec. 49.25 expressly provides that claims for old-age assistance shall be filed in probate or administration proceedings by the county judge. If a lien is to be enforced under sec. 49.26, subsec. (3) thereof would be applicable. It reads:

"The district attorney *at the request of the county judge* or said manager of county institutions shall take the necessary proceedings *and represent the county court* or said manager of county institutions in respect to any matters arising under this section."

You have asked specifically about the rights of the district attorney to compromise such a claim. The district attorney does not act as a principal when participating in proceedings for the collection of these claims, whether his authority be considered as emanating from sec. 59.47 or from sec. 49.26 (3) above quoted. He is only an agent, and acts at the direction of the officers who are empowered by statute to conduct the proceedings. With respect to the authority of an attorney to compromise his client's claims, 5 Am. Jur. 317, sec. 96, states:

"The rule is well established that an attorney, merely by virtue of his employment as such, has no implied authority to release his client's claim or cause of action or otherwise surrender his client's rights, except upon full payment."

The statutes relating to old-age assistance do not authorize compromise of claims by any officer other than the one designated in accordance with the statutes to administer old-age assistance. This is either the county judge, pension director, pension board or other similar officer designated in accordance with sec. 49.51, as the case may be.

The conditions under which such a claim may be compromised by the proper officer are governed by the statutes

relating to the subject as well as by the general rules of law. Sec. 49.25 makes it the duty of the county judge or other officer in charge of old-age assistance to file a claim for "the *total* amounts of assistance paid, including medical and funeral expense paid as old-age assistance." Sec. 49.26 makes "*all* old-age assistance paid" a lien on the beneficiary's real estate and provides that it shall remain a lien "until * * * satisfied." Sec. 49.25 provides in part:

"* * * 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."

This authority is given to the county court in its judicial capacity, and not to the officer charged with the administration of the law. Disallowance of the claim on the above grounds may be made only by order of the court when it is passing upon the claims filed in probate or administration proceedings.

Sec. 49.26 provides that the county judge may release the lien given by that section whenever he is "satisfied that the collection of the amount paid as old-age assistance will not thereby be jeopardized or that the release of the lien in whole or in part is necessary to provide for the maintenance or support of the beneficiary, his spouse or minor children." The express authorization to release the lien under prescribed conditions impliedly forbids its release under any other conditions. Even where the prescribed conditions exist, the provision last above quoted could not be construed as an authorization to compromise the *claim* since it clearly indicates that the release of the lien on the grounds first set out shall not constitute a release of the *claim* but merely of the *security* for its payment.

Since we find no specific statutory authority for the person administering old-age assistance to compromise a claim to recover assistance granted, it follows that his authority in this respect must be determined under the general rules

of law relating to compromise by public officers. Such a claim, therefore, may not be compromised unless there is a genuine dispute and reasonable doubt as to matters affecting its validity, the order of priority in which it is to be paid, or the amount of aid given, or unless there are no assets out of which its collection could be enforced. No part of a valid claim could be released under a compromise agreement in order to permit another creditor, or an heir other than a spouse or minor children, to receive a larger share of the estate of a beneficiary of old-age assistance.

BL

Public Officers — Sheriff — County board may, during sheriff's term, change amount of compensation to be paid him for meals of prisoners but may not increase or diminish annual allowance for use of his car.

December 24, 1941.

GEORGE A. RICHARDS,
District Attorney,
Rhineland, Wisconsin.

You state that the sheriff of your county receives an annual salary of \$3600 and for the past year has been receiving, in addition, 75¢ per day for meals of prisoners and \$300 per year for car allowance. You ask whether the county board may increase the amount payable for meals to \$1 per day and the annual car allowance to \$500, the increase to become effective during the sheriff's term.

For purposes of this opinion we assume that the compensation in the form of an annual salary plus a fixed amount of \$300 for car allowance was set by the county board at its annual meeting prior to the commencement of the term now being served by the sheriff, as prescribed by sec. 59.15 of the statutes.

The question whether the annual car allowance and amount to be paid for board of prisoners may be increased

during the term of the sheriff is to be determined by that portion of sec. 59.15, subsec. (1), which reads:

"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:

"(a) Compensation to the sheriff for keeping and maintaining prisoners in the county jail."

The above quoted provision specifically exempts from the operation of sec. 59.15 (1) the compensation paid to the sheriff for keeping and maintaining prisoners in the county jail. In the absence of constitutional or statutory restriction there is no objection to the alteration at any time of compensation allowed to a public officer. *Dandoy v. Milwaukee Co.*, 214 Wis. 586; *Sieb v. Racine*, 176 Wis. 617; *Kollock v. Dodge*, 105 Wis. 187, 198. In the latter case the court said:

"It is well settled that, in absence of any prohibition or restriction, the term of office and the compensation of the officer may be changed by the proper authority, and such change will apply to officers then in office as well as to those thereafter selected. * * *" (P. 198.)

It has been ruled in the following opinions of the attorney general that the compensation to be allowed for meals of prisoners may be changed by the county board during the term of a sheriff. XI Op. Atty. Gen. 99; XX Op. Atty. Gen. 386, 717; XXII Op. Atty. Gen. 554.

The restrictions of sec. 59.15, Stats., have been held by our courts to apply to reimbursement of county officers for expenses necessarily incurred in carrying out their duties as well as to compensation paid them in the form of salary. *State v. Cleveland*, 161 Wis. 457; *Parsons v. Waukesha County*, 83 Wis. 288; *Crocker v. Supervisors of Brown County*, 35 Wis. 284. In accordance with this rule, it has been held in the following cases that no change may be

made during a county officer's term in the amount of compensation allowed him for expenses incurred in the discharge of his duties. *Quaw v. Paff*, 98 Wis. 586; *Rooney v. Supervisors of Milwaukee County*, 40 Wis. 23. See also XXIII Op. Atty. Gen. 811. The rule was applied in the latter opinion so as to prevent an allowance by the county board to the sheriff for operation of his car unless provision therefor is made prior to the commencement of his term. The rule has also been applied in XX Op. Atty. Gen. 35 upon a set of facts almost identical with those submitted by you. A different result was reached in the opinion set out at page 1112 of the same volume with respect to the mileage rate allowed a county superintendent of schools for use of his automobile. Without consideration of the correctness of the latter opinion, it is sufficient to note here that the facts there involved are distinguishable from those which you describe. For purposes of the opinion in XX Op. Atty. Gen. 1112, it was assumed that the rate of mileage allowance was generally applicable to all county officers and employees, and that it was fixed separately from the salaries.

It is true that it was held in *Milwaukee County v. Halsey*, 149 Wis. 82, that the allowance of a fixed annual sum for necessary expenses of a circuit judge in the discharge of his duties was not a part of his compensation so as to be subject to the provisions of sec. 26, art. IV of the constitution, prohibiting the change in compensation of a public officer during his term. It has been repeatedly held, however, that this provision of the constitution does not apply to county and municipal officers. *Dandoy v. Milwaukee County, supra*; *Seib v. Racine, supra*; *State ex rel. Sommer v. Erickson*, 120 Wis. 435, 442; *State ex rel. Martin v. Kolb*, 50 Wis. 178; *Milwaukee County v. Hackett*, 21 Wis. 613.

County officers are governed by sec. 59.15 (1) and accordingly the only cases directly controlling on the question here presented are those which construe that section. As previously pointed out, the compensation which is subject to the restrictions of section 59.15 includes reimbursements for expenses as well as actual salary. One reason for placing a different construction upon the term compensation as used in the statutory provision and as used in the

constitutional provision is that sec. 59.15 enumerates as exceptions to its application the payment of expenses of county officers in certain cases. Had it not been intended that the statute should apply to payment of expenses incurred by county officers in the discharge of their duties, it would not have been necessary to incorporate such exemptions in its provisions.

We are of the opinion that the county board may change the allowance for meals of prisoners, the change to become effective during the sheriff's term, but may not change the annual allowance to compensate him for use of his car.

Since it does not appear that the one action on the part of the county board was dependent upon, or an inducement to, the other, we believe that the two portions of the resolution are severable and that effect may be given to the valid portion.

BL

Criminal Law — Public Officers — Constable — Under sec. 353.25, Stats., county is liable for all costs of prosecution of criminal case, regardless of whether some of such costs are made necessary by fact that local municipality maintains no jail and constable must incarcerate his prisoners in county jail pending issuance of warrant. But county is not liable for any costs of prosecution for violation of town ordinance, which is civil action to collect forfeiture, for which town must pay costs under sec. 288.20.

Constable is not entitled to mileage under sec. 60.55, subsec. (10), for arresting person without warrant and conveying him to county jail for safekeeping pending issuance of warrant, but is entitled to mileage for round trip subsequently made to jail to serve warrant. However, he is entitled under sec. 60.55 (22) to his necessary and actual disbursements, if any, in transporting prisoner to county jail without warrant, provided warrant is later issued; if he uses his own automobile for such purpose he may be reimbursed only for cost of gasoline and oil allocable to such trip. Person so arrested is "prisoner" in meaning of sec. 60.55 (22).

Constable is not entitled to any reimbursement for traveling to remove auto from highway after arresting driver thereof, since sec. 60.55 makes no provision therefor and constable takes his office *cum onere*.

December 29, 1941.

CLARENCE V. OLSON,
District Attorney,
Ashland, Wisconsin.

You state that in Ashland county there is a town containing an unincorporated village located about 12 miles from the county jail. Neither the town nor the unincorporated village has a jail in which to put their prisoners and the constable, therefore, upon arresting a person who is drunk or disorderly, takes him to the county jail, where he is detained pending the issuance and service of a warrant. Thereafter, a warrant is issued by the justice of the peace of the town and the constable then returns to the county

jail, serves the warrant and returns the prisoner to the justice of the peace for trial. If the prisoner is found guilty he is fined and if he can't pay his fine he is committed to the county jail. You state that the records of the justice of the peace do not indicate whether the drunkenness charge is brought under the state statute or under the town ordinance. You ask several questions with reference to the fees of the constable in such a situation:

1. Whether the constable is entitled to any fees from the county for transporting the person arrested to the county jail pending the execution and service of the warrant.
2. Whether the constable is entitled to any fees in case it is necessary, after arresting a drunken driver and placing him in the jail, to travel back to remove the automobile from the highway.
3. Whether the fact that the town and the unincorporated village do not maintain a jail of their own requires the town rather than the county to bear the expense of the constable's travel to and from the county jail in such cases.

For convenience, the third question will be answered first. Sec. 353.25, Stats., provides in part as follows:

"* * * In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury."

It is clear from the foregoing that if the prosecution is brought under a state statute the county and not the town is liable for the costs. There is no section of the statutes under which the town could be held liable merely because it fails to provide a jail and it is the policy of the law that the counties shall bear the expense of criminal prosecutions—although it could just as easily have been provided in the first place that some other political subdivision should pay the costs or that the state itself should pay them directly. See *Northern Trust Co. v. Snyder*, (1902) 113 Wis. 516, 542.

But you state that you are not informed as to whether the prosecutions may have been brought under the town

ordinance rather than the state law. If the latter is the case, then the actions are not criminal actions at all, but are civil actions for the enforcement of a forfeiture. *Chafin v. Waukesha County*, (1885) 62 Wis. 463; *Waukesha v. Schessler*, (1941) 239 Wis. 82. As to such actions, sec. 353.25 does not apply but sec. 288.20 is controlling, which provides in part as follows:

“In all actions brought under the provisions of section 288.10 the town, city, village or corporation in whose name such action is brought shall be liable for the costs of prosecution; and, if judgment be for defendant, for all the costs of the action, and judgment shall be entered accordingly.”

See *Chafin v. Waukesha County*, *supra*.

You are therefore advised that it will be necessary for you to determine, before approving any fees in these matters as a charge against the county, whether the prosecutions were brought under the state law or under the town ordinance, and, if the latter, then the costs cannot be allowed by the county but must be paid by the town. Compare XXIV Op. Atty. Gen. 65.

In answering your first question, we shall assume that the prosecutions were under the state law and were therefore criminal actions, for which the county is liable to pay the costs. Sec. 60.55 (10) and (22) provide in part:

“Constables may receive the following fees:

“* * *

“(10) For each mile actually traveled, going and returning to serve any process or to give or to post up notices, ten cents; but he shall serve all process and papers in any one action which may then be in his hands for service, which can be served at the same time and upon all persons upon whom service is required, who can be served in the same journey; and he shall be entitled to one mileage for the greatest distance actually traveled to make such service and no more.”

“(22) He shall also receive all his necessary disbursements actually made for board and conveyance of prisoners, to be settled by the county board; * * *.”

The county may not pay the constable any fees except such as are specifically authorized by statute. He takes his office *cum onere* and such functions as he is required to perform without pay must be presumed to be compensated by fees which he receives for other services. This principle is thoroughly established in this state. *Crocker v. Supervisors of Brown County*, (1874) 35 Wis. 284; *McCumber v. Waukesha County*, (1895) 91 Wis. 442, 444; *Northern Trust Co. v. Snyder, supra*; XX Op. Atty. Gen. 1052. Sec. 60.55 (10) makes it clear that the constable is entitled to mileage at the rate of 10¢ only for one round trip for the purpose of serving a process and the same rule applies to sheriffs. *Schneider v. Waukesha County*, (1899) 103 Wis. 266, 268; *Northern Trust Co. v. Snyder, supra*, at pp. 544-546. No mileage is provided for any other traveling which he may be required to do in the course of his duties, although under some circumstances he may be entitled to his expenses. Since the constable's initial trip to the county jail in each case is made for the purpose of detaining the prisoner without a warrant, it does not come under the statute allowing mileage for traveling "to serve any process" (sec. 60.55 (10)) since at that stage no process has yet been issued. Therefore his charge for mileage at the rate of 10¢ a mile for such trips should be disallowed.

However, the question remains whether he is entitled to have the county board allow him his expenses for the trip, under sec. 60.55 (22). That subsection permits him to charge for his "necessary disbursements" actually made for board and conveyance of prisoners.

The first question is whether a person arrested without a warrant is a "prisoner" in the meaning of this statute. The word "prisoner" in its broad sense includes "any person * * * who is held in confinement against his will." *United States ex rel. Carapa v. Curran*, (C. C. A. 2d, 1924) 297 Fed. 946, 950, 36 A. L. R. 877, 879. See also 50 C. J. 330. A case which is very persuasive here is *Brewster County v. Taylor*, (Tex. Civ. 1938) 122 S. W. (2d) 1097, 1098, in which it appeared that the sheriff had made a claim for support and maintenance of certain persons who had been confined in the county jail without warrant but who, according to the sheriff's testimony, were all subsequently

charged with penal offenses. The statute (Vernon's Ann. C. C. P., art. 1046) entitled the sheriff to reimbursement of his expenses incurred "for the safekeeping and maintenance of prisoners." The court held that in view of the sheriff's proof that charges were eventually lodged against all of these persons, they came within the meaning of the word "prisoners" as used in that statute, stating as follows:

"* * * For a person to be a prisoner it is not necessary for a complaint to have been lodged against him before he is incarcerated, since peace officers are allowed under certain circumstances to make arrests without warrant, and it will not be presumed that the sheriff violated the law either in making the arrest or in failing to take the prisoner before a magistrate immediately. The testimony quoted is sufficient prima facie to show that such persons were prisoners within the meaning of said Art. 1046."

It is therefore considered that a person arrested without warrant under the circumstances here under consideration is a "prisoner" within the meaning of sec. 60.55 (22), provided that a warrant charging him with an offense against the state law is subsequently issued.

The question remains whether the constable is entitled to any compensation for taking the prisoner to the county jail in his own automobile. (Your letter does not so state, but we assume for purposes of this opinion, that the constable uses his own automobile for this purpose.) It has been held that sec. 60.55 (22) does not entitle the constable to any expenses for transporting a prisoner in his own conveyance. *McCumber v. Waukesha County*, (1895) 91 Wis. 442. The same rule has been announced with reference to sheriffs under sec. 59.28 (27), which allows to sheriffs "actual and necessary disbursements for board and conveyance of prisoners." II Op. Atty Gen. 314; XVIII Op Atty. Gen. 150; XX Op. Atty. Gen. 1052. However, the earlier of these decisions were rendered in the "horse and buggy days" and it seems that the rule ought not to be applied to the use of an automobile. Obviously if a man uses his own horse and rig he cannot claim that he had made any actual and necessary disbursements for the trip, but if he uses his automobile he consumes a certain quantity of gasoline and lubricating

oil for every mile driven and it is considered that the purchase of such gasoline and oil clearly constitutes a disbursement within the meaning of secs. 60.55 (22) and 59.28 (27). Of course, if the sheriff or constable is entitled to mileage for the trip in question, as for example if he is transporting the prisoner to jail either pursuant to a commitment (IV Op. Atty. Gen. 943; XX Op. Atty. Gen. 1052) or after arrest upon a warrant, then no additional expense should be allowed for the use of the automobile since that is already compensated for by the mileage allowed under secs. 60.55 (10) and 59.28 (27). That is, disbursements for gasoline and oil in such cases are necessarily made by the officer in earning his mileage and no additional disbursement is "necessary" for transporting the prisoner. See XVIII Op. Atty. Gen. 150. But where the prisoner is being lawfully and necessarily conveyed under such circumstances that the constable is not entitled to mileage, it seems that he would be entitled to reimbursement for the actual cost of gasoline and oil expended for the trip, which may easily be calculated.

Your second question must be answered in the negative. As pointed out above, the constable is not entitled to any fees except such as are specifically provided by law and there is no provision in the statutes which by any possible construction allows him any fees for travel to remove an automobile from the highway. Possibly a sheriff may be paid his necessary expenses therefor as allowed by the court, under sec. 59.28 (25), but a constable clearly may not. Such service must be deemed compensated for by the fees allowed for other services. *McCumber v. Waukesha County*, (1895) 91 Wis. 442, 444. See XV Op. Atty. Gen. 465.

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