

**OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**

**OF THE**  
**STATE OF WISCONSIN**

**VOL. XXXI**

January 1, 1942, through December 31, 1942

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**JOHN E. MARTIN**  
Attorney General



**MADISON, WISCONSIN**  
1942



# ATTORNEYS GENERAL OF WISCONSIN

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## 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

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JOHN E. MARTIN ..... Attorney General  
JAMES WARD RECTOR ..... Deputy Attorney General  
MORTIMER LEVITAN ..... Assistant Attorney General  
NEWELL S. BOARDMAN ..... Assistant Attorney General  
WARREN H. RESH ..... Assistant Attorney General  
HAROLD H. PERSONS ..... Assistant Attorney General  
RICKARD H. LAURITZEN ..... Assistant Attorney General  
J. R. WEDLAKE ..... Assistant Attorney General  
WILLIAM A. PLATZ ..... Assistant Attorney General  
MYRON L. SILVER ..... Assistant Attorney General  
BEATRICE LAMPERT ..... Law Examiner

## FOREWORD

February 15, 1941.

Dear Mr. District Attorney:

This letter is being directed to all district attorneys who have not served during the period in which I have been attorney general. It is the purpose of the letter to call attention to the rules of this office relating to requests for opinions. The following requirements should be observed:

1. The request should fully state the question upon which an opinion is desired.
2. The request should set forth the district attorney's conclusion upon any question presented and should set forth as well the reasoning upon which his conclusion is based.
3. The request should set forth all statutory provisions in point and should contain an analysis of all text and case authorities upon which the district attorney relies in support of his conclusion. If there are any case or text authorities pointing the other way, they should be stated as well.
4. An opinion should not be requested in any case unless the district attorney, after having given the problem careful consideration, is unable to arrive at an answer which he considers to be satisfactory. A request should not be submitted to this office simply because someone wishes it submitted, and the district attorney should refuse to submit a request if he is satisfied that he knows the correct answer to the question submitted.
5. No request should be submitted which does not concern the duties of the district attorney. It is the function of the attorney general to advise the district attorney with respect to the duties of his office. This function includes advising the district attorney in those cases where he is called upon to act or advise. There is no requirement, however, that district attorneys advise town officers, school district officials, etc., and accordingly questions of that character should not be relayed to the attorney general through the district attorney.

When I assumed office two years ago I wrote a letter of this character to all of the district attorneys in the state. The letter may be found as a foreword to Volume XXVIII of the Attorney General Opinions, and I respectfully suggest that newly elected district attorneys might well read that foreword.

May I say in conclusion that the members of the attorney general's staff will gladly co-operate with the district attorneys of this state for the coming two years as they have for the past two years. The requirements referred to above are imposed in pursuance of that desire, and we think you will agree that unless some such require-

ments are imposed we would simply be unable to function in this office. We have found during the past two years that we have obtained a great measure of help from discussions submitted by district attorneys and in many instances the opinions that have been given would have been far less valuable had no such discussion been submitted to us. In addition to that, the data submitted by the district attorneys saves a great deal of time and this is, of course, a very important consideration to us.

May I in concluding this letter extend to you my very best wishes for a successful term as district attorney.

Very truly yours,

JOHN E. MARTIN,  
Attorney General.

OPINIONS  
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VOL. XXXI

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*Taxation — Tax Collection — Sec. 74.03, Wis. Stats. 1941, in providing for payment of one-half of taxes by January 31 refers to taxes on each parcel of land as separately assessed and taxed and does not require taxpayer owning more than one parcel to pay one half of aggregate taxes on all parcels.*

January 19, 1942.

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

You have submitted for opinion the question of whether the provisions of the semiannual payment of tax plan contained in sec. 74.03, Wis. Stats. 1941, that one-half of the taxes be paid on or before January 31st in each year, require a taxpayer owning two or more parcels of land that are assessed and taxed separately, to pay one-half of the aggregate taxes on *all* of his lands or merely one-half of the taxes as related to each of the separate parcels. We agree with your conclusion that a taxpayer has the right to pay the taxes on any parcel of real estate on the semiannual payment plan, regardless of how or whether he pays his taxes on any of his other parcels of land.

The semiannual tax payment plan as set forth in sec. 74.03, Wis. Stats. 1941 was effected by ch. 426, Laws 1933, becoming operative on October 1, 1941. As the statutes existed prior thereto it is perfectly clear that a taxpayer who owned one or more lots or parcels of land which were separately assessed was perfectly free to pay or not to pay the taxes on any of them without in any way affecting the others. He had the right to, and frequently did, pay the taxes on one or more and allowed the remainder to become delinquent. Ch. 426, Laws 1933, in promulgating the semiannual plan of payment of taxes, was in no way directed toward that situation. Its purpose was rather to make the payment of taxes easier by the adoption of the semiannual payment plan. We find nothing whatsoever in it that in any way indicates or even suggests that the right of the taxpayer to deal with the taxes on each of his parcels of land separately and apart from the taxes on any other parcels was intended to be changed. The only change that this legislation made in this regard was to provide that rather than require that the taxes be paid all at once there was adopted a state-wide uniform system of semiannual payment.

If it had been the intention of the legislature to require that, for a taxpayer who owns two or more parcels of land to be entitled to pay his taxes upon a semiannual payment basis, he must pay one-half of the aggregate taxes on all his lands, it would have so provided by express language. That, however, would have presented additional problems and some provision for handling them. A consideration of one of the problems that would have then been presented impels the conclusion that the present statute could not be so applied. There are, of course, a number of taxpayers who own a number of parcels of land that are located in several different taxing districts. Any endeavor to apply the present statute as requiring a payment of one-half the aggregate of the taxes on all of his lands so situated immediately discloses that there is an absence of any provision to cover the administrative difficulties thus encountered. If for no other reason this would be sufficient to justify a construction of this statute as applicable only to each parcel of real estate as separately assessed and standing alone.

It is our opinion that sec. 74.03, Wis. Stats. 1941, is to be applied to the tax on each parcel of real estate that is separately assessed without regard to the taxes on any other parcel of real estate owned by the same owner.

HHP

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*Criminal Law — Prisons* — Sentence to state prison commences running on day of actual incarceration in state prison under that sentence, regardless of any statement made by court that credit be given for time served under previous sentence for same offense which was vacated by court when new trial was granted. XXVII Op. Atty. Gen. 329 followed.

January 22, 1942.

A. W. BAYLEY, *Secretary,*  
*Department of Public Welfare.*

You state that on December 4, 1940, one R. W. was sentenced to the state prison for a term of one to 10 years for the offense of breaking and entering in the nighttime in violation of sec. 343.11, Stats., and was received at the state prison on December 15, 1940. One year later the warden received an order signed by the circuit judge requiring that R. W. be produced in court on December 20, 1941, for a new trial. This was done and on December 20, 1941, R. W. was returned to the prison following his new trial with a new sentence in the following form:

“That you R. W. be punished by confinement at hard labor in the state prison at Waupun, for an indeterminate sentence of not less than one nor more than four years; and to have credit of one year on said sentence for time already served.”

You inquire whether the prisoner may lawfully be given credit against his new sentence, for purposes of parole eligibility and calculation of good time and discharge date, for the year which he spent in the prison under the previous sentence, as ordered by the trial court. Sec. 359.05, Stats., provides in part as follows:

"In every case in which the punishment of imprisonment in the state prison is awarded against any convict, except [etc.] \* \* \* 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 or by pardon as provided by law. \* \* \*"

Sec. 359.07 provides in part as follows:

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

In this case the court attempted in effect to provide that service of the term of the sentence imposed December 20, 1941, should be deemed to have commenced one year prior to the date on which it was imposed—that is, on December 20, 1940. This is in direct violation of the provision of sec. 359.07 above quoted.

The same question was raised by the board of control and answered by this office in XXVII Op. Atty. Gen. 329. In a well considered opinion it was ruled that the time for imprisonment to begin or end is no part of the sentence and that therefore it is not affected by the general rule that the sentence of a court of competent jurisdiction, even though

erroneous, controls until modified by appropriate proceedings. The form of the sentence prescribed by sec. 359.05, above quoted, contains no provision as to when the sentence shall commence. The power of the court is only to fix the amount of the punishment, and the beginning and ending thereof is determined by operation of law.

You are therefore advised that the direction by the court that credit be given for time previously served is contrary to law and must be treated as surplusage. The sentence of R. W. is for a term of not less than one nor more than four years commencing December 20, 1941, and no credit can lawfully be given for the time served under the previous sentence which the court has vacated.

WAP

*Bridges and Highways — Relocation* — Where owner of land to be condemned for highway relocation cannot be ascertained, it appears to be legislative intent in sec. 83.08, subsec. (2), Stats., that service may be made in manner prescribed where address of owner is unknown. If proceedings are otherwise proper and notice given in above manner should be held inadequate, it would not affect measure of damages ultimately to be paid true owner, but his right of action to contest award would not be limited to period prescribed by statute.

Landowner may proceed to have his damages appraised immediately upon filing of award under sec. 83.08 (2), even though there has been no actual physical entry upon his land.

After award is made, approved and filed highway authorities may take immediate possession of land even though owner commences proceedings to have his damages appraised.

January 23, 1942.

WILLIAM LEITSCH,  
*District Attorney,*  
Portage, Wisconsin.

Your questions concern condemnation of land for relocation of highways under the summary procedure provided by sec. 83.08, subsec. (2), Stats., which reads:

“If for any reason the needed lands cannot be acquired by easement, conveyance or deed for a reasonable price, the county highway committee shall acquire the same either by condemnation proceedings in the manner provided by chapter 32 of the statutes or by section 83.07, or shall make and sign an award of damages to the landowner and, when approved by the state highway commission, shall file the same with the county clerk; and thereupon the amount so awarded shall be payable the same as when the land is acquired by easement, conveyance or deed; and the landowner may receive the same without prejudice to his right to claim and to contest for a greater sum. When such award shall have been made, approved and filed, the highway authorities and their contractors and employes may take possession of

the premises and proceed with the contemplated highway improvement and construction. A copy of the award shall be promptly delivered or mailed to the owner if his address be known and if not known then to the occupant of the land. If the land is unoccupied and the address of the owner is unknown, the award shall promptly be published for three successive weeks in a newspaper having general circulation in the county. The landowner may, within a period of two years after the filing of the award with the county clerk, proceed as provided in chapter 32 to have his damages appraised, or may within said period apply to the county judge, on five days' written notice to any member of the county committee, to appraise the owner's damages and thereafter the proceedings shall be as provided in section 83.07 and the provisions of said section shall apply."

You ask, first, how notice of the award can be given in cases where the owner of the land cannot be ascertained without a long and expensive investigation, and perhaps court proceedings.

This is primarily a question of statutory construction. Since a specific statute should be interpreted in the light of constitutional restrictions, it may be helpful to summarize the minimum requirements which must be met in condemnation proceedings in order to protect the constitutional rights of a landowner. A good summary of such requirements is set out in the following excerpts from *N. Laramie Land Co. v. Hoffman*, 268 U. S. 276, 69 L. ed. 953, 45 S. Ct. 491, 494-495:

"All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or con-

demnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559, 9 S. Ct. 603, 32 L. Ed. 1045; *Ballard v. Hunter*, 204 U. S. 241, at page 262, 27 S. Ct. 261, 51 L. Ed. 461.

“\* \* \*  
 “\* \* \* As was held in *Bragg v. Weaver*, supra, the necessity and expediency of the taking of property for public use ‘are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.’ *Joslin Co. v. Providence*, 262 U. S. 668, 678, 43 S. Ct. 684, 67 L. Ed. 1167; *Georgia v. Chattanooga*, 264 U. S. 472, 483, 44 S. Ct. 369, 68 L. Ed. 796. With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings. See *Bragg v. Weaver*, supra.”

Wisconsin cases follow the same rules. The questions of necessity for the taking is legislative, and due process does not require that the owner be given notice or opportunity to be heard on that issue. *Highway Committee of Jefferson County v. Guist*, 235 Wis. 18, 22-23. On the question of damages, the owner is entitled to an opportunity to be heard, but constructive notice by posting or publication is sufficient. *The Winnebago Furniture Mfg. Co. v. The Midland R. Co.*, 81 Wis. 389, 394.

The legislative history of the provision that is now sec. 83.08 (2) reveals something of the legislative intent. When originally enacted as a part of the highway law in 1911, it provided that if lands could not be acquired by negotiation, the county highway committee might proceed in the manner described in sec. 83.07. By ch. 446, Laws 1923, the provision was amended so as to permit acquisition through the procedure set up in ch. 32, Stats., as well as by that described in sec. 83.07. The purpose of the amendment is shown by the revisor’s note, 1923:

“The only change is to make chapter 32, Stats., available for acquiring needed lands. Probably it is now available. *This is needed in case the owner is unknown or is a nonresident, as there is no provision in section 83.07 (o. s. 1317m-6) for service by publication.*” (Italics supplied.)

Sec. 83.08 has since been amended to provide a third method of acquisition, by filing an award. Ch. 187, Laws 1929. It is significant that since the above quoted revisor’s note was written, the provisions of sec. 83.08 relating to filing the award have been further amended to permit notice by publication, which would seem to indicate a legislative intent that proceedings under sec. 83.08 should not be subject to the limitation as to cases where the owner is unknown, which the revisor had pointed out with respect to sec. 83.07.

Three methods of acquisition of land without consent of the owner are now permitted by sec. 83.08:

1. Condemnation under sec. 83.07.
2. Condemnation under ch. 32.
3. Summary condemnation by filing an award as prescribed in sec. 83.08.

According to the revisor’s note above quoted, proceedings under sec. 83.07 are not available where the owner is unknown or is a nonresident.

If there is ample time, it would probably be preferable to pursue formal proceedings under ch. 32 in cases where the owner is unknown, because there is little doubt that notice may be served on unknown owners by publication in such proceedings. Service by publication of any party who “cannot be found” is authorized by sec. 32.05. In addition, secs. 262.12 and 262.14 provide that summons may be served by publication on all necessary parties defendant in an action or proceeding involving title to land. Sec. 262.12 (3) is specifically made to apply where any such defendant is unknown. Condemnation proceedings under ch. 32 were held in *Milwaukee L., H. & T. Co. v. Ela Co.*, 142 Wis. 424, to be special proceedings.

The third method of condemnation authorized by sec. 83.08 has been devised to permit more summary proceedings where haste or continuity in the highway program renders

the more formal and deliberate methods unpractical. There has been no judicial construction of the statute with respect to giving notice of the award in cases where the owners are unknown.

A reading of the section makes it clear that the matter of necessity for the taking is left to the authorities empowered to administer the state highway program (see sec. 83.08 (1) ), and that neither notice to the owner nor opportunity to be heard on that question is contemplated.

In *Knutson v. Rock County*, 238 Wis. 110, 114, the court pointed out that sec. 83.08 (2) had for its purpose the expediting of possession by highway authorities. See, also, *Carisch v. County Highway Committee*, 216 Wis. 375, 380, where it was said:

“\* \* \* The purpose of sec. 83.08 (2) was to permit the county committee to acquire land expeditiously, and by making an award, to secure immediate possession of the premises.”

With such purpose in mind, it appears likely that the legislature intended the procedure under sec. 83.08 (2) to be available in all cases where condemnation could be had under ch. 32, since the need for expedition extends throughout the entire project. It is improbable that the legislature intended an entire project to be delayed, where many pieces of land are involved, by the fact that the name of the owner of a single piece cannot be ascertained. Specific provision is made that if the address of the landowner is unknown, notice of the award is to be served on the occupant, or if the land is unoccupied, it is to be published. We believe the legislature intended these alternatives to apply in cases where the name as well as the address of the owner is unknown. Where the address of the owner is unknown, the notice should be served upon the occupant of the land, even if it appears that his claim is by adverse possession. If there is a doubt as to whether he would be included within a legal definition of the term occupant, he should be served anyway, and as an additional precaution the award should be published. Where the name of the owner can be ascertained from examination of the record title or by any other usual

and ordinary methods, his name should be included in the award, and if his address can be ascertained, a copy should be delivered to him. If, however, the name of the owner cannot be ascertained by an examination of the record title or otherwise than through institution of court proceedings, the purpose of proceeding under sec. 83.08 (2) would be defeated if it were held necessary to obtain an adjudication of title. In such cases resort might as well be had to the more deliberate procedure under ch. 32.

In some cases involving statutes requiring notice of application for a tax deed to be given the owner, it has been held that where the land is assessed to an unknown owner no notice need be given. *Irwin v. Burdick*, 44 N. W. 375, 79 Ia. 69, and cases therein cited. In other such cases, it has been held that notice should be given by publication. One of the latter cases is *State ex rel. v. Halden*, 62 Minn. 246, 249, 64 N. W. 568, from which the following excerpt was taken:

“\* \* \* The contention of the appellant is that no notice of the expiration of the period of redemption was necessary under the circumstances; that the statute requiring such notice is inapplicable to such a case, because there is no person to whom the notice could be addressed, or upon whom it could be served, and hence the requirements of the statute cannot be complied with. We do not concur in this view. In our opinion, the statute is just as applicable to cases where the owner of the land is stated to be unknown as where the property is assessed in the name of a known owner or supposed owner. Where the owner is stated to be unknown, of course the notice could not be addressed to any particular person by name. Whether, in such case, any investigation should be made to find the owner, or whether, without any such effort, service might be made on the person, if any, in the actual possession of the premises, we need not now consider. But at least where the owner cannot be found, and there is no one in actual possession, there is no reason why the notice may not be served by publication, where the name of the owner is unknown as well as where the land is assessed in the name of a known owner. If it is required to be addressed to any one, it can be addressed to the ‘unknown owner.’ \* \* \*”

It is significant that sec. 83.08 (2) authorizes the taking of possession after the award is “made, approved and filed.” The wording and arrangement of the statute indicate that

possession by highway authorities may precede notice and payment. The amount of the award is payable immediately upon its filing, and is thereafter held for the benefit of the landowner, so that the filing might be considered a constructive payment. Provision for notice of the award is made in the latter part of the subsection in connection with the provision limiting the owner's right of action to contest the amount of damages awarded. It appears, therefore, to be the purpose of the notice to measure the beginning of the period within which the landowner may commence a contest. If such is the purpose of the notice, a defect therein would not vitiate the county's right of possession, which inured immediately upon the filing, but would result in nothing more than a prolongation of the period in which the amount of damage could be questioned.

Since the statute does not in express words specify the method of service when the owner's name as well as his address is unknown, it must be conceded as possible that the courts might not adopt the construction which we have indicated we believe accords with the legislative intent. If, however, notice given in good faith to an unknown owner through service upon the occupant and by publication should be held insufficient, the position of the condemnor could be no worse than where service is made upon the supposed owner and the title is in fact in someone else. According to the rule in *Searl v. School District*, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. ed. 740, the condemnor will be liable in later condemnation proceedings against the true owner only for the value of the property at the time of the taking. In setting out the rule of the above case and other authorities along the same line, the court said in *Bear Gulch Placer Mining Co. v. Walsh*, 198 Fed. 351, 355:

“Where property is taken and improved for public use before condemnation and compensation made, not in willful trespass, or improper motive, or defiance of the owner's right of property, but in good faith, relying on negotiations or condemnation proceedings then pending, the rule of damages is the same as in cases of condemnation and compensation made before taking, and the improvements so made are not to be taken into consideration. \* \* \*”

Under the foregoing rule, a defect in the manner in serving the notice, where the proceedings are otherwise proper, would result only in making the condemnor liable to the true owner for the value of the land at the time of taking, plus interest from the time when the payment was wrongfully withheld. The need for expedition in a particular project may outweigh the desirability of having the question of damages finally disposed of within two years.

2. Your second question is whether the landowner may commence proceedings to contest the damages awarded him under sec. 83.08 (2) before actual physical possession of the land is taken by the highway authorities or their agents.

Under the express provisions of sec. 83.08 (2), Stats., the landowner may proceed as provided in ch. 32 to have his damages appraised "within \* \* \* two years after the filing of the award." Nothing in the terms of the statutes makes the taking possession by the highway authorities a condition precedent to such action.

In *Baerwolf v. W. R. P. Co.*, 198 Wis. 112, in which it was held that before a landowner may commence proceedings under the authority of sec. 32.15, Stats., he must show that there has been a taking of the land, proceedings under sec. 83.08 (2) were not there involved. The case holds only that nothing in ch. 32, of itself, authorizes the landowner to commence condemnation proceedings until possession of his land has actually been taken. The case is not applicable when authority to commence condemnation proceedings is given specifically by another section of the statutes.

In *Muscoda Bridge Co. v. Worden-Allen Co.*, 196 Wis. 76, the court held that the award of damages by the county judge under sec. 83.07 (3) did not amount to a taking such as to warrant condemnation proceedings by the landowner under sec. 32.15, before the award was paid or possession taken. The court said, however, in referring to sec. 83.07 (3), pp. 89-90:

"While the legislature might have provided that the relocation of the highway by the state highway commission should constitute a taking of private property for that purpose, it very carefully refrained from incorporating such a provision in the law, and no doubt for a very good reason. Under the statute as it is written, after application has been

made to the county judge and the award of damages has been determined, the county committee may then pay the sum awarded to the owner by delivering to him a county or town order. When a tender is made to the owner of the property, the rights sought to be acquired, by the terms of the statute, vest in the county or town board, as the case may be. The statute as drawn leaves it optional with the public authorities to determine whether or not they will take the land after the amount of the award is fixed. If the application to the county judge amounted to a taking, then, under the authorities, the public officials could not arbitrarily withdraw from the proceeding, and they would probably be bound to pay the award even though it might, in their opinion, be very excessive. \* \* \* Even if it should be held that they might abandon the proceedings, they would remain liable for damages. \* \* \*

Neither of the foregoing cases involved sec. 83.08 (2), which expressly authorizes the landowner to proceed under sec. 32.15 of the statutes after the "filing" of the award. Under sec. 83.08 (2) the award becomes payable immediately upon its filing. It was held under *Knutson v. Rock County*, 238 Wis. 110, that when the award is made and paid under sec. 83.07 (2), there are no further steps to be taken by the county. They are entitled to immediate possession of the land, and whether or not they take advantage of that right they have completed all the steps prescribed by statute to constitute a legal taking.

If the statute were interpreted to mean that the owner could not question the award until actual entry, the highway authorities might delay taking physical possession and thus entirely prevent the landowner from bringing action to contest the award, since the statute limits bringing of such action to a period within two years of the "filing."

3. Your third question is whether a landowner's action to contest an award under sec. 83.08 (2) precludes the county or state from taking possession of the land until the outcome of the appeal.

Sec. 83.08 (2) expressly provides that possession of the premises may be taken immediately after the award has been "made, approved and filed." As pointed out in *Knutson v. Rock County* and *Carisch v. County Highway Commission, supra*, it was the primary purpose of the enactment

to make immediate possession possible and to void the delay incidental to proceedings under ch. 32. The opinion in XXV Op. Atty. Gen. 646 had no reference to proceedings under sec. 83.08 (2) and has no bearing on your question. When there is a specific enactment on a particular subject, the express provisions of that enactment supersede general statutes which might otherwise have applied to the same subject.

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*Police Regulations — Weights and Measures — Standard Time* — Under sec. 175.09, subsec. (1), Stats., it was legislative intention to establish United States standard central time as standard time in state of Wisconsin.

January 27, 1942.

THE HONORABLE,  
*The Governor.*

You have requested my opinion as to the standard of time that will be effective in this state beginning at 2:00 A. M., February 9, 1942, when the standard time of each time zone established pursuant to congressional legislation is to be advanced one hour.

Standard time in the state of Wisconsin, as it now exists, was established by chapter 244, Laws 1923, which created what is now numbered as sec. 175.09, subsec. (1), Wis. Stats. That subsection reads as follows:

“The standard of time in this state shall be the solar time of the ninetieth meridian west of Greenwich, commonly known as central time, and no department of the state government, and no county, city, town or village shall employ any other time, or adopt any ordinance or order providing for the use of any other than the standard of time.”

At the time that sec. 175.09 (1) was created the congress of the United States had theretofore legislated on the subject of standard time by what is now numbered as 15 U. S. C. A. secs. 261, 263. Congress had divided the territory of the continental United States into five zones and had established a standard time for each zone. The state of Wisconsin was included in the second zone, and it was provided that the standard time of that zone should be known and designated as United States standard central time. The time so established was based on the mean solar or astronomical time of the 90th degree of longitude west from Greenwich.

By virtue of P. L. 403 enacted by the 77th congress, approved January 20, 1942, it has been provided that standard time, as defined by 15 U. S. C. A. secs. 261, 363 as heretofore set out, shall be advanced one hour beginning at 2:00 A. M. of the 20th day after the date of the law's enactment. Since the law was approved on January 20, 1942, the standard time of the various time zones of the United States will be advanced one hour at 2:00 A. M., February 9, 1942. As applied to the central zone, in which the state of Wisconsin is located, this will mean that beginning at the designated time United States standard central time will be based upon the mean solar time of the 90th degree of longitude west from Greenwich plus one hour.

The determination of the question at issue involves a rather careful analysis of the Wisconsin law. As a matter of first impression, one is inclined to conclude that sec. 175.09 (1) establishes as the standard of time in this state the solar time of the 90th meridian west of Greenwich, and that the addition of the words "commonly known as central time" is simply descriptive of the standard of time so fixed. If this analysis is the correct one, then it is evident that any change in central time would not affect or change the Wisconsin standard.

A careful consideration of the language of sec. 175.09 (1) convinces us, however, that the words "commonly known as central time" are more than merely descriptive and that they in fact constitute the definition of standard time in the state of Wisconsin. Any other construction of

the section would be impossible if due regard is given to the correct meaning of the words employed.

It must be remembered that there is a distinction between "solar time" and "mean solar or astronomical time". Solar time, as defined by Webster's New International Dictionary, is "true solar time or apparent time". Apparent time is the time fixed by the movement of the sun over a particular point. It varies at different seasons of the year because the movement of the sun varies from time to time during the year.

Mean solar time, on the other hand, is not variable. It is based upon the average sun time at a given point. It presupposes an imaginary sun which travels with perfect uniformity at all times.

These conclusions as to the measure of time are well known to people versed in that field and are well recognized by legal authorities bearing upon that subject. See 62 C. J. 962 and cases there cited.

The legislature could not have intended to use the phrase "solar time" in its technical sense in enacting sec. 175.09 (1). This is easily established by the fact that the reference to the solar time of the 90th meridian west from Greenwich is qualified by the phrase "commonly known as central time". Central time did not at the time that sec. 175.09 (1) was enacted, nor does it now, consist of the solar time of the 90th meridian west from Greenwich. It consists of the *mean* solar time, which, as I have shown, is an entirely different measure. Consequently, we must suppose that the phrase "solar time" was used by the legislature in a broad or general, as distinguished from a technical, sense; that it was the purpose of the legislature to establish the standard of time in this state as a time based upon the movement of the sun over the 90th meridian west from Greenwich as measured by what was commonly known as central time. I have already shown that the reference to central time could not be viewed as merely descriptive and the only alternative is to regard it as a substantive part of the standard intended to be laid down.

As applied to the standard of time established when sec. 175.09 (1) was enacted, it is clear that the mean solar time of the 90th meridian west from Greenwich was adopted,

since at that time central time was so calculated. The reference in the statute to the establishment of standard time was to "central time", however, and "mean solar time" was adopted only in the sense that it then constituted central time. The situation has now been altered. By definition, central time is now the mean solar time of the 90th meridian plus one hour. Consequently, central time having been established as the standard time in this state and having been so changed, I cannot escape the conclusion that our standard must be correspondingly changed.

It is my conclusion, therefore, that at the present time the standard of time in this state conforms with that established as United States standard central time, and that the change made by the federal government in the computation of United States standard central time will require a corresponding change in the standard time of this state. In common parlance, this means that daylight saving time will become the standard time of Wisconsin at such time as it becomes the standard time of the second or central time zone.

I may say in concluding this opinion that there seems to be some misunderstanding as to the purpose of the Wisconsin law relating to standard time. It has been referred to in many instances as an anti-daylight-saving statute. Such a statement is, in my opinion, inaccurate. It is undoubtedly true that the statute was designed to prevent departments of the state government and the municipalities of the state from adopting any time other than central standard time. So long as central standard time consisted of mean solar time, it could be truly said that the statute was designed to prevent departments of the state government and local governing bodies from establishing daylight saving time. When, by definition, standard time was changed to correspond to what has been known as daylight saving time, any restriction against the use of that time was removed. Actually, I see no reason why we need attribute any intention to the legislature other than that of creating a standard of time identical with the standard in general use throughout the United States.

JWR

*Taxation — Forest Crop Lands* — Amounts received by town pursuant to ch. 29, Laws 1937, were “on account of forest crop lands” and twenty per cent thereof is payable to county under sec. 77.04, subsec. (3), Stats.

January 28, 1942.

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

You state that the treasurer of the town of Pence, Iron county, failed to certify to the state treasurer and tax commission, pursuant to the provisions of sec. 77.04, subsec. (2), Stats. 1933, a list of the forest crop lands owned by the county within that township in 1934, but that out of the special appropriation made by ch. 29, Laws 1937, the town of Pence was paid \$894.58, the amount which it would have received had such certification been duly made. It now refuses to pay 20% thereof, amounting to \$178.92, to Iron county pursuant to sec. 77.04 (3), Stats., claiming that the provisions thereof are not applicable to this \$894.58 so received because paid to it pursuant to special act of the legislature. An opinion is requested as to the correctness of this position taken by the town.

Sec. 77.04 (3), Wis. Stats., reads as follows:

“Out of *all* moneys received by any town *from any source on account of forest crop lands* in such town, the town treasurer shall first pay twenty per cent to the county treasurer \* \* \*.”

Ch. 29, Laws 1937, which appropriated the money in question, reads:

“An act providing for the payment of the full amount due certain towns under the 1935 *forest crop allotment*, and making an appropriation.

“\* \* \*

“Section 1. There is appropriated from the general fund eight thousand seven hundred seventy-nine dollars and twenty three cents, the total balance of the 1935 state con-

tribution *due under the forest crop law* to fifteen towns in thirteen counties, such towns having been paid less than the respective amounts due by reason of the 1935 apportionment being made before certifications were filed. Payments to the several towns from this appropriation shall be made upon certification of the conservation commission."

The town of Pence is wholly unjustified in its position. The 20% payment should be made to the county out of the sum received through the special appropriation. It is evident, both from the above italicized language in the title of chapter 29, Laws 1937, and from the italicized language in the text of the law, as quoted above, that the money was appropriated to and it was received by the town "on account of forest crop lands in such town." There is no room for ambiguity in such a situation. The fact that the money is received from a special appropriation instead of from the ordinary appropriation cannot alter the import of the words "out of all moneys received \* \* \* from any source on account of forest crop lands."

It is therefore our opinion that 20% of the sum received by the town of Pence from the special appropriation made by the legislature in ch. 29, Laws 1937, is now due and owing to the county of Iron, pursuant to sec. 77.04 (3), Stats. HHP

*Taxation — Exemption* — Brooder equipment kept and used on farm in connection with hatching and raising chickens for sale from eggs produced on farm, where no custom hatching is done, is exempt from taxation by sec. 70.11, subsec. (12), par. (a), Stats.

January 29, 1942.

O. STROSSENREUTHER,  
*District Attorney,*  
Shawano, Wisconsin.

You have submitted the facts relating to the ownership and use of certain described brooder equipment and requested an opinion as to whether it comes within the provisions of sec. 70.11, subsec. (12), par. (a), Wis. Stats., which exempts from taxation:

“The tools of a mechanic kept and used in his trade and farm, orchard and garden machinery, implements and tools actually used in the operation of any farm, orchard or garden, \* \* \*.”

“W” owns 120 acres of farm land, 35 of which are cultivated and the rest is pasture and wood lots. He keeps 17 head of cattle and has the usual and ordinary farm machinery. Besides, he has brooder equipment with which he hatches and cares for approximately 65,000 chicks annually. He uses only the eggs produced on his own farm and does no custom hatching for anyone who might bring eggs to his hatchery. Of the chickens he hatches annually he keeps approximately 4,000 as breeding stock, raises an additional 15,000 as “started chicks”, which are sold to buyers after they reach maturity, and the remainder he sells as day-old chicks. Your inquiry is whether the brooder equipment used in hatching these chicks is exempt from taxation.

The buildings on the land are the usual and regular farm buildings, excepting that the chicken coop or house and the brooder equipment are kept in a single building apart from the barn or any of the outbuildings and a short distance from them. “W” estimates that his own personal time is

divided approximately 25% devoted to the hatchery end and 75% to the care of his matured chickens and general farm work. He has one married son living on the farm with him, who works full time, and another son who works when not at school, both in the general farm and the hatchery operations. One hired man, although not a specialist in hatchery business, works exclusively in the hatchery and in caring for the chickens raised and kept on the farm. Practically all the feed required for the chickens is not raised on the farm. He does not keep a separate set of books for the hatchery segregated from his other farm income, although books are kept for purpose of the income tax. It is stated that about 60% of his income is derived from the chicken business and 40% from the regular farm business.

The question is whether such use of the brooder equipment constitutes the use of farm machinery, implements and tools in the operation of a farm. We find no case in this state passing upon the question of whether the hatching and raising of chickens is a farming operation. However, our court in the recent case of *Eberlein v. Ind. Comm.*, (1941) 237 Wis. 555, 297 N. W. 429, pointed out that in determining the meaning of the word "farm", as used in the workmen's compensation act, consideration must be given to the common understanding of that term.

In a bankruptcy case, where it was necessary to construe the term "farmer", it was held that a person deriving all his income from raising about 5,000 chickens upon about 20 acres of land, from which about 25% of their food was derived, was a farmer. *In re Wilkinson*, (1935 D. C. N. Y.) 10 Fed. Supp. 100, 27 Am. Bankr. Rep. (N. S.) 632.

In *Fleckles v. Hille*, (1925) 83 Ind. App. 715, 149 N. E. 915, a workmen's compensation case, it was necessary to determine whether a man employed on a tract of 40 acres, one-fourth of which was cultivated, the principal output of which was eggs and poultry, was engaged in farm labor when he was hurt while preparing feed for the chickens. In holding that he was, the court said, p. 717:

"\* \* \* In this state, it is a matter of common knowledge that poultry production by Indiana farmers is well nigh universal, though carried on more extensively by some

than by others. The fact that appellants in the operation of the farm specialized in the production of poultry, did not, under the facts of this case, take them or their employees out of the agricultural class.”

Although used in a different type of case from that here involved, the language of the Indiana court is very much in point and is expressive of the common understanding in this state of poultry raising as a farming operation. For years chickens have been, and still are, kept and raised quite generally on the farms in this state, on some more extensively than others, and in recent years the use of some type of brooder equipment has become very common. The fact that a particular piece of equipment, such for example as tractors, pumps and wagons, may be used in an occupation or business other than farming does not make it any the less a farming machine, implement or tool when actually used on a farm in carrying on farming operations.

Under the facts you present, and especially in view of the fact that no custom hatching is done, we cannot say that this brooder equipment is not used in carrying on farming activities, but is used rather in operating a commercial business. Our opinion is in accord with your view that this brooder equipment comes within the language “farm machinery, implements and tools used in the operation of a farm” of sec. 70.11 (12) (a), Stats., and is therefore exempt from taxation.

HHP

*Criminal Law — Judgments — Prisons — Prisoners — Parole* — When convict on parole from state prison violates his parole by committing misdemeanor for which he is sentenced to county jail or house of correction state prison sentence is tolled from date of violation until he is returned to state prison and time spent in county jail or house of correction does not count toward service of such prison sentence. XXX Op. Atty. Gen. 218 followed and applied.

January 30, 1942.

A. W. BAYLEY, *Secretary,*  
*Department of Public Welfare.*

You state that a man who had been paroled from the Wisconsin state prison was subsequently convicted of a misdemeanor and sentenced to a term of six months at the Milwaukee county house of correction, where he is now incarcerated. You do not state whether any action has been taken to revoke his parole nor whether the misdemeanor conviction occurred in the same court in which he had previously been convicted and sentenced to the state prison, but we consider those facts to be immaterial.

You inquire whether the sentence to the state prison under which the defendant was paroled runs concurrently with the sentence to the house of correction, referring to the opinion of this office reported at XXX Op. Atty. Gen. 218.

In *Application of McDonald*, (1922) 178 Wis. 167, the Wisconsin supreme court adopted the rule that where a man is on parole from the state prison and is convicted of another offense and sentenced anew to that prison, the two sentences run concurrently in the absence of a direction by the court to the contrary. This decision is based in part on the provisions of sec. 359.07, which provides that a sentence to the state prison shall commence on the day that such sentence is pronounced, and in part on the fact that ch. 390, Laws 1889, formerly provided that in such a case the second sentence to the state prison should not commence to run until after the expiration of the term on which the defendant had been paroled, but that statute was repealed by

the revision of 1898. It is therefore clear that the rule of the *McDonald* case applies only to situations in which both sentences are to the state prison and does not cover a situation where the second sentence is to a county jail or the house of correction upon conviction of a misdemeanor. The *McDonald* case was decided solely on the brief and argument of counsel for the petitioner, an assistant attorney general having appeared and conceded that there was no warrant for the further imprisonment of said petitioner under the facts of that case. For that reason it is considered that the *McDonald* case is not to be regarded as in any way persuasive in the present situation, but is limited as an authority to cases where both sentences were to the state prison. Other cases in which the rule of the *McDonald* case has been adopted recognize that it is so limited and does not apply where the two sentences are to different prisons. See *People ex rel. Clancy v. Graydon*, (1928) 329 Ill. 398, 160 N. E. 748; *White v. Kwiatkowski*, (C. C. A. 10th, 1932) 60 F. (2d) 264, 265.

As pointed out in XXX Op. Atty. Gen. 218, a parole violator has for most purposes the status of an escaped prisoner. His sentence continues to run while he is on parole only until the date of the violation, at which time he is deemed to have escaped and his sentence ceases to run by virtue of sec. 359.07, Stats. Upon his return to the state prison, it commences to run again and it is immaterial that he may also be then under sentence for another offense. This rationale was adopted by the circuit court of appeals in the *Kwiatkowski* case, above cited, in explanation of its decision that the two sentences to the same prison would run concurrently in the absence of a contrary order by the court. However, the period of the escape cannot be considered to have expired prior to the time when the escaped prisoner is returned to the institution from which he escaped. Time spent in a county jail is specifically excluded from the computation of a sentence to the state prison by sec. 359.07, and in the present case it is a county jail sentence which the prisoner is serving at the house of correction. Where a defendant is sentenced to a penitentiary on one count and to a county jail on another count, such sentences are presumed to be consecutive, not concurrent (*United States v. Remus*,

(C. C. A. 6th, 1926) 12 F. (2d) 239, certiorari denied, 271 U. S. 689), although it may be conceded that in such a case the court could direct that the two sentences be served concurrently at the penitentiary, though not at the county jail in view of the specific provision of sec. 359.07 above referred to.

To recapitulate, then, it is considered that the rule in the *McDonald* case applies only where the second sentence is to the state prison and not where the second sentence is to be served in some other institution; the parole violator is regarded as having escaped from the state prison on the date of his violation and the term of his sentence ceases to run from that date until he is again received at the prison; and time served in the house of correction or a county jail on conviction of a misdemeanor cannot be counted toward service of the state prison sentence. Therefore, the prisoner in the case which you have submitted is required to serve the balance of his term in the state prison, computed from the date of violation of his parole, after he has completed service of his six-month term in the house of correction, if his parole is duly revoked.

WAP

*Public Officers* — County purchasing agent appointed under sec. 59.07, subsec. (7), Stats., is not authorized to purchase equipment for offices other than those there enumerated.

County officer appointed as purchasing agent may be paid compensation for acting as such agent in addition to his regular salary as county official.

January 30, 1942.

FULTON COLLIPP,

*District Attorney,*

Friendship, Wisconsin.

You have requested our opinion as to whether the county board may appoint one of the county officers enumerated in sec. 59.07, subsec. (7), Stats., as purchasing agent for all offices and departments of the county government.

You also ask our opinion as to whether, if one of the county officers so enumerated is selected as purchasing agent, either for all county offices or for those enumerated, he may be granted compensation for discharging such functions in addition to the compensation which he enjoys by virtue of his office.

Sec. 59.07 (7), Stats., reads as follows:

“The county board of each county is empowered at any legal meeting to:

“\* \* \*

“(7) Prescribe the form and manner of keeping the public records of the county in any county office and the accounts of the several county officers; and, except in counties of a population of two hundred fifty thousand or more, may appoint a person or committee as county purchasing agent, and such person or member of such committee need not be a member of the county board but may be the county clerk, county treasurer or any other county officer, and make appropriations for their services. Such purchasing agent shall provide all books, stationery, blanks, safes, furniture, telephone service, fuel and lights necessary for the discharge of official business in the offices of the county clerk, clerk of the circuit court, register of deeds, treasurer, sheriff and county judge, and the chairman of the county

board shall forthwith sign an order in payment therefor. When the cost of such supplies exceeds sixty dollars, the said purchasing agent shall in such manner as he shall deem best to secure the attention of probable bidders, invite proposals of similar standard supplies of equal quality, and shall purchase from the lowest reliable bidder. In counties having a population of two hundred fifty thousand or more, purchases shall be made for any or all of the offices, boards, departments and commissions of said county in such manner and by such agency as the county board shall by ordinance provide for."

Prior to certain amendments, to which attention will be called, the quoted subsection empowered the county board to provide necessary equipment in the offices of county clerk, clerk of circuit court, register of deeds, treasurer, sheriff, and county judge. Sec. 669, subsec. 7, R. S. 1878. These offices, you will note, are the same offices now enumerated. A question was raised by the court in *Towsley v. Ozaukee County*, 60 Wis. 251, as to whether the enumeration of these certain offices did not preclude the county board from purchasing supplies for offices not enumerated. The court indicated that no such power had been granted, although the observation appears to have been expressed by way of *obiter dictum*. We do not think it necessary to pass on that particular question at this time, however, since we are of the view that the problem may be solved by a proper application of other relevant principles.

At the time the law vested the power of purchasing in the county board it was held in a well written opinion of this office that the power could not be delegated to one not a member of the county board. XII Op. Atty. Gen. 212. Thereafter the statute seems to have been amended for the express purpose of permitting the county to employ a purchasing agent who was not a member of the county board. See ch. 69, Laws 1929. Following that amendment a county board designated an elected county officer as county purchasing agent, and it was held in XX Op. Atty. Gen. 196 that the two positions were incompatible. Following that opinion, and probably as a result of the holding, the statute was amended to permit county boards to appoint one of the county officers now referred to in sec. 59.07 (7), Stats., as county purchasing agent.

In view of this legislative history we are of the opinion that none of the county officers mentioned, if appointed county purchasing agent, can exercise the power to purchase equipment for any offices other than those enumerated. We start with the premise that the statute authorizes the county board to appoint a purchasing agent to act for it in making purchases for certain designated offices. It may well be that the county board possesses power to make purchases for offices other than those mentioned. This question is not entirely free from doubt, in view of the case above cited, but whatever the power of the county board might be in that situation, it is made clear by the opinion in XII Op. Atty. Gen. 212, to which reference has been made, that the additional power cannot be delegated by the board in the absence of some authority to so delegate it.

We are not here concerned with the power which the county board has to purchase equipment for county offices. We are concerned with the narrow question of the right of the county board to delegate such authority as it may have. We are satisfied that its power to delegate authority is limited to the express power given and to which reference has been made.

This disposition of the question renders it unnecessary to consider the effect of statutes such as those relating to the power of the county superintendent of schools to purchase equipment for his office. It may well be contended that he is specifically authorized to make purchases without regard to any other provision that might be made to county purchasing.

With respect to the second question presented, we think that if one of the designated officers is appointed to act as purchasing agent it would not be improper to compensate him for acting in that additional capacity. As you point out in your request, the law provides that the salary of a county officer shall not be increased or diminished during his term (see sec. 59.15, (1), Stats.), but this does not mean that he cannot hold an additional position and receive such salary as is incident to the performance of the duties of that position. It is one thing to increase a salary incident to an office and it is another thing to appoint an officer to another

office or position which carries a salary. An officer may hold two offices and may receive two salaries as an incident to those offices and the appointment to the second office does not constitute an increase in the compensation of the first office. He derives his second salary not by virtue of the first office but by virtue of the second office.

JWR

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*Appropriations and Expenditures — Education — Vocational Education* — State vocational board may not direct expenditure of funds received from federal government for vocational aid except in compliance with restrictions and conditions of federal laws. Each phase of program for which expenditures are contemplated should first be submitted to federal security agency for approval before any federal funds are utilized therefor.

January 31, 1942.

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

You state that the safety engineer of the rural electrification administration of the United States department of agriculture has made a request to your department for circuit instruction in safety and job training for rural cooperatives in the field of rural electrification. The safety engineer has proposed that the several rural electrification cooperatives advance funds for a portion of the cost of travel and instruction of circuit teachers who would be employed on this program, the balance of the cost to be paid from federal Smith-Hughes and George-Deen funds allotted to the state. In this connection you ask three questions:

“1. Would funds appropriated by the several rural electrification cooperatives to be paid directly to the instructors be considered as private or public funds for the purpose of

instruction in the fields outlined, and could federal Smith-Hughes funds therefore be legally used to match expenditures made?"

The George-Deen act makes federal aid dependent on the condition "that the several States and Territories shall be required to match *by State or local funds or both*" certain percentages of the appropriations. 20 U. S. C. A., sec. 15h.

The Smith-Hughes act contains the following provision:

"\* \* \* The moneys expended under the provisions of this chapter, in cooperation with the States, for the salaries of teachers, supervisors, or directors of agricultural subjects, or for the salaries of teachers of trade, home economics, and industrial subjects, shall be conditioned that for each dollar of Federal money expended for such salaries the *State or local community, or both*, shall expend an equal amount for such salaries; \* \* \*." 20 U. S. C. A., sec. 19.

Rural electrification cooperatives can not be classified within the term "State or local communities." The term local communities obviously refers to governmental subdivisions or agencies. Under a literal interpretation of the quoted provisions, the payment of teachers' salaries and expenses by cooperatives would not be a matching of federal funds by state or local communities, nor an expenditure of funds by the state or a local community.

"2. In view of the restrictions placed upon the expenditure of federal funds in section 20.33 (8) of the statutes and section 41.13 which creates and determines the power and authority of the state board of vocational and adult education, would it be possible for the state board of vocational and adult education to pay for a portion of the cost of such a program of safety and job training for the rural electrification cooperatives from the aforementioned federal funds?"

Sec. 20.33, subsec. (8), Stats., reads in part:

"Any moneys received by the state from the United States as federal aid for vocational adult education \* \* \* shall be expended only in conformity with the

purposes and requirements of the several acts of congress under which such federal aid is paid to this state.  
\* \* \*

It is provided in 20 U. S. C. A., sec. 18 that a state may secure the benefits of appropriations for vocational education only by securing the approval of the federal security agency for the proposed instructional program. Secs. 20 and 21 of 20 U. S. C. A. provide that the educational projects for which federal funds are used shall be under "public supervision or control" and that they shall meet certain other conditions in respect to which the approval of the federal security agency must be obtained.

20 U. S. C. A., sec. 26, provides in part:

"The Federal Board for Vocational Education [whose functions have been transferred to the federal security agency] may withhold the allotment of moneys to any State whenever it shall be determined that such moneys are not being expended for the purposes and under the conditions of this chapter."

Under the foregoing provisions it appears that the federal security agency would be entitled to withhold funds from the federal appropriation if it were not satisfied that the instruction for which they are to be used is under the public supervision and control or fails to meet the other conditions prescribed by the federal law. Unless the instruction program has been approved by the federal security agency as meeting the conditions prescribed in the federal law, the state board of vocational and adult education is prohibited by sec. 20.33 (8) from using federal funds therefor.

"3. It has also been suggested that the several cooperatives would appropriate funds and donate time to schools of vocational and adult education for the carrying on of the proposed instruction. Could local boards of vocational and adult education legally accept such donations in view of the fact that there is no specific provision in the statutes for acceptance of gifts or donations by local boards of vocational and adult education?"

As you have pointed out, there is no express provision in the statutes authorizing boards of vocational education to accept gifts. In *Beurhaus et al. v. Cole et al.*, 94 Wis. 617, 627, it was recognized as a rule of the common law that a municipal corporation has authority without specific authorization to accept gifts to be used for authorized municipal purposes. A city, village or town might accept funds to be appropriated for purposes of vocational education provided no unlawful or unauthorized conditions were attached to the gift.

Subsecs. (2), (5) and (6) of sec. 41.16, Stats., make provision for the appropriation to the vocational and adult education fund of moneys received from sources other than tax levy. While subsecs. (2) and (5) may have been included in the law to cover state and federal aid, subsec. (6) apparently contemplates that local boards of education may receive moneys from different sources. Its terminology is sufficiently broad to cover gifts. It reads:

“All moneys received by said board shall be paid to the town, village or city treasurer and are appropriated to the vocational and adult education fund.”

Whether or not any funds donated to a local vocational board by a private agency would be regarded for purposes of matching federal funds as moneys supplied by “the state or local community” is a matter involved in the administration of the federal law, upon which the interpretation by the federal security agency would have more practical effect than any opinion given by this office, at least in the absence of legal action.

The same observation applies to all of your questions. We have given you the foregoing information to appraise you of the restrictions imposed upon the state vocational board as to the expenditure of federal funds otherwise than in strict accordance with the federal law. As to whether any particular program or project is one for which federal funds may be used, the federal security agency is given a considerable amount of discretion. We advise you to draft complete information as to the particular phase of the in-

structional program involved in your questions and submit it to the federal security agency to ascertain whether or not it meets their approval.

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*Appropriations and Expenditures — County Council of Defense* — Counties and towns are not empowered to appropriate funds to county councils of defense, except those exercising village powers under sec. 60.18, subsec. (12), Stats., may make such appropriations. Cities and villages, including city of Milwaukee, may appropriate such funds.

February 2, 1942.

THE HONORABLE,  
*The Governor.*

You have requested our opinion as to whether counties, towns, cities and villages may appropriate public money to support county councils of defense.

During the last world war provision was made for appropriation of money by counties, towns, cities and villages to county councils of defense authorized by the state council of defense. Ch. 241, Laws 1917. This specific authorization was repealed by ch. 396, sec. 25, Laws 1921. There is no longer any express authorization in the statutes for such appropriations.

The Wisconsin council of defense, as now constituted, is not a legislative creation but exists by virtue of executive order. It operates as an agency of the executive office and is financed by an appropriation made to the executive office by the legislature for the purpose of enabling the state to participate in national defense activities. See sec. 20.02, subsec. (9), Wis. Stats. The state council of defense participates in national defense activities in that, among other things, it acts as the state agency co-operating with the national civil-

ian defense program. There are other respects in which it also participates, but it is not necessary for the purposes of this opinion to go into them in detail.

County defense councils for the most part operate in the several counties of the state upon a county-wide basis as the units through which the activities of the state council are carried on in the several counties. There are or may be a few instances in which counties are divided into two portions with a separate council for each portion, but this is an exception to the rule. Thus, the organization of the civilian defense program is so planned that civilian defense activities within a particular county are administered by the county council of defense. As in the case of the state council, the county councils are not a legislative creation. They do not constitute a part of the county government.

Notwithstanding the fact that the activities carried on by the county councils are highly important from the standpoint of serving the public welfare, we are of the opinion that county boards may not appropriate county money for the purpose of financing their activities. Under the law of this state, counties are regarded as agencies of the state government and have only such powers as are expressly granted or are necessarily implied from grants expressly made. *Spaulding v. Wood County*, 218 Wis. 224. We find no suggestion of an express grant to appropriate money such as was made by ch. 241, Laws 1917. Neither is the power to be necessarily implied from any other express grant. The action of the legislature in making specific provision for such appropriations as it did in enacting ch. 241, Laws 1917, would suggest that in its opinion such an express grant was required. As we have pointed out, when that express grant has been repealed it cannot be relied upon to justify such appropriations at this time.

The same considerations are applicable in the case of towns and need not be independently considered. We must qualify this statement, however, by the suggestion that in the case of those towns of a special class which have been duly authorized pursuant to the provisions of sec. 60.18 (12), Wis. Stats., the power to appropriate would probably be the same as the power of villages to appropriate as here-

inafter discussed. The section in question authorizes the electors of towns having a population of not less than 500 and having therein one or more incorporated villages to direct by resolution that the town board may exercise all powers relating to villages and conferred on village boards by ch. 61, Stats., except as such powers conflict with statutes relating to towns and town boards. We fail to see where the exercise of the power to appropriate such money would conflict with any statute relating to towns or town boards and we, accordingly, are of the view that this special class of towns has the same power to appropriate money as do villages.

In the case of cities, however, a different principle governs. Through the enactment of ch. 242, Laws 1921, the legislature granted to cities of the second, third and fourth class very broad powers with respect to acting for the benefit of their inhabitants. Sec. 62.11, Wis. Stats., created by the law in question, has been said by the Wisconsin supreme court to confer upon such cities "all the powers that the legislature could by any possibility confer." *Hack v. Mineral Point*, 203 Wis. 215, 219.

The situation appears to be the same with respect to such cities as it was under the express grant of authority made by the legislature pursuant to ch. 241, Laws 1917. In that case the power to appropriate was made by express grant and in the present case it exists by virtue of a general grant.

We shall not extend this opinion by setting out sec. 62.11, Stats. It is sufficient for present purposes to say that in our opinion it is sufficiently broad to permit of appropriations to county councils of defense since it is quite clear that such appropriations relate to the "good order of the city" and to the "health, safety and welfare of the public."

Neither do we think that any serious constitutional question is present. It might conceivably be claimed that, since portions of a county without the boundaries of a second, third or fourth class city within a county benefited by reason of such a city's appropriation of money to the county council of defense, the appropriation would be invalid as applied to a county rather than to a city purpose. The doc-

trine might be invoked that a city may appropriate the money of city taxpayers for the benefit of the city government but that it cannot extract money from its taxpayers for the benefit of the citizens of another governmental subdivision, such as a county. We recognize the existence of a principle of constitutional law under which such an argument could be advanced. We do not think, however, that the principle applies in the present case. It has never been held that a city's power to appropriate money for the benefit of its inhabitants is rendered nonexistent by the fact that people who are not inhabitants of the city are also benefited. It is sufficient to sustain the appropriation that the people of the city derive a direct benefit and that the purpose is one which may be fairly related to the government or the general welfare of the city's inhabitants. Without attempting to exhaust the field by any means we call attention to the following cases dealing with the subject: *Lund v. Chippewa County and others*, 93 Wis. 640; *Brodhead v. City of Milwaukee and others*, 19 Wis. 624; *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147.

The fact that no constitutional objection was raised to such appropriations during the last war would indicate a general acceptance of the view that there was no constitutional infirmity involved.

The same rule applies to villages as that which applies to cities. See sec. 61.34 (1), Wis. Stats.

With respect to the city of Milwaukee, which is the only first class city in the state, the situation is the same as in the case of second, third and fourth class cities. The city of Milwaukee operates under a special, as distinguished from a general, charter but powers as applied to the field in which it may act for the benefit of its inhabitants are the same as those of second, third and fourth class cities. See sec. 6.04, Milwaukee city charter.

JWR

*Physicians and Surgeons — Public Health — Wisconsin General Hospital* — Fee fixed by sec. 142.03, Stats., may not be paid to physician for filing verified report on patient's condition unless such physician has also examined patient personally under appointment made for that purpose by county judge.

Where application is made for hospital treatment at public expense under ch. 142, Stats., county judge is required to appoint physician to examine patient.

February 11, 1942.

PAUL W. GRIESSER,  
*District Attorney,*  
Medford, Wisconsin.

In connection with applications for hospital treatment under sec. 142.02, Stats., you ask whether the patient's own physician is entitled to the statutory fee of five dollars fixed by sec. 142.03 if such physician files a verified report on the patient's condition based on a previous examination without making further examination of the patient and without being appointed by the county judge to make such an examination.

Sec. 142.03, subsec. (2), provides in part that after an application for hospital treatment has been filed, the county judge "shall" appoint a physician "personally to examine" the person seeking hospitalization. The physician so appointed is required to make a verified report on certain matters, presumably based on the personal examination which he was appointed by the county judge to make. The statute then provides that the physician "shall be paid by the county five dollars, and actual and necessary expenses." The purpose of the statute is obviously to provide for an impartial examination and report by a physician acting in behalf of the county rather than as the agent of the person desiring hospitalization, in order to enable the county judge to determine whether the conditions warrant expenditure of public funds. The statutory fee is in compensation for the entire service, which includes not only the report but the examination upon which the report is based. The fee is not

apportionable and may be paid only when *all* the conditions prescribed by the statute have been met. In this connection, sec. 271.41 (2), Stats., may also be applicable. It prohibits the acceptance of a fee fixed by law unless the service for which the fee is payable has been rendered.

A medical examination made at the behest of the patient prior to the application for hospitalization fails to meet the statutory requirements. It is not made on behalf of the county nor under appointment by the county judge.

The language of sec. 142.03 (2), with respect to the appointment of a physician to examine the applicant, is mandatory. The legislature made the procedure prerequisite to the expenditure of public funds for hospitalization of individuals. It is in the nature of a safeguard upon the public treasury. One express modification of the procedure is contained in the last sentence: "In the case of a crippled person for whom recommendation has been made for hospital treatment, by a recognized orthopedic surgeon." The fact that a specific modification of the procedure is provided for certain cases negatives an intent that there should be a modification in other cases. The legislature has provided in sec. 142.02 that application for hospitalization may be filed by a physician or surgeon as well as by certain other persons. It is not indicated, however, that applications filed by a physician shall be subject to any different procedure than applications filed by other persons.

Our court has held in *Carthaus v. Ozaukee County*, 236 Wis. 438, 295 N. W. 678, that medical expense and hospital care may not be made a public charge except in strict accordance with the statutes.

The legislature probably did not contemplate that in ordinary circumstances the physician to be appointed by the county judge would be the physician of the person for whom public aid is sought. If, however, the county judge in the exercise of his discretion should appoint the patient's own physician, such physician is entitled to the statutory fee upon performance of the service prescribed by sec. 142.03 (2), even though he may have been previously compensated by the patient for performing a similar service.

BL

*Indigent, Insane, etc. — Poor Relief — Old-age Assistance* — Amounts collected by county from property transferred to county by recipient of old-age assistance, or from proceeds of sale of real estate subject to lien for old-age assistance, must be first applied by county officials as specified in sec. 49.25, Stats., to full extent of old-age assistance claim before being used to reimburse county for other forms of public assistance. This is true regardless of whether amounts are recovered through proceedings in county court or otherwise. Obligation is not affected by fact that old-age assistance beneficiary may have signed agreement purporting to subordinate old-age assistance claim to claims of county for other forms of assistance.

February 11, 1942.

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

You have submitted a number of questions relating to disposition of funds recovered by counties from the property of beneficiaries of old-age assistance who have also received other forms of assistance from the county. You state that some counties apply the recovered money first to repayment of the county's disbursements for funeral expenses, poor relief, medical aid, and institutional care, and apply only what is left to repayment of old-age assistance in accordance with the following quoted portion of sec. 49.25 of the statutes:

“\* \* \* Of the net amount recovered pursuant to the provisions of this section or section 49.26, one-half shall be paid over to the United States government, and the remainder shall be paid into the treasuries of the state and its political subdivisions, in the proportion in which they respectively contributed to the old-age assistance recovered.”

Your first two questions apply to cases in which the county's claims are recovered in county court proceedings for administration or probate of the estates of deceased beneficiaries of old-age assistance. Some of the information which you gave us, however, and our subsequent investiga-

tion, reveal that funds recovered through transfer of property from beneficiaries of old-age assistance, even where no administration or probate proceedings are involved, are sometimes applied to reimburse the county for other forms of relief prior to reimbursement for old-age assistance.

As a general proposition, and funds recovered by reason of an assignment or a lien given under sec. 49.26 of the statutes are amounts "recovered pursuant to" such section, and must be allocated in the manner prescribed in sec. 49.25, regardless of whether the recovery is effected through proceedings in county court or otherwise. The provision of sec. 49.25 relating to allocation of recovered funds is directed to county administrative officials rather than to the court as a judicial agency. The obligation under the quoted sentence does not arise until the funds have been collected by administrative officials and are beyond the jurisdiction of the court in whatever action they may have been collected.

So many different factual situations may arise that it is impossible to anticipate them all in an opinion of general import. This opinion will attempt to lay down general rules for the guidance of officials charged with the handling of funds recovered from the recipients of old-age assistance but, in any case where the application of the general rules is doubtful, specific facts must be submitted before an answer can be given which is applicable to the individual case.

It appears that some counties assert the right to apply the recovered funds to claims for general relief and institutional care, on the basis of written assignments or liens executed by the beneficiary whereby he agrees that such claims of the county shall have priority over claims for old-age assistance. In other cases, the old-age assistance beneficiary, prior to the receipt of such assistance, executes a written lien or assignment as security for repayment of poor relief or institutional care, and priority is claimed on the ground that such liens antedate the statutory lien for old-age assistance.

The Wisconsin statutes impose upon local governmental units a mandatory duty to relieve the poor. *Meyer v. Town of Prairie du Chien*, 9 Wis. 233; *Mappes v. The Board of Supervisors of Iowa County*, 47 Wis. 31. The whole matter

of relief to the poor is strictly statutory. The legislature may require local governmental units to give relief upon such conditions as it sees fit, and neither any obligation nor any right of a governmental agency in respect to public relief exists independently of statute. *Holland v. Cedar Grove*, 230 Wis. 177; *Patrick v. Baldwin*, 109 Wis. 342.

It is also a fundamental concept of law that a county has no powers except as created by statute, either expressly or by necessary implication. *Spaulding v. Wood County*, 218 Wis. 224, 228; *Frederick v. Douglas County, et al.*, 96 Wis. 411. In accordance with these well established rules, it is fatal to the existence of any right claimed by a county if statutory authorization is lacking. It is doubtless true, as stated in 48 C. J. 520, that it is not contrary to public policy for a pauper to indemnify public authorities for his support; but that rule has no bearing on the question of authority of subordinate governmental agencies, whose powers are grounded in statute, to require or accept such indemnity.

It was ruled in XXI Op. Atty. Gen. 596, XXII Op. Atty. Gen. 277 and XXV Op. Atty. Gen. 673 that the Wisconsin statutes do not give a county authority to require, as a condition to the granting of relief, that the needy person contract to reimburse the county. This we deem still to be the law under existing statutes. The enactment of chapter 299, Laws 1933 (sec. 49.025, Stats.), confirms the legislative intent in this respect. That law reads:

“No person shall be denied relief as a poor person on the ground that he has an equity in the home in which he lives or a cash or loan value not in excess of three hundred dollars in a policy of insurance. No applicant for relief shall be required to assign such equity or insurance policy as a condition for receiving relief.”

This is, in effect, an express affirmation of the legislative policy that no person eligible for relief should be required to assign his property as a condition of receiving relief. The policy had previously been effectuated merely by the failure of the legislature to authorize an assignment; but when the standard of eligibility for receiving public support was altered, the legislature expressly indicated that the alteration

should not change the existing law relating to the requirement of indemnity, as applied to the cases covered by the new law.

It has been contended on behalf of some counties that, since sec. 49.26 of the statutes makes it discretionary with the county judge whether the applicant for old-age assistance shall be required to assign his personal property, it follows that the judge has authority to accept an assignment in which claims for old-age grants have been subordinated to other claims. The discretionary power conferred upon the judge by sec. 49.26 (1) is limited to a determination whether the assignment is necessary. In XXV Op. Atty. Gen. 205 it was pointed out that the phrase "if the county judge deems it necessary" means if he deems it necessary *in order that the public be secured*. Once his determination as to the necessity of an assignment has been made, the operation of the statute becomes mandatory. The mere taking of the assignment shows that the discretion as to determining the necessity therefor has been exercised. The discretion does not extend to the imposition of conditions inconsistent with the purpose of the statute.

The county judge is given no discretion as to filing a lien upon the real estate under sec. 49.26 (4). That section provides that "all" old-age assistance paid "shall" become a lien, and that the required data "shall be entered upon a certificate which the county judge "shall" cause to be recorded. He may release the lien only if 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 \* \* \* is necessary to provide for the maintenance and support of the beneficiary." Since his discretionary authority to release the lien is limited to cases falling within the scope of the foregoing wording, it follows that he may not release it for another purpose, such as to permit other county claims to take priority. If the value of the property is insufficient to take care of all such claims, the release of the statutory old-age assistance lien in order to substitute contractual liens would be contrary to the express provision of the statute, since it would jeopardize the collection of the amount paid as old-age assistance.

The remedies available to counties for recovery of amounts paid as poor relief or for institutional care are covered completely in sec. 49.10 of the statutes, and in the case of counties of 500,000 population or more, in sec. 46.10 (7). If the legislature intended that the relief should constitute a charge or lien, or that counties should have authority to accomplish that result by contract, it would have so provided. On the contrary, the provisions of the above sections make it clear that there shall be no right or remedy on the part of the county until the assistance has been given. The existence of a contractual lien would be inconsistent with the right of a judge under sec. 49.10 to refuse to render judgment in an action brought to enforce the claim for relief granted, "in any case where a parent, wife or child is dependent on such property for future support."

The fact that a county enforcing a claim under sec. 46.10 (7) is given the status of a preferred creditor indicates that the legislature considered the question of what security or preference the county should have in such cases, and fixed upon the preference so given in lieu of other machinery for enforcement of the claim.

In construing these statutes, it must be borne in mind that the county would have no claim of any kind against the beneficiary's property if it were not given by statute. 48 C. J. 519, sec. 202.

Some counties apparently hold the theory that the validity of liens or assignments taken from recipients of relief depends upon whether they are voluntary. Whether such instruments are voluntary depends upon the facts in the individual cases. Where the instruments are taken by the county in the usual course of the procedure set up to deal with applicants for relief, before relief is given, the probability is that the impression is created in the mind of the applicant, at least, that the signing is a condition to his receiving relief. A determination as to whether such an assignment is voluntary, however, is probably academic. We find no statutory authority for the county to accept and handle property of a recipient of poor relief or institutional care, or to accept a lien on such property, unless the transaction constitutes reimbursement for amounts due the county at the time.

The situation with respect to a county's authority to require an assignment is no different in a case where the applicant for relief is ineligible at the time of his application because of his ownership of property. The authority of the county to grant relief extends only to persons eligible under the statutes, and does not permit it to create eligibles by acceptance of an assignment of their property. If the applicant is eligible for relief, he is entitled to receive it unconditionally except as conditions may be fixed by statute. If he is not entitled to relief, the county has no authority to grant it, conditionally or otherwise.

The questions specifically asked in your request for an opinion are set out in the following discussion :

1. Is it proper for the probate court to allow a county claim in gross for institutional care, poor relief and old-age assistance, which for the purpose of discussion are designated as "constituent" claims?

Allowance of a claim in county court is only a determination of its validity. While the validity of each individual item must be passed upon, the aggregate of the items may be allowed in gross to each claimant. After the claim has been allowed, the statutes provide for an order or judgment by the court directing payment of the debts of the deceased in whole or in part. (Sec. 313.17.) If there are not enough assets to pay all claims in full, it should be decided at some stage in the proceedings whether some are entitled to be paid in full before any payment may be made on others. The same determination should be made with respect to the separate items due a single claimant, if some items have priority over others. The executor or administrator is entitled to ask instructions from the judge with respect to such matters, and the order of priority may be specified in the judgment or order directing payment. Whether or not there is an order specifying priorities, the executor or administrator is responsible under his bond for payment of claims and items of claims in their proper order. (See secs. 310.14, 311.05, 313.16, 313.20, and 316.25)

The procedure in county courts is not always uniform, and in many cases the executor or administrator applies assets on allowed claims without specific instruction from the

judge as to preferences. The usual order of priorities is established by statute, and when no extraordinary situation exists and no question is raised by a claimant, the court's approval of the executor's or administrator's account is sometimes the only judgment given respecting relative priorities. In literal response to your first question, it may be said that if there is no request for instructions by the executor or administrator and no question is raised by a party to the proceeding, the county court may allow the total of the county's claim without any decision as to priorities between its various items, even though the assets are not sufficient to pay the claim in full. This was the practice followed in the administration of estates of old-age beneficiaries in most of the cases investigated by this office in connection with the preparation of this opinion. The most usual situation in such cases was that the entire balance left after payment of expenses of administration and expenses of the funeral and last illness was turned over to the county to apply on the various items of its claims, without any specification as to the proportion paid on each. Assuming that the county receives the full share of the assets to which it is entitled, this practice is not improper.

The entire amount found due, or so much of it as there are assets to pay, may be turned over by the executor or administrator to the proper representatives of the county in gross, even though some items are paid in whole, some are paid in part, and some are disallowed entirely. After the funds have been paid into the hands of the county officials, the county court as such has no further jurisdiction over their disposition. In counties where the county judge is charged with administering the old-age assistance system, it is his duty as administrator of the law to see that the funds recovered are properly allocated between governmental units in accordance with the statutes, but his actions in that respect are those of an administrative officer and are not entitled to the weight of a judgment by a court of law.

If there is any question as to priorities which could affect the total to be paid to the county or to any other claimant, that question should be decided either by the executor or administrator, or by the judge. Any party to the pro-

ceeding may obtain a judicial decision if the question is properly raised.

It has been ruled in XXVII Op. Atty. Gen. 751 that the claim for old-age assistance is entitled to no preference over general debts in the administration of a beneficiary's estate, except as it represents payments for funeral expenses and except as to the rights given by sec. 49.26. The latter section was not enacted to establish priorities in the administration of a decedent's estate, but rather to provide security for, and a means of enforcing, the claim for old-age assistance paid. *Goff v. Yawman*, 237 Wis. 643. Presumably, if the procedure prescribed by sec. 49.26 is followed, there would be no necessity for presentation of the old-age assistance claim in administration proceedings. If the beneficiary had personalty out of which the claim was payable, it would have been transferred in his lifetime and the county would simply retain the amount to which it was entitled. If he had realty, the county's lien could be foreclosed in the same manner as a mechanic's lien.

Examination of actual county court records showed that when the county filed a claim in administration proceedings it was ordinarily in cases where there was a lien under sec. 49.26 on the decedent's real estate. In such cases the claim may be handled in several different ways, depending upon the circumstances.

a. The executor or administrator, or an heir, sometimes pays in full the amount necessary to free the property from the lien.

b. If the value of the property does not exceed the amount of the lien, the executor or administrator sometimes releases all claim to such property and leaves the county to its remedy by foreclosure. In such cases, the county's claim to the other assets in the estate, on which it has no lien, has no preference over other debts, except in so far as it represents expenses of the funeral and last illness which are later discussed, and except for such preference as may be given by sec. 46.10 (7) in the case of counties of 500,000 population or more.

c. The executor or administrator sometimes sells the property on which the lien exists, and distributes the proceeds. Where property subject to lien is sold in administra-

tion proceedings, the lien holder is entitled to have the proceeds applied first to satisfaction of his claim in full unless the property is sold subject to the lien. (Sec. 316.24, Stats.; 24 C. J. 433, sec. 1189) The lien under sec. 49.26 being for old-age assistance, proceeds of a sale of the reality by the administrator, unless the sale is subject to the lien, should be applied to payment of all of the old-age assistance claim before they can be used for payment of any unsecured debts, or to debts secured by subordinate liens. This situation, too, may be specifically covered in an order by the county court but, if not, it is the responsibility of the executor or administrator to allocate the proceeds of the sale in accordance with the rights of the parties.

d. The lienholder may release his lien to permit the property to be sold clear of encumbrance. The statutory limitations on the authority of the county judge to release an old-age assistance lien have been heretofore discussed. Without entering a discussion of the circumstances which might warrant the release of an old-age assistance lien to permit the executor or administrator of an estate to sell property free from encumbrance, it seems clear that such a release could only be given on condition that proceeds of the sale should be applied to payment of the old-age assistance claim before being utilized to reimburse the county for other types of assistance.

2. If such a county claim in gross is properly allowed, may the county officials allocate the proceeds to the various "constituent" claims in their own discretion?

As above pointed out, the mandate of sec. 49.25 of the statutes with respect to application of amounts recovered from property of old-age assistance beneficiaries, is directed to county administrative officials rather than to the probate court as such. The requirement applies with equal force to recoveries made where there is no court procedure.

Any amounts collected through a transfer of personal property by a beneficiary of old-age assistance or by reason of the existence of a lien on real estate under sec. 49.26 of the statutes must be first applied as directed in sec. 49.25, regardless of whether the collection was effected with or without court proceedings. Payments made to the county

for the release of its lien under sec. 49.26 or from proceeds of a sale of real estate on which there is such a lien are amounts "recovered pursuant to" such section, even though the payment results from the filing of a claim in administration proceedings. The recovered funds should be applied in accordance with sec. 49.25.

The state is not precluded from enforcing the county's statutory obligations with respect to disposition of the recovered funds by the fact that the county court may not have recognized any precedence of the old-age assistance claim over other county claims arising out of relief given. The county's obligation under sec. 49.25 of the statutes does not arise until the money has been turned over to it and is beyond the jurisdiction of the county court as such. The distribution of funds after they are paid to the county is not a matter within the jurisdiction of the county court in probate or administration proceedings. The case of *Bakula v. Schwab*, 167 Wis. 546, recognized the well-established rule that a judgment settles nothing as to the relative rights of coplaintiffs or codefendants as between themselves. If a judgment does not conclude coparties to an action as to their rights one against the other, there is even less reason for asserting that it settles the relative rights of a party to the action as against a third person who is not a party. The court in the above entitled case said:

"It is fundamental and universal that the former judgment proffered as *res adjudicata* in a subsequent suit must have been rendered in an action in which the parties to the subsequent suit were adverse parties. What is meant by adverse parties scarcely needs definition. Its significance is apparent from the expression itself. They must be opposite parties to an issue between them. The issue must be proffered by one and controverted by the other. They must be arrayed on opposite sides of the issue" (pp. 555-556).

There may also be instances in which personal property of an old-age assistance beneficiary is administered at his decease, no transfer having been taken by the county during his lifetime. In such a case, it has been ruled that the claim for old-age assistance is entitled to no priority over general claims, (XXVII Op. Atty. Gen. 751) except as to the

portion paid for funeral expenses or expenses of last illness; neither do claims for other forms of public assistance have any preference in the absence of statute. See *Guardianship of Banski*, 226 Wis. 361. The old-age assistance claim would not have priority over the claim for poor relief in the absence of a lien or assignment under sec. 49.26 (except as to expenses of the funeral and last illness); but neither would the claim for poor relief have preference over the old-age assistance claims. They would be on an equal footing, and payments made by the executor or administrator to the county should be allocated proportionately between such claims. That portion representing the old-age assistance claim should be applied by county authorities as prescribed in sec. 49.25.

In such cases, institutional claims may be entitled to preference under sec. 46.10 (7) under appropriate circumstances; but this preference could not be given with respect to amounts recovered by reason of a lien or transfer under sec. 49.26.

3. When the proceeds are so allocated, can the state department of public welfare object if it believes that improper preferences are made by the county officials as between the "constituent" claims?

The state department of public welfare is charged by secs. 49.50 (lm), 58.36 and 58.37 of the statutes with the duty of supervising "the administration of old-age assistance."

Secs. 49.25 and 49.26, relating to recovery of payments and allocation of proceeds, are a part of the old-age assistance law, and the state department of public welfare has authority to see that such provisions are properly administered. If county administrative officials allocate recovered funds in a manner not authorized by the law, the state department of public welfare may object to such allocation and take the necessary steps to enforce its supervisory powers.

4. Can the state department of public welfare object that proper preference was not allowed to an old-age assistance claim where there is a statutory lien on realty under sec.

49.26 (1), and enforce its objection by making audit adjustments (disallowances) under subsec. (1) of sec. 49.38?

The first part of this question is covered by the answer to the third.

Sec. 49.38, Stats., provides in part:

“(1) \* \* \* If the state pension department shall be satisfied that the amount claimed has actually been expended in accordance with the provisions of sections 49.20 to 49.38, it shall certify to the secretary of state eighty per cent of the approved amount paid by each county.”

In making its determination as to how much has been actually expended “in accordance with the provisions of sections 49.20 to 49.38”, the state department of public welfare may take into consideration all of the specified sections. If recovered funds have not been allocated as required in sec. 49.25, that fact may be considered in deciding how much has been “actually expended” in the administration of the law as a whole.

Sec. 49.38 further provides that any “necessary audit adjustments” may be made for any previous month or months, without restriction as to the length of time which may have elapsed.

As pointed out in *Travelers Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 106-107,

“\* \* \* The word ‘audit’ \* \* \* generally is extended to include the investigation, weighing of evidence, and deciding whether items should or should not be included.”

In *Conover v. W. Jersey Mortgage Co.*, 126 A. 855, 861, 96 N. J. Eq. 441, it was said:

“\* \* \* To audit an account is to see that the accountant is charged with everything with which he is chargeable, and that nothing is placed on the credit side for which he is not justly entitled to credit.”

It is our opinion that the state department of public welfare should, in making its certifications and audit adjust-

ments, take into consideration recovery of claims for assistance previously paid, and the disposition of funds so recovered.

If action is brought against the state by the county to enforce payment of the state aids granted by law, we are of the opinion that the amount due from the county under sec. 49.25 might be set off under authority of other statutory provisions. Questions relating to setoffs in a legal action are technical ones which would be involved only in the event that there is litigation, and there is no purpose in giving a detailed discussion of such questions in this opinion.

5. Should the county wish to dispute such audit disallowances, may it proceed against the state department of public welfare by mandamus, and if so, would the attorney general represent the state department in such proceedings?

Proceeding by mandamus is an appropriate action to compel state officers to perform their statutory duties, provided the duties are clear and mandatory and not merely discretionary. Such an action would lie against the state department of public welfare to compel certification of the amount demanded by the county only if it were shown that the department was under a statutory duty to make the certification as requested.

The attorney general is required by sec. 14.53 of the statutes to "appear for the state and prosecute or defend \* \* \* any cause \* \* \* in which the state \* \* \* may be in any wise interested," when requested by the governor or either branch of the legislature to do so. If action is brought against the state department of public welfare by any county, the attorney general would represent that department if requested to do so by the proper officials.

BL

*Corporations — Securities Law — Taxation — Motor Fuel Tax — Trade Regulation — Fraudulent Advertising — Trading Stamps* — Sec. 78.11, subsec. (6), Stats., is not violated where gasoline dealer posts and sells at price which is set up to show and include net selling price per gallon, tax per gallon, and cash redemption value per gallon of trading stamps given in connection with sale. Same holds true where cash redemption value of stamps per gallon is not stated but is merely expressed in form of discount percentage.

Posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure results in violation.

None of above situations is violation of sec. 100.15 (1), sec. 100.18, or ch. 189, Stats.

February 13, 1942.

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

You have called our attention to sec. 78.11, subsec. (6), Stats., which reads as follows:

“Every wholesaler and every other person selling or distributing motor fuel in this state shall keep posted in a conspicuous place, most accessible to the public at his place of business, and on every pump from which delivery is made directly into the fuel tank attached to a motor vehicle, a placard showing, in figures not less than one inch high, the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. All sales shall be made at the posted price and delivery slips shall also show the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. If the wholesaler or person has more than one place of business in this state, the wholesaler or person shall post said placard at all of his places of business. All prices posted shall remain in effect for at least twenty-four hours after they are posted.”

Our opinion is requested on the legality of the use of trading stamps in connection with the retail sale of gasoline under the above statute where either one of the following two methods of posting prices is followed.

In the first situation mentioned the dealer posts the net selling price per gallon, the amount of the license tax per gallon, and then adds words to this effect: ".04 cents (or whatever figure reflects the cash value of the stamp) cash redemption value of trading stamps." Finally a grand total of all of these figures is set up to arrive at the gross price so that the final posted figures will reflect the net selling price per gallon, the amount of the license tax per gallon, the cash redemption value of the stamps, and the total or gross selling price per gallon.

In the second method employed the net selling price per gallon and the amount of the license tax are stated with the further wording: "Prompt payment entitles you to discount of 1 2/3% in S & H Green Stamps, one stamp on each 10¢ paid."

It is your conclusion that the first method complies with sec. 78.11 (6) in that the net selling price per gallon, and the amount of license tax per gallon, are stated. Furthermore, all sales are made at the complete posted price.

We concur in your conclusion.

There is nothing in the statute which says that the *posted* price may not include items other than the *net* selling price, plus the tax.

Neither is there anything in the statute which states that trading stamps may not be used in connection with the sale of gasoline. Significantly enough, the 1939 legislature which by ch. 332 amended sec. 78.11 (6) to read as it now does, also passed a bill prohibiting the use of trading stamps in connection with gasoline sales, but this bill was vetoed by the governor.

Sec. 78.11 (6) is a part of ch. 78, the motor fuel tax law, and from its place in the statutes it would seem that the purpose of the section in question is to insure full information to the public as to how much of the total selling price of the gasoline per gallon is devoted to taxes, and to enable the taxing authorities to have some check on the situation through the delivery slips.

We do not construe sec. 78.11 (6) to be a price-fixing or fair-trade practice statute, and find no difficulty in concluding that the command of this statute is met where the price posting conforms with the statute as to location, size, etc., and includes net price, tax, and any other item or items which enter into the grand total of the final posted price at which sales are actually made. It is true that the customer who neglects to take stamps or who neglects to redeem them later does not receive the discount, but he is entitled to the same privileges as any other purchaser, if he chooses to exercise them, and his failure so to do cannot be said to result in a sale being made by the dealer at some figure other than the posted price.

While the second situation presented may seem somewhat more difficult at first glance, it still falls short of constituting a clear-cut violation of the statute in question. The sale is actually consummated upon the basis of the posted price. Again the customer who neglects to take stamps or who fails to redeem them later does not receive the discount. Yet there is no uncertainty as to his rights in this respect. The sale has been made at the posted price. There is no subterfuge and no one has been misled. The posting on the pump tells the story for all who will read and the purpose of the statute, as hereinbefore explained, has not been defeated.

Since submitting the above situations for our consideration, you have suggested a third one, where the net selling price per gallon is stated, the amount of tax per gallon, and the total of these figures with a further posting of ".5 cents (or whatever figure reflects cash value of the stamps)—discount for prompt payment by means of trading stamps." This amount is then subtracted from the previous total so as to arrive at a final balance representing the net price per gallon after giving effect to the use of the trading stamps.

While we are not informed on this point, we assume that the trading stamps are redeemed in accordance with sec. 100.15 (1). Stats., "upon presentation in amounts aggregating twenty-five cents or over of redemption value." If they are not so redeemed, sec. 100.15 (1) would be violated, and if sec. 100.15 (1) is strictly followed, there will obviously

be many cases where the purchase will not result in the receipt of trading stamps aggregating twenty-five cents or more in redemption value. Since stamps of a lesser amount cannot be redeemed, the purchaser is actually charged more than the final posted price, because this final posted price has had the value of the trading stamps subtracted from it. This situation is quite distinguishable from the first two discussed, in that the posted prices in those instances include the value of the stamps which might, or might not be redeemed, whereas in this case the value of the stamps is not included in the final posted price. Therefore, it would appear that since under this arrangement sales are not actually made at the final posted price, there would be a violation of sec. 78.11 (6).

Lastly, you have inquired whether any of the suggested postings are in violation of secs. 100.15 (1), 100.18, or ch. 189 of the statutes.

The answer is, No; unless there are other factors involved, which have not been called to our attention.

Sec. 100.15 (1) relates to the regulation of trading stamps. The issuance and redemption of trading stamps in connection with the sale of "any goods, wares or merchandise" is lawful, provided the procedure outlined in sec. 100.15 (1) is followed, i. e., each stamp must bear its stated cash value and is redeemable only in cash in amounts aggregating 25 cents or more. Obviously, the sale of gasoline is the sale of "goods, wares or merchandise," and there is nothing in sec. 100.15 (1) to indicate otherwise.

Sec. 100.18 relates to fraudulent advertising, and you have not suggested that there is anything fraudulent in the situations mentioned. So far as we are informed, all postings are strictly complied with when sales are made, and hence there is no statement or representation which is "untrue, deceptive or misleading" within the meaning of sec. 100.18.

If the use of trading stamps in connection with the sale of gasoline is in violation of the securities law, ch. 189, Stats., then the use of trading stamps in connection with the sale of any other merchandise is likewise illegal, and so

far as we know, the use of trading stamps in connection with the sale of merchandise, has never been deemed a violation of ch. 189.

We will not here take the space to analyze the issuance of trading stamps from the standpoint of the securities law for the purpose of determining whether or not there is any conflict, since even if there were a conflict, the special statute relating to trading stamps would control over the general statute relating to securities. *Kollock v. Dodge*, 105 Wis. 187; *Hite v. Keene*, 137 Wis. 625.

WHR

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*Indigent, Insane, etc. — Poor Relief — Old-age Assistance — Public Officers — County Pension Director — District Attorney* — Where heirs refuse to probate estate of old-age pensioner and county pension director is appointed administrator and is represented by district attorney as attorney and there is surplus in excess of county's claim under sec. 49.26, Stats., these officers may be allowed fees for performance of their probate services, but such fees in case of full-time pension director or full-time district attorney must be turned over to county.

February 13, 1942.

WILLIAM W. STORMS,  
*Assistant District Attorney,*  
Racine, Wisconsin.

You state that in your county several situations have arisen involving the probating of the estates of old-age pensioners where the heirs have refused to take any steps to probate the estates, apparently on the theory that the county will eventually take care of the probate proceedings so as to obtain reimbursement for old-age assistance, and that the surplus will be distributed to the heirs without the usual expense for administrators' and attorneys' fees.

Attention is called to XXX Op. Atty. Gen. 275, in which it is pointed out that any fees earned by a full-time district attorney or county pension director in the probating of such estates would inure to the benefit of the county, and you inquire whether it is possible for the county pension director, acting as administrator, and the district attorney acting as attorney, to probate such estates, charging the regular fees with the understanding that such income would be turned over to the county as receipts from such offices.

We find nothing in sec. 49.26 relating to old-age assistance which would indicate that the legislature intended to relieve the heirs of an old-age pensioner from probate expenses where there is a surplus for distribution over and above the county's claim, and in the opinion above referred to, we did not indicate that the full-time district attorney or full-time county pension director would be precluded from collecting fees as attorney and administrator respectively. We merely held that if such extra fees were obtained they would have to be turned over to the county under the ruling in *Gregory v. Milwaukee County*, 186 Wis. 235.

Ordinarily in these matters, the district attorney and the county pension director should not be expected to do any more than is necessary to insure collection of the county's claim. With this thought in mind, it would seem more appropriate, where it appears that there is going to be a surplus for the heirs, to have the county court appoint some person other than the pension director as administrator, and to have such administrator choose an attorney other than the district attorney. Then the district attorney and county pension director would be relieved of all responsibility other than the prosecution of the county's claim.

Of course, there are situations in which it is impossible to determine in advance with any degree of certainty that there will be a surplus after paying the county's claim. In those situations it would seem advisable for the county pension director and the district attorney to act. Then if a surplus arose there would appear to be no good reason why the court should not allow fees for such administrator and attorney for those services incident to closing the estate and which were not necessarily performed in obtaining payment

of the county's claim. In that event, the fees should be turned over to the county as indicated in our previous opinion.

It should also be noted that in the case of real estate, the lien of the county could be enforced without probate proceedings in an action in the nature of a mechanic's lien foreclosure under sec. 49.26 (4), Stats. This procedure may suggest itself as being more expeditious in some cases. Ordinarily, it would seem that if the value of the real estate exceeded the county's claim it would be to the advantage of the heirs to probate the estate and to arrange for a sale in the usual manner in the course of the probate proceedings rather than to risk the possible loss of the surplus on a forced sale in a foreclosure action. On a foreclosure sale, the plaintiff usually bids the property in for the amount of the lien, whereas in the more leisurely proceedings to sell real estate during the course of probate there is greater opportunity to look for a buyer and to negotiate a sale at a price more nearly approximating the true value of the property. Thus a foreclosure action or the threat of a foreclosure action may tend to force probate proceedings by the heirs and eliminate a lot of extra work on the part of the pension director and district attorney in probating the estate without being able to retain any of the fees for themselves.

WHR

*Constitutional Law — Public Officers — Director of Purchases — Public Printing* — Bureau of purchases has no authority to purchase and use multilith machine for state work.

February 16, 1942.

AUGUST FREY, *Director,*  
*Division of Departmental Research.*

In your letter you state:

“I should be pleased to have you render an opinion as to the legality of the use of multilith equipment and process by various state departments, commissions, etc., which equipment and process is similar to that of mimeographing now used in state government.

“This equipment is used extensively by other governmental units and industrial plants throughout the country and it is my belief that its use here would enable the state to turn out a better piece of work than that which is being produced by the mimeographing process.”

Supplementing the request we have received several written opinions from attorneys representing a company and its sales representatives interested in selling such a machine or machines to the state. The opinions are all to the effect that the state has power, under the constitution and statutes, to purchase and use such a machine.

The constitutional provision involved is art. IV, sec. 25, which reads as follows:

“The legislature shall provide by law that all stationery required for the use of the state, and all printing authorized and required by them to be done for their use, or for the state, shall be let by contract to the lowest bidder, but the legislature may establish a maximum price, no member of the legislature or other state officer shall be interested, either directly or indirectly, in any such contract.”

The section of the statutes cited as sustaining state power to purchase is sec. 15.28 (3), which reads as follows:

"The director of purchases shall have the full power and authority and is hereby directed to purchase and may, subject to the approval of the executive council, delegate to special designated agents the authority to purchase:

"(1) \* \* \*

"(2) \* \* \*

"(3) All mimeograph, multigraph and similar work, except for offices which may be permitted by the advisory council to do their own mimeograph and multigraph work."

It is argued that this section is clear authority for the director of purchases to purchase and use such equipment; that sec. 35.34, relating to job printing and all printing not otherwise classified and which with respect to same provides, "where it does not interfere with the multigraph, multicolor, and mimeograph operation in the director of purchases' offices" cannot be read as a limitation of the director's power to purchase and use, under sec. 15.28 (3), as said section had its origin in ch. 468, laws 1929, and is much later in point of time than the provision quoted from sec. 35.34 (1), Stats., which had its origin or genesis in ch. 593, Laws 1919; that if there is any conflict between the two sections, that which was enacted later in point of time prevails. We are unable to agree with the conclusion reached for the following reasons:

(1) Sec. 33.03 (6), Stats. 1927, with reference to the powers and duties of the superintendent of property, provided, in so far as material, as follows:

"\* \* \* It shall be his duty to furnish and perform all mimeograph and multigraph work for all said offices or officers. \* \* \*"

This provision was repealed by ch. 468, Laws 1929. In so far as that chapter contained any germane provision for the provision appearing in the 1927 statutes, the provision is sec. 15.28 (3) above quoted. Sec. 15.28 (3) does not relate to purchase or use of equipment. It relates to purchase of "all mimeograph, multigraph and similar work, except for offices which may be permitted by the advisory council to do their own mimeograph and multigraph work."

Authority to purchase this type of work for the various departments is quite different from authority to purchase equipment and perform the work for the various departments. It cannot be said, therefore, that sec. 15.28 (3) expands in any sense, so far as purchase and use of equipment is concerned, the terminology of sec. 35.34 (1), Stats., hereinbefore quoted.

It must be conceded that the terminology of sec. 35.34 (1), Stats., is not sufficiently broad to include multilith equipment, as the terminology is by express language limited to "multigraph, multicolor and mimeograph operation in the director of purchases' offices".

(2) If it be assumed that sec. 15.28 (3), Stats., authorizes the director to purchase equipment and perform work similar in process to that performed by mimeograph and multigraph, we doubt that the multilith could be said to be similar "equipment and process". The request states that the multilith equipment and process is similar to that of mimeographing. It further states that the multilith will permit the state to turn out a better piece of work than that which is being produced by the mimeographing process. This latter statement would indicate that there is some dissimilarity between the two processes. We have given some study to the mimeographing process, the multigraphing process and the multilith process. All three seem to be distinct processes. They have points of similarity and points of difference. The same is true of any printing press as compared with all three types of equipment.

The particular multilithing machine purchase of which is contemplated and which gave rise to the inquiry is known as a dual duplicator. It will produce both offset and relief duplication. The offset duplication is nothing less than that which is known in the printer's trade as "the offset process" or method of printing. The relief duplication answers all of the calls of the term "letter press printing" as that term is defined in your state printing specifications. Both the offset method and the relief method are common methods used in commercial printing.

(3) As both the offset method and relief method are common methods used in commercial printing we should await a clear legislative expression to the effect that at least, so far as the legislature is concerned, it does not consider the multilith, and the purchase and use of same, by the state to be in controvention of art. IV, sec. 25 of the constitution. The sections of the statutes, hereinbefore referred to, for the reasons already stated, do not express any clear legislative declaration upon the subject.

Our conclusion is: (1) That the legislature has never authorized purchase and use of such a machine, and (2) that there is a grave constitutional question as to whether the legislature could authorize purchase and use of such a machine. It will be time enough to meet the constitutional question if and when the legislature clearly authorizes purchase and use of such a machine. Purchase at the present time would not only involve the constitutional question, it involves as well a lack of statutory power.

NSB

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*Charitable and Penal Institutions* — Under amendment of sec. 46.10, subsec. (7), Stats., by ch. 67, Laws 1941, claim of department of public welfare or of any county against estate, husband or wife of inmate of certain state and county institutions for per capita cost of his maintenance is no longer preferred claim and statutes of limitation are now available as defense.

February 16, 1942.

L. J. GOODMAN,  
*District Attorney,*  
Sparta, Wisconsin.

You inquire as to the effect of the amendment of sec. 46.10, subsec. (7), Stats., by ch. 67, Laws 1941. The amendment may be shown by superimposing the statute as it exists in the 1941 statutes upon the same section as it existed

in the 1939 statutes, indicating the portions stricken out by enclosing them in brackets and the portions added by setting them out in italics, as follows:

“The actual capita cost, as defined by rule of the state [board of control,] *department of public welfare*, of maintenance furnished an inmate of any state institution, or any county institution in which the state is chargeable with all or a part of the inmate’s maintenance, except as to tuberculosis patients provided for in chapter 50 and subsection (2) of section 58.06, may be recovered by the state [board of control,] *department of public welfare*, or in counties having a population of 500,000 or more by the county, from such person, or from his estate, or may be recovered from the husband or wife [father, children or mother] of such person. [In any such action or proceedings the statutes of limitation shall not be pleaded in defense. In all claims of the state board of control or of any such county upon such relatives for support of an inmate or upon moneys or property held by said inmate or held by some one in his behalf, the state board of control or any such county shall be deemed a preferred creditor.] The sworn statement of the collection and deportation counsel of the state [board of control,] *department of public welfare*, or the superintendent of such institution, for the purpose of showing the names, time in the institution, and the actual per capita cost of maintenance furnished, shall be prima facie evidence of such facts. The state [board of control] *department of public welfare* shall make adjustment with the several counties, for their proper share of all moneys recovered in the settlement with the counties provided in subsections (2) and (3) of this section.”

You inquire whether, in view of this amendment to the statutes, the state department of public welfare or a county any longer has a preferred claim against the estate of a deceased inmate and whether the statute of limitations now applies to such claim.

The provision of sec. 46.10 (7), Stats. 1939, which gave the department and the county a preferred claim and which provided that the statutes of limitation should not be pleaded in defense were clearly repealed by the above amendment and hence no longer apply. It was evidently the intention of the legislature to reduce the claim of the department and of the county to the status of an ordinary

claim and to make available the defense of the appropriate statute of limitations. No reason is apparent why the legislature could not do so, and it seems quite plain that the amendment is constitutional.

WAP

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*Prisons — Prisoners* — Where prisoner was received at Milwaukee county house of correction on January 12, 1939, with sentence of three years, was paroled October 14, 1940, subsequently violated his parole and was again received at institution on July 19, 1941, with new sentence of one year on new conviction, he must serve so much of his original sentence as remained unexpired at time he violated his parole. Hence he is entitled to have second sentence combined with first for purpose of calculating his good time allowance under secs. 53.11 (1) and 56.19 (3), Stats. Since two sentences overlap to some extent, good time will be calculated according to rates applicable to third and fourth sentence years.

February 25, 1942.

A. W. BAYLEY, *Executive Secretary,*  
*Department of Public Welfare.*

You have requested an opinion as to the following facts:

G. D. W. was committed to the Milwaukee county house of correction on January 12, 1939 for a term of three years. The original discharge date for this sentence, with allowance for good time, was calculated as July 12, 1941. On October 14, 1940, he was released on parole. His parole was revoked on July 11, 1941, for the reason that he had violated it by absconding, but you do not state the date of the violation. On July 9, 1941, (two days before his parole was revoked) he was convicted of a new offense and sentenced to one year in the house of correction but because of a stay of execution he was not received at that institution until July 19, 1941.

You inquire whether he is entitled to earn good time at the rate of one month per year on this latter sentence or at the rate of four months per year under sec. 53.11, subsec. (1), and sec. 56.19 (3), Stats. The answer depends on whether or not there was any portion of his first sentence remaining to be served at the time that he was received at the institution on July 19, 1941, because if so the two sentences would be treated as one for purpose of calculating good time, XXIX Op. Atty. Gen. 290, whereas if the first had expired before he was received at the institution the good time rate for the first sentence year would apply.

It is apparent that on July 19, 1941, the original sentence of the prisoner had not expired. Had he observed all the conditions of his parole, his sentence would have expired, with deductions for good time, on July 12, 1941. But as we have recently pointed out in two opinions, violation of parole causes the sentence to stop running for the reason that the parolee's status becomes that of an escaped prisoner. XXX Op. Atty. Gen. 218; opinion dated January 30, 1942.\* This being the case, the prisoner, when he was received at the house of correction on July 19, 1941, still had to serve so much of his original sentence as had not expired on the date when he violated his parole by absconding. (Moreover, he was then subject to having his good time theretofore earned on that sentence cancelled. XXIX Op. Atty. Gen. 446.) In the absence of a direction to the contrary by the court, the new sentence runs concurrently with the remainder of the old one. XXX Op. Atty. Gen. 218. Accordingly, under the rule stated in XXIX Op. Atty. Gen. 135, he is entitled to earn good time on his second sentence at the rates applicable to the 3d and 4th sentence years. However, he cannot earn four months of good time since the two sentences overlap to some extent and do not total four years.

WAP

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\*Page 24 of this volume.

*Appropriations and Expenditures — Athletic Commission* — Emergency board may supplement appropriation to state athletic commission under sec. 20.48, Stats., which appropriates sum of \$7,000 or such lesser sum as commission may receive from its activities.

February 26, 1942.

FRED R. ZIMMERMAN,  
*Secretary of State.*

This is in response to your letter dated February 9, in which you request our opinion as to whether the appropriation made by sec. 20.48, Wis. Stats., to the state athletic commission can be supplemented by the emergency board under the provisions of sec. 20.74, Stats.

In our opinion the appropriation may be so increased. The provisions of sec. 20.74, Stats., authorizing the emergency board to supplement appropriations is general and in terms applies to all appropriations. The only basis upon which it could be said that this general language does not apply to the appropriation made by sec. 20.48, Stats., lies in the wording of that section. It reads in part as follows:

“There is appropriated from the general fund to the state athletic commission annually, beginning July 1, 1941, \$7,000 but in no year shall the appropriation exceed the non-appropriated receipts. \* \* \*”

We do not construe sec. 20.48, Stats., to contain any legislative intent that the state athletic commission is to be restricted to expending its receipts not in excess of \$7,000 to the extent that the emergency board cannot increase or supplement its appropriation. It was the intention of the legislature to make the appropriation to the commission equivalent to the amount of its receipts with the proviso that the maximum limit of the appropriation was to be \$7,000. Had the sum been fixed at \$7,000 with nothing said as to receipts, it would be clear that the emergency board could supplement that figure. The fixing of the amount appropriated to the amount of receipts, if such receipts are less than

\$7,000, does not change the situation. The only difference is that the amount of the appropriation is less than \$7,000 if the receipts are less than \$7,000. The appropriation may still be supplemented and there is nothing to suggest that it may not.

We are returning your enclosure herewith.

JWR

*Automobiles — Law of Road — Motor Vehicle Operators' Licenses* — Sec. 85.08, subsec. (27), par. (a), Stats., authorizing commissioner of motor vehicle department to suspend licenses of automobile operators under certain circumstances, has no application to conviction for driving while under influence of intoxicating liquor resulting in restricted occupational operator's license under sec. 85.08 (25c).

Under sec. 85.08 (25) (b), Stats., it is duty of commissioner of motor vehicles to forthwith revoke license of operator upon receipt of record of his conviction for driving while under influence of intoxicating liquor, unless such operator has obtained stay order under provisions of sec. 85.08 (25c). Appeal to circuit court does not in and of itself operate as stay.

March 6, 1942.

**MOTOR VEHICLE DEPARTMENT.**

You state that a person pleaded guilty to driving a motor vehicle while under the influence of intoxicating liquor and that the court, under sec. 85.08, subsec. (25c), Stats., ordered that he might operate a motor vehicle for occupational purposes under a restricted license. From other information which you have obtained, it appears that, at the same time and arising out of the same set of facts, this person was involved in an accident which would ordinarily result in application of the suspension provisions of sec. 85.08 (27) (a). However, there was no conviction of any offense coming under this section.

Under these circumstances, you inquire if the person in question must carry proof of financial responsibility during the period of the restricted occupational license in case the commissioner were to order suspension for one day.

Sec. 85.08 (27) (a) provides:

“Whenever an operator is convicted under a state law or under a county, city or village ordinance which is in conformity to the state law, the commissioner shall suspend the license of such operator without preliminary hearing, upon receiving the record of such operator's conviction of any of the following offenses:

“(a) Has been convicted as an operator in any accident resulting in the death or personal injury of another or serious property damage.”

Sec. 85.08 (25c) provides in part:

“The revocation of an operator’s license of a person convicted the first time in a period of a year for violating the state law or a county, city or village ordinance in conformity with the state law prohibiting a person from operating a motor vehicle while under the influence of intoxicating liquor may be stayed by the judge or magistrate in whose court such conviction takes place. 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,  
\* \* \*”

Nowhere in subsec. (25c) is there any provision for carrying proof of financial responsibility during the period of the restricted occupational license arising out of the conviction for driving while under the influence of intoxicating liquor and, since the entire matter is statutory, there is no authority on the part of the commissioner to prescribe anything which is not provided for by statute.

Sec. 85.08 (27) (a) is entirely separate and distinct from sec. 85.08 (25) and (25c). Sec. 85.08 (25) and (25c) relate to offenses calling for mandatory revocation of licenses, whereas sec. 85.08 (27) (a) relates to offenses calling for suspension. The mere fact that the defendant could have been charged on the same set of facts under separate counts falling within both provisions does not give occasion for applying both sections. A conviction is required under each section.

To illustrate the point, it is perfectly possible for a person to be guilty of driving while under the influence of intoxicating liquor when his car is under perfect control and he is observing all of the rules of the road. In such a case he might be convicted and given a restricted license under sec. 85.08 (25c), but there would be no occasion for charging him also with reckless driving, or, for instance, of driving on the left hand side of the road, which would call for sus-

pension under sec. 85.08 (27) (a). On the other hand, as in the instant case, his conduct might have justified charges for driving while under the influence of intoxicating liquor as well as for an offense falling within the purview of sec. 85.08 (27) (a). Since, however, he was charged and convicted only for driving while under the influence of intoxicating liquor there is nothing before the commissioner for consideration under sec. 85.08 (27) (a). Therefore, there is no basis for a suspension order which would make the filing of proof of financial responsibility mandatory under sec. 85.08 (29) (a).

Lastly you mention the case of an operator of a motor vehicle convicted of driving while under the influence of intoxicating liquor and who has appealed his case to circuit court. You ask whether the commissioner should revoke his operator's license upon the receipt of the record of conviction from the lower court or withhold action until the appeal has been determined.

Sec. 85.08 (25) (b) provides:

"Whenever an operator is convicted under a state law or under a county, city or village ordinance which is in conformity to the state law, the commissioner shall forthwith revoke the license of such operator upon receiving the record of such operator's conviction of any of the following offenses when such conviction has become final:

"(a) \* \* \*

"(b) Operation of a motor vehicle while under the influence of intoxicating liquor or a narcotic drug except as provided in subsection (25c);"

It is to be observed from the language hereinbefore quoted from subsec. (25c) that the only provision for a stay of revocation is that contained in subsec. (25c). In the absence of a stay order issued under subsec. (25c), there would be nothing to prevent the application of the mandatory language of subsec. (25) directing the commissioner to "forthwith revoke the license of such operator upon receiving the record of such operator's conviction" unless it can be said that the words "when such conviction has become final" in some way restrict the application of the statutory mandate where an appeal is pending.

In view of the provisions of subsec. (25c) respecting a stay order under certain circumstances, we are of the opinion that stays under other circumstances, e. g., pending appeal, are impliedly excluded under the doctrine of statutory construction that the expression of one results in the exclusion of others,—*expressio unius est exclusio alterius*, and that the words “when such conviction becomes final” relate only to proceedings in the lower court resulting finally in the conviction of the defendant. By way of analogy we refer to provisions relating to appeals to the supreme court, such as sec. 274.33 (2) which provides for an appeal to the supreme court from “A *final* order affecting a substantial right made in special proceedings \* \* \*” Obviously if the order were final in the sense that nothing further could be done about it, the supreme court would be powerless to reverse it on appeal, and the provision for appeal would be meaningless.

Hence the word “final” when used in law in the case of orders, decisions, judgments, decrees or sentences of a court designates usually one which ends the action or proceeding in the court that makes it, leaving nothing further to be determined by the court, or to be done except the administrative execution of the judgment or sentence. However, such a judgment does not as such preclude an appeal. See Webster’s New International Dictionary for definition of word “final” under subheading *Law*.

This being the dictionary definition of the word “final” as used in law, and having in mind the rule of statutory construction stated in sec. 370.01 (1) that all words and phrases shall be construed and understood according to the common and approved usage of the language, but that 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, we conclude that the words “when such conviction has become final” relate entirely to the court in which the conviction occurs, so that it is not necessary for the commissioner to await the decision of the circuit court on appeal before revoking the license and that the duty to revoke arises immediately upon receipt of

the record of conviction unless the defendant has obtained a stay order under the provisions of sec. 85.08 (25c).  
WHR

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*Real Estate — Statistics — Vital Statistics — Birth Certificates — Sec. 235.46, Stats.,* was intended only to provide means of correcting defects in record title to real estate. Affidavit filed under that section cannot take place of delayed birth certificate filed pursuant to sec. 69.57 for purpose of showing age and citizenship.

March 9, 1942.

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

You state that the authorities in several counties have recently inquired whether an affidavit recorded under sec. 235.46 may be used in lieu of a delayed birth certificate obtained under sec. 69.57, Stats. Apparently it is being contended by some attorneys that it is unnecessary to obtain a delayed birth certificate and that an affidavit recorded with the register of deeds will be just as effective for all purposes as a properly authenticated delayed birth certificate would be. Sec. 69.57, which was enacted for the purpose of conforming with regulations of the federal census bureau, army and navy for the purpose of proving citizenship and age, provides as follows:

“(1) A delayed registration is defined as a birth, death or marriage filed one year or more after the event occurred. The state registrar is empowered to file such records for births, deaths or marriages occurring heretofore or hereafter in this state upon presentation of sufficient proof, which in main shall conform with the national recommendations of the bureau of the census.

“(2) The state registrar shall issue detailed instructions as to the proof required for filing a delayed record and for correcting any record of birth, death or marriage shown to

be in error which instructions shall be strictly followed in making any corrections or filing any delayed records within the state. Such proof shall consist of documentary evidence for delayed records or for major corrections of records.

“(3) All the evidence affecting the major corrections of a certificate or the filing of a delayed certificate, after such evidence has been filed with the state registrar, shall be kept in a special permanent file. When a copy of such corrected or delayed certificate is issued, a summary of such evidence shall be included.

“(4) The admissibility in evidence of a delayed or corrected certificate shall be subject to the discretion of the court, judicial or administrative body or official to whom any such certificate is offered as evidence.”

A birth certificate filed under the vital statistics law contains, among other things, information as to the date and place of birth, the usual residence of the mother and the name, color or race, age and birthplace of the father and mother, including the maiden name of the mother.

Ch. 235, Stats., is entitled “Alienation by deed, and proof and recording of instruments.” Sec. 235.46, found in that chapter, provides as follows:

“Affidavits, witnessed by two subscribing witnesses, stating facts as to possession of any premises, *descent, heirship, date of birth*, death or marriage, or as to the identity of a party to any conveyance of record, or that any such party was or is single or married, or as to the identification of any plats or subdivisions of any city or village, may be recorded in the office of the register of deeds *in any county where such conveyance is recorded*, or within which such premises or city or village is situated, and the record of any such affidavit, or a certified copy thereof, shall be prima facie evidence of the facts touching any such matter, which are therein stated.”

This section was originally created by ch. 302, Laws 1909, which was entitled as follows: “An Act to amend [should read ‘create’] section 2238a of the statutes, *relating to record evidence of titles to real estate.*”

Subsequent acts amending this section also indicate in their titles that the subject matter relates to titles to real estate. See ch. 382, Laws 1917, and ch. 425, Laws 1921.

It is quite apparent from (a) the location of sec. 235.46 in a chapter of the statutes dealing with record titles to real estate, (b) the language of sec. 235.46 itself and (c) the titles of the acts by which sec. 235.46 was created and amended, that the only purpose of this statute is to afford a means of correction by affidavit of defects in the record title to real estate.

Under the language of sec. 235.46 "affidavits \* \* \* stating facts as to \* \* \* descent, heirship, *date* of birth \* \* \* of a party to any conveyance of record" may be recorded in the office of the register of deeds where the conveyance is recorded and shall be prima facie evidence of the facts stated therein. Nothing in this section authorizes an affidavit stating the *place* of birth nor any of the other facts which are required to be included in a birth certificate, except only the *date* of birth, descent and heirship. Such an affidavit is prima facie evidence only of facts therein stated which are authorized by sec. 235.46. Hence the affidavit could not in any event be prima facie evidence of the *place* of birth, which is the essential fact to be shown by a birth certificate for the purpose of proving citizenship. Moreover, unless the party whose birth is thus recorded by affidavit is a party to a conveyance of record, the affidavit is not prima facie proof even as to *date* of birth since the statute does not authorize recording of affidavits concerning persons who are not parties to conveyances nor in any office where no such conveyance is recorded.

For the foregoing reasons, it is clear that an affidavit filed pursuant to sec. 235.46 cannot take the place of a delayed birth certificate filed pursuant to sec. 69.57 for the purpose of showing age and citizenship.

WAP

*Workmen's Compensation* — Counties are not required to carry workmen's compensation insurance, but county boards may provide for carrying it. Sec. 59.07, subsec. (23), Stats., does not apply to this type of insurance. VIII Op. Atty. Gen. 529 followed.

March 9, 1942.

JOHN A. MOORE,  
*Acting District Attorney,*  
 Oshkosh, Wisconsin.

You inquire as to the right of Winnebago county to drop its policy of workmen's compensation insurance and become a self-insurer.

Sec. 102.04, subsec. (1), Stats., defines employers subject to the compensation act as including counties. Sec. 102.28 (2) requires all employers subject to the act to insure the payment of compensation in an authorized insurance company unless exempted from such insurance by the industrial commission. Pursuant to the last mentioned statute, the commission has issued a general order exempting all political subdivisions of the state from carrying insurance, as a result of which it is optional with each municipality to obtain insurance or not as it sees fit. VIII Op. Atty. Gen. 529.

You raise the further question whether sec. 59.07 (23) requires the county to set up an annual fund to cover such self-insurance. The statute reads as follows:

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

"\* \* \*

"(23) Provide by ordinance that the county shall carry public liability and property damage insurance, either in commercial companies or by self-insurance created by setting up an annual fund for such purpose, covering without exclusion because of enumeration, motor vehicles, malfeasance of professional employes, maintenance and operation of county highways, county parks, parkways, or airports, and any other county activities involving possibility of damage to the general public."

This statute does not specifically mention workmen's compensation insurance, nor is such insurance included in the omnibus clause at the end: "any other county activities involving possibility of damage *to the general public.*" Workmen's compensation liability is not a liability growing out of "damage to the general public" since it covers injuries only to a special class of persons, namely, county employees. Authority for counties to purchase insurance covering such risks is not dependent upon the grant of power in sec. 59.07 (23), but is implied in the compensation act. VIII Op. Atty. Gen. 529.

It is therefore unnecessary for counties or other municipalities to comply with sec. 59.07 (23) by setting up an annual fund for self-insurance of compensation risks. In case of an award against the county, it would have to be paid pursuant to sec. 102.21, irrespective of whether the county had set up an insurance fund to cover it.

WAP

*Indigent, Insane, etc. — Re-examination of Insane* — Under sec. 51.11, subsec. (1), Stats., jurisdiction to re-examine sanity of inmate of central state hospital who was originally transferred there from penal institution pursuant to sec. 51.22 and whose sentence to such penal institution has expired is vested in judge of any court of record in county where such insane person resides or in county where department of public welfare adjudged him insane pursuant to sec. 51.22. Court in which insane person was originally sentenced to penal institution does not, as such, have jurisdiction to re-examine his sanity under sec. 51.11 (1). If no such proceeding is pending and no jury trial is desired, department of public welfare may re-examine such person's sanity, pursuant to sec. 51.11 (7).

March 13, 1942.

A. W. BAYLEY, *Executive Secretary,*  
*Department of Public Welfare.*

You have submitted, with a request for an opinion, a communication from the superintendent of the central state hospital in which he inquires as to what court has jurisdiction of a sanity rehearing in the case of inmates of the central state hospital who were originally transferred there from a penal institution under sec. 51.22, Stats., and whose sentences to such penal institutions have since expired. He states that in some instances such proceedings have been commenced in the courts which sentenced such persons to the penal institution but that in a recent case the sentencing court held that it was without jurisdiction.

Sec. 51.11, Stats., provides in part as follows:

“(1) Except as otherwise provided in sections 51.22, 357.11 and 357.13, any person adjudged insane by any court, tribunal, or officer having lawful authority so to adjudge, or restrained of his liberty because of his alleged insanity, may on his own verified petition or that of his guardian or some relative or friend have a retrial or re-examination of the question whether such person is sane or insane before the judge of any court of record of the county in which such person resides or in which he was adjudged insane.

\* \* \*

“(7) When a proceeding for such retrial or re-examination is not pending in a court of record and a jury trial is not desired by the persons authorized to commence such proceeding, the state board of control acting as a commission in lunacy may, on application, by like procedure determine the sanity or insanity of any such person committed to any hospital or asylum for the insane, and its determination shall be recorded in the office of the county judge of the county in which such inmate resides or was adjudged insane, and shall have the same force and effect as though made by such judge. The board may also, on or without application, if it has reason to doubt the insanity of any such inmate, request the county judge of the county in which such inmate resides or was adjudged insane to determine his mental condition, pursuant to this section; and it shall be the duty of said judge to do so.”

Sec. 51.22 provides in part as follows:

“The department of public welfare, acting as a commission in lunacy, as provided in section 51.11, may adjudge any prisoner in the state prison, the state reformatory, the industrial home for women, any county jail or in the Milwaukee house of correction to be insane, or feeble-minded, and may, with the approval of the governor, remove him to the central state hospital or to one of the homes for the feeble-minded. \* \* \* When a prisoner thus removed recovers his reason before the expiration of his sentence he shall, by order of the department, be returned to the prison from whence he was taken.”

In an opinion to your department rendered a year ago we pointed out that an insane person transferred to the central state hospital pursuant to sec. 51.22 is no longer to be classified as an insane criminal after the expiration of his sentence, but has the status of an ordinary insane person. XXX Op. Atty. Gen. 103, 105. This being true, he is entitled to a re-examination of his sanity under sec. 51.11. Subsec. (1) of that section vests jurisdiction to conduct such hearing in “the judge of any court of record of the county in which such person resides or in which he was adjudged insane.” Nothing in this section vests jurisdiction in the court which sentenced the person to the prison, unless the judge of that court happens also to be the judge of a court in the county

in which the inmate resides or in which he was adjudged insane.

You are therefore advised that such proceedings should be brought before any judge of a court of record in the county in which the insane person resides or the county in which the department of public welfare adjudged him insane, pursuant to sec. 51.22. In case the insane person has no legal residence in this state, the latter county is the only one in which such hearing can be had.

In case no such court proceeding has been commenced and a jury trial is not desired, the department of public welfare has jurisdiction under sec. 51.11 (7) to conduct such a hearing.

WAP

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*Appropriations and Expenditures — Student Loans —* Appropriations for loans to needy students made under ch. 363, Laws 1933, ch. 10, Special Session 1933, and ch. 17, Laws 1935, are now controlled by provisions of said ch. 17 and are to be loaned under terms and provisions prescribed by state department of public welfare without regard to limitations as to purpose and amount per student prescribed in ch. 363, Laws 1933.

March 13, 1942.

DEPARTMENT OF PUBLIC WELFARE.

You inquire whether student loans may be made: (1) For partial maintenance or must be restricted only for tuition, incidental and other fees; (2) whether the total loan to any one student is limited to \$150.00, or limited to \$150.00 for any one year, or may exceed \$150.00 for any one year or term of years.

The original provision for student loans was made by par. (c) of subsec. (6) of sec. 7 of ch. 363, Laws 1933, which read as follows:

“Not to exceed one hundred seventy thousand dollars for loans to needy and qualified residents of the state attending

or desirous of attending the university, the state teachers' colleges, Stout institute or other educational institutions of this state of like rank, in cases where the student-applicants are either unemployed or would otherwise be unable to continue their education and thus add to the number of the unemployed. *Such loans shall be made only for tuition, incidental, and other fees and shall not exceed one hundred fifty dollars to any one student.* Such loans shall be made by the industrial commission on the student's application endorsed by the authorities of the institution which the applicant desires to attend or is attending. The terms and other provisions of such loans shall be prescribed by the industrial commission, which shall have authority to adopt and enforce all necessary rules to carry out the intent of this paragraph. Such rules shall provide that the loans shall be distributed among the several counties as nearly as possible in proportion to their population." (Italics ours.)

The italicized language above clearly limits the purpose of the loans to tuition, incidental and other fees and to an amount not in excess of \$150.00 to any one student in any event, regardless of the number of years or terms of attendance in school. There is no ambiguity in the language and hence no room for interpretation or construction as far as this particular appropriation is concerned.

We understand that this appropriation was used up and that in the special session of 1933 the legislature enacted ch. 10, section 1 of which provided as follows:

"There is appropriated, on the effective date of this act, from the general fund to the industrial commission out of the balance of the receipts from the emergency taxes for relief purposes on incomes and transfers of property levied in sections 2 to 4 of chapter 363, laws of 1933, not to exceed one hundred seventy thousand dollars for loans to needy and qualified residents of the state attending or desirous of attending the university, the state teachers' colleges, Stout institute, Wisconsin mining school, or other educational institutions in this state of like rank during the second semester (or corresponding period) of the current school year in cases where the student-applicants are either unemployed or would otherwise be unable to continue their education and thus add to the number of the unemployed. Such loans shall be made by the industrial commission on the student's application endorsed by the authorities of the institution which the applicant desires to attend or is attending. *The*

*terms and other provisions of such loans shall be prescribed by the industrial commission, which shall have authority to adopt and enforce all necessary rules to carry out the intent of this paragraph. Such rules shall provide that the loans shall be distributed among the several counties as nearly as possible in proportion to their population.”* (Italics ours.)

Loans made under this appropriation were not limited to the purposes of tuition, incidental, and other fees or to \$150.00 to any one student, but were to be subject only to such terms and provisions as might be prescribed by the industrial commission.

We understand that under the rules adopted by the industrial commission it was provided that loans could be made for tuition, incidental, and other fees and for partial maintenance. It was provided further that loans to any one student should not exceed \$150.00 per year for fees nor \$60.00 per semester for partial maintenance.

In 1935 ch. 17 was enacted, providing:

“SECTION 1. (1) There is appropriated from the general fund the following sums for loans to needy and qualified residents of the state attending high schools or desirous of attending the university, the state teachers’ colleges, Stout institute, Wisconsin mining school, or other educational institutions in this state of like rank above the high school:

“(a) On the effective date of this act, one hundred seventy thousand dollars for the second semester of the school year 1934-35.

“(2) Such loans shall be made in cases where the student applicants are either unemployed or would otherwise be unable to continue their education and thus add to the number of the unemployed.

“(3) Such loans shall be made by the industrial commission on the student’s application endorsed by the authorities of the institution which the applicant desires to attend or is attending. The terms and other provisions of such loans shall be prescribed by the industrial commission, which shall have authority to adopt and enforce all necessary rules to carry out the intent of this section.

“SECTION 2. All moneys repaid on loans heretofore made, under paragraph (c) of subsection (6) of section 7 of chapter 363, laws of 1933, or chapter 10, laws of special session 1933-34, any balances remaining under said provisions, and all moneys repaid on loans hereafter made under this act,

are reappropriated to the industrial commission for loans to such students in accordance with the provisions of this act.

“SECTION 3. The general fund shall be reimbursed for all appropriations made by this act from any moneys made available by this state for unemployment relief.”

It is to be noted that under this act the appropriation became for the first time a revolving one. Sec. 3, above quoted, is a troublesome section and most difficult to understand. As the 1933 appropriations clearly did come from moneys made available by the state for unemployment relief, it would appear upon first impression that the legislature appropriated by sec. 2 and took away the appropriation by sec. 3. We have studied this matter with the budget director and are convinced that the only significance of sec. 3 is that of a bookkeeping matter in relation to taxes levied for emergency unemployment relief, as distinct from other tax levies, which moneys, including taxes levied for unemployment relief, went into the general fund and were appropriated therefrom. That being true, the section is of no practical importance in relation to the problems which you present, and we therefore refrain from further discussion of that section.

This last appropriation in 1935 contained the same language respecting terms of the loans, that is, the terms and provisions were to be prescribed by the industrial commission the same as under ch. 10 of the laws of the special session of 1933, and we are informed that the industrial commission followed the same rules mentioned above regarding purposes and size of loans per student as was set up after the passage of ch. 10, Laws Special Session 1933.

The administration of student loans continued in the industrial commission until transferred to the state department of public welfare by the operation of ch. 435, Laws 1939. See XXVIII Op. Atty. Gen. 680. The state department of public welfare, by rule 13 P. A. sec. 2, par. (a), has followed the same terms as to loans, this rule reading:

“Loans will be made for tuition, fees and partial maintenance, not to exceed \$150 per year for fees nor \$60 per semester for partial maintenance.”

The foregoing analysis of the statutory history of student loans makes it clear that such loans made by the state department of public welfare are not restricted to tuition and fees nor to \$150.000 to any one student per year, but that these matters are to be governed by such terms and provisions as may be prescribed by the state department of public welfare.

From your inquiry it appears that the question you have raised was prompted by the fact that the revisor of statutes in the 1941 Wisconsin statutes included ch. 363, Laws 1933, as amended from time to time, and that at p. 1107, under par. (c) of subsec. (4) of sec. 7, has retained the phraseology of sec. 7, subsec. (6) (c) of ch. 363, Laws 1933, as quoted above, although, as hereinbefore indicated, this language was not contained in the subsequent appropriations from which loans are now being made.

Furthermore, you call attention to the fact that the legislature in 1941 amended the introductory paragraph of subsec. (1) of sec. 4 of ch. 363, Laws 1933, as last amended by ch. 14, Laws Special Session of 1937. See ch. 63, Laws 1941, sec. 4. This, however, should not lead to any confusion, since the legislature did not purport to amend that portion of ch. 363 relating to student loans.

The work of the revisor in this connection has been made difficult by reason of the fact that the provisions of ch. 363 were not given section numbers in the revised statutes, nor were any of the subsequent provisions as to student loans given such numbers. Moreover, with the exception of the revolving fund feature in ch. 17, Laws 1935, and its effect on the earlier appropriations, none of the student loan laws amended or specifically mentioned any of the prior laws on the same subject. Hence, in setting up ch. 363, Laws 1933, in the 1941 revised statutes, the revisor modified the original wording only as specifically amended by later acts.

Consequently he was correct in continuing to include the words "Such loans shall be made only for tuition, incidental, and other fees and shall not exceed one hundred fifty dollars to any one student" even though the words relate only to the first appropriation that has been used up and which has been superseded by subsequent appropriations not sub-

ject to such restriction. Even if there were loans still outstanding that were made under the original appropriation, the money received in payment thereof would fall into the revolving fund created by ch. 17, Laws 1935, and could be reloaned under the provisions of that chapter without regard to the limitation prescribed by ch. 363, Laws 1933.

You are therefore advised that the restrictions as to purpose and amount of loans contained in ch. 363, Laws 1933, relate only to the loaning of moneys from that appropriation and not to loans from the appropriations made by ch. 10 of the laws of the special session of 1933 and ch. 17 of the laws of 1935, and that if any balance is left in the original appropriation under ch. 363, Laws 1933, or from repayment of loans made under such appropriation, the same may now be loaned out under the present rules of the state department of public welfare without regard to the restrictions contained in ch. 363, Laws 1933.

WHR

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*Public Health — Dentistry* — Dental educational requirement of four years of thirty-two weeks each prescribed by sec. 152.03, subsec. (1), Stats., relates to academic or school years rather than to calendar years, and board of dental examiners may accept credentials of graduate who has received required one hundred twenty-eight weeks of instruction even though same has been completed in less than four calendar years.

March 13, 1942.

DR. S. F. DONOVAN, *Secretary,*  
*Board of Dental Examiners,*  
Tomah, Wisconsin.

Our attention is called to that portion of sec. 152.03, subsec. (1), Stats., which reads:

“\* \* \* On and after January 1, 1941, the degree of ‘Doctor of Dental Surgery’ shall be conferred only upon one

who has satisfactorily completed a curriculum of at least four years of thirty-two weeks each in a dental school or college recognized by the Wisconsin state board of dental examiners. \* \* \*”

We understand that it is now planned to offer the course of four academic years contemplated by the above statute within the space of three calendar years by means of adding summer school instruction, and thus to speed up the training of dentists urgently needed for military and civilian needs.

You inquire whether the statute above quoted will conflict with the proposed plan of accelerating the training of dentists.

The above quoted statutory provision was added to the statutes by ch. 216, Laws 1939. Prior to that time, the statute read:

“(1) No degree in dentistry shall be conferred in this state except doctor of dental surgery, and that only upon one who has satisfactorily completed a course of at least three years of eight months each in a recognized dental school. \* \* \*”

The section is subject to two possible interpretations: (1) The legislature intended the completion of four years of academic work which should be spread out over a period of four calendar years,—a relationship of academic years to calendar years; or (2) the term “four years” relates only to academic school years of not less than thirty-two weeks each.

Some universities operate on the quarter system, the year being divided into four quarters of twelve weeks each. Under this arrangement a student who does not enroll in the summer quarters would require four years in which to complete the same work that another student could cover in three years by attending the summer quarters. Even in schools operating under the traditional semester system, it is customary to apply summer school attendance towards residence requirements so that the residence requirement stated in terms of academic years may be materially shortened so far as calendar years are concerned. For example,

the residence requirement for graduation from the university of Wisconsin law school is three years. However, attendance at three summer sessions is counted as the equivalent of a year of residence, and hence it is possible to graduate with but two years of attendance in regular session, plus three summer sessions. Attendance at any summer session of the law school counts for one-third of a year's residence.

Thus, in dealing with educational matters or curriculum or residence requirements expressed in terms of "years" it seems to be quite customary to relate the term "years" to academic years and curriculum requirements. The provision in question, as it read prior to the 1939 amendment, refers to "one who has satisfactorily *completed a course*" and after the 1939 amendment the provision refers to "one who has satisfactorily *completed a curriculum.*" The years referred to would seem to be academic years as they are measured respectively by "eight months each" and "thirty-two weeks each." Such language would seem to refer to an academic year rather than a calendar year, particularly when read in the light of the language "satisfactorily completed a course" or "satisfactorily completed a curriculum."

The provision in question seems to have been drafted with the traditional academic year in mind. So far as we know it was not customary in 1939 or prior thereto to operate dental schools throughout the entire calendar year as is now proposed by adding summer school instruction. Does the provision referred to prohibit qualifying students by encompassing four academic years of work in three calendar years?

We think that it does not. We are of the opinion that the term "four years" relates only to four academic years of thirty-two weeks each.

In view of the foregoing you are advised that the board of dental examiners may accept the credentials of a graduate of a recognized dental school or college if he has received 128 weeks of instruction, even though it has not been spread out over four calendar years of study.

WHR

*Public Officers — Register of Deeds* — Under sec. 59.57, subsec. (1), par. (b), Stats., fee for recording conveyance of lands for highway purposes is ten cents per folio and three cents for every necessary entry in tract index when kept. Wisconsin recorders association lacks authority to add highway conveyance form to sixty standard forms mentioned in sec. 59.57 (1) (a) or to provide recording fee therefor other than that prescribed by statute.

March 13, 1942.

HIGHWAY COMMISSION.

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

You inform us that the state highway commission requested the Wisconsin recorders association for approval of form No. 250-A used by the commission in acquiring right-of-way for highway purposes and for the establishment of a uniform recording fee for such instruments by the registers of deeds. It was also requested that such form be designated as "Wisconsin Legal Form No. 61" under the provisions of sec. 235.16, Stats.

The Wisconsin recorders association at its July, 1941 meeting adopted a resolution establishing a fee of 15¢ per folio for recording such instruments, and you inquire if this conflicts with sec. 59.57, subsec. (1), par. (b), which provides for a recording fee of 10¢ per folio and 3¢ for every necessary entry in a tract index in the case of instruments relating to real estate other than those sixty standard forms for which uniform fees are provided under sec. 59.57 (1) (a).

There is no authority on the part of the Wisconsin recorders association or any other agency to change the recording fees provided by statute. For example it was ruled in XXIV Op. Atty. Gen. 429 that the county board cannot change the fees fixed by statute for the register of deeds, and in XXV Op. Atty. Gen. 494, that the register of deeds much charge the filing fees prescribed by the Wisconsin statutes rather than fee schedules prepared by federal officers or agencies presenting papers to be recorded.

Moreover, there is no authority on the part of the Wisconsin recorders association to add to the sixty standard forms now on file with the secretary of state.

Sec. 235.16 (1), Stats., provides:

"The several forms of deeds, mortgages, land contracts, assignments, satisfactions and other conveyancing instruments *heretofore prepared* by the Wisconsin state register of deeds association, denominated 'State of Wisconsin' forms and numbered 1 to 60, both inclusive, and now on file with the secretary of state, are hereby approved and recommended for use in the state of Wisconsin. Such forms shall be kept on file with and preserved by the secretary of state as a public record."

The approval and filing of the sixty standard forms by the register of deeds association was provided for by ch. 584, Laws 1919. From a reading of sec. 235.16 (1), above quoted, it appears that at the time of the enactment of ch. 584, Laws 1919, the register of deeds association had already prepared the sixty standard forms and that they were then on file with the secretary of state.

In XXVIII Op. Atty. Gen. 650, 651, we said:

"\* \* \* It was provided by section 235.16 (1) that such forms should be kept on file with and preserved by the secretary of state as a public record. There is nothing in chapter 467, Laws 1939, which would indicate that any forms other than those approved by the register of deeds association and presently on file in the office of the secretary of state are contemplated unless such a meaning could be attributed to the use of the words 'which are to be approved by the register of deeds association and thereafter filed in the approved form in the office of the secretary of state'. In view of the fact that the register of deeds association is a purely voluntary association and that sec. 235.16, Stats., has not in any way been changed by the 1939 legislature, it would not appear that ch. 467, Laws 1939, necessarily contemplates any further approval or filing of forms by the register of deeds association or is to be regarded as a direction to such association to so act in the future. A comparison of the names of the sixty forms listed in ch. 467, Laws 1939, with the names of the sixty forms now on file in the office of the secretary of state, which forms as we have seen constitute a public record, shows that the names of these forms and the corresponding numbers of each of them are the same in both instances."

Furthermore, even if it could be said that the register of deeds association had authority to add to the present standard forms, this would not include the authority to set up a fee arbitrarily and without legislative guidance or sanction. It is to be noted that the fees for the sixty standard forms vary from 50¢ to \$1.90. Nowhere is the fee of 15¢ per folio prescribed for any of these standard forms.

It is true that sec. 59.51 (11) and sec. 59.57 (6) provide for an additional filing fee of one-half the regular fee where the instrument offered for filing varies from the approved size or substance of paper as prescribed by sec. 59.51, and you state that the highway conveyance form does differ from such standards. However, it is apparent from the context of sec. 59.51 (11) and sec. 59.57 (6) that they both relate only to bills of sale, chattel mortgages, conditional sales contracts, assignments, releases and renewals or copies thereof, foreclosure affidavits and the like.

In view of the foregoing, it is our opinion that the recording fee for right-of-way conveyances is 10¢ per folio and 3¢ for every necessary entry in a tract index when kept, as provided by sec. 59.57 (1) (b) for entering and recording instruments relating to real estate other than the sixty standard forms covered by sec. 59.57 (1) (a), and that there is no authority on the part of any recording association or other agency to add to these sixty standard forms or prescribe recording fees other than those provided for by the statutes.

WHR

*Industry Regulation — Industrial Commission — Words and Phrases — Public Building — Sec. 101.01, subsec. (12), Stats.*, which defines term “public building” for purposes of state building code promulgated by industrial commission, applies to building owned by religious order and occupied by three or more sisters of that order who teach in parochial school.

March 13, 1942.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, *Chairman*.

You have inquired whether or not the provisions of the state building code as promulgated by the industrial commission under ch. 101, Stats., applies to a building owned by a religious order and occupied by sisters of that order who teach in a parochial school. Our attention is called to sec. 101.01 (12), which provides:

“The term ‘public building’ as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants.

You do not state specifically the number of sisters occupying the building, but for purposes of this opinion, we will assume that there are three or more.

In construing the word “tenant” as used in the above statute, our supreme court has held that it does not mean simply “tenant” as used in the phrase “landlord and tenant” but that it has the more general meaning of one in possession of the premises, whether as owner or otherwise. *Skrzypczak v. Konieczka*, 224 Wis. 455.

The court in this case refers to the definition of the term as used in Webster’s Dictionary. So far as material here, this definition reads:

“One who holds or possesses real estate, \* \* \* by any kind of right, whether in fee simple, in common, in severalty, for life, for years, or at will; also (as correlative to

landlord), one who has the occupation or temporary possession of lands or tenements the title of which is in another.

“One who has possession of any place; a dweller; an occupant.”

In view of the fact that safety is the object of the statute, as the court points out in the above case, no particular showing of tenancy in the technical sense is necessary to bring the situation within the purview of the statute, and apparently the relationship between each of the occupants of the building and the religious order owning it is one of tenancy either express or implied in the broader sense in which that term is used so far as sec. 101.01 (12) is concerned.

It is well established that the safe-place statute applies to corporations organized for religious and charitable purposes. *Jaeger v. Evangelical Lutheran Holy Ghost Congregation*, 219 Wis. 209.

Hence there can be no exemption here from the requirements of the statute because of the character of the ownership or occupancy.

You are therefore advised that sec. 101.01 (12) applies to the building in question if it is occupied by three or more sisters.

WHR

*Public Officers — County Board — Malfeasance — City Supervisor* — Under sec. 62.09, subsec. (7), par. (d), Stats., it is unlawful for supervisor elected from ward in city to county board to sell insurance to city if annual premium exceeds three hundred dollars, irrespective of his share of commission thereon.

Supervisor elected from ward in city to county board does not violate sec. 348.28, Stats., by selling insurance on city school buildings.

Supervisor elected from ward in city to county board violates sec. 348.28 by selling insurance on city buildings other than schools if he is also member of common council of city from which he is elected.

March 13, 1942.

JOHN A. MOORE,  
*Acting District Attorney,*  
Oshkosh, Wisconsin.

You inquire whether there is a violation of either sec. 62.09, subsec. (7), par. (d), Stats., or sec. 348.28, Stats., if a supervisor who is elected from a city ward to the county board contracts with a city for insurance on city buildings and city school buildings, where the total premiums for the same exceed three hundred dollars for any one year, regardless of what may be his share of the commissions thereon.

Sec. 62.09 (7) (d), Stats., provides in part as follows:

“No city officer shall be interested, directly or indirectly, in any improvement or contract to which the city is a party, and whenever it shall appear that such is the case such contract shall be absolutely null and void and the city shall incur no liability whatever thereon. \* \* \* The provisions of this section shall not apply \* \* \* to contract for the sale of printed matter or any other commodity, not exceeding three hundred dollars in any one year, \* \* \*.”

A supervisor who is elected from a ward in a city to the county board is a city officer. Sec. 62.09 (1) (a), Stats., XXVII Op. Atty. Gen. 704. It is a violation of the above quoted statute for such county board member to make a contract with the city for insurance on any of its buildings,

XII Op. Atty. Gen. 279, unless such contract is "for the sale of \* \* \* commodity, not exceeding three hundred dollars in any one year." This last quoted exception was construed in XXVII Op. Atty. Gen. 841 to permit city officers to lawfully sell insurance to the city if the amount of the *annual premium* does not exceed three hundred dollars. Thus, the amount of money that will be disbursed by the city on a contract with a city officer determines whether such contract falls within said exception of sec. 62.09 (7) (d), Stats., and the extent of the city officer's pecuniary interest therein is wholly immaterial, as long as there is some such interest. Therefore, it is a violation of sec. 62.09 (7) (d), Stats., for a county board member who is elected from a ward in a city to make a contract with the city for insurance on any of its buildings where the total annual premiums paid by the city exceed three hundred dollars, irrespective of what his commission may be thereon or of the fact that the commission on such insurance is shared by him with others.

As to whether a supervisor who is elected to the county board from a city ward may, under sec. 348.28, Stats., lawfully contract with the city for insurance, several questions are presented. In *State v. Bennett*, 213 Wis. 456, 252 N. W. 298, sec. 348.28, Stats., was construed as not making it an offense for an officer, clerk or agent of a municipality to have a pecuniary interest in a contract unless the contract was made by, to, or with him in his official capacity.

The power and duty of insuring school buildings is vested in the respective school boards. Secs. 40.16 (2) and 40.53 (1) and (7), Stats. Since a county board member has no duty to perform with respect to the insuring of school buildings, a contract with the city for insurance on its school buildings is not made by him in any official capacity and so is not in violation of sec. 348.28, Stats. XXIV Op. Atty. Gen. 180.

However, a different result may obtain with respect to contracts with the city for insurance on its other buildings. A supervisor who is elected to the county board may also be a member of the common council of the city from which he is elected. Secs. 59.03 (3) and 62.09 (1) (b), Stats., XXII Op. Atty. Gen. 501. Under sec. 62.11 (5), Stats., the common council has the management and control of city prop-

erty, which presumably includes the power and duty to keep the property properly insured. A supervisor who is elected to the county board and who is also a member of the common council of the city from which he is elected would therefore act in an official capacity in authorizing or approving a contract of insurance on city property. Thus, it would be a violation of sec. 348.28, Stats., for him to make a contract with the city for insurance on city buildings, XXV Op. Atty. Gen. 393, unless the annual premiums for the same do not exceed one hundred dollars in the case of a first class city or three hundred dollars in the case of other class cities, such transactions being excepted from sec. 348.28, Stats., by its own provisions. It follows that a supervisor who is elected to the county board and who is not also a member of a city council may, without violating sec. 348.28, Stats., sell insurance to the city regardless of the amount of the annual premium thereon.

MLS

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*Municipal Corporations — Municipal Borrowing — Municipal Budgets* — Sec. 67.12, Stats., does not authorize temporary borrowing by county to pay accrued claims for permanent improvements to fairgrounds, which claims were erroneously omitted from county budget adopted under sec. 65.90, since such claims are not "current and ordinary expenses".

March 13, 1942.

O. STROSSENREUTHER,  
*District Attorney,*  
Shawano, Wisconsin.

You state that when the 1942 county budget was adopted pursuant to sec. 65.90, Stats., the board failed to take into consideration approximately \$15,000 in outstanding claims and bills representing amounts due for permanent improvements to the county fairgrounds. You inquire whether the

county may borrow this amount under sec. 67.12, Stats., and if so whether the provisions of sec. 65.90 must be observed. You also state that the amount already set up in the 1942 budget has reached the maximum permissible limit of taxation under sec. 70.62 (2).

Sec. 67.12 (1) authorizes temporary borrowing to pay "current and ordinary expenses, including expenditures under the provisions of chapter 49 and maturing interest on its funded indebtedness \* \* \*." The question is therefore whether the payment of outstanding claims for permanent improvement to the fairgrounds constitute "current and ordinary expenses" within the meaning of the foregoing section. In the case of *Herman v. The City of Oconto*, (1901) 110 Wis. 660, 678, the court stated as follows:

"It cannot be said with any show of right that the building of a sewer system is a current expense. While it is not easy to accurately define what may be included under that head, still it is plain that it must be limited to such as are necessary to carry on the city government,—such as are usual and ordinary from year to year."

The term "current expenses" has been held not to include expenditures for building a courthouse (*Thompson v. Mayo*, (1918) 135 Ark. 143, 204 S. W. 747) nor a city hall (*State v. Harvey*, (1919) 108 Wash. 48, 182 Pac. 931) nor a schoolhouse (*Sheldon v. Purdy*, (1897) 17 Wash. 135, 49 Pac. 228, 230) nor the cost of opening or making permanent improvements to streets (*Stone v. Bonaparte*, (1930) 148 Okla. 70, 297 Pac. 228, 232) nor any highway construction (*State v. Brown*, (1925) 112 Ohio St. 590, 148 N. E. 95, 98; XXIV Op. Atty. Gen. 459) nor construction of a new barn on the poor farm premises (XXIV Op. Atty. Gen. 459). It is also at least questionable that the term "current expenses" includes expenditures for a year other than the current year. *Babcock v. Goodrich*, (1874) 47 Cal. 488, 510; *State ex rel. Egger v. Payne*, (1899) 151 Mo. 663, 52 S. W. 412, 414.

For the foregoing reasons, it is clear that this is not a proper case for temporary borrowing under sec. 67.12.

It would appear that in order to pay these claims out of current revenues it will be necessary to amend the budget

in the manner provided by sec. 65.90 (5). Since anticipated revenues cannot now be augmented, it will be necessary to reduce other appropriations correspondingly, in amounts sufficient to free enough funds to pay the claims.

WAP

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*Social Security Act — Poor Relief — Old-age Assistance*

— Attorney general does not express opinion as to priority of purchase money mortgage executed by pensioner subsequent to filing of old-age pension liens where question is academic and of no present practical importance to department of public welfare in administration of law.

Where daughter and son-in-law agree to support and maintain old-age pensioner for balance of his life if pension department will release property owned by pensioner from existing old-age pension lien, county pension administrative officers may release from such lien but are not obliged to do so even though municipality having financial burden by virtue of county charge back under sec. 49.37, subsec. (2), Stats., desires and requests release of existing lien and handling of future support and maintenance of pensioner in such manner.

March 18, 1942.

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

You request our advice with respect to the proper application of sec. 49.26, subsec. (4), Stats., to two factual situations, as follows:

“1. A person is receiving old-age assistance and a certificate of lien has been filed. He purchases a home with money borrowed from a bank. This is done without contacting the county pension department. The bank’s purchase money mortgage is subsequently filed. Is the bank’s mortgage subordinate to the old-age assistance lien in the

amount of the old-age assistance lien as of the time of filing of the bank's mortgage, or is the bank's mortgage subordinate to the old-age assistance lien for all old-age assistance previously and subsequently paid the beneficiary?"

As to the particular case,—the pensioner is not dead. You may never be faced with the question of having to determine the question of priority. You have no immediate necessity of determining any similar question of priority in relation to any other pending cases. It is our thought that any question such as the above (which does not appear to be of any present practical importance to your department in administration of the law) should be met when a situation arises which calls for a solution of it.

Unfortunately the statute is not clear. Any interpretation that we might place upon it in relation to the problem presented would necessarily partake of speculation. There is no exception in the statute with respect to purchase money mortgages. Question: Would enforcement of the pension lien as one entitled to priority over the purchase money mortgage result in such a ridiculous or inequitable situation and work such a hardship against the mortgagee that it can be reasonably concluded the legislature never intended such a result? If it can be said that such conclusion is a legitimate conclusion, then it would seem the courts might well be justified in reading an exception into the statutes in favor of purchase money mortgages, even though there is no such express exception.

On the other hand, reading the statutes as a whole, a meritorious argument can be made to the effect that the legislature did intend to subordinate purchase money mortgages such as the one in question to the prior old-age assistance lien and to the full amount due at the time of liquidation thereof. If we were to express an opinion that a purchase money mortgage, such as the one in question, is not subordinate to the old-age pension lien, banks might make such loans in reliance upon such opinion. Such opinion might not ultimately be sustained in the courts (the question is a close one) and banks so circumstanced would then be inclined to place the blame for their predicament upon this office.

Your second factual situation is as follows:

"2. A man and his wife receive old-age assistance. They own in joint tenancy the small farm on which they reside. The wife dies after receiving \$780 in old-age assistance. The husband still lives and has received \$1,716 in old-age assistance. He is 70 years of age. His daughter and son-in-law will agree to maintain him without the need of old-age assistance if the county pension department will release its old-age assistance lien for all amounts received by both the recipient and his wife. Opinions as to the value of the property vary between \$1,500 and \$4,000. The county board pension advisory committee has declined the offer of the daughter and son-in-law. The city council of the city within whose boundaries the small farm is located are urging the release of the lien. May or should the old-age assistance lien be released under such facts?"

You further advise that the city involved in this situation is in a county which charges back the local share under sec. 49.37 (2), Stats. The city thus actually has the financial burden of the local share rather than the county. As to whether the lien *may* be released under such facts, we are of the opinion that it may be. Sec. 49.26 (4) provides in part as follows:

"\* \* \* and provided, also, that whenever the county judge of the county in whose favor such lien exists is satisfied that the collection of the amount paid as old-age assistance will not thereby be jeopardized 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, he may release the lien hereby imposed with respect to all or any part of the real property of the beneficiary, \* \* \*"

Release of the lien is thus authorized in two situations: (1) where the lien will not be jeopardized and (2) where release is necessary to provide for maintenance or support. Authority to release, under the facts of this case would appear to be conferred by (2) above.

As to whether the old-age assistance lien *should* be released under such facts, that is a matter for the county pension administrative officers to determine. There will be

many, many factors which will enter into such a determination, such as ability of the daughter and son-in-law to furnish the support and maintenance, the past relationship between the beneficiary and the daughter and son-in-law, the present relationship, the expectancy of life and present status of the health of the beneficiary, the value of the property involved (as usual, opinions as to value take a wide range) and undoubtedly many other factors, all of which go to determine the providence of such a release from a financial standpoint, as well as from the future maintenance and support question in relation to this particular beneficiary. The county pension officers are charged with the duty of weighing all such factors and making the ultimate determination with respect thereto. Any determination they make will be final and conclusive unless it can be said that the determination is so wholly arbitrary and capricious that it does not manifest a good faith exercise of the discretion conferred upon them. The situation would appear to be peculiarly one for the exercise of a sound discretion.

NSB

*Taxation — Tax Sales* — Where county does not take possession of lands on which it holds tax deed and does not bring any action to recover possession within period prescribed in sec. 75.36, Stats., results are: (1) County's tax title is extinguished if possession of lands was held during prescribed period by former owner or persons claiming under him; (2) County's title becomes absolute if lands are unoccupied during entire period of three years after execution and recording of deed and no action is brought during that period to test its validity.

March 18, 1942.

RALPH STELLER,

*District Attorney,*

Hayward, Wisconsin.

You state that you desire to prosecute some parties under sec. 343.511, Stats., for larceny of timber from lands to which the county holds a tax deed. You state that the county did not go into possession of said lands nor bring any action to recover possession thereof within three years from the recording of the tax deed.

Your first question relates to the state of the title to the lands.

We assume that the county's tax deed is fair on its face, in which case the limitation statutes applicable are secs. 75.26 and 75.27. Different sections of the statutes are applicable in the case of deeds void on their face.

You have not informed us whether the lands were occupied by the former owner after the execution of the deed or whether they were unoccupied. Under the rulings of our supreme court the effect of the limitation statutes cannot be determined without knowing who held possession of the lands involved during the period following execution and recording of the deed. You have indicated that the county was not in possession and we will accordingly discuss the status of the title first, on the assumption that the possession was held by the person who owned the land at the time of the tax sale or those claiming under him; and second, on the assumption that the lands were unoccupied.

It is true, as you have pointed out, that the court has referred to the statute limiting the time for bringing action to test the validity of a tax deed as a double-edged sword, in that it may cut off either the right of the grantee of the tax deed or that of a former owner. An examination of the cases in which the limitation statutes have been applied, however, will show that the sword cuts in only one direction at a time, that is, against the person who, under the facts of a particular case, is under the necessity of bringing action to establish his title. There is no case in which it has operated to divest both the title of the tax deed grantee and that of the former owner. The reason why the simile of the double-edged sword was originally used was doubtless because when the question first arose there was only one limitation statute and it was not entirely clear from the wording that the legislature did not intend it as a limitation against the tax deed grantee only. The statute (sec. 123, ch. 15, Revised Statutes 1849) reads:

“Any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the lands redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter.”

Since that time two separate statutory provisions have been enacted and continued in force, one with respect to the limitation on the tax deed grantee and the other with respect to the limitation on the former owner. These statutes, which are now secs. 75.26 and 75.27, have continued in effect without substantial change since 1880.

The statutes limiting the time for bringing action to test the validity of the tax deed are statutes of limitation, the purpose of which is to fix the status of the title rather than to render it uncertain. In discussing these limitations, the court said in *Knox v. Cleveland*, (1860) 13 Wis. 245, 249:

“\* \* \* The law of limitation to actions is introduced for the public good, in order that title to property may not remain forever doubtful and uncertain, after allowing the owner sufficient time in which to pursue and establish his claim.”

The purpose of such a statute is effected by vesting the title to land in one owner, and extinguishing the adverse claim. As stated in *Laffitte v. Superior*, (1910) 142 Wis. 73, 83-84:

“\* \* \* Under our system the statute of limitations does not act merely on the remedy. It extinguishes the right on one side and creates a right on the other which is of as high dignity as regards judicial remedies as any other; a right entitled to constitutional protection.”

The statutory limitation on the bringing of actions to test the validity of tax deeds operates to divest the title of either the tax deed grantee or the former owner, depending upon which was under the “necessity of resorting to legal proceedings”; but it has the reciprocal force of vesting corresponding rights in the adverse claimant. See *Laffitte v. Superior*, *supra*.

The action which is barred by secs. 75.26 and 75.27 is only that action which is necessary to establish the validity or invalidity of the tax deed as between the tax deed grantee and the former owner, or those claiming under them. Once the statutory period has expired, the title of one or the other becomes absolute in so far as rights under the tax deed are concerned, and the person whose right thus becomes absolute may maintain as an incident to his title whatever action may be necessary to protect his rights against the world. Under sec. 75.14 (1) the tax deed grantee gets a fee simple which enables him to maintain any action incidental to the ownership of real estate. *Lawrence v. Kenney*, (1873) 32 Wis. 281; *Cezikolski v. Frydrychowicz*, (1904) 120 Wis. 369; *Wisconsin River Land Co. v. Paine Lumber Co.*, (1907) 130 Wis. 393; *Cole v. Van Ostrand*, (1907) 131 Wis. 454; *Van Ostrand v. Cole*, (1907) 131 Wis. 446.

If the former owner of the property has remained in possession throughout the three years after the execution and recording of the tax deed and the tax deed grantee has failed to take the necessary steps to protect his deed, the title of the former owner thereupon becomes absolute and he may bring whatever action is incidental to that title. *Laffitte v. Superior*, *supra*.

In order to determine to whose benefit the limitation statutes operate in a particular case, it is necessary to know who was in possession of the lands. The court said in *Knox v. Cleveland*, (1860) 13 Wis. 245, 251:

“\* \* \* For without knowing which had the possession it is impossible for the court to determine in whose favor the limitation is to be applied. The party in possession needed no recovery and was under no necessity of resorting to legal proceedings. It devolved on the party out, whichever it might be, to bring his action within the time prescribed by the statute.

“But when the premises were unoccupied, the intention of the legislature seems to have been to make the recording of the tax deed such a claim of title on the part of the holder, as enabled the original owner, if he desired to test its validity, to maintain his action against him. It must have been known that many cases of that kind would arise, \* \* \*. The recording of the deed was regarded as a *bona fide* assertion of title on the part of the holder, and a declaration that he was prepared to defend it.”

With respect to unoccupied land, the same rule as announced in the above excerpt has been followed in subsequent cases, regardless of the changes in wording of limitation statutes. *Parish, et al. v. Eager* (1862) 15 Wis. 532; *Lawrence v. Kenney, supra*; *Cezikolski v. Frydrychowicz, supra*; *Wisconsin River Land Co. v. Paine Lumber Co., supra*; *Cole v. Van Ostrand, supra*; *Van Ostrand v. Cole, supra*.

Sec. 75.36, Stats., provides that deeds executed to the county “shall have the same force and effect as deeds executed by such clerk to individuals for lands sold for the non-payment of taxes.”

The general rules announced in the foregoing cases apply to lands on which the county has taken tax deeds. First, if the lands remained in the possession of the person who owned them at the time of the tax sale or of those claiming under him, and the county failed to bring action to recover possession within the period specified in sec. 75.26, Stats., the county's rights under the deed are extinguished and the title of the former owner or his successors is vested. Second, if the lands were unoccupied and remained unoccupied

during the three years after the recording of the county's tax deed, the county's title becomes absolute.

You also ask who is liable for the delinquent taxes on the lands if the county's tax title is extinguished by the statute of limitations.

In *Pereles v. Milwaukee*, (1933) 213 Wis. 232, 251 N. W. 255, it was held that the purchase of a tax certificate on land constitutes a payment of the tax and the tax is thereby extinguished. The court said at pages 235-236:

“\* \* \* Under that provision, upon the striking off of the land to the city and its receiving a tax certificate thereof, the tax for which the property was sold and struck off is no longer a tax which is to be paid. After that, there remains in the owner merely the right of redemption (under sec. 75.01, Stats.) from the lien of the tax certificate. As this court said in *Lindsay v. Fay*, 28 Wis. 177:

“ . . . The conclusion seems inevitable, that a redemption of the land is not a payment of the tax. . . . There seems to be a wide difference between the payment of the tax by the owner of the land, and the redemption of the land by him after it has been sold for non-payment of the taxes assessed upon it. There is really no tax to be paid when land is thus redeemed. That has been canceled by the sale.’

“That has been considered the result even if the property is acquired by the state or a municipality on such tax sale.

“The purchase by the state of property sold for delinquent taxes will extinguish the debt and all liens arising from those taxes.’ Black, Law of Tax Titles (2d ed.) sec. 301.

“When the body politic by which the tax was levied bids in the land, it is not obliged to go through the useless form of paying the price with one hand and receiving it with the other, but on the consummation of the sale the payment is in legal effect made.’ 26 Ruling Case Law, p. 417, sec. 375.

“Consequently, when, prior to the tax sales to plaintiff and the issuance to him by the county of certificates and deeds pursuant to those sales, the property in suit was struck off to the city and tax certificates were received by it for city taxes, those city taxes no longer constituted unpaid taxes and therefore plaintiff's title was not subject thereto under the provision in sec. 75.14 (1), Stats.”

It is true that purchase of a tax certificate might be held to constitute a payment of the tax under one statute and not

under another. Even if the sale of a certificate were not a payment, however, it has been held that the election by a county to exchange its certificate for a tax deed extinguishes the general taxes for which the certificate is issued and the lien of all general taxes represented by tax certificates previously issued. *In re Dancy Drainage District*, (1929) 199 Wis. 85, 89-90; *Spooner v. Washburn Co.*, (1905) 124 Wis. 24.

The case of *In re Dancy Drainage District*, *supra*, also held that where the county took a tax title, the lien of taxes subsequently assessed merged with its title, since certificates for later years could be sold only to the county under the provisions of sec. 75.32, Stats. If, however, the county's title under the tax deed is defeated by the statute of limitations, the lien of subsequent tax certificates could not well be merged with it.

Under sec. 75.32 the county may be the owner of tax certificates for two years subsequent to the one for which it took its deed. Where a tax deed executed to a county is cut off by the limitation statute, the county might still preserve its rights under a subsequent certificate. Under section 75.20 the rights under a certificate held by the county are not extinguished until fifteen years after the sale. The general rule is that a tax deed does not cut off subsequent assessments. Under the rule of inverse priority followed in this state the last assessment in point of time is the first in point of right. *Pereles v. Milwaukee*, (1933) 213 Wis. 232; *Cole v. Van Ostrand*, (1907) 131 Wis. 454.

The various statutes which make the payment of tax a condition precedent to contesting the validity of a tax deed do not apply where the invalidity of the deed results from the operation of a limitation statute rather than from legal action brought to contest it. *Perkins v. Perkins*, (1921) 173 Wis. 421.

BL

*Public Officers* — Clerk of circuit court is entitled to fees from naturalization proceedings in addition to salary fixed by county board. Board may not compel him to pay such fees into county treasury.

County board may not provide two alternative compensation plans for office of clerk of circuit court and permit clerk to choose which shall be applicable.

March 23, 1942.

JOHN P. MCEVOY,

*District Attorney,*

Kenosha, Wisconsin.

You have asked:

1. May the county board fix a salary to be paid to the clerk of the circuit court in lieu of all fees, including fees in naturalization proceedings?

2. May the county board fix the salary of the clerk of circuit court in the alternative, one figure to be applicable providing the clerk retains naturalization fees and the other to be applicable providing he agrees to turn such fees into the county treasury?

The legislature by the enactment of sec. 59.15, subsec. (1), par. (d), Stats., has indicated its intent that the compensation of the clerk of circuit court for work done for the United States government or for congress shall be in addition to the annual salary fixed by the county board. The enactment of the above provision changed the rule announced in *Barron County v. Beckwith*, 142 Wis. 519. The opinion was given in XXII Op. Atty. Gen. 258 that the fees received by the clerk from naturalization proceedings are within the scope of sec. 59.15 (1) (d) and are the clerk's own property rather than the property of the county. In the absence of specific statutory authorization, the county board has no power to change the law and to deprive the clerk of circuit court of property to which the statutes entitle him.

Sec. 59.15, Stats., provides that the salary of the clerk of circuit court to be elected in the ensuing year shall be fixed by the county board at its annual meeting. The reason for such a requirement is discussed in the following excerpt from *Feavel v. Appleton*, 234 Wis. 483, 487-489:

“\* \* \* In *Smith v. Phillips*, 174 Wis. 54, 56, 182 N. W. 338, sec. 62.09 (6) (b), was construed and its purpose declared. It was there said:

“The terms of this statute are positive and indicate that the legislature intended that the common council of cities are required to fix the salaries of city officers at this first regular meeting in February. Manifestly it was considered the best municipal policy to remove the question of compensation of city officers from the influence of the municipal election which follows early in April. This idea of freeing the salary question from municipal political influence is also guarded by forbidding any increase or diminution of such fixed salary during the term of any such officer. We are of the opinion that the circuit court correctly held that the terms of this statute are mandatory; and require city councils to fix the amount of the official municipal salaries at the regular meeting in February.’

“A similar statute, sec. 59.15 (1), Stats. 1937, which relates to the fixing of salaries of county officers by county boards, in part, provides:

“The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer’s term.’

“The substance of that statute was adopted at a very early date. Ch. 75, Laws of 1867. The public policy declared in that statute is obviously similar to that declared in sec. 62.09 (6) (b). It too has been construed by this court. In *Hull v. Winnebago County*, 54 Wis. 291, 293, 11 N. W. 486, it was said:

“It is quite clear that the statute contemplates that the power shall be exercised at a *period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office.* Hence the statute provided that the board should fix, at its annual meeting, the amount of annual salary which each county officer should receive.’

“In *State ex rel. Banks v. McClure*, 91 Wis. 313, 315, 316, 64 N. W. 992, it was said:

“It is very apparent by the terms of sec. 694, R. S. (substantially the same as 59.15 (1)) that the legislature intended to make an harmonious general law, by which the salaries of all salaried county officers should be fixed before their election, doubtless for the purpose of removing from

the question personal and political feelings, and of informing a candidate for office what the salary of that office was to be. *Hull v. Winnebago County*, 54 Wis. 291. It is equally apparent that both of these objects are desirable objects.

“We construe the two statutes (sec. 694 and sec. 694a) as meaning that the sheriff, after he has become a salaried officer, is entitled to know before his election what salary he is to receive, and after his election is secure from change in his salary, as well as other county officials.’”

A provision for alternative salaries, leaving the determination of which should be applicable to be made after the election of the clerk of circuit court, would be contrary to the statutory requirement that the salary be fixed at the annual meeting. The question of which salary should be chosen might conceivably become an issue in the election of the clerk, which would be contrary to the legislative policy discussed in the foregoing excerpt.

The proposal to permit the clerk to elect which of two alternative compensation plans should be applicable is subject to the further objection that it would delegate to that officer a power given by statute only to the county board. In *Lord v. The City of Oconto*, 47 Wis. 386, the supreme court said at pages 388-389:

“The power to regulate the tolls was vested *solely*, by the legislature, in the mayor and common council, and such power could not be delegated by the common council alone, or jointly with the mayor, to any other officers or persons by lease or otherwise. This principle is elementary, and scarcely needs the support of reported cases, but is most distinctly recognized in all of the cases upon the subject. 1 Dillon on M. Corp., secs. 60, 445, 618; Cooley's Con. Lim., sec. 204. In *Lauenstein v. The City of Fond du Lac*, 28 Wis. 336, where the law conferred upon the common council, in connection with the board of education, the power to purchase a site for a school house, it was held that such power could not be delegated by the common council to the board of public works, and that a contract for the purchase of such site, entered into by the board of education, was not binding.

“In *Mullarky, Administrator, v. The Town of Cedar Falls*, 19 Iowa, 21, where the town conveyed away by deed of trust a toll bridge, with the franchise of collecting the tolls, it was held that the town could not delegate such power to collect the tolls, and that the deed for such purpose

was void. The same principle, in nearly parallel cases, is recognized in *Gale v. The Village of Kalamazoo*, 23 Mich., 344, and in *Milhau and others v. Sharp and others*, 17 Barb., 435, and in the numerous cases in the brief of the respondent's counsel."

See also *State ex rel. Buchanan v. Cole*, 218 Wis. 187 at 189-190.

The fixing of compensation of county officers is a function involving the exercise of discretion. The statute has authorized the performance of this function by the county board only. Such power may not be delegated.

The legislature has by sec. 59.15 (1) (d) indicated its intent that fees from naturalization proceedings shall belong to the clerk of circuit court as part of the compensation incident to the office. That the compensation of a public officer is an incident of the office and not a matter of contract is well settled. See *Nelson v. City of Superior*, 109 Wis. 618, 622, where it is said:

"\* \* \* The salary to be paid to a public officer is not a matter to be fixed by contract, or that can be so fixed, either before or after the term commences. It is an incident of the office, and an incumbent thereof has the same title thereto as he has to the office. A municipality governed by a charter like that of respondent can no more make the salary of an officer a matter of contract than it can make the office itself such a matter. It cannot omit to elect a person to fill an office and then contract with some person to perform its duties. No one would claim that; yet it is just as plain that it cannot fill an office and make the compensation for performance of its duties a matter of contract. This court very recently passed upon the question involved. *Rettinghouse v. Ashland*, 106 Wis. 595. The authorities to that effect are numerous. The following are but a small part of them: *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38; *People ex rel. Ryan v. French*, 91 N. Y. 265; *Kehn v. State*, 93 N. Y. 291; *Clark v. State*, 142 N. Y. 101; *State ex rel. Kercheval v. Mayor of Nashville*, 15 Lea, 697; *Dyer v. U. S.* 20 Ct. Cl. 166; *Montague's Adm'r. v. Massey*, 76 Va. 307; *Larew v. Newman*, 81 Cal. 588; *Scholfield v. U. S.* 32 Fed. Rep. 576; *Stocksdale v. U. S.* 39 Fed. Rep. 62; *Bowe v. St. Paul*, 70 Minn. 341.

While a public officer might voluntarily make a contribution to the government of a part of his salary, such contri-

bution may not be compelled by withholding a portion of the salary. See *Schuh v. Waukesha*, 220 Wis. 600.

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*Automobiles — Law of Road* — Provisions of sec. 85.09, subsec. (15), Stats., as created by ch. 206, Laws 1941, and relating to releases of proof of financial responsibility by commissioner of motor vehicle department in cases involving suspension or revocation of drivers' licenses, apply only to offenses resulting in suspension or revocation where such offenses were committed subsequent to September 1, 1941, effective date of ch. 206, Laws 1941. By virtue of sec. 85.137, provisions of sec. 85.08 (19), Stats. 1939, still apply where offense was committed prior to September 1, 1941.

March 23, 1942.

MOTOR VEHICLE DEPARTMENT.

You have called our attention to sec. 85.09 (15) (a) Stats., which reads:

“The commissioner shall upon request cancel any bond or cancel any certificate of insurance, or the commissioner shall direct and the state treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this section as proof of financial responsibility, or waive the requirements of filing proof of financial responsibility in any of the following events:

“(a) At any time after one year in the case of a suspended license, and at any time after 2 years in the case the license was revoked, from the date such proof was required when during such period preceding the request of the person on whose behalf such proof was filed, has not been convicted of any offense for which the penalty is suspension or revocation of his license.”

We are asked whether the foregoing provision is applicable to revocations and suspensions of licenses that occurred prior to September 1, 1941, the effective date of ch. 206, Laws 1941, which created sec. 85.09 (15) (a).

This question is answered in the negative for the reason that sec. 85.137, Stats., which was also created by ch. 206, Laws 1941, provides in effect that the provisions of subsec. (19) of sec. 85.08 of the statutes of 1939, are to continue to apply to bonds, proofs of insurance, and money and collateral filed, furnished or deposited, pursuant to sec. 85.08 of the statutes of 1939, notwithstanding the repeal of said sec. 85.08 of the statutes of 1939. Note the following language from sec. 85.137:

“\* \* \* For the purpose of this section the provisions of subsection (19) of section 85.08 of the statutes of 1939 repealed by this act continue to apply to bonds, proofs of insurance and money and collateral filed, furnished or deposited pursuant to section 85.08 of the statutes of 1939 repealed by this act.”

We deem it unnecessary here to discuss the differences between sec. 85.08 (19), Stats. 1939, and sec. 85.09 (15) (a), 1941 Stats., and merely point out that the provisions of the former statute are still operative as to revocations and suspensions occurring prior to September 1, 1941, by reason of the foregoing language in sec. 85.137.

It might also be added in closing that even though the suspension or revocation took place subsequent to September 1, 1941, sec. 85.08 (19), 1939 statutes, would still apply in those cases where the offense had been committed prior to September 1, 1941, by reason of the following language in sec. 85.137, 1941 statutes:

“The repeal of section 85.08 of the statutes of 1939 repealed by this act shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such section before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such sections, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal. And criminal prosecutions and actions at law or in equity founded upon such repealed sections; whether instituted before or after the repeal thereof, shall not be defeated or impaired by such repeal but shall, notwithstand-

ing such repeal, proceed to judgment in the same manner and to the like purpose and effect as if such repealed sections continued in full force to the time of final judgment thereon. \* \* \*.”

WHR

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*Taxation — Tax Sales* — Town may not, by payment of delinquent taxes, interest and penalties, compel county to convey to such town tax deed or tax certificate held by county on lands located in such town.

March 23, 1942.

RALPH STELLER,

*District Attorney,*

Hayward, Wisconsin.

You have asked two questions:

1. If a town should pay to the county all taxes, interest and penalties that the county has against a parcel of land in a town and the land is county owned by virtue of the county taking a tax deed thereon, can the town force the county to deed such land to the town?

Under sec. 75.14, subsec. (1), Stats., a tax deed shall “vest in the grantee an absolute estate in fee simple”. Under sec. 75.36, Stats., deeds executed to the county “shall have the same force and effect as deeds executed by such clerk to individuals”. In *Spooner v. Washburn Co.*, 124 Wis. 24, 33-34, the court held that when the county takes a tax deed to land it becomes the absolute proprietor of such land and may deal with the land as it sees fit. The following excerpt is from the opinion in that case:

“\* \* \* 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 may

see fit. Under similar statutes in other states the deed is held to vest all the interest and title in fee, and gives the county full power of disposition. *Conn. Mut. L. Ins. Co. v. Wood*, 115 Mich. 444, 74 N. W. 656; *Dyke v. Whyte*, 17 Colo. 296, 29 Pac. 128; 2 Cooley, Taxation, 977, 978. 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. \* \* \*

Since the county is the absolute owner of land upon which it holds a tax deed, a town cannot compel the county to convey such land, in the absence of a contract or other circumstances creating rights independent of those existing by force of the tax deed.

2. If a town would pay to the county all taxes, interest and penalties that the county has against a certain parcel of land on which the county holds a tax certificate, could the town force the county to assign the tax certificate?

Sec. 75.34 (1), Stats., requires a county treasurer, "when no order to the contrary shall have been made by the county board," to assign tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest thereon at the rate specified in the certificates. Whatever obligation the above section imposes upon the county treasurer, however, would relate to assignment of certificates only to such persons as have authority to receive an assignment. In *Eaton v. The Supervisors of Manitowoc Co.*, 44 Wis. 489, it was held that towns are not authorized to purchase and hold tax certificates. The court said at pages 494-495:

"\* \* \* If, then, a town cannot become a purchaser at a tax sale without express statutory authority, how can it be claimed that a town can become the purchaser of a tax certificate, either from a county or an individual, without such express authority?

"The authority and consequences would be the same, whether a town should be the original purchaser or the assignee of such purchaser. What is not allowed to be done directly, cannot be done indirectly.

"In either case, the town could sell the certificate or take a deed of the land, or, in case of the illegality of the tax, sue

the county for the repayment of the consideration, or embark generally in tax-title dealings and speculations. Towns are the creatures of the law, with limited and clearly defined powers, and can do nothing which is not expressly authorized, or clearly implied from authority expressly conferred, within the scope of the legitimate objects and purposes of such a corporation; and certainly such objects and purposes do not embrace speculation in tax titles, so commonly attended with litigation, perplexity and mischief. That towns, in certain limited and necessary cases, may take and hold real estate, is foreign to this question.

"We consider, then, that towns are not authorized to purchase or own tax certificates, \* \* \*."

See also *Irvin, et al. v. Smith*, 60 Wis. 175; *Jackson v. The Town of Jacksonport*, 56 Wis. 310, 313.

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*School Districts — Tuition Tax* — State superintendent of public instruction should not certify for payment to school districts under sec. 40.47, subsec. (6), Stats., tuition claims for payment of which sufficient taxes have been collected but which remain unpaid because municipal treasurer has failed to observe priorities accorded by sec. 74.15 (2), Stats. 1939, or 74.03 (9), Stats.

March 26, 1942.

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

You ask whether the state superintendent of public instruction may certify for payment to school districts, under sec. 40.47, subsec. (6), Stats., tuition claims which remain unpaid because municipal treasurers have failed to give them the priority to which school taxes are entitled by statute.

The statutes relating to payment of property taxes were materially changed by ch. 426, Laws 1933, which became ef-

fective October 1, 1941. Tuition claims payable out of taxes due prior to that date are affected by different statutory provisions from similar claims payable out of taxes becoming due in 1942 and thereafter. The question will be first discussed as affected by the earlier statutes, and later as affected by the changes made by ch. 426, Laws 1933.

I. Tuition payable out of tax levies  
due prior to October 1, 1941

The rule announced in XXIII Op. Atty. Gen. 652, to the effect that money owed to a high school district by a municipality is not entitled to share the preference given school taxes under sec. 74.15 (2), Stats., was changed with respect to tuition claims by ch. 238, Laws 1939. That law amended sec. 40.47 (6) by adding the provision that the amount entered on tax rolls for tuition due to a school district "shall have the same priority as is accorded to school taxes under the provisions of subsection (2) of sec. 40.15" (changed to 74.15 by ch. 517, Laws 1939). Subsec. (2) of sec. 74.15 of the 1939 statutes required the municipal treasurer to set aside "all sums of money levied for school taxes" before tax money might be allocated to other local purposes. As pointed out in XXII Op. Atty. Gen. 507, there is no statutory priority between various levies for school purposes and if tax collections are insufficient to pay school levies in full, after payment of state taxes and county school tax, the available money should be prorated between the various school levies including tuition claims arising under sec. 40.47 (6).

Sec. 40.47 (6) provides that when the amount of taxes collected is insufficient to pay tuition claims, "the difference between the amount collected and the amount of such claims" is to be certified to the state superintendent of public instruction. If the statement is correct, the state superintendent shall in turn certify such amount for payment to the proper school district out of the state treasury; but he is not to certify the amount shown in the municipal treasurer's statement unless it is correct. The certification of the municipal treasurer is not correct unless it shows all tax moneys collected which should be applied to payment of

tuition claims in accordance with the preference accorded by the statutes.

II. Tuition claims payable out of tax levies due subsequent to October 1, 1941

Sec. 40.47 (6) of the 1941 statutes still provides that sums due for tuition "shall have the same priority as is accorded to school taxes under the provision of subsection (2) of section 74.15", but sec. 74.15 was repealed as of October 1, 1941 by ch. 426, Laws 1933. Under the semiannual plan for tax payment which was inaugurated by ch. 426, Laws 1933, school taxes are apparently entitled to no preference out of tax collections made prior to the first Monday in March. After the settlement of August 15, however, the municipal treasurer is required by sec. 74.03 (9) to give school taxes priority over taxes levied for general town, city or village purposes, in the same manner as was formerly required by sec. 74.15 (2). Sec. 74.03 (9) reads:

"Out of the money received from the county treasurer in August, the town, city or village treasurer shall first set aside and pay over to the school district treasurers the balance due on school district levies."

This corresponds with the following provisions of the former sec. 74.15 (2), Stats. 1939:

"Out of the taxes collected the treasurer \* \* \* [after paying the state tax and county school tax] \* \* \* shall then set aside all sums of money levied for school taxes \* \* \*"

By sec. 74.03 (9), school taxes are given the same priority in the August settlement as they formerly had in the March settlement under the terms of sec. 74.15 (2). Sec. 74.03 (9) is in substance a re-enactment of the provisions of sec. 74.15 (2) relating to the priority of school taxes. It has merely been adjusted so as to fit into the semiannual tax payment scheme.

In *E. L. Husting Co. v. Milwaukee*, 200 Wis. 434, it was held that a statutory reference to a certain section, which section was later repealed and re-enacted under a new

section number, should be construed to apply to the new section. The court said (pp. 436-437) :

“It is significant that when the legislature repealed the Prohibition Act it expressly continued the power of municipalities to license the soft-drink business in exactly the same language, with few very minor changes, that was used in the Prohibition Act. ‘This, upon well-settled rules of construction, must be construed as a mere continuation of such statute, and not as a repeal and re-enactment of it.’ *Cox v. North Wisconsin L. Co.*, 82 Wis. 141, 144, 51 N. W. 1130. ‘In this state the rule seems to be well settled that where a statute has been repealed, and then wholly or partially re-enacted, such re-enacted portion of the statute will be regarded as a continuation of the old statute.’ *State ex rel. Holland v. Lammers*, 113 Wis. 398, 409, 86 N. W. 677, 89 N. W. 501.”

See also sec. 371.08, Stats., which the revisor’s note says was “intended as declaratory of what has been decided by the supreme court of this state to be the effect of the repeal and re-enactment, at the same time, of a law in substance the same as the one repealed.”

The legislature manifested its intent by sec. 40.47 (6) that tuition claims should have the same preference as was accorded to school taxes by sec. 74.15 (2). The removal of the provision for such preference from sec. 74.15 (2) to sec. 74.03 (9) in order to fit it into the new scheme of tax collection does not indicate an alteration of that intent.

Sec. 40.47 (6) was enacted while the annual tax collection structure still prevailed. It contemplated the payment of tuition deficiencies early in the year for the reason that taxes became delinquent by March 1, and the municipal treasurer made his accounting in March. Sec. 40.47 (6) provides that the municipal treasurer shall “prior to May of each year” file a statement of tuitions paid. Under the annual tax payment plan, a statement made prior to May could show all taxes paid prior to the date of delinquency. Under the semi-annual tax payment plan the school districts are entitled only to a proportionate share in the March settlement and are entitled to further payment from the municipal treasurer after the August settlement. A final statement of the tuition paid out of the taxes levied for any year could not or-

dinarily be made under the semiannual tax payment plan until after the final settlement in August. Neither the extent of the tax delinquency nor the extent of its effect upon the claim of the school district can be determined until that time.

Sec. 40.47 (6) provides for certification and payment by the state of "the difference between the amount collected" and the amount of tuition claims. Under the last sentence of the subsection, the state is to be reimbursed for such payment "when delinquent taxes are collected". These provisions read together made it clear that the legislature intended that the state treasury should advance to school districts the shortages resulting from tax delinquency only.

School districts are required by sec. 40.47 (3) to accept nonresident pupils. Since certain areas in the state had such large delinquent rolls that collection of tuition claims from the municipalities was impossible, the obligation imposed upon school districts in those areas constituted a hardship. It was the intent of the legislature in providing for payment of tuition claims out of the state treasury to alleviate the hardship in such cases.

It seems obvious that the legislature did not contemplate advancing state funds to school districts for the few months elapsing between the first and second settlements under the semiannual tax payment plan, where there is no indication that the ultimate payment of the claim by the municipal treasurer will be prevented by tax delinquency. There is no provision for reimbursement of the state from any source but delinquent tax collections. It is likely that the major portion of the funds distributed in the August settlement will not represent delinquent tax collections; it is possible that none will. Under the semiannual tax plan an interpretation of sec. 40.47 (6) which would compel payment out of the state treasury of the portions of tuition claims still due to school districts after the March settlement would probably result in extending the benefits of the law to practically every school district in the state instead of limiting it to the areas suffering from tax delinquencies. The book-keeping and administrative expense resulting from such an interpretation would far exceed anything contemplated by the legislature. It would also result in duplicate payments

being made to school districts, with the right of the state treasury to recoup its payment being none too clear.

The direction that a statement of tuitions paid by the municipal treasurer be filed "prior to May" of each year cannot be significant when the intent of the legislature is otherwise clear. The duty may as well be performed after May as before, when tax collections are not to be completed until later. As stated in *Appleton v. Outagamie County*, 197 Wis. 4, 9-10:

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

See also *Wisconsin B. & I. Co. v. Industrial Comm.*, 233 Wis. 467.

The essence of the thing to be done by the municipal treasurer is the filing of a statement of the amount available for, and actually paid on, tuition claims out of tax collections, rather than that a statement without the essential information be filed on a specific date.

Since the statute involves payment of funds out of the state treasury, it should be borne in mind that "the legislature does not intend to deprive the crown of any prerogatives, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible." *State v. Milwaukee*, 145 Wis. 131, 135.

The amount to be paid out of the state treasury is "the difference between the amount collected" and the amount of claims for tuition. In view of the later provision for reimbursement of the state treasury "when delinquent taxes are collected" the term "amount collected" as used in the statute means the amount of taxes collected for tuition purposes at any time before such taxes become delinquent. Since the

second installment of taxes does not become delinquent under the semiannual tax payment plan until August 1st, the difference to be paid school districts cannot be ascertained before that time and computation of such difference must take into consideration the preference to which the district is entitled in the August settlement under sec. 74.03 (9).

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*Criminal Law — Lotteries — Scheme known as "Foto-Pay-Day" violates provisions of 348.01, Stats.*

March 26, 1942.

SIDNEY J. HANSON,

*District Attorney,*

Richland Center, Wisconsin.

You have requested our opinion as follows:

"Re: Foto-Pay-Day

"I would appreciate an opinion as to whether the operation of the above named plan by a theatre is a violation of section 348.01, Wisconsin statutes.

"The theatre patron purchases an admission ticket and then has the privilege of selecting an envelope from certain trays on display in the theatre lobby. Each envelope contains at least one penny and some of the envelopes contain vouchers which entitle the holder to a certain amount of money as shown thereon. The holder of one of the latter vouchers either has to furnish the theatre with a photograph of himself or else have his photograph taken by the theatre and also has to sign the following form before he receives any money;

"Foto-Pay-Day  
"The \_\_\_\_\_ Theatre \_\_\_\_\_ will pay to the holder of this voucher the sum or \$\_\_\_\_\_ for his or her photograph. It is further agreed that all rights to the reproduction of this photograph for advertising purposes is hereby given to the above mentioned theatre.

"This instrument must be presented within 72 hours after the hereinabove date.

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Manager  
Received Payment

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Signed \_\_\_\_\_,

“A person does not participate in the plan unless he purchases a ticket of admission to the theatre. In addition to the amounts indicated on these separate vouchers there is another sum of money starting at \$50.00 weekly and unless some number is selected corresponding thereto a sum of \$10.00 weekly is added to such original sum until some number is selected by a patron which would entitle him to this amount.

“I am informed that the proponents of the plan contend that this is not a lottery but is a purchase of a person’s photograph. It would appear, however, that the purpose of the plan is a trade inducement and that it falls within the definition of a lottery. *State ex rel. Cowie v. La Crosse Theatres Co.*, 232 Wis. 153, 286 N. W. 707.”

We agree with your view. Under the case cited the rule is clearly established that a lottery involves three elements—chance, prize, and consideration.

Consideration is present in the scheme in question by reason of the inducement that it offers for increased patronage. The element of consideration in this respect is precisely the same as that involved in the case to which you have referred.

Chance is present in the sense that the question as to whether a person selects an envelope containing one penny or a voucher entitling him to sell his photograph for a sum of money considerably in excess of one cent is determined solely by chance.

The element of prize is present in the sense that a person selecting an envelope which contains a voucher entitling him to sell his photograph for a substantial amount thereby realizes a considerable material advantage. It is this factor in the case which forms the entire basis for the successful operation of the scheme. People are induced to come to the theater by reason of the fact that they thereby are permitted to enter into the drawing with a chance that they may realize a considerable prize if they are fortunate enough to select a voucher entitling them to sell their pictures.

The scheme is a very clever one and was no doubt designed to escape the condemnation of the rule laid down in *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153. We have had occasion to discuss the case with the sponsors of the scheme and it has been argued that there is no element of gambling involved but that, on the contrary, it simply contemplates that a person may receive the right to sell his picture and that if he does so it is an out-and-out business transaction. This argument, as is readily apparent, entirely ignores the fact that not everyone is permitted to sell his picture. It is only those people who, by reason of chance, select certain envelopes that are entitled to this privilege. Moreover, differing amounts are offered for pictures, depending entirely upon the selection of particular envelopes. The proprietor has not the slightest idea when the prizes are offered as to who will get them. He pays one person \$10.00 for a picture and another \$5.00 for a picture, depending solely upon whether the person has been lucky enough to draw an envelope entitling him to the one figure or the other.

The whole scheme is clearly a promotional scheme and must be viewed from the standpoint of the way in which it is operated. Judged from this standpoint we have not the slightest doubt as to its illegality.

JWR

*Tuberculosis Sanatoriums* — State board of health may not approve allowance of state funds for care of patient in county tuberculosis hospital unless proper county judge has made determination that support of such patient should be public charge, as required by sec. 46.10, subsec. (1a) and secs. 50.03 (2) and 50.07 (2), Stats.

Where application is made under sec. 50.03 (2) for treatment at public charge and evidence is given which would warrant necessary findings by county judge, grant of application should be construed as compliance with statutory requirements although it does not expressly recite that court determined chargeability for patient's support.

March 26, 1942.

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

You have asked whether the state board of health may approve the allowance of state funds to a county for part of the expense of maintaining a patient in the county tuberculosis sanatorium when the procedure by which the patient was admitted was as follows:

The patient, before being admitted to the hospital, filed a verified application with the county judge setting forth that she was a legal resident of the county, that she had no property or income sufficient to pay for her care and treatment and that she desired admission to the county sanatorium as an indigent patient. A hearing was held and the evidence given showed the applicant to be 34 years of age and unmarried, that she owned no property of any kind and had no income. After the hearing the judge signed an order in the following wording:

“Upon the petition on file herein praying for an order determining A-B- to be an eligible person, and granting admission to the Milwaukee County Sanatorium as such, and upon the testimony taken in open court, and the report of the physician on file herein, the court hereby finds that said A-B- is a legal resident of Milwaukee County, is suffering from tuberculosis in the moderately advanced stage, and is therefore entitled to admission to said Sanatorium as a patient.

"WHEREFORE, IT IS ORDERED, That the application of said A for admission to said Milwaukee County Tuberculosis Sanatorium as a patient is approved and granted."

More than 16 months later the superintendent of the sanatorium to which the patient was admitted as the result of the above order filed a petition for amendment of the order and the county judge thereupon signed the following:

"Upon the petition on file herein praying for an order determining A-B- to be an eligible person, and granting admission to the \_\_\_\_\_ County Tuberculosis Sanatorium as such, and upon the testimony taken in open court, and the report of the physician on file herein, the court hereby finds that said A-B- is a legal resident of \_\_\_\_\_ County, is suffering from tuberculosis in the moderately advanced stage, and is therefore entitled to admission to said Sanatorium as a patient.

"WHEREFORE, IT IS ORDERED, That the application of A-B- for admission to said \_\_\_\_\_ County Tuberculosis Sanatorium as a patient is approved and granted."

The procedure to be followed in the admission of patients to a county tubercular hospital at public charge is prescribed in sec. 50.03, subsec. (2), secs. 50.07 (2) and 46.10 (1a), Stats. A county is not authorized to give hospital care at public expense unless the statutory procedure is followed; nor is the state board of health authorized to approve the allowance of state funds for maintenance of patients in county institutions unless the statutory procedure is followed in the admission of such patients. It is well established that no public liability nor any private right with respect to poor relief exists except as created by statute. Our court said in *Holland v. Cedar Grove*, 230 Wis. 177, 188-189, 202 N. W. 407:

"\* \* \* The whole matter of poor relief is of statutory origin. \* \* \* The whole matter being purely and strictly statutory, there is no liability where a statute imposes none. \* \* \* The matter of poor relief being of purely statutory origin, the legislature has very large powers with respect thereto. It may impose duties and liabilities upon its creatures, the various municipal corporations of the state, in accordance with its discretion provided no provision of the constitution is violated. \* \* \*"

In the recent case of *Carthaus v. Ozaukee County*, 236 Wis. 438, 295 N. W. 678, it was held that medical expense and hospital care may not be made a public charge except in strict accordance with the terms of the statutes covering the subject. The following expressions are contained in the opinion at pages 441 and 443-444 of 236 Wis.:

“The facts involved in this case relate to care of an injured person by a doctor and a hospital and the question presented is: Who is legally obligated to pay therefor? The obligation to pay primarily rests upon the individual who had the benefit of the treatment and the hospital services. It is a debt which should be paid by the individual. The social obligation resting upon a municipality to see that one in distress does not suffer from neglect does not ordinarily mature into a liability until it has been shown that such an individual is an indigent person and entitled to pauper relief. \* \* \*”

“\* \* \* The statute, calculated to enable one in an emergency of this character to secure temporary assistance, does prescribe conditions that must be complied with in order to charge the liability upon a community. Serious departure from regulations laid down by the legislature would open the door to a considerable abuse, for, as already pointed out, many people do not find it convenient to pay their honest debts. ‘The liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation.’ *Smith v. Colerain* (Mass.), 9 Met. 492; *Patrick v. Baldwin*, 109 Wis. 342, 349, 85 N. W. 274, 53 L. R. A. 613.”

When the law authorizes the disbursement of public funds only for a particular purpose or in a particular manner, public officers are held accountable if they disburse such funds for a different purpose or in a different manner. It was said in *Milwaukee v. Binner*, 158 Wis. 529, 531, 149 N. W. 211:

“\* \* \* It is the policy of the law to hold an official custodian of public funds to very strict accountability, and to make him responsible for money illegally disbursed, regardless of whether the municipality received an equivalent or not. There is no other safe course, and any attempt to evade the law must receive judicial condemnation upon every opportunity therefor.”

See also *United States F. & G. Co. v. Hooper*, 219 Wis. 373, 263 N. W. 184.

Counties are authorized by sec. 50.06 of the statutes to maintain tuberculosis hospitals. Sec. 50.07 (1) authorizes them to receive patients upon payment of the proper rate. Sec. 50.03 (1) provides that all patients admitted shall pay the cost of their own care except as otherwise provided by statute. Counties are empowered by sec. 50.07 (2) to admit patients to tuberculosis hospitals at public charge, but only pursuant to sec. 50.03 (2), which reads:

“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, \* \* \* 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.”

The foregoing subsection provides that the investigation shall be made by the county judge in the manner prescribed in sec. 46.10 (1a) which reads:

“Whenever any person shall apply for admission to any institution 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 give due notice of the hearing to the district attorney of such county who shall attend said hearing; and the said court, judge, magistrate or board shall upon proper evidence determine the legal settlement of such person and *his general financial ability*. If the evidence does not disclose property sufficient to save the county free from the expense of his support, the said court, judge, magistrate or board shall ascertain by further proof the residence and financial ability of any person, if any, liable for such support, pursuant to law, and shall order proper proceedings to be brought for the enforcement of such liability; \* \* \* At the conclusion of said hearing the court, judge, magistrate or board *shall determine the chargeability for the support of such person and certify such determination to the superintendent of the institution; and thereupon such person shall be admitted.*"

For purposes of this opinion we shall assume that due notice of the hearing on the application was given to the district attorney as required by sec. 46.10 (1a), Stats. After the application is filed and the hearing duly held, the following questions must be determined by the county judge before the patient may be hospitalized at public charge:

- (a) The legal settlement of the patient;
- (b) The residence and financial ability of the person liable for his support. (If there is such a person, and his financial condition warrants it, the county judge must order proceedings to enforce his liability rather than to admit the patient as a public charge); and
- (c) The chargeability for support of a patient. (This means that the county judge must determine whether the patient must pay all or part of the cost of his maintenance, whether some other person is liable for his support and must pay all or part of the maintenance, or whether the circumstances warrant that the hospital treatment be given wholly at county expense.)

A determination of the matters relating to who should be chargeable for the maintenance of the patient is the gist of the whole proceeding before the county judge. If the patient is to be admitted to the tuberculosis hospital solely at his own expense no order of any kind on the part of the county judge is necessary. The determination of whether the patient is eligible for admission in such a case is to be

made by the superintendent of the institution or by the visiting physician. See sec. 50.07 (1). This determination by the county judge with respect to the legal settlement of the applicant, his financial condition and the financial condition of any person chargeable with his support is a precaution which the legislature has established as a condition precedent to the expenditure of public funds for treatment of patients in county tuberculosis institutions. The determination of such matters involves the exercise of discretion, which cannot be delegated.

The original order of the county judge above quoted does not contain an express finding or determination relative to the financial ability of the applicant or any person chargeable for her support. The second order purports to supply this omission by amendment. For purposes of this opinion, we will assume that there was no procedural defect in the entry of the second order in relation to such matters as the giving of notice to interested parties and the like. The question to be determined is whether there has been a substantial compliance with the statutory requirements relating to the substantive functions of the county judge.

The extent to which a defect in an order or judgment may be cured by amendment is discussed in *Milwaukee E. C. Mfg. Corp. v. Feil Mfg. Co.*, 201 Wis. 494, 230 N. W. 607; *Bostwick v. Van Vleck*, 106 Wis. 387, 390, 82 N. W. 302 and *Packard et al. v. Kinzie Avenue Heights Co.*, 105 Wis. 323, 326, 81 N. W. 488. An error or omission in the *recording* of the judgment or order actually pronounced by the court may be cured by amendment, but a judicial error such as the failure to *make* a finding or determination essential to the validity of the judgment or order cannot be so cured. If, prior to the entry of the first order here involved, the county judge actually made a determination that the financial condition of the applicant and of any person liable for her support were such as to warrant her admission to the sanatorium at public charge, the failure to record such finding or determination in the written judgment would be a clerical error which could be rectified by amendment. In determining the meaning and effect of the original order entered by the county judge, the following rules for construction of records of judicial action are applicable:

“\* \* \* When judgments are ambiguous they are construed in accordance with the pleadings. *Succession of Durnford*, 1 La. Ann. 92; *Peniston v. Somers*, 15 La. Ann. 679. The whole record may be gone into in construing such a judgment.”

The above excerpt is from *Estate of Kehl*, 215 Wis. 353, 357, 254 N. W. 639.

While the original order here involved did not expressly recite the findings and determinations of the county judge with respect to the financial circumstances of the applicant and any person chargeable with her support, it was an express approval and grant of her application to be determined an indigent person and admitted to the county sanatorium as such. The order was entered upon undisputed evidence in the record which showed that the applicant had neither property nor income and that she was 34 years of age and unmarried. Such evidence would, we believe, be sufficient for the findings and determinations required under secs. 46.10 (1a) and 50.03 (2), Stats. It would have been meaningless for the county judge to enter an order granting an application for admission to the county sanatorium unless it was intended that at least a part of the expense of the patient's maintenance was to be charged to the county. No order of the county judge would have been necessary to admit the patient to the institution at her own expense. Therefore, in spite of the fact that the original order contained no express words determining the chargeability for the support of the patient, we believe that the entry of an order approving and granting the application should be construed as in effect a determination of such matters. In such cases the omission from the order of an express finding or determination is clerical error which can be rectified by amendment.

It undoubtedly would be preferable practice if the record of the proceedings held on an application filed under sec. 50.03 (2), Stats., contained express terms showing compliance with each statutory requirement. Such compliance cannot be better shown than by following the wording of the statutes themselves.

BL

*Historical Society* — State historical society may not destroy or otherwise dispose of documents in its collection deemed to be of no historical importance. Authority to do so can be granted only by act of legislature, in view of sec. 44.01, Stats.

April 3, 1942.

EDWARD P. ALEXANDER, *Superintendent*,  
*State Historical Society*.

You have requested advice with reference to the following state of facts:

On November 4, 1903, the circuit court for Milwaukee county made an order in the matter of the voluntary assignment of the Plankinton Bank, which provided as follows, omitting formal parts:

“ORDERED, that the said assignee is hereby directed and authorized to ship to The Wisconsin State Historical Society at Madison, Wisconsin, all the books, papers and documents belonging to the said estate, which in the opinion of said assignee are of no further use to said estate.

“IT IS FURTHER ORDERED, that the said assignee prepare a complete list of said books, papers and documents so shipped to The Wisconsin Historical Society, and procure its receipt therefor, and file said list and receipt in the above proceedings.”

Pursuant to the foregoing order, the assignee caused the books and papers of the defunct Plankinton Bank to be deposited in the state historical library. Doubtless the intent was to vest the ownership of these documents in the society, since the latter has no authority to act as a warehouse or storage place for privately owned papers. This material, about four tons in weight, has been examined by the staff of the society and all books and records considered valuable for historical purposes have been arranged for permanent use and preservation. There remains a vast quantity of papers consisting of checks, vouchers, etc., which occupies a great amount of space badly needed for the storage of other things and which has no value for historical purposes. Nor is there any private purpose which would be served by fur-

ther preservation of these papers since it is almost half a century since the bank in question closed its doors. It is, therefore, your desire to dispose of this as waste paper and you inquire how to obtain authority to do so.

Under sec. 44.01, Stats., the historical society holds "all its present and future collections and property for the state" as trustee. The statute further provides that the society "shall not sell, mortgage, transfer or dispose of in any manner, or remove, except for temporary purposes, from the historical library building any article therein without authority of law; \* \* \*." The phrase "authority of law," as thus used in sec. 44.01, means statutory authority. We are unable to find any authority in the statutes for the destruction of any materials collected by the society. It would be of no avail to apply to the circuit court at this late date for a modification of its order entered nearly 40 years ago, nor would an order of the court constitute the "authority of law" required by sec. 44.01.

You are therefore advised to apply to the legislature for an act granting authority to destroy or otherwise dispose of these papers. This can be accomplished by an act granting either a special authority referring to only the Plankinton Bank papers or a general authority to dispose of any articles, papers and documents which the executive committee of the society deems of no historical importance, with such exceptions as may be desirable.

WAP

*Minors — Child Protection* — Where child was adjudged delinquent by juvenile court of County A and placed in foster home in County B at expense of County A and while so in County B committed further acts of delinquency, juvenile court of County B had concurrent jurisdiction under sec. 48.01, subsec. (5), par. (am), Stats., notwithstanding retention of jurisdiction by juvenile court of County A pursuant to sec. 48.01 (5) (b). If it was error for juvenile court of County B to assume jurisdiction under such circumstances, such error did not affect jurisdiction of court but constituted error committed within jurisdiction. However it was probably not error for juvenile court of County B to assume jurisdiction under circumstances, thus saving expense of returning child, together with witnesses, to juvenile court of County A.

Order of juvenile court committing child to industrial school, regular on its face, must be honored by superintendent of school until reversed or set aside by proper court action.

If juvenile court was wholly without jurisdiction to commit child to industrial school, proper remedies are by appeal under sec. 48.07 (8) by *certiorari* or by *habeas corpus*. If juvenile court committed mere error in assuming jurisdiction of case of delinquency and ordering child committed to industrial school, only remedy is by appeal under sec. 48.07 (8).

April 24, 1942.

A. W. BAYLEY, *Executive Secretary,*  
*Department of Public Welfare.*

You state that a child was brought into the juvenile court of county A and adjudged to be delinquent, whereupon the court ordered him placed on probation and placed in a foster home in county B at the expense of county A. While in County B he committed further acts of delinquency and was brought before the juvenile court of County B, which assumed jurisdiction and committed him to the Wisconsin industrial school for boys. You inquire:

"(1) Could the juvenile court in County B take jurisdiction and commit this child to the industrial school while the child is a ward of the court in county A?

"(2) Will you indicate what section of the statute describes the authority for this procedure?

"(3) If the juvenile court in County B cannot assume jurisdiction, can the commitment to the industrial school be considered binding?

"(4) If County B did not have jurisdiction, what provision is made in the statute for procedure in such a situation?"

Your first and second questions will be answered together. Juvenile court proceedings in Wisconsin are purely statutory in origin and constitute a new form of proceeding in the law of this state; partaking of the nature of both civil and criminal proceedings. The power of any juvenile court to act in a particular case must be found in the statutes and cannot be inferred from the general law relating to venue in civil and criminal cases.

Sec. 48.01, subsec. (2) provides in part:

"All courts of record in this state shall have original jurisdiction of all cases of \* \* \* delinquent children,"

and provides for the designation of a juvenile court in each county to exercise the jurisdiction so granted. Sec. 48.01 (5) (a) provides that the juvenile court shall have exclusive original jurisdiction of proceedings under ch. 48, Stats., involving delinquency of children *residing* within the county. The residence of the child in question for purposes of the jurisdiction of the juvenile court is probably in County A because his removal to the foster home in County B was not voluntary. It is true that for some purposes, such as attendance at school, children so placed in foster homes are regarded as residents of the place where the foster home is located, but it is doubtful that this would be true for all purposes. However, sec. 48.01 (5) (am) provides in part as follows:

"If in any of the cases in paragraph (a) of this subsection either the child or the parent, guardian or custodian is at the time of filing of petition present within some other

county, but does not reside therein, the juvenile court of such other county shall have concurrent jurisdiction.  
\* \* \*

This paragraph apparently gives the juvenile court of County B concurrent jurisdiction of this case since the child was present in County B at the time of filing of the petition there, although he did not reside therein. The juvenile court of County A also retained jurisdiction by virtue of sec. 48.01 (5) (b), which 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.”

The supreme court has held that where a matter is pending in one of two courts having concurrent jurisdiction it is reversible error for the second court to assume jurisdiction of the matter if the first court can afford as adequate, complete and efficient a remedy as the second court, but that this is not an error affecting the jurisdiction of the second court. *Cawker v. Dreutzer*, (1928) 197 Wis. 98, 128. It follows that if the juvenile court of County B committed error in assuming jurisdiction of this case while proceedings were still pending in the juvenile court of County A by virtue of sec. 48.01 (5) (b), such error is not an error of jurisdiction. That is, the judgment of the juvenile court of County B might be subject to reversal on appeal but it is nevertheless valid until so reversed.

But it is unlikely that it would be held that the juvenile court of County B committed error in assuming jurisdiction of this matter. The second delinquency was committed within the geographical jurisdiction of that court. It is conceivable that a child might be adjudged delinquent in the juvenile court of Douglas county in the extreme northwest section of the state and later commit a second delinquency in Milwaukee county. It does not seem reasonable that the legislature intended that in such a case the child would have to be returned to Douglas county for further proceedings requiring the attendance of witnesses and officers from Mil-

waukeee county at great inconvenience and expense. The sensible thing in such a situation would be for the juvenile court of Milwaukee county to assume jurisdiction on the ground that the juvenile court of Douglas county could not afford as adequate, complete and efficient a remedy as the juvenile court of Milwaukee county under the circumstances. So, here, the juvenile court of County B has avoided the necessity of transporting the child and witnesses back to County A for further proceedings in the original case. Since the court of County B had at least concurrent jurisdiction, it was justified in taking such action.

The answer to your third question is that the commitment to the industrial school, being regular on its face and within the apparent jurisdiction of the juvenile court of County B, must be honored until it is reversed or set aside by proper court action. XXX Op. Atty. Gen. 197.

The answer to your fourth question is that if the juvenile court of County B was wholly without jurisdiction, proper remedies to test this question are an appeal under sec. 48.07 (8), a writ of *certiorari* or a writ of *habeas corpus*. However, if the rule of *Cawker v. Dreutzer*, (1928) 197 Wis. 98, applies as indicated above, and the juvenile court of County B committed at most reversible error in assuming jurisdiction, then the point can be raised only by taking an appeal as provided in sec. 48.07 (8), but not by *certiorari* or *habeas corpus*.

WAP

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*Elections* — Voting residence requirement of workers who have come into county to work on Badger Ordnance Plant discussed.

April 4, 1942.

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

The numerous inquiries you have received as to the eligibility to vote at the coming election of persons who have

come into your county for the purpose of working on the construction of the Badger Ordnance Plant have occasioned a request by you for an opinion upon the subject. It appears that there are the following classes:

1. Workmen, such as bricklayers, electricians, tractor operators, etc., employed by contractors to work on the construction, as long as the construction job lasts, who have no intention of remaining after the construction work ends.

(a) Many of these have homes in other localities, where their families continue to reside and to which the men will return upon completion of the work.

(b) Others have brought their families with them to live in trailers at or near the plant site, not with the thought of making this a permanent home, but only because it is more economical to have their families present, their intention at all times being to return to some other place which they call home upon completion of the work.

(c) Others are single men who have the intention of returning to their home communities, where their parents or relatives reside and where they have heretofore resided, upon completion of the construction work.

2. Persons who have come to work in the construction of the plant and have the intention of obtaining jobs in production within the plant after it is completed. These individuals may or may not bring their families with them, which is, of course, an important fact, but not necessarily controlling, provided their intent expressed by word and by circumstances indicates that they intend to stay as long as they can find work—in other words, make this their home.

3. Persons who have come in, such as guards in the plant, whose jobs begin with the construction and will follow through after the plant goes into production. Their intention is to make this their home as long as they retain their jobs.

Sec. 6.01, subsec. (1), Wis. Stats., provides the qualification of electors:—

“Every citizen of the United States of the age of twenty-one years or upwards, who shall have resided in the state one year next preceding any election, and in the election district, or precinct where he offers to vote, ten days, shall be deemed an eligible elector.”

Then, sec. 6.51, Wis. Stats., sets forth rules covering certain specific situations relating to the determination of the residence of an elector. In sec. 6.50, Stats., questions are set forth that may be asked of an elector that are of assistance in determining his residence eligibility. However, it is to be noted that the questions there set forth are not exclusive, for the provisions of subsec. (9) specifically provide that such other questions may be put to a person whose eligibility is challenged as may be necessary to test his qualifications. Our supreme court has had several occasions to set forth the general principles that govern residence eligibility of voters. Each case is to be determined on its own facts by a careful consideration thereof and an application thereto of the various applicable rules and principles.

An important element in determining the residence of an elector is his intention as to where he makes his home. However, his own statements as to such intent are not of themselves controlling in respect to his residence for voting purposes if his expressed intention does not harmonize with the physical facts and circumstances. The physical facts and circumstances are controlling over express statements by electors where the same do not harmonize. *Seibold v. Wahl*, (1916) 164 Wis. 82, 159 N. W. 546; *In re Burke*, (1938) 229 Wis. 545, 282 N. W. 598.

Our supreme court stated the rule in *State ex rel. Hallam v. Lally*, (1908) 134 Wis. 253, 258, 114 N. W. 447, where it said that, as used in the election statutes:—

“\* \* \* ‘Residence’ means a fixed habitation without any present intention of moving therefrom, and to which when the person is absent he has the intention of returning, and that one shall not be deemed to have gained a residence within the meaning of the law by merely coming into an election precinct for temporary purposes only  
\* \* \*”

In that case the party in question came into the ward on February 5 before the election, to stay temporarily and only while engaged on a particular job of work which he supposed, at the time of his coming, would last only a matter of months. He intended to go elsewhere, or at least out of the ward, as soon as the job was completed. He had no in-

tention of making a home in such ward or to stay there except while he was engaged upon the work mentioned. The court held that manifestly he was not a qualified voter in the ward.

In the case of *State v. Bosacki*, (1913) 154 Wis. 475, 143 N. W. 175, it was held that members of a logging crew who were citizens of the state; unmarried, kept their clothing in the logging camp and had no other place they claimed as home but who had no intention of remaining in the town in which their logging camp was located longer than their logging job lasted (logging jobs being temporary in their very nature) did not gain a residence in such town and were not entitled to vote therein. On the other hand, the mere fact that the employment of the elector in the place where he sought to vote might end at some time in the future does not alone necessarily make his residence there merely temporary. It was so held in *State v. Galligan*, (1918) 167 Wis. 487, 167 N. W. 802. In that case the persons involved were guards at a powder plant, unmarried, and living at a plant barracks, which was fitted up with conveniences making it a suitable place for habitation. They had no present intention of going elsewhere, although it was possible, and in fact a certainty, that many of them would be released when the war, being World War I, came to an end. Their employment was permanent in nature and the matter of termination was not of sufficient certainty so that the job could be characterized as temporary in character.

Thus, the first consideration is the length of time that the party has resided in the state and in the election precinct. He cannot vote unless he has resided in the state for one year. He cannot vote in the precinct unless he has resided there for ten days. If he has been within the state for one year and within the election precinct for ten days then the query is whether or not he has had a residence therein for the prescribed periods.

Those in the first class above mentioned, who have been in the election district for a period of only a few months or even a year, would not have a voting residence in the precinct and would be disqualified to vote there, because their intention is to stay there only temporarily. In the most part they will have a voting residence elsewhere and can

vote by absentee ballot at those places wherever they may be.

Those in the second class, who have moved into your county with the thought of working on construction and with the intention of keeping on working in the production in the plant after the construction has come to an end, may or may not be qualified electors. This will depend upon the facts in each case. If they have brought their families with them, abandoned any previous home elsewhere and set up a home in your county and called it their home, with no specific intention of making their home elsewhere in the future, they would be eligible electors, if otherwise qualified.

As to the third class, which would include not only guards, but other powder company employees who will work in reference to the construction and then stay on and continue during the productive operation of the plant, they would be qualified electors if the physical facts and circumstances, similarly to class No. 2, are in harmony with their intention of making their home permanently for the present in your county, if they are otherwise qualified.

HHP

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*Intoxicating Liquors* — Subsecs. (c), (d) and (e) of regulation 9 promulgated by state treasurer do not subject permittee or licensee to penalty for any sale of intoxicating liquor if such sale is otherwise in accordance with statutory regulation.

April 6, 1942.

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

You have asked a number of questions relating to the validity and interpretation of subsecs. (c), (d) and (e) of regulation 9 promulgated by the state treasurer, which read:

“(c) Each manufacturer, rectifier, or wholesaler licensed by the state treasurer, who owns or controls the trade-mark, brand name or label of intoxicating liquor which is sold or is intended for sale in Wisconsin shall register with the beverage tax division of the state treasury department on and after October 1, 1940, on a form provided by the beverage tax division of the state treasury department, the name of each person, if any, to whom the right is granted by such manufacturer, rectifier, or wholesaler, to sell or distribute the intoxicating liquor at wholesale, specifying the trade-mark, brand name or label of the intoxicating liquor in respect of which such distributing rights have been given, and the geographical territory or territories for which such distributing rights have been assigned.

“(d) No manufacturer, rectifier, or wholesaler shall make any change or reassignment of brands or territories without first notifying the beverage tax division of the state treasury department at least thirty days in advance of such contemplated change, which shall take effect on the first of the month following the expiration of the thirty-day period.

“(e) When selling to a Class ‘A’ licensee who also holds a wholesaler’s permit, each manufacturer, rectifier or wholesaler who controls a trade-mark, brand name or label of intoxicating liquor may mark all invoices or papers pertaining thereto, ‘For retail sales only,’ if the purchasing wholesaler has not been designated by the manufacturer for wholesaling this line of merchandise.”

Records of official action should be construed wherever possible so as to be valid. *State ex rel. Posey v. The Supervisors of Crawford County*, 39 Wis. 596, 599-600. The question of validity and interpretation of the regulations issued by the state treasurer are correlated. The validity may depend upon the interpretation and the interpretation may be affected by the limitations on the authority of the treasurer.

As was pointed out in XXIX Op. Atty. Gen. 178-179:

“The power of the state treasurer to prescribe rules \* \* \* must, of course, be grounded in some affirmative grant of power by law. Under art. VI, sec. 3, of the Wisconsin constitution, it is provided that the powers, duties and compensation of the treasurer shall be prescribed by law.”

The only general statutory grant of power under which the treasurer may establish rules relating to the sale of in-

toxicating liquor is sec. 176.43, subsec. (2), whereby he is authorized "in furtherance of effective control" to promulgate rules and regulations "consistent with chapter 66 or chapter 139." Ch. 66 contains provisions relating to the sale of beer at retail and ch. 139 relates to the occupational tax on malt beverages and intoxicating liquors. Sec. 176.43 (2) does not authorize the treasurer to establish rules consistent with ch. 176, which regulates the sale of liquor from a social and economic standpoint. In so far as the sale of intoxicating liquor is concerned, the treasurer is apparently restricted under sec. 176.43 (2) to regulation in the furtherance of "effective control" from the point of view of tax collection. Subsecs. (c), (d) and (e) of regulation 9 should accordingly be construed as rules in aid of the treasurer's powers and duties with respect to the collection of taxes.

Since the violation of these regulations subjects the offender to the penalties prescribed by sec. 176.43 (2a) the regulations are penal in nature. Penal provisions are to be strictly construed against the state and in favor of the person to be penalized. The scope of such provisions should not be extended to other offenses than those clearly described. *Brown v. State*, 137 Wis. 543; *State v. Boliski*, 156 Wis. 78; *Oeflein, Inc. v. State*, 177 Wis. 394; *State ex rel. Dinneen v. Larson*, 231 Wis. 207.

Undoubtedly the treasurer's functions in collecting the occupational tax on liquor are facilitated by the availability of information relating to contracts, franchises and conditions under which liquor is sold. If, in practice, the sale of certain brands of liquor is restricted by contract, the work of the treasurer's department will be simplified by the knowledge of such restrictions. To the extent that the regulations in question may be interpreted as a device to furnish enforcement officers with knowledge of conditions prevailing in the liquor industry rather than as restrictions upon the right of permittees and licensees to sell liquor as authorized by statute they are valid. So interpreted, subsecs. (c) and (d) of regulation 9 require persons controlling certain brands of liquor to notify the treasurer's office of franchise and contract limitations on the sale of such brands. Subsec. (e) requires that persons controlling certain brands

must place similar information on invoices covering liquor sold to individuals possessing both wholesale and retail licenses. Since secs. 139.06, 139.27, 139.29 and 139.295, Stats., contemplate that the treasurer and his staff shall examine the records of permittees and licensees for the purpose of determining the amount of tax due, information given on the invoices may be of assistance in the performance of these duties.

Under the foregoing interpretation, the only violation of the regulations in question is the failure to supply information in the manner required. The regulations do not prohibit the sale of liquor not otherwise prohibited by the statutes. If liquor is sold in violation of contractual obligations, a private remedy may exist through civil action on breach of the contract. Regulation 9 does not, however, create a penal liability for a sale which is otherwise in accordance with statutory requirements. In other words, the holder of a wholesale permit or retail license is not subject to prosecution under subsecs. (c), (d) and (e) of regulation 9 because the permittee from whom he purchases liquor has failed to comply with such regulations or because the holder of the wholesale permit or retail license himself fails to comply with his contractual obligations.

In accordance with the foregoing discussion, the answers to your specific questions I to IV are:

"I. Do subsections (c) and (d) of regulation 9 constitute a valid exercise of the power to regulate by the state treasurer under existing statutes?"

Yes, as herein construed.

"II. If they do so constitute such valid exercise of such power to regulate under existing statutes, what duties or restrictions, if any, do said subsections (c) and (d) of regulation No. 9 impose upon licensed wholesale vendees who purchase tax-paid intoxicating liquor from licensed manufacturers, rectifiers or wholesalers owning or controlling the trade-mark, brand name or label of such intoxicating liquor, in the resale of said intoxicating liquor to other licensed vendees in the proper statutory quantities?"

They impose no restrictions upon sale of liquor by the wholesale vendees.

"III. Does subsection (e) of regulation No. 9 constitute a valid exercise of the power to regulate by the state treasurer under existing statutes?"

Yes, as herein interpreted.

"IV. If said subsection (e) of said regulation No. 9 does constitute a valid exercise of such power to regulate by the state treasurer under existing statutes, is any sale at other than retail a violation of such regulation which can be enforced criminally pursuant to section 176.43 (2a) against either the licensed seller or licensed purchaser or by revocation or suspension of license against the licensed seller or licensed purchaser thereunder?"

No, provided the sale is otherwise in accord with statutory requirements.

In view of the answers to the above general questions, we assume that answers to your other questions on specific phases of the problem are unnecessary.

You have also asked whether the delivery of intoxicating liquor by retail licensees to a consumer pursuant to a telephone order from the latter, on the same day and within a very short time after the order, is within the prohibition of sec. 176.70 (1).

Your attention is called to XXVIII Op. Atty. Gen. 251, in which the opinion is given that a retail liquor dealer holding a "Class A" license may not deliver liquor at a point other than the licensed premises unless the sale was first consummated on the premises. Since the opinion has been given that a situation such as you describe violates other provisions of the statutes, it is probably unnecessary to determine whether it violates sec. 176.70 (1).

BL

*Automobiles — Law of Road — Auto Registration* — Under sec. 85.01, subsec. (1), Stats., where owner of vehicle of 8,000 pounds or more elects to pay motor vehicle registration fee on quarterly, rather than on annual basis, he may at any one time apply and pay for as many quarters less than full license year as he desires, but fee for each quarter must be one-fourth of annual fee, plus one dollar.

April 9, 1942.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Commissioner*.

Our opinion is requested on several questions involving the interpretation of sec. 85.01, subsec. (1), Stats., as amended by ch. 276, Laws 1941. The questions are as follows:

“(1) Where a vehicle having a gross weight in excess of 8,000 pounds is not registered in the first quarter and an affidavit of nonuse is filed at the beginning of the second quarter and second quarter fees paid, then at the beginning of the third quarter the operator of such vehicle desires to pay fees for the two remaining quarters, shall this department accept such fees or shall the owner of the vehicle be held to the quarterly basis?

“(2) A vehicle registered on a quarterly basis for the first quarter is not operated during the second quarter and at the beginning of the third quarter an affidavit of nonuse is filed for such second quarter and the application is for the remaining two quarters. Shall this be accepted or shall the owner of the vehicle be held to a quarterly basis?

“(3) First quarter fees have been paid for a vehicle and at the beginning of the second quarter fees are tendered for the remaining three quarters. Shall these fees for the remaining three quarters be accepted or shall the owner of the vehicle be held to a quarterly basis?

“(4) Is the \$1.00 additional fee for quarterly registration to be collected in any case except when the fees are paid for one quarter only?”

Sec. 85.01 (1) Stats., so far as material here, reads:

“\* \* \* 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; \* \* \* No such quarterly plate shall be issued except it appear by affidavit that such vehicle was not operated on the highways of this state during the previous quarter of the license year without the payment of the annual or quarterly registration fee due for such previous quarter. If such vehicle was not operated on the highways during any quarter it shall be exempt from the payment of the registration fee for such quarter in which it was not used. \* \* \*"

The first three questions relate to the same general problem, and the answer to any one of these questions indicates the correct answer to the others. Restating these three questions in the form of one question, the problem is this:

Once having elected to pay the registration fee on a quarterly basis for any quarter of the license year, may the owner thereafter at the beginning of any quarter, apply and pay for registration for all remaining quarters of the license year, or must he wait until the beginning of each quarter before making application and paying the fee for that quarter?

So far as we are able to find there is no language in the relevant portion of sec. 85.01 (1), Stats., above quoted, or elsewhere in the statutes which would require the owner to wait until the beginning of each of the remaining quarters of the license year before making application for registration and paying the registration fee for the balance of the license year on a quarterly basis.

From an administrative standpoint there is much to be said in favor of applying and paying for more than one quarter at a time, since there is a considerable saving of time and overhead, both to the department and to the applicant. If the applicant may apply and pay for the full annual registration in advance and may also pay on the quarterly basis, there appears to be no good reason why he should not apply and pay for as many quarters of registra-

tion less than the full annual registration as he desires at any one time. The state loses nothing and is fully protected by such a procedure. If anything, it stands to gain rather than to lose under this plan.

The last question relates to the payment of the \$1.00 additional fee for quarterly registration. There is no authority under the statute for waiving this \$1.00 additional fee where payment is made for more than one quarter, but for less than a full year, at any one time. The payment must either be the regular annual fee, or if by quarters at the rate per quarter of one-fourth of the annual fee, plus \$1.00. Thus if the application were for two quarters, the fee would be one-half of the annual fee, plus \$2.00, and if for three quarters, the fee would be three-fourths of the annual fee, plus \$3.00. The words of the statute, "The quarterly registration fee for each quarter shall be one-quarter of the annual fee plus \$1", are so clear and unambiguous as to permit of no other construction.

WHR

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*Intoxicating Liquors* — Municipalities may make more rigid closing requirements with respect to sale of intoxicating liquors than those established by sec. 176.06, Stats.

Ruling in XXVII Op. Atty. Gen. 650 distinguished.

April 10, 1942.

JOHN A. MOORE,  
*Acting District Attorney,*  
Oshkosh, Wisconsin.

In your letter you state:

"One of the townships in Winnebago county is contemplating passing a town ordinance requiring the closing of taverns on Sunday mornings during the time when the churches are ordinarily conducting services, presumably from eight in the morning until twelve or one o'clock."

You are inclined to question the validity of such regulation in that sec. 176.06, Stats., prescribes the closing hours and no exception is there made to subsec. (3) of said section, which, you conclude provides for closing hours for retail "Class B" liquor licenses between 1:00 o'clock A. M. and 8:00 o'clock A. M. You direct our attention to sec. 176.43 (1), which permits additional regulations by municipalities not in conflict with the provisions of ch. 176, Stats. The question presented is whether such a regulation as is contemplated is in conflict with sec. 176.06, Stats.

We had some doubt as to the propriety of our undertaking to resolve the question as we have ruled a number of times that we do not advise district attorneys on the constitutionality or validity of local ordinances governing the sale of intoxicating liquor for the reason that prosecution under such ordinances is not the duty of the district attorney. The validity of such ordinances can, therefore, be of no concern to the district attorney in his official capacity. If they do not concern the district attorney in his official capacity they cannot concern us in ours. XXIII Op. Atty. Gen. 191; XXIII Op. Atty. Gen. 140. See the foreword in XXVIII Op. Atty. Gen.

However, you have grounded your conclusion upon language which we used in XXVII Op. Atty. Gen., 650, 651, in relation to the subject matter of intoxicating liquors, as follows:

"\* \* \* It is oftentimes most difficult to determine whether an ordinance is in conflict with the state law. Additional regulation to that of state regulation even with respect to subject matter where the state has regulated is not necessarily in conflict. 43 C. J. 219. But in view of the legislature's expressed desire for uniformity, it must be held that where the state has acted with reference to the subject matter municipalities are without power to impose additional requirements. The state by acting has preempted the field. *Baraboo v. Dwyer*, 166 Wis. 372; *State ex rel. Torres v. Krawczak*, 217 Wis. 593."

Because of this fact and the public importance of the question we have concluded that it is proper and desirable for us to express our views upon the question submitted.

The concluding language in the paragraph quoted from XXVII Op. Atty. Gen. 650 cannot be divorced from the language which precedes it. Further, it must be read in relation to the particular aspects of the subject matter sought to be regulated in the particular ordinance under consideration in the opinion. The ordinance proposed sweeping and minute regulation with respect to sale of intoxicating liquor for medicinal or scientific purposes far in excess of and at variance with state regulation or policy as manifested by sec. 176.18, Stats. We concluded that requirements or regulations not required by said section were in conflict therewith. We were of the opinion that the regulations proposed were of the type in relation to the particular subject matter under consideration which required condemnation by application of the rule announced in *State ex rel. Torres v. Krawczak*, 217 Wis. 593.

The question posed with respect to any municipal requirements supplementing state legislation is necessarily one of whether the municipal regulation undertakes to destroy uniformity where the state requires and intended uniformity within the rule of *State ex rel. Torres v. Krawczak, supra*, or whether the municipal supplementation is of a type where uniformity is not required or intended and therefore of a type authorized by sec. 176.43 (1), Stats., which provides:

“Any city, village, or town may by ordinance prescribe additional regulations in or upon the sale of intoxicating liquor, not in conflict with the provisions of this chapter.  
\* \* \*”

To what extent did the legislature intend to provide uniformity by the provisions of sec. 176.06, Stats., which provides:

“No premises for which a wholesale or retail liquor license has been issued shall be permitted to remain open for the sale of liquor:

“(1) If a wholesale license, between 5 P. M. and 8 A. M. except on Saturday when the closing hour shall be 9 P. M.

“(2) If a retail ‘Class A’ license, between 9 P. M. and 8 A. M.

“(3) If a retail ‘Class B’ license, between 1 A. M. and 8 A. M.

“(4) On any election day as provided in section 176.34.

“(5) Hotels and restaurants whose principal business is the furnishing of food and/or lodging to patrons shall be permitted to remain open for the conduct of their regular business but shall not be permitted to sell intoxicating liquors during the hours mentioned in subsections (3) and (4) of this section.”

It is our view that the legislature intended to fix the maximum hours during which the licensed premises “shall be permitted to remain open for the sale of liquor” and that it did not intend to prohibit more rigid municipal regulation with respect to closing. This conclusion seems inescapable when it is considered that the legislature has given municipalities *carte blanche* authority to regulate the closing hours for sale of nonintoxicating liquors (beer). See XXIV Op. Atty. Gen. 691 and sec. 66.05 (10), (h), 1, where it is provided:

“(h) *Conditions of licenses.* Wholesalers’ and retailers’ licenses shall be issued subject to the following restrictions:

1. No fermented malt beverages shall be sold or consumed upon any licensed premises during such hours as may be prohibited by local ordinance.”

Thus the legislature has manifested a clear intent to leave the matter of opening and closing hours to the various municipalities with respect to sale of nonintoxicating liquors. As to sale of intoxicating liquors, the legislature has limited municipal authority by sec. 176.06, Stats., and has stated that municipalities shall not permit sale of these liquors at hours prohibited by said section. But by so doing, did the legislature mean to say that municipalities *must* permit intoxicating liquors to be sold at hours other than those prohibited by that section? To so hold would in effect be the equivalent of holding that the legislature has treated the intoxicating liquor of less significance in relation to public health, welfare and morals than the nonintoxicating — would be the equivalent of holding that municipalities have more power with respect to rigidity of requirements in the matter of the sale of nonintoxicating liquors than they have

in the matter of the sale of intoxicating liquors. Such a holding would not make sense.

It is our view that the legislature by the enactment of sec. 176.06 meant to limit the authority of municipalities with respect to maximum open hours for sale or disposition of intoxicating liquors; that these maximum open hours must be uniform throughout the state but that municipalities otherwise have full power to provide more rigid closing requirements and have the same authority in this regard with respect to sale of intoxicating liquors as they have with respect to the sale of nonintoxicating liquors.

We do not mean to infer from the foregoing that municipalities may require closing of places of business in violation of sec. 176.06 (5). It is our view that they cannot make any such requirements. Municipalities may, however, require such places of business to quit selling and dispensing intoxicating liquors at the same hours as are required generally of all other places selling and dispensing intoxicating liquors.

NSB

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*Indigent, Insane, etc. — Poor Relief — Old-age Assistance* — Sec. 49.25, Stats., providing for recovery by county of funds paid as old-age assistance out of estate of deceased pensioner does not permit assistance furnished wife to be recovered from separate estate of her husband, though both were pensioners.

April 15, 1942.

LAVERN G. KOSTNER,  
*District Attorney,*  
Arcadia, Wisconsin.

You ask our opinion in the following matter:

A and B were husband and wife, both receiving old-age assistance from Trempealeau county. A, the husband, died in December, 1940, and the wife died approximately one

year later. They owned a small home, the title to which was in the husband alone. The husband died testate and probate of his will was commenced. The county filed a claim in the estate of the husband for the old-age assistance furnished to him, and also for the assistance furnished his wife.

The question you wish to have answered is: Does Trempealeau county have a valid claim in the estate of A, the husband, for old-age assistance furnished to B, his wife? The answer is: No.

Chapter 49 of the statutes contains the provisions governing the granting of old-age assistance. Sec. 49.25 controls the recovery of assistance furnished. So far as pertinent, sec. 49.25 reads as follows:

“On the death of a person who has been assisted under sections 49.20 to 49.51, the total amount of assistance paid, including medical and funeral expense paid as old-age assistance, but without any interest, shall be allowed as a claim *against the estate of such person* by the court having jurisdiction to settle the estate. \* \* \*”

A reading of the above quoted portion of the statute discloses an unequivocal intention of the legislature to permit recovery of old-age assistance from the estate of the person to whom it was furnished only, and makes no provision for recovery from any other source, including the estate of the deceased pensioner's spouse.

That the legislature does not intend to permit recovery from the estate of one spouse for assistance furnished the other is also evidenced by the legislative history of sec. 49.25. Previous to the special session of the legislature of 1937, sec. 49.25 reads as follows:

“On the death of a person who has been assisted under sections 49.21 to 49.39, or of the survivor of a married couple, both of whom were so assisted, the total amount paid together with simple interest at three per cent annually shall be allowed and deducted from the estate of such person or persons by the court having jurisdiction to settle the estate. \* \* \*”

The emphasized portions of the above quoted statute were omitted when the statute was amended by chapter 7, Laws

Special Session 1937. Other matter was added, leaving the section to read as in the statutes of 1941.

It is clear that previous to 1937 the statute provided that the estate of the second spouse to die was subject to claim for the assistance furnished both spouses. The amendment of 1937 eliminated the provision for such claim. The repeal of this provision, without reenactment or the substitution of equivalent language, evinces a clear legislative intent that no such claim as was formerly permitted should now be allowed—the legislature intends that the county should have no claim in the estate of one spouse for assistance furnished the other.

For the foregoing reasons, it is the opinion of this office that since the amendment of sec. 49.25, Wis. Stats., by ch. 7, Laws of Special Session 1937, a county which furnishes old-age assistance to both individuals of a married couple has no claim against the estate of the one for the assistance furnished the other.

PCM

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*Peddlers* — Exception to itinerant merchant trucker law contained in sec. 129.11, subsec. (2), par. (b), Stats., does not apply to dealer in seasonal fruits and vegetables who does not maintain established place of business throughout year.

April 17, 1942.

MOTOR VEHICLE DEPARTMENT.

Attention Hugh M. Jones, *Commissioner*.

You have inquired whether the exception to the itinerant merchant trucker law contained in sec. 129.11, subsec. (2), par. (b), Stats., applies to dealers in berries, fruits or seasonal vegetables of a perishable nature where such dealers do not handle other commodities so as to be actively engaged in business throughout the year.

The exception above referred to reads as follows :

“A person transporting property owned by him in a motor truck or other vehicle owned or leased by him, his agent or employe, whether operated by him, his agent or employe, when such transportation is incident to a business conducted by him at or from an established place of business operated by him, either within or without this state, and when such property is being transported to or from such established place of business.”

For purposes of sec. 129.11 the term “established place of business” is defined in subsec. (1) (e) as follows :

“‘Established place of business’ means any permanent warehouse, building or structure, at or from which a permanent business is carried on as such in good faith and not for the purpose of evading the provisions of this section, and at which stocks of the property being transported are produced, stored or kept in quantities reasonably adequate for, and usually carried for, the requirements of such business, and which business is carried on regularly during normal business hours throughout the year, and shall not mean residences, tents, temporary stands or other temporary quarters, nor permanent quarters occupied pursuant to any temporary arrangement.”

In view of the foregoing statutory provisions it is plainly evident that to come within the exception to the law, the dealer must not only have an established place of business as specified in sec. 129.11 (2) (b), but such established place of business under sec. 129.11 (1) (e) must be one where the business is carried on regularly during normal business hours *throughout the year*.

Obviously a dealer engaged in the handling of seasonal products and who does not handle other commodities so as to be actively engaged in business throughout the year would fail to meet this latter requirement, and hence does not come within the purview of sec. 129.11 (2) (b).

WHR

*Education — Vocational Education — Industry Regulation — Master and Apprentice* — It is discretionary with local board of vocational and adult education under sec. 41.19, Stats., whether tuition shall be charged for nonresident pupils.

If local boards of vocational and adult education require payment of tuition for nonresident students they may exempt pupils serving as apprentices of residents pursuant to ch. 106, Stats.

Minor apprentice may acquire residence different from his parents' for school purposes so as to be entitled to attend vocational school maintained by municipality in which master resides free of tuition charges, even though parents of minor reside in another municipality.

Adult serving as apprentice is not entitled to attend vocational school maintained by municipality in which contract is to be performed free of tuition charges unless such apprentice actually resides in that municipality or, if not residing in such municipality, unless board of vocational education of such municipality elects not to charge tuition for attendance of such persons.

April 20, 1942.

GEORGE P. HAMBRECHT,

*Board of Vocational and Adult Education.*

You have asked a number of questions about payment of tuition for the attendance at vocational schools of apprentices indentured under ch. 106, Stats.

Your first question is:

“We have taken the position that the charging of nonresident tuition fees (section 41.19 of the statutes) for all nonresident students is *permissive* rather than *mandatory*. Are we correct in this interpretation?”

Sec. 41.19, Stats., provides in brief that the local board of vocational and adult education “is authorized” to charge tuition for nonresident pupils not to exceed a specified amount; that the secretary of the board “shall” send a sworn statement of the amount due to the proper officials

of the municipality of the pupils' residence; that the statement "shall" be filed and allowed in the same manner as other claims against the board or municipality; that non-resident students over 21 "may" pay such nonresident tuition charge; and that no board or municipality shall be liable for the tuition unless notified of the pupils' attendance within 30 days after enrollment.

Grammatically speaking, the term "is authorized" is permissive rather than mandatory. Our court has held that where power or authority is given to public officers in permissive language, the exercise of such power is to be regarded as permissive rather than mandatory unless the act is clearly for the benefit of the public or of third persons so that they have a right *de jure* to have the power exercised. *Curry v. Portage*, 195 Wis. 35, 37; *Hart v. Godkin*, 122 Wis. 646, 649; *The Market National Bank of New York v. Hogan*, 21 Wis. 317, 319; *Kelley v. City of Milwaukee*, 18 Wis. 83; *Cutler, Guardian, etc., v. Howard, Executor, etc.*, 9 Wis. 309, 312. In the case last cited the court said:

"\* \* \* The cases fully establish the doctrine that when public corporations or officers are authorized to perform an act for others, which benefits them, that then the corporations or officers are bound to perform the act. The power is given to them not for their own, but for the benefit of those in whose behalf they are called upon to act; and such is presumed to be the legislative intent. In such cases they have a claim *de jure* to the exercise of the power. But where the act to be done is not clearly beneficial to the public or third persons, the exercise of the power is held to be discretionary."

With respect to a statute which provides that a city "is authorized to erect" a building and that such building "shall be erected" under certain conditions, it was held in *Klinck v. Pounds*, 163 N. Y. S. 1008, 1009, that the power conferred was discretionary and not mandatory. The court said:

"\* \* \* The act says, 'The city of New York is authorized to erect,' etc. There is a distinction between 'authorized' and 'required' or 'directed.' 'Authorized' is not on its face mandatory. *County of Lehigh v. Hoffart*, 9 Atl. 177.

The most that can be urged as to the subsequent provisions of the act relied on by the plaintiff, viz., 'shall be erected,' is that, if the city avails itself of the permission granted by section 1, etc."

Likewise, in sec. 41.19 the use of the mandatory language with respect to the duties of the secretary of the board may be held to apply only in case the board of vocational and adult education exercises its authority to charge tuition.

Since permissive language may be construed as either permissive or mandatory depending upon whether the authorization is intended for the benefit of the public or of third persons so that the latter shall have a right *de jure* to demand its exercise, it is necessary to determine the legislative intent with respect to the particular statute. An examination of other sections of the Wisconsin statutes providing for payment of tuition by nonresidents shows that the legislature has used mandatory language in sec. 40.21, relating to common schools, and in secs. 36.16, 41.26 and 41.30, with respect to out-of-state students attending the state university, Stout institute and the Wisconsin institute of technology, respectively.

Since the legislature has used mandatory language with respect to charging tuition in certain types of schools and has used permissive language in a statute relating to a school of an entirely different type, it seems probable that the difference in language was intended to be significant. The difference may have been based on the fact the benefits of vocational education sometimes inure to the agency paying the cost of maintaining the school rather than to the community from which the pupils are recruited. It is as probable that graduates of vocational schools will exercise their talents in the community in which they receive their education as that they will return to the communities where their families reside in order to pursue their trades. In any event, there is no reason for presuming that the legislature intended to prohibit a municipality from extending the benefit of such educational facilities, if it desires, to other municipalities which are arms of the same state government and to the residents of such municipalities.

The fact that state aid to vocational schools is given without reference to the residence of pupils or to payment of tui-

tion (see XXVIII Op. Atty. Gen. 196) also points to a legislative intent not to require that the free use of such schools be restricted to residents of a particular community.

While it is impossible to predict with absolute certainty how the statute will be construed by the courts, we are of the opinion that the legislature intended the authorization to charge tuition as contained in sec. 41.19 to be permissive rather than mandatory, and that local vocational boards may extend the benefits of their schools free of charge to residents of other communities in the state, if they wish.

Your second question is:

“May local boards of vocational and adult education which require nonresident tuition fees to be paid for all other than indentured apprentices also make provision that minors and/or adults who are indentured apprentices may be admitted free of nonresident tuition charges?”

The opinion was given in XXII Op. Atty. Gen. 245 that the board of regents of normal schools had no authority to exempt certain classes of persons from payment of incidental fees. The opinion was based upon the fact that such board has only the powers conferred by statute and that there was no statutory authorization for it to make such exemptions.

Sec. 106.01, subsec. (10), reads:

“It shall be the duty of all school officers and public school teachers to co-operate with the industrial commission of Wisconsin and employers of apprentices to furnish, in a public school or any school supported in whole or in part by public moneys, such instruction as may be required to be given apprentices.”

We believe this declaration of legislative policy to promote public education of persons engaged as apprentices is sufficient authorization for local boards of education to recognize such persons as a separate class with respect to payment of tuition.

While it is true that discrimination in favor of one class of persons and against others may violate the 14th amendment of the federal constitution, a classification is not in-

valid if it is a reasonable one and is germane to the purpose of the law or regulation in which it is involved. *Union F. H. S. Dist. v. Union F. H. S. Dist.*, 216 Wis. 102.

Your third question reads :

“Has an apprentice, minor or adult, indentured to a Milwaukee employer, though his parents reside outside the corporate limits of Milwaukee, a right to insist upon being admitted tuition free to the Milwaukee school of vocational and adult education?”

Under sec. 106.01 (5) and (6), Stats., and under the rules of the industrial commission promulgated to carry out the apprenticeship statutes, it is obligatory that an apprentice shall receive a specified number of hours of instruction in school.

The courses of instruction required to enable the apprentice to learn his desired trade are ordinarily furnished only by vocational schools. In order to carry out the apprenticeship contract, instruction must be made available to the apprentice in such a school in the municipality in which the master has his business.

With respect to admission of pupils into vocational schools, sec. 41.18 of the statutes provides :

“The schools of vocational and adult education shall be open to all residents of the cities, towns and villages in which such schools are located, who are fourteen years of age and who are not by law required to attend other schools, and to all persons over fourteen years of age employed in said cities, towns or villages, but who are residents of other municipalities maintaining schools of vocational and adult education; provided, such nonresidents shall present the written approval of the local board of vocational and adult education of their home municipality. The schools of vocational and adult education shall be open to all persons fourteen years of age or over who reside in other municipalities having local board of vocational and adult education but in which the specific courses desired by such persons are not given; provided, such courses are given in the municipality in which such persons elect to attend and the local board of such municipality agrees to admit them; provided further, that such nonresidents shall present the written approval of the local board of vocational and adult education of their

home municipality. Any person over the age of fourteen years who shall reside in any town, village or city not having a vocational and adult education school, and who is otherwise qualified to pursue the course of study, may with the approval of the board of vocational and adult education, be allowed to attend any school under its supervision. Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

Residents of a municipality who are over 14 years of age and not obligated to attend other schools are entitled to admission tuition-free to a vocational school maintained by such municipality. The right of a nonresident to attend such school is subject to approval by the board of vocational education of the municipality of his residence if such municipality maintains a vocational school giving the desired courses; otherwise, the right of a nonresident to admission to a vocational school is subject to the approval of the board maintaining the school. See *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94, 96.

If, therefore, a person apprenticed to learn his trade in a certain locality be regarded as a nonresident of such locality, the terms of sec. 41.18 of the statutes do not entitle him to demand as a matter of right that he be admitted to the vocational school in the municipality where the apprenticeship contract is to be performed and in which he at the time lives.

As to minors, neither the residence of the parents of an apprentice nor his own residence prior to the apprenticeship is necessarily determinative of the residence of such apprentice after he enters upon performance of his indenture. In *Kidd v. Joint School District*, 194 Wis. 353, it was held that where a father gave a minor son his freedom to earn his education, the place to which such minor went for that purpose constituted his residence for school purposes even though it was different from that of the father. The following excerpt is taken from the opinion in that case at page 357:

"The plaintiff's first and primary purpose thereafter necessarily was to find a home whereby he could support himself, and gain whatever advantages were incidental thereto. He investigated several places and concluded to go to Rich-

*land Center*. There he found a home where he could earn his living and go to school. But going to school was not his primary purpose. He must live by daily toil, and that necessarily came first in his consideration in finding a home. This seems to the court to be the logic of the situation. There are some differences in the authorities as to the relation of parents and child after emancipation. But the cases cited from *State ex rel. School District v. Thayer*, [74 Wis. 48, 41 N. W. 1014], and *McMillan v. Page*, [71 Wis. 655, 38 N. W. 173], seem to settle the question in this state, that a child may gain a residence, for school purposes, apart from his parents when they in fact emancipate him. \* \* \* The authorities are not uniform in different jurisdictions, and as to the special considerations as to what constitutes residence. Residence, however, is a very broad and liberal term, used most frequently to apply to a place where a person resides without a present purpose to remove therefrom. 'Resident' is synonymous with 'inhabitant.' "

The controlling circumstance was stated in *The State ex rel. School District No. 1 of Waukesha v. Thayer*, 74 Wis. 48, 41 N. W. 1014, to be whether the child is actually residing in the district "for other, as a main purpose, than to participate in the advantages which the school affords" (p. 53).

See also XX Op. Atty. Gen. 666, XXI 117, XXII 149, XXV 410 and 608, and XXVIII 549.

It would seem that the average indentured apprentice attending a vocational school located in the same municipality that he resides in while performing the apprenticeship indenture would come within the scope of these cases and would thus have a residence for school purposes different from that of the parent. An indentured apprentice would seem to be residing within the municipality "for other, as a main purpose, than to participate in the advantages which the school affords."

If an apprentice continues the performance of his apprenticeship contract after he becomes of age he may continue or acquire a residence in the place where he is receiving his training if he chooses to live there, and in such case is entitled to attend the vocational school in that community free of tuition charges. The adult can always establish his own residence. The residence of the parent is not of the

same significance with respect to adults that it is with respect to minors. If the adult apprentice chooses to reside in a municipality other than the one in which he is receiving his apprenticeship training and where the vocational school is located, his right to attend such vocational school without payment of tuition depends upon what action is taken in that respect by the board of vocational education of such municipality.

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*Courts — Words and Phrases — Forest or Wild Land Area — Meaning of “forest or wild land area” as used in sec. 331.175, Stats.*

April 24, 1942.

RALPH W. STELLER,  
*District Attorney,*  
Hayward, Wisconsin

You advise that some time ago you prosecuted a party for an alleged violation of sec. 331.175, Stats., for failure to send notice to the county clerk of intention to cut timber as required by said section; that the case was dismissed by the municipal judge on the grounds that the land where the cutting was done did not come within the meaning of “forest or wild land area” as used in said section; that in said case the land on which the cutting had been done was part of an unincorporated Indian village located in a wooded area (presumably forest area) but that such wooded area was interspersed with houses of the Indians. In the light of this experience you request our opinion as to the proper interpretation of the words “forest or wild land area” as used in sec. 331.175, Stats.

Sec. 331.175 (1) reads:

“Before any person shall cut, or cause to be cut, any timber or Christmas trees upon any land in, upon, or adjoining any forest or wild land area within this state, such per-

son each year shall send a notice in the English language containing the name and post-office address of such person, and also a description of all the lands upon which such cutting is to be done, designating the same by each forty acre governmental subdivision or fraction thereof with the proper section, town and range, by registered letter properly enveloped, sealed, postage prepaid, and addressed to the county clerk of each county in which said land is located; and the county clerk shall mail a copy of such notice to the district forest ranger and the town chairman of each town in which said lands upon which such timber and Christmas trees are to be cut are located."

As was stated in *Forest Preserve Dist. v. Jirsa*, (Ill.) 168 N. E. 690, 692, in which a statute relating to forest land was involved: "Whether a tract of land is a forest is a question of fact."

Since the question whether any particular piece of land falls within the term "forest or wild land area" must be determined on the facts in each case, the rules of interpretation here given can serve only as general guides for the triers of the facts.

It is true that sec. 331.175 is a penal statute, and that penal statutes are to be strictly construed so as to minimize rather than to extend their penal character, if their meaning is not clear. *State ex rel. Dinneen v. Larson*, 231 Wis. 207; *Calvetti v. Industrial Comm.*, 201 Wis. 297; *Oeflein, Inc., v. State*, 177 Wis. 394; *State v. Boliski*, 156 Wis. 78; *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557; *Minneapolis T. M. Co. v. Haug*, 136 Wis. 350; *Brown v. State*, 137 Wis. 543; *Cohn v. Neeves*, 40 Wis. 393; *Stone v. Lannon*, 6 Wis. 497.

It is equally true, however, that the statute must be construed to carry out the legislative intent if that is apparent. *State ex rel. Shinnors v. Grossman*, 213 Wis. 135; *State v. Peterson*, 201 Wis. 20; *State v. Helmann*, 163 Wis. 639; *Weirich v. State*, 140 Wis. 98; *Miller v. Chicago & N. W. R. Co.*, 133 Wis. 183; *Nelson v. The State*, 111 Wis. 394; *The State v. Shove*, 96 Wis. 1. What, then, is the legislative purpose and intent with respect to this section?

It seems unnecessary to point out that the matter of reforestation, forest protection, preservation and conservation have been matters of grave national and state concern

for decades. The national government has set apart in this state and elsewhere vast "national forest" areas. The work of the national forest service has been supplemented by the work of other national agencies such as the FERA land use program, which was inaugurated and financed by virtue of congressional emergency appropriation acts. This program was vastly extended in this state and upon a national scale when taken over by the resettlement administration and later by the farm security administration (successor to the resettlement administration) when this latter agency was set up and became a permanently recognized agency within the department of agriculture. The federal government, through its national forest service and these supplementing agencies, has spent millions of dollars in the state and elsewhere throughout the nation in a forest development, preservation, protection and conservation program.

The merest glance at the state legislation aimed at the same objectives must convince the most sceptical as to the extent to which the legislature has for years manifested concern of the gravest nature with respect to these objectives and legislated accordingly. The various units of government from the sovereign (the state) down to and including the smallest unit of government, the school district, are all given powers to act in relation to the promotion of and accomplishment of these objectives. Literally since the turn of the century, if not before, these objectives have been of vast concern to the legislative representatives of the people of this state. *State ex rel. Owen v. Donald*, 160 Wis. 21. The state itself undertook such objectives shortly after the turn of the century. It was subsequently held in the case above cited that art. VIII, sec. 10 of the constitution, prohibiting the state from engaging in or being a party to carrying on works of internal improvement, operated as an effective barrier to the state as such carrying on a program of acquisition, preservation and development of forests. This matter was of such concern to the people of the state that they subsequently amended their constitution so as to permit the state as such to engage in such activities. Note the present wording of art. VIII, sec. 10, Wisconsin constitution. See *State ex rel. Hammann v. Levitan*, 200 Wis. 271.

It took a constitutional amendment for us to have state forests on any considerable scale but we now have them and upon a considerable scale because the people have demanded that we have them. See ch. 28, Stats.

Sec. 59.98 provides for reforestation by counties, for the establishment of county forest reserves and for state aids in the establishment and maintenance of same.

Sec. 66.27 provides :

“Any city, village, town, or school district of the state may acquire and own lands for forestry purposes, either within or without the territorial limits of such municipality, and may carry on forestry on such lands, and appropriate, raise and expand money for such purposes.”

The state encourages individuals in relation to these same objectives by the forest crop law. See sec. 20.07 (2), Stats. and ch. 77, Stats. It may be noted in connection with the forest crop lands that forty acres qualifies for entry as such. See sec. 77.02 (1), Stats. The only real estate tax levy which the state has made for years is that authorized by art. VIII, sec. 10 of the constitution and sec. 70.58, Stats., enacted pursuant to this constitutional authorization for the purpose of “acquiring, preserving and developing the forests of the state.” This state tax levy, unlike most state taxes when received, does not go into the general fund but rather into the conservation fund. See sec. 70.58, Stats.

The state conservation commission is given vast powers in relation to this forest acquisition, preservation and development program. It is the supervising and administrative agency by which the state correlates its own state program with the programs which the other various units of government are authorized to conduct and through which the state correlates its own and these various programs with that of the similar objective programs of the federal government. The university of Wisconsin is brought into the picture so that it in turn may cooperate and give guidance and direction to the program. In addition to the chapters and sections heretofore cited, see ch. 24 and secs. 23.09 (7), 28.02 and 28.20.

In the performance of its functions the commission is given wide powers by sec. 26.12 with respect to the forma-

tion of forest protection districts and to that end is authorized to employ experienced wardens or forest rangers; is authorized to subdivide the districts into patrol areas; to establish lookout towers, construct ranger stations, telephone lines, purchase tools for fire fighting as well as other necessary supplies or equipment considered necessary to effectively protect the district from fires, including the promulgation of rules and regulations.

By sec. 26.11 the commission is vested with power, authority and jurisdiction in all matters relating to the prevention, detection and suppression of forest fires outside the limits of incorporated villages and cities in the state and to do all things necessary in the exercise of such power, authority and jurisdiction. Note that by sec. 26.11 (2) "The term 'forest fire' as used in this chapter means uncontrolled wild, or running fires occurring on forest, marsh, field, cut-over or other lands."

With the exception hereinafter noted in subsec. (2), subsec. (1) of sec. 331.175 requires that certain notice shall be given before timber or Christmas trees are cut upon any land in, upon, or adjoining any forest or wild land area within the state. The giving of this notice is obviously not an end in itself but is required in order that certain other state purposes and objectives may be accomplished or subserved thereby. What then is the purpose to be accomplished or subserved by the giving of this notice? It would seem apparent that the legislature intended the giving of this notice to subserve this vast and manifold program with respect to acquisition, development and preservation of the forests within the state and further to facilitate enforcement of the various statutes enacted in furtherance of these legislative objectives. In the first instance the notice is given in writing to the county clerk, so that it becomes a public record which, under the provisions of sec. 18.01, Stats., may be examined not only by public officers but by other persons. Among the statutory provisions which may be served by making the notice of cutting a matter of public record is sec. 75.37, which prohibits the cutting of timber from land sold for nonpayment of taxes and requires the treasurer to take steps to protect the county's interest in such cases. Enforcement of secs. 343.511, 343.512 and

331.18, relating to trespass on forest lands and the wrongful cutting of timber, will be aided through the notice required by sec. 331.175.

A copy of the notice is to be mailed by the county clerk to the district forest ranger and to the chairman of the town in which the lands are located. The duties of these officers under secs. 26.13 and 26.14 relate to the enforcement of fire prevention regulations. Such regulations include the proper disposition of slash and debris left after the cutting of timber. The requirement that notice of cutting be supplied to the forest ranger and the town chairman was doubtless intended to supply them with information helpful in enforcement of the statutory provisions relating to fire prevention.

If sec. 331.175 is intended to facilitate the enforcement of the various statutes aimed at forest acquisition, development, preservation, protection against fire, prevention of cutting from tax delinquent lands and prevention of other wrongful cutting, the terms "forest or wild land area" must be construed to have a sufficiently broad meaning to accomplish the purpose. A restricted or technical interpretation of the terms must be rejected if such interpretation defeats the legislative purpose and intent.

The terms "forest land" and "wild land" as separate and distinct terms, have been judicially construed from time to time but our investigation has not revealed any case where the words were involved in a statute similar to the one under consideration and which is obviously enacted to subserve the manifold purposes and legislative objectives hereinbefore set forth. While no decision herein cited is controlling as to the meaning of the terms as employed in our statute, an examination of the cases is helpful in ascertaining the usual limitations in statutes of restricted scope and purposes.

In *Diana Shooting Club v. Kohl*, 156 Wis. 257, 259, our court defined the term "wild land" as used in a statute relating to costs in actions for trespass:

"\* \* \* Wild land is land in a state of nature, uninhabited, unoccupied, and uncultivated, and not in use by the owner, his agent or lessee, for any artificial purpose. We do not think the marsh property of a shooting club however

extensive, used as a feeding and breeding place for wild fowl and for the purposes of hunting during the lawful hunting season and surrounded by cultivated farms, is wild land within the meaning of this statute. Such land is inhabited and occupied so far as the nature of the property will permit and the use to which it is put. \* \* \*

The following cases from other jurisdictions indicate that the term "wild land" includes only areas located separate and apart from lands under cultivation, and does not include woodland which is contiguous to and used in connection with a farm, dwelling or other improved and cultivated land. *Hopkins v. Roach*, 56 S. E. 303, 304, 127 Ga. 153; *Watkins v. Country Club*, 47 S. E. 538, 120 Ga. 45; *Kirkland v. Pitman*, 50 S. E. 117, 122 Ga. 256; *Holden v. Page*, 107 A. 492; 118 Me. 242; *Leavitt v. Tasker*, 76 A. 953, 955, 107 Me. 33; *Central Maine Power Co. v. Rollins*, 138 A. 170, 174, 126 Me. 299.

With respect to the term "forest land" you have referred to the definition in Black's Law Dictionary to the effect that forests were waste lands belonging to the king, replenished with beasts or chase which are under his protection. Black's Law Dictionary classifies such definition as old English law. There is no reason to assume that the legislature in enacting a provision relating to protection of forests intended to use the term "forest" as it was used in old English law if such use would render it inapplicable to lands in the state in need of protection. Sec. 370.01 (1), Stats., reads:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning."

The first definition of the word "forest" given by Funk & Wagnalls New Standard Dictionary of the American language is "a large tract of land covered with a natural growth of trees and underbrush; a large wood; woodland often with intervening spaces of open growth." The first definition given in Webster's New International Dictionary

(2 ed.) is "In popular usage, a dense growth of trees and underbrush covering a large tract of land; \* \* \*"

The case of *Higgins v. Long Island R. Co.*, 114 N. Y. S. 262, 264, interpreted the term "forest" as used in a statute relating to fire prevention as follows:

"The land of the plaintiff which was burned over was, like that in the neighborhood, partly woodland, but not a forest. That word has a large and significant, not an insignificant, meaning. \* \* \*"

In the case of *Forest Preserve Dist. v. Jirsa*, 336 Ill. 624, 168 N. E. 690, 691, the court interpreted the term "natural forest" as used in a statute giving a forest preserve district the right of eminent domain. The court said:

"\* \* \* A forest is defined as a tract of land covered with trees; a wood, one usually of considerable extent. *Washburn v. Forest Preserve District*, 327 Ill. 479, 158 N. E. 801; 2 Words and Phrases, second series, p. 610. Webster's New International Dictionary discusses the words 'forest,' 'wood,' 'woods,' 'woodland,' and 'grove,' and draws the distinction between a forest, which implies a large body of trees growing naturally or a tract covered with trees, and a wood or grove, the latter being not of sufficient extent to be classed a forest. \* \* \*"

The term "forest" appears to imply a considerable extent of naturally wooded land. Whether any particular area is sufficient extent to fall within such general definition is largely a question of fact which must be determined in each case.

The terms "forest" and "wild land" are, grammatically speaking, used alternately in sec. 331.175, which indicates that if a particular piece of land fits within the definition of either term it is within the purview of the statute. Perhaps it should be noted, as a matter of caution, that the term "or" is sometimes construed in legislative provisions to mean "and." *Wisconsin Dry Milk Co. v. Circuit Court*, 176 Wis. 198; *State ex rel. Rich v. Steiner*, 160 Wis. 175; *The Attorney General v. The West Wisconsin Ry. Co.*, 36 Wis. 466. It is possible that the court might apply such construction to sec. 331.175, particularly in view of the fact that it

relates to the cutting of timber, which would have no application to wild land unless the wild land is also wooded. We do not believe that a construction contrary to primary grammatical usage should be ordinarily adopted by administrative and enforcement officers, unless there is clear judicial authority for doing so with respect to the particular statute involved.

Furthermore, subsec. (2) of sec. 331.175 carries the following proviso:

“\* \* \* Provided, however, that the provisions of this section shall not apply to any person who shall be engaged in cutting cordwood or other fuel wood upon his own land or engaged in cutting timber or trees for clearing any land actually owned and occupied by him.”

If the legislature had intended the term “forest or wild land area” to exclude all occupied land, it would not have been necessary to make an exception for certain cutting performed on land owned and occupied by the cutter. The specification of the exception above quoted tends to deny an intent that there should be exceptions other than those expressed.

It is our view that sec. 331.175 is intimately related to practically all aspects of the vast program of acquisition, development, preservation, protection and conservation of the forests of this state and that in order to give effect to the manifold legislative purposes which this section was designed to subserve, the term “forest or wild land area” as used in said section should be construed to include not only woodlands in a state of nature which are uninhabited and uncultivated, but also any part of a reasonably extensive tract of land covered with growing trees of natural or artificial plantings even though the tract may be interspersed to some extent with occupied or cultivated areas.

It may be noted that it is not necessary that the cutting be done upon land which qualifies as “forest or wild land area”. It is sufficient if the cutting is upon land which adjoins an area which does so qualify.

Justice Holmes observed in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, 41 S. Ct. 506, 65 L. ed. 963, 16 A. L. R. 66, that there are situations where “a page of history is

worth a volume of logic." The purpose of this statute cannot be divorced from the determination of the people of this state to develop, preserve and protect the forests of the state as manifest in the legislation enacted to that end. The statute was designed to subserve such purposes and appears to be admirably adapted to serve the manifold purposes of this program. Restricted legalistic concepts applicable to statutes of limited purpose and scope would appear to be of no controlling significance in relation to proper construction of this statute, which obviously is designed to subserve the manifold purposes of the whole acquisition, development and preservation of forests program.

NSB

BL

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*Municipal Corporations — Beer Licenses — Retail Class "B" license issued under sec. 66.05, subsec. (10), Stats., to house manager of club may not be transferred from such house manager to his successor.*

Beer may not be sold under such license after resignation of house manager to whom it was issued, even though sales are made by person holding operator's license.

April 25, 1942.

CONNOR HANSEN,

*District Attorney,*

Eau Claire, Wisconsin.

You state that a Class "B" license to sell beer at retail has been issued to the house manager of a certain incorporated club; that the house manager has resigned his membership and a new manager elected to take his place. You ask:

1. May the license issued to the house manager who resigned be transferred to his successor?

It was held in *The State v. Bayne*, 100 Wis. 35, that a license issued pursuant to statute is not assignable unless the statute so provides. The court said at page 38:

“The powers of the town board were purely statutory. It could only exercise such powers as were expressly granted to it by statute, or necessarily implied from the powers so granted. *Eaton v. Manitowoc Co.* 44 Wis. 489; *Smith v. Todd*, 55 Wis. 459; *Jackson v. Jacksonport*, 56 Wis. 310; *Cathcart v. Comstock*, 56 Wis. 607; *Wright v. Zettel*, 60 Wis. 168. The statutes cited only authorized the town board to grant licenses ‘to such persons as *they deem proper*,’ and then only upon the conditions and under the restrictions therein prescribed. The board was thus required to exercise judgment and discretion in the selection of proper persons to be so licensed; and then, after such license should be granted, the board was still required to revoke the same in case the licensee should be found to be an improper person. A license granted is a mere privilege to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee. *Metropolitan Board v. Barrie*, 34 N. Y. 657. From the very nature of things, such a license is not assignable at common law.  
\* \* \*

Sec. 66.05, subsec. (10), subd. (d), par. 4, Stats., with respect to licenses to sell fermented malt beverages, provides in part:

“\* \* \* Said licenses shall particularly describe the premises for which issued, *shall not be transferable*, and shall be subject to revocation for violation of any of the terms or provisions thereof or of any of the provisions of this subsection.”

This provision was construed in XXII Op. Atty. Gen. 937 and XXIV Op. Atty. Gen. 138 to prohibit the transfer of licenses not only from the premises for which issued to other premises but from one person to another.

If there is any authorization for the transfer of a license such as the one you describe, it should be sought in the provisions of sec. 66.05 (10). The fact that sec. 176.05 authorizes the transfer, in certain circumstances, of licenses to sell intoxicating liquor has no bearing on the assignability of license issued under sec. 66.05 (10) to sell fermented

malt beverages. As stated in *State ex rel. Torres v. Krawczak*, 217 Wis. 593, 597:

“\* \* \* Ch. 13 [which created chapter 176 of the statutes] is a later statute than ch. 207 [which created sec. 66.05 (10), Stats.], and does not in any way affect ch. 207. By not repealing ch. 207 the intention of the legislature was to leave it in full force and effect.”

It may be argued that, since the license was issued to the house manager as agent for a club, it is in reality issued to the club and that the transfer from the house manager to his successor is a transfer in form rather than in substance. Sec. 66.05 (10) (g), however, evinces an intent that Class “B” retail licenses for the sale of beer shall be issued to natural persons for certain premises. Throughout the section clubs appear to be classified with the businesses or premises for which licenses may be issued rather than with the persons to whom they are to be issued.

The qualifications for a licensee as laid down by sec. 66.05 (10) (g) show that the legislature intended to place the responsibility in such individual licensee even in the cases where he is permitted to be licensed as an agent. The subdivision provides that the licensees shall be “of good moral character,” shall be “citizens of the United States” and that they shall be “personally responsible for compliance with all of the terms and provisions of this subsection.” It was indicated in *John Barth Co. v. Brandy*, 165 Wis. 196, that the responsibility assumed by a licensee, even where he is acting as agent for another, is not a mere fiction but has a real and practical effect. The court said there at page 199:

“It has also been held that the person having obtained and holding a license is responsible for whatever is done in that place of business by his agents in violation of law, even though it be against the express direction of the person having such license. *State ex rel. Conlin v. Wausau*, 137 Wis. 311, 118 N. W. 810; *Olson v. State*, 143 Wis. 413, 127 N. W. 975; *Reismier v. State*, 148 Wis. 593, 596, 135 N. W. 153.”

The argument might be made that the restriction against assignment of a beer license issued under sec. 66.05 (10) (f) is more onerous than the restrictions imposed with re-

spect to transfer of licenses to sell intoxicating beverages and that there is no more reason for imposition of such restrictions in the former case than in the latter. If that be true it is an argument which can concern the legislature alone. The following excerpt from *Whitbeck v. Wisconsin Tax Commission*, 207 Wis. 58, 70, is appropriate in this connection:

“\* \* \* It may well be that the statute as construed is very onerous and imposes upon the taxpayer a heavy burden. If that is true, it is a matter for the consideration of the legislature. We can only interpret and apply the statute as it is written. Limitation of the right of a court review does not operate, however, to limit his right to have the matters reviewed by the various taxing tribunals as provided in the statute. A consideration of claims for refund within the provisions of the statute by the assessor of incomes, county board of review, or the Tax Commission cannot enlarge the taxpayer's right to a court review as provided by the statute. Sec. 71.17 (1) provides in terms that the right to refund and credit shall be confined to the method provided for by the statute. There is no room, therefore, for incorporating into the statute by construction or interpretation any other method of review than that provided.”

2. Is it possible for some new members of the club to secure an operator's license under sec. 66.05 (10) (i) 1 and for the club to continue selling fermented malt beverages without obtaining a new license?

An operator's license issued under sec. 66.05 (10) (i) was intended to give the licensee no rights except to sell fermented malt beverages under the authority of a Class "B" license issued to another person. His responsibility is limited to "the acts of all persons serving as waiters, or in any other manner, any fermented malt beverages to customers." It is not co-extensive with the responsibility placed upon the holder of the Class "B" license by sec. 66.05 (10) (g) as hereinbefore quoted.

A question similar to the one you submit was dealt with in XXIV Op. Atty. Gen. 138, where it was ruled that the wife of a licensee could not continue operation of the licensed business after her husband left home with no inten-

tion of returning, although sec. 66.05 (10) (i) provides that any member of the immediate family of the licensee shall be considered as holding an operator's license. It was stated in the above opinion that to allow the wife to run the tavern under the license issued in the name of the husband would be accomplishing by indirection what could not be done directly because forbidden by law.

BL

*Industry Regulation — Industrial Commission — Safe Employment and Place — School Districts* — Under sec. 40.16, subsec. (2), Stats., school districts may obtain insurance against liability for accidental injuries to members of public caused by defective construction or maintenance of school buildings under sec. 101.06. But school districts — unlike counties, sec. 59.07 (23) — have no authority to obtain insurance against injuries for which they are not liable. Hence, since they are not liable for injuries caused by negligence of employees or by any other cause not covered by safe-place statute, no insurance may be obtained covering such injuries. XVIII Op. Atty. Gen. 559 reviewed and modified.

May 4, 1942.

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

You have requested a review of the opinion reported in XVIII Op. Atty. Gen. 559 in the light of the changed liability of school districts under the safe-place statute. The question raised in XVIII Op. Atty. Gen. 559 was as follows:

“Can a school district lawfully carry insurance on the pupils enrolled in its schools against injuries sustained in or about the school grounds in the course of their regular school work or in athletic contests sponsored by the schools?”

In that opinion this office pointed out that school districts are not liable for injuries to school children, under the general doctrine that municipalities are not liable for the torts of their employees committed in the performance of a governmental function. Therefore, it was ruled, there is no liability to be insured and hence no justification for expending public moneys for that purpose.

There has been no change in the law with reference to the nonliability of school districts for injuries caused by the negligence of their employees. *Lawver v. Joint District*, (1939) 232 Wis. 608. Hence there is no occasion for taking out insurance covering such injuries.

However, it has been held by the supreme court that the safe-place statute, sec. 101.06, creates a liability against a municipality for injuries to members of the public caused by defects of construction or maintenance of a public building even though the building is operated by the municipality in the performance of a governmental function. *Heiden v. Milwaukee*, (1937) 226 Wis. 92. By the terms of sec. 101.01 (13), the term "owner" as used in the safe-place statute includes a school district as well as a city. Hence the rule of *Heiden v. Milwaukee* would also apply to a school district. Other subsequent cases which indicate that the safe-place statute applies to municipalities are *Cegelski v. Green Bay*, (1939) 231 Wis. 89; *Grinde v. Wauertown*, (1939) 232 Wis. 551; *Lawver v. Joint District*, (1939) 232 Wis. 608; *Connor v. Meuer*, (1939) 232 Wis. 656.

But in the more recent case of *Holzworth v. State*, (1941) 238 Wis. 63, the supreme court held that the safe-place statute does not create any liability on the part of the state to respond in damages, although the state is also specifically mentioned as an "owner" subject to the statute, in sec. 101.01 (13). In that case the court recognized the fact that the safe-place statute does not create any civil liability for damages but merely establishes a standard of care, the violation of which constitutes *negligence* as a matter of law. Since the state is not subject to a suit for damages based upon negligence the court held that it could not be sued for damages arising out of an alleged violation of the safe-place statute. It would appear that this decision raises a substantial question as to the correctness of the holding in *Heiden v. Milwaukee* and the other cases cited *supra*, but the court did not specifically overrule them and the language used in the *Holzworth* case seems to indicate that they are still the law. Cf. XXX Op. Atty. Gen. 174, 176. Therefore it must be assumed for the present that school districts and other municipalities are liable for damages for violation of the safe-place statute.

This liability, of course, is only for injuries caused by defects of construction or maintenance of the school buildings and does not extend to the school grounds, flagpoles, playground equipment and the like. *Lawver v. Joint District*,

(1939) 232 Wis. 608; *Grinde v. Watertown*, (1939) 232 Wis. 551. Cf. *Cegelski v. Green Bay*, (1939) 231 Wis. 89. However, such permanent or semi-permanent structures as bleachers set up for the witnessing of athletic contests are held to be "buildings" within the meaning of the safe-place statutes. *Bent v. Jonet*, (1934) 213 Wis. 635.

It is also well established that municipalities are not liable for injuries caused to students taking part in school athletic contests. *Mokovich v. Independent School Dist.*, (1929) 177 Minn. 446, 225 N. W. 292.

Therefore the only insurable risk to which the school district is subject is the risk of injury to members of the public by reason of defective construction or maintenance of school buildings and the district has no legal authority to insure against injuries caused by negligence of employees, defective playground equipment or athletic contests.

It may be pointed out that counties are specifically authorized by sec. 59.07 (23) to carry public liability insurance on certain activities for which the county would not be liable to respond in damages, but no similar authority is granted to school districts.

It is our opinion that the district board has authority under sec. 40.16 (2) to obtain public liability insurance covering the school buildings to the extent of the insurable risk indicated above. That statute provides in part as follows:

"\* \* \* It shall also be the duty of the [common school] board to keep the buildings and equipment amply insured."

See *French v. Millville*, (1901) 66 N. J. L. 392, 49 A. 465, affd. (1902) 67 N. J. L. 349, 51 A. 1109. Cf. *Travelers' Ins. Co. v. Wadsworth*, (1924) 109 Oh. St. 440, 142 N. E. 900.

WAP

*Intoxicating Liquors* — Applications for intoxicating liquor licenses for following license year filed after April 15 cannot be considered until after July 1, beginning of license year. This prohibition applies both to granting of applications for renewal of existing licenses and to granting of applications of those not licensed.

May 4, 1942.

HENRY VAN DE WATER,  
*District Attorney,*  
Sheboygan, Wisconsin.

You have submitted two questions and request our opinion thereon:

“Question 1. In your opinion is it mandatory upon the town board, village board or common council to refuse consideration of an application for license when such application is presented to them after April 15th?”

“Question 2. In your opinion does subsec. (8) of sec. 176.05, Stats., apply to applications for new licenses?”

The answers to the questions are governed by sec. 176.05, subsec. (8), Stats., reading as follows:

“All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued, or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for after July 1. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the state treasurer. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk’s minutes as to the reasons for such rejection.”

It appears to be the legislative intent that applications for intoxicating liquor licenses for the license year begin-

ning July 1 shall not be considered if submitted after April 15 and prior to July 2. If it had not been the intention of the legislature to prohibit the granting of licenses based upon applications made after April 15, it would not have been necessary to insert the proviso that licenses might be granted where applications are made after July 1. The fact that this proviso was inserted discloses the legislative view that without the proviso the language employed would prevent the granting of licenses for a full license year unless application were made on or before April 15 of the preceding license year.

It is speculative as to why the legislature prohibited the consideration of applications made during the period beginning April 16 and ending on July 1. Possibly it was felt that an adequate opportunity should be given licensing authorities for the purpose of acting upon applications and that such authorities should be compelled to pass upon all applications a reasonable time prior to the beginning of the license year. To this end the legislature determined that all applications should be in by a certain date and should be acted upon by a certain date.

We think the prohibition with respect to the granting of licenses upon applications made after April 15 applies as well to those of persons not then licensed as to those of existing licensees. There certainly is nothing in the statute which makes any distinction between the two cases, and we know of no reason why such a distinction should be read into it.

In your request you seem to take the view that the situations are different in the respect that all persons holding licenses are given priority in renewals and that the filing date was inserted for the purpose of requiring existing licensees to file in order to determine how many new applications might be granted. In our view, an old licensee has no priority over any other applicant. The limitation statute does not give any. As we read the limitation statute, it simply provides that licenses, according to a certain percentage of the population of the municipality or according to the number of licenses in force at the time the limitation law became effective, whichever number may be the greater,

may be issued. The limitation law merely sets a limit upon the number of licenses. It does not contain any suggestion that one group of applicants for licenses shall be favored at the expense of any other group.

JWR

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*Insurance — State Insurance — Public Lands — Forest Fires —* Sec. 26.11, subsec. (1), Stats., granting to conservation commission power to do all things necessary for prevention, detection and suppression of forest fires, contemplates that equipment for fire fighting is to be acquired by contract whenever possible and is to be commandeered only when absolutely necessary in emergency.

Equipment to fight forest fires may be rented under authority of sec. 26.11 (1) and (4), Stats.

Sec. 26.14 (3), authorizing disbursements for emergency fire-fighting equipment, covers repair bills for damage to rented equipment.

Insurance on such rented equipment may be carried with state insurance fund.

State is not liable for negligent acts of its officers or agents in operating commandeered equipment.

May 5, 1942.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Director*.

You have asked a number of questions arising under ch. 26 of the statutes concerning the use of privately owned equipment by the state in fighting forest fires.

The first question is whether the conservation commission under existing statutes may commandeer teams, trucks, tractors, airplanes and any other equipment that might be needed in an emergency to fight forest fires.

Sec. 26.11, subsec (1), Stats., reads:

“The conservation commission of Wisconsin is vested with power, authority and jurisdiction in all matters relating to the prevention, detection and suppression of forest fires outside the limits of incorporated villages and cities in the state, and to do all things necessary in the exercise of such power, authority and jurisdiction.”

You state in this connection that you have never interpreted the statutes as conferring the right to commandeer equipment but that such matters have always been handled by contract.

Undoubtedly the statute above quoted contemplates that as to equipment the commission is to take such steps as may reasonably be taken in advance by purchase or contract to prepare for the suppression of forest fires, just as you have construed the statute in the past, and that it was not intended that such an extreme exercise of the police power as the commandeering of property should be resorted to except in a real emergency making such procedure necessary. The emergency does not create the power but merely furnishes the occasion for its exercise, and we gather from your inquiry that heretofore such an occasion has not arisen as you have always been able to get the necessary equipment by contract of hire.

This emergency power discussed here is referred to in law as the police power. It has been described as the law of necessity and as being coextensive with the necessities of the case and the safeguards of public interest. It is the power of self-protection on the part of the community. 11 Am. Jur. 978.

This concept is reflected in the language of sec. 26.11 (1), where the legislature has said in the plainest English that the conservation commission shall have power “to do all things necessary” for the prevention, detection and suppression of forest fires outside the limits of incorporated villages and cities.

It is, of course, impossible to say in advance what is or what is not necessary in any given situation, and we must content ourselves here with the foregoing general discussion.

Sec. 26.14 (1) deals with the duties as well as the powers of certain named officers or employees. It concludes “They

shall have authority to call upon any able-bodied citizen to assist in fighting such fires in such manner as they may direct." It has been suggested that the express mention of the impressment of persons results in the implied exclusion of power to commandeer property or equipment for emergency temporary use in fighting forest fires. We do not think the suggestion sound. Sec. 26.14 (1) confers duties and powers upon certain named officers. The granting of this express power to these named officers cannot operate as a retraction of or in limitation of the broad power granted to the commission in sec. 26.11 (1) "to do all things necessary in the exercise of such power, authority and jurisdiction." This language necessarily grants the power to do all things necessary to successfully meet any emergencies. A power to meet any necessary emergency should not lightly be construed as withheld from the *commission* by the mere grant of specific duties and powers with respect to certain officers or employees.

Secondly you inquire whether the conservation commission has authority to enter into contracts directly for the hire on a rental basis of the equipment mentioned in the first question, and either with or without operators.

The answer to this question is indicated in the answer to the first question and such authority again is clearly implied in the power "to do all things necessary." Moreover, additional authority, if any is needed, is to be found in the language of sec. 26.11 (4), which reads:

"The commission may enter into arrangements or agreements and co-operate with town boards, county boards or committees thereof, with individuals, concerns, corporations or associations, for the purpose of improving the protection against forest fires."

Thirdly you inquire whether damages beyond normal wear and tear could be paid for under such rental contracts in the regular manner and from state funds.

Sec. 26.14 (3) reads in part:

"\* \* \* And in addition thereto the commission may allow \* \* \* disbursements for emergency equipment."

The words "disbursements for emergency equipment" are not necessarily limited to rental of such equipment, and we see no good reason why such terminology is not broad enough to cover repair bills for damages to rented equipment. This, of course, is to be paid out of the fund appropriated by sec. 20.205 (2). See XXI Op. Atty. Gen. 365, 366. If the commission refuses to pay, the state is liable for compensation for the services of men and machines furnished to fight forest fires. *Rosenbluth v. State*, 222 Wis. 623.

Fourthly you inquire whether it is possible for the commission to secure insurance against undue loss on such rented equipment.

In XXVIII Op. Atty. Gen. 687, at 689, it was said:

"Where one has possession of property of others for which the insured may be called on to account, he may insure the entire value of the property and recover such value, accounting to the real owner who sees fit to avail himself of the benefit of the insurance for any excess beyond the interest or liability of the insured. 26 C. J. 85-86."

See also *Tischendorf v. Lynn Mutual Fire Ins. Co.*, 190 Wis. 33, 38, and cases cited, p. 38. Further, we believe that such insurance may be effected under ch. 210 titled "State insurance."

Sec. 210.01 provides:

"No officer or agent of this state, and no person or persons having charge of any public buildings or property of the state, shall pay out any public moneys or funds on account of any insurance against loss by fire, tornado, or any other risk upon property, or loss or damage from any cause to property, or shall in any manner contract for or incur any indebtedness against the state on account of any such insurance upon any of the public buildings, furniture, fixtures or property of any kind whatever belonging to the state except in the manner hereinafter provided."

The question arises whether privately owned equipment which is in the possession and use of the state for fire fighting purposes is included in the words "or property of any kind whatever belonging to the state." This same prob-

lem was discussed at great length and answered in the affirmative in V Op. Atty. Gen. 405, where it was ruled that military equipment loaned to the state by the federal government may be insured in the state insurance fund. It is suggested there that an insurable interest is "property" and, too, that the statutory phrase "of any kind whatever belonging to the state" is an enlargement of the word "property" and makes it more comprehensive than where used alone. We are inclined to apply the same reasoning in the instant question. See also XXI Op. Atty. Gen. 627.

Lastly you inquire whether the state is liable for property damage arising out of the operation of trucks or automobiles, commandeered by the commission for transportation of men and equipment for fighting forest fires.

It is well settled that the state is not liable for the negligent acts of its officers or agents. Ch. 285, relating to actions against the state, applies only to claims rendering the state a debtor, and not to equitable claims or to tort claims such as would be involved in the type of situation described here. See *Holzworth v. State*, 238 Wis. 63.

WHR

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*Public Officers — Public Administrator — Taxation — Inheritance Taxes* — Fees of public administrator in estate pursuant to sec. 72.17, subsec. (3), Stats., are not payable until inheritance tax in estate has been determined by court.

May 15, 1942.

JOHN M. SMITH,  
*State Treasurer.*

You have requested an opinion as to whether a public administrator is entitled to payment of his fees in an estate pursuant to sec. 72.17 (3), Wis. Stats., until the inheritance

tax has been determined by the county court in said estate.

The appointment of the regular public administrator is provided by sec. 253.32, Wis. Stats., but this section contains nothing as to fees or compensation. Subsec. (3) of sec. 72.17 contains the only provision in respect thereto. After specifying the duties of the public administrator it provides:

“\* \* \* and for such services the public administrator shall be entitled to five per centum of *the gross inheritance tax as determined in each such estate*, to be paid by the county treasurer out of the inheritance tax funds *upon an order of the county judge*, provided that the minimum fee for each such estate shall not be less than three dollars, except that *it shall not exceed the amount of such tax*, and the maximum fee not more than twenty-five dollars; but in cases of unusual difficulty, *where the tax exceeds five hundred dollars*, the county judge may allow the public administrator such additional compensation as he may deem just and reasonable. \* \* \* *Before the county judge shall sign an order for the payment of fees to such public administrator, such public administrator shall render a report to the county judge setting forth the names of estates in which he appeared in court for and in behalf of the county and state, the amount of tax determined in each estate, and the fees to which such public administrator was entitled under this section. The county judge shall attach said report to his order allowing fees of the public administrator. The public administrator shall make such report quarterly.*”

In the first place the above quoted language very clearly provides for a computation of the fee of the public administrator at a percentage “of the gross inheritance tax as determined in each such estate,” and then places a minimum of \$3.00 and a maximum of \$25.00 thereon in each estate. Thus until the inheritance tax has been determined by the court in an estate there is no base to which to apply the percentage and until the percentage computation is made the minimum and the maximum limitations do not come into operation. There is also the further provision that the fee shall not exceed the amount of the tax. Likewise this limitation is not applicable until after the tax has been determined.

In the second place the statute expressly requires the public administrator to file a report with the county judge before the latter signs an order for the payment of his fees. It is expressly required that such report set forth the names of the estates in which he has appeared and the amount of tax determined in each estate.

The foregoing consideration of the provisions of sec. 72.17 (3) shows that the determination by the court of the inheritance tax in each estate is a prerequisite of the computation of the fees of the public administrator and to the making of an order for the payment of his fees. It is therefore our opinion that a public administrator is not entitled to fees in an estate computed in accordance with sec. 72.17 (3), Wis. Stats., until the inheritance tax in the estate has been determined by the court.

HHP

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*Appropriations and Expenditures — Refunds — Taxation — Inheritance Taxes* — County treasurer is entitled under sec. 72.20, Stats., to retain seven and one-half per cent of amount of gift tax credit applied in payment of inheritance tax. Nonretention by county treasurer of seven and one-half per cent of gift tax credit results in overpayment in error refundable under sec. 20.06, subsec. (2), Stats.

May 20, 1942.

JOHN M. SMITH,  
*State Treasurer.*

You have presented for opinion a question as to the computation of the amount that the county treasurer is entitled to retain under sec. 72.20, Wis. Stats., in accounting to the state treasurer for inheritance tax collections. In some estates the court, upon the determination of the inheritance tax, finds that gifts made during a lifetime, and upon which a gift tax was paid, were in contemplation of death and

therefore are taxable as inheritances under sec. 72.01, subsec. (3), Wis. Stats. Such gifts accordingly are included in the inheritance tax computation in the estate. Then, in accordance with the provisions of par. (c) of subsec. (1) of the gift tax law, sec. 4 of ch. 363, Laws 1933, as amended, the amount of the gift tax paid, upon due proof thereof, is applied as a credit upon the inheritance tax and the remainder is paid in cash to the county treasurer. The question is whether the county treasurer is entitled to retain seven and one-half per cent of the portion of the inheritance tax so discharged by the application of the gift tax paid credit.

Sec. 72.20, Wis. Stats. 1941, provides as follows:

*"The county treasurer shall retain for the use of the county, out of all taxes paid and accounted for by him each year under sections 72.01 to 72.24, inclusive, seven and one-half per cent on all sums so collected by or paid to said treasurer."*

Paragraph (c) of subsec. (1) of the gift tax law, sec. 4 of ch. 363, Laws 1933, as amended, provides:

*"(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer.*  
\* \* \*"

By the specific provisions of sec. 72.01 (3), Wis. Stats., a transfer by gift in contemplation of death is clearly taxable under the inheritance tax law. The determination by the court that a gift was in contemplation of death thus makes it subject to the inheritance tax and regardless of whether it has been subjected to taxation under the gift tax law. Its effect is also to demonstrate that the gift was not subject to the gift tax and to render the amount of gift tax paid an improper tax and one that therefore normally would be subject to return or refund.

But the gift tax statute expressly covers the situation and says that instead of returning or refunding the improper

tax the amount thereof shall be transferred to the credit of the estate and applied as payment of the inheritance tax that is properly payable. The presentation of such credit for the amount previously paid as gift tax and its application to the inheritance tax effects a payment of the inheritance tax to the extent of such credit just as effectively and the same as payment of cash in that same amount. In fact the statute does not say that a gift tax paid upon a gift shall be *offset* against and reduce the inheritance tax payable thereon, but rather that if the gift is taxable under the inheritance tax law then no gift tax is payable thereon and any amount paid to discharge a gift tax not properly payable may be applied as a *credit* upon the inheritance that is properly payable thereon. In substance it takes the amount previously collected and paid in discharge of a gift tax liability that appeared to be existent when the payment was made but which the subsequent court adjudication effectively refutes, and applies it to and in payment of the alternative tax liability that is thereby established as the only tax properly payable.

There can be no question that if the amount of the gift tax paid were refunded and then in turn turned over to the county treasurer in payment of the inheritance tax the county would be entitled to retain seven and one-half per cent thereon. This statute merely eliminates the mechanics involved in the state treasurer making a refund to the estate of the improperly collected gift tax and then receiving the same amount back again from the estate through the county treasurer. This administrative method was adopted by the legislature as the simplest and most expedient method of accomplishing that result. Actually the application of the credit converts the money previously paid into a money payment on the inheritance tax. It thus constitutes a collection to that extent of the inheritance tax. It is perforce thereof that the state treasurer, whenever such a credit is applied, makes a transfer on his books of the amount thereof from the gift tax account to the inheritance tax account.

The obvious intent of sec. 72.20, Wis. Stats., is that the county shall retain seven and one-half per cent of all inheritance taxes whose collection is handled through the county

treasurer. In substance and effect the allowance of a gift tax paid credit is a collection effected through the county treasurer and just as much so as if that amount of cash actually passed through his hands. The presentation and application of the credit is a payment to that extent in lieu of cash by something that is made a substitute therefor. The application of a gift tax credit and the payment of the balance of the inheritance tax to the county treasurer in cash effects full payment of the inheritance tax and the county treasurer's receipt is to that effect. His duty is to collect the full amount of the inheritance tax as determined by the court, subject, of course, to the discounts on one hand and the penalties and interest on the other that are prescribed by the statute. In making report to the state treasurer he includes such an inheritance tax as fully paid and accounts for the amount not collected in cash by showing the application of the gift tax credit. The application and allowance of the gift tax credit is just as much the collection by the county treasurer of that inheritance tax as the receipt of the cash paid.

Upon the foregoing considerations it is our opinion that the county treasurer is entitled to retain under sec. 72.20 Wis. Stats., for the use of the county in accounting to the state treasurer for inheritance taxes, seven and one-half per cent of the gift tax paid credit allowed and applied on the inheritance tax determined.

You also ask whether, in the event the county treasurer in making report to the state treasurer does not retain seven and one-half per cent for the gift tax credits applied during the period covered by the report, the amount thereof that should have been retained can be returned to him and, if so, by what method.

There is nothing that we find in ch. 72 to cover this situation. However, as pointed out in XXIX Op. Atty. Gen. 329, the provisions of sec. 20.06 (2), Wis. Stats., were designed and enacted essentially to cover, among other things, just such matters. It is our conclusion that the failure to retain such amount results in an overpayment in error by the county treasurer of that amount and may be refunded under sec. 20.06 (2), Wis. Stats.

HHP

*Banks and Banking — Public Deposits* — Questions answered with respect to operation of ch. 34, subsecs. (13) and (14) of sec. 220.08 and sec. 220.20, Stats.

May 25, 1942.

ALLEN G. PFLUGRADT, *Chairman,*  
*Banking Commission.*

You have requested our opinion upon the following questions:

1. "Do moneys deposited with the banking commission for redemption of bank script and moneys held by the commission for unclaimed dividends from completely liquidated banks, all of which moneys have been deposited as a separate fund in the state treasury by the commission pursuant to sec. 220.20 and sec. 220.08 (13) and (14), constitute, within the meaning of sec. 34.01: 'public deposit'; 'public moneys'; or, 'private funds held in trust by public officers'?"

It is our opinion that upon the funds described in the above question being deposited in any state bank, savings and trust company, mutual savings bank or national bank in this state, such funds would constitute a "public deposit" within the meaning of subsec. (1), sec. 34.01, Wis. Stats.

It is our opinion that upon the funds described in the above question coming into the hands of the state treasurer such funds are "public moneys" within the meaning of subsec. (5) of sec. 34.01, Wis. Stats.

It would further appear that the funds described in the above question are "private funds held in trust by public officers," as that term is used in defining the term "public deposit" in subsec. (1) of sec. 34.01, Stats. In order to answer the remaining questions in your request for an opinion, it would also seem pertinent to determine whether the funds described in the above question are privately owned trust funds within the meaning of sec. 34.026, Stats., and it is our opinion that such funds are privately owned trust funds within the meaning of said section.

2. "Is the banking commission or the state treasurer the public officer acting as trustee and holding such funds in trust?"

Since the banking commission has, under the appropriate statute, turned such funds over to the state treasurer, it is our opinion that the state treasurer is the public officer acting as trustee and holding such funds in trust, and not the banking commission.

3. "If the aforesaid funds are subject to chapter 34, then does a public depository have the authority: to collect the interest earned on such funds and pay the same into the state deposit guarantee fund in payment of the assessment fixed by the board of deposits; to deduct from such funds the amount of the difference between the interest earned on such funds and the amount of the assessment fixed by the board of deposits in the event the interest earned is insufficient to pay such assessment to the state deposit fund?"

In our opinion the answer to this question is "Yes".

4. "Does the banking commission have authority to assume and pay as an item of general expense the amount deducted from the principal of such funds and paid into the state deposit fund and to prorate among the amount of the claims of the respective claimants to such separate funds a pro rata share of the amount deducted by the public depository and thereafter as such claimants present their claims the commission shall certify such claims in such amounts as shall exist after such deductions?"

In our opinion the foregoing question is answered "No". Under sec. 220.20 and subsec. (14) of sec. 220.08, the banking commission's only function with respect to such funds which it has deposited with the state treasurer is to determine whether claims presented against such funds are proper claims and to certify to the secretary of state the name and address of the persons entitled to payment out of such funds and the amount thereof. Where such funds have been depleted by deductions from interest and principal made by the depository banks under the provisions of ch. 34, it would appear that the only means of restoring such deductions to said funds would be by action of the legisla-

ture under the provisions of sec. 34.026, Stats. Should a situation arise where, to the knowledge of the banking commission there are claims in existence against such funds in excess of the amount of the particular fund to which such claims refer, it would appear that a method of distribution on some equitable basis would have to be followed. Since the payments made out of the fund to the board of deposits under ch. 34 are for the ultimate benefit of all claimants to the fund, it would seem equitable that all such claimants should share in the cost of obtaining the insurance under ch. 34 in proportion to their interest in the fund. However, since the state treasurer is in effect the trustee of this fund, we do not believe it would be necessarily incumbent upon the banking commission to certify the claims to the secretary of state against any such fund in any amount except in their full amount. If it is at this time known that the claims against any particular fund would exceed the amount at the time available, this would appear to be a matter for discussion in any such case between the banking commission, the secretary of state and the state treasurer, and since there is nothing specific in the statutes as to the manner of allocating the deductions or with respect to the protection of the interests of unknown claimants, it might be advisable to refer the matter to a proper court for determination.

5. "By what means and in what manner shall the banking commission satisfy, discharge and dispose of claims presented to it by the respective claimants to such separate funds where, by reason of deductions from the principal, either by the public depository or by the banking commission, the whole of such separate funds is expended?"

It is our opinion that if the situation as above described should arise, the banking commission would not need to take any steps to attempt to satisfy, discharge and dispose of claims presented against any such fund. Once the funds have been turned over to the state treasurer the banking commission's only duty with reference to such funds is to certify claims to the secretary of state, as we have hereinbefore stated. The banking commission is not liable to claimants to any of such funds regardless of their condition at the time when the claim is asserted.

RHL

*Public Officers — County Clerk — Register of Deeds — Vacancies* — Register of deeds and county clerk do not vacate their offices by enlistment in armed forces of United States.

Register of deeds and county clerk may offer themselves as candidates for re-election while serving in armed forces of United States.

May 26, 1942.

CLIVE J. STRANG,  
*District Attorney,*  
Grantsburg, Wisconsin.

You have inquired: (1) Whether the register of deeds and county clerk of your county will vacate their offices under the provisions of sec. 17.03, Wisconsin statutes, by enlisting in the armed forces of the United States; and (2) Whether, if question 1 is answered in the negative, the officers referred to may be eligible for re-election while serving in the armed forces.

*First.* We have held that a district attorney's office is not vacated under the provisions of sec. 17.03, Wis. Stats., by his induction into the armed forces of the United States under the provisions of the selective service act. Vol. XXX Op. Atty. Gen. 54. The same conclusion applies in the cases you present. Consequently, your first question is answered in the negative.

You have stated in connection with presenting these questions that the officers in question intend to leave their offices in charge of deputies duly appointed under the provisions of secs. 59.16 and 59.50, Wis. Stats. We see no reason why this cannot be done, although we point out that under the provisions of sec. 59.16 (3), Stats., the county board may appoint a county clerk in any case in which the clerk is incapable of discharging the duties of his office. The appointment is to run until such time as the disability is removed. If the board is not in session at the time of the incapacity of the clerk to discharge his duties, the chairman of the county board may appoint a clerk, whose term shall extend until

the next regular or special meeting of the board. In case of such an appointment, the powers of a deputy appointed by the disabled clerk shall terminate.

*Second.* We know of no reason why the register of deeds and the county clerk cannot offer themselves as candidates for re-election. The same reasoning which would permit them to hold their offices after having entered the armed forces would also permit them to run for re-election while serving in the armed forces.

JWR

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*Education — Teachers Retirement — Public Records —*  
If it is administratively desirable annuity board may disclose to third party accumulations to credit of member of retirement system and amount of monthly annuity which such member could receive upon retirement.

May 29, 1942.

ALBERT TRATHEN, *Director of Investments,*  
*Annuity and Investment Board.*

From time to time the state annuity and investment board has been requested to give some one other than a member of one of the retirement associations information concerning the amount of a certain member's accumulations and of the monthly annuity that said member could receive if he were to retire. Some members of the retirement associations feel that this information should not be disclosed to any third party without the consent of the member. If this information is a matter of public record and open to inspection by anyone at a reasonable hour and under reasonable regulations, then in many cases it would save time and avoid confusion in the accounting department if the information were furnished to such third party by the state annuity and investment board. You desire the opinion of this

office as to whether your board may supply this information to a third party without the consent of the member whose account is involved.

At the common law the right to inspect and copy public records was confined to those having some interest in the particular record sought to be inspected or copied. *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30.

The statutes of Wisconsin have abrogated the common law requirement of interest and conferred upon all persons the right of access to public records. *Musback v. Schaefer*, 115 Wis. 357, 91 N. W. 966; *Hanson v. Eichstaedt*, *supra*; Opinions of the Attorney General for 1910, 820; XI Op. Atty. Gen. 7; XX Op. Atty. Gen. 323.

Section 18.01, subsecs. (1) and (2) of the statutes provide:

“(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).”

It was held in XI Op. Atty. Gen. 7 that the words “required by law to be filed, deposited, or kept in his office,” referred only to such property and things as the officer is under a legal duty or obligation to preserve and does not embrace every document or memorandum that may be found in a public office at any time. This conclusion was approvingly cited in XXII Op. Atty. Gen. 419.

“A public record has been defined, among other things, as one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law. 53 C. J. 604.” XXVII Op. Atty. Gen. 255.

Sec. 25.17 subsec. (9) (a) imposes upon the state annuity and investment board, whose executive head is the director of investments, the duty of administering the retirement law, and sec. 42.36 provides in part:

“\* \* \* The director of investments shall be the secretary of the several retirement boards and furnish all necessary actuarial, stenographic, clerical and other services for said boards at the expense of the state annuity and investment board.”

Section 42.37 provides:

“Each retirement board shall:

“\* \* \*

“(3) Maintain individual records and individual accounts for members.

“(4) Furnish to any member upon written request not oftener than once in any year a statement of the account of the member.

“\* \* \*”

Section 42.40 provides:

“\* \* \* All amounts deposited by or on behalf of any teacher shall be held for the benefit of the individual teacher in the retirement deposit fund for the purpose of providing an annuity or other benefit as provided in this act.”

Sections 42.46 and 42.47 provide:

“The several retirement boards shall annually, as soon after June thirtieth as shall be practicable, ascertain the teaching experience of, and the amount of required deposits made during the year by each member and on a basis thereof determine the state deposit to be made by the state in the retirement deposit fund on account of service rendered during the year for each member and shall certify the total amount of such state deposits to the annuity board. The annuity board shall thereupon certify, and on the warrant of the secretary of state the state treasurer shall as of June thirtieth of such year transfer from funds appropriated for the purpose, to the retirement deposit fund, the amount of such deposits to be credited to the individual accounts of the members for the purpose of providing an annuity or other benefit as provided in this act.”

“As of June thirtieth of each year the annuity board shall credit the account of each member of the several associations in the retirement deposit fund with interest at the actual rate earned during the preceding year as determined by the annuity board.”

In order to comply with the foregoing statutory provisions, it is necessary for the state annuity and investment board to keep an individual account for each member of the various retirement associations. As the individual accounts are kept pursuant to statutory requirements, they are matters of public record. Since the amount to the credit of any member of the several retirement associations is open to public inspection under sec. 18.01, Wisconsin statutes, it is our opinion that you may supply this information to one not a member of any retirement association if, in your judgment, there is an administrative advantage in doing so.

Section 42.34, Wisconsin statutes, provides that periodically “the annuity board shall determine, adopt and certify the rates at which the annuities and other benefits shall be granted.” These rates are determined, adopted and certified pursuant to statutory mandate, and are available to the public under section 18.01. The amount of the monthly annuity to which an eligible member would be entitled upon retirement depends upon the prevailing annuity rate and the amount of the accumulations which the member may use for the purchase of an annuity. Given the accumulations and the rate, the determination of the monthly annuity is merely a matter of simple mathematical calculation. In our opinion you may also inform one not a member of a retirement association what the amount of any member’s monthly annuity would be if you deem it administratively advisable to do so.

JRW

*Automobiles — Law of Road — Drunken Driving — Intoxicating Liquors* — Beer is “intoxicating liquor” in meaning of drunken-driving statute, sec. 85.13, Stats., notwithstanding its exclusion from definition of that term as used in ch. 176.

June 1, 1942.

J. KYLE ANDERSON,

*District Attorney,*

Waupaca, Wisconsin.

You state that you recently prosecuted a man in justice court for violation of sec. 85.13, Stats., making it unlawful for “any person who is under the influence of an intoxicating liquor” to operate a vehicle upon a highway. The defendant proved that he had had five bottles of beer and claimed that because beer is excluded from the definition of intoxicating liquors by sec. 176.01 he could not be found guilty of violating sec. 85.13. You inquire whether the defense was good and refer to the case of *Wolf v. Evans*, (1933) 211 Wis. 601, as tending to support it.

Sec. 176.01 provides in part as follows:

“As used in this chapter, or in any regulation made pursuant thereto, unless the context or subject matter otherwise requires:

“(2) ‘Intoxicating liquors’ means all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use for beverage purposes, but shall not include ‘fermented malt beverages’ as defined in subsection (10) of section 66.05, which contain less than five per centum of alcohol by weight.”

Note that the definition there set out refers only to the term “intoxicating liquors” as used in ch. 176 and the regulations made thereunder. There is nothing in the statutes to show that such definition is intended to apply to the use of the word in ch. 85 or any chapter of the statutes other than ch. 176. Ch. 176 governs the taxation and regulation of the business of manufacturing, rectifying and selling “intoxicating liquors” as therein defined but the taxation and

regulation of the manufacture and sale of "fermented malt beverages" is governed by sec. 66.05 (10). The obvious reason for excluding fermented malt beverages (beer) of less than five per cent alcoholic content by weight from the definition of intoxicating liquors in sec. 176.01 is because such beverages are already regulated by sec. 66.05 (10) and not because the legislature intended to lay down a rule that such beverages are not intoxicating in fact. Therefore nothing in the definition contained in sec. 176.01 has any bearing on the use of the term "intoxicating liquor" in sec. 85.13. In enacting sec. 85.13 the legislature was presumably concerned with keeping drunken drivers off the highways, not with the type of beverage which the offender consumed and which made him drunk.

The supreme court of Wisconsin has held that it will take judicial notice that beer is intoxicating. *Briffitt v. State*, (1883) 58 Wis. 39. See *Steinkrause v. Eckstein*, (1920) 170 Wis. 487, 491; *Kannenberg v. State*, (1927) 193 Wis. 476, 478. Many other cases might be cited in which beer has been held to be intoxicating in fact. 22 Words & Phrases (perm. ed.) 446-450. Of course, under sec. 85.13 it must always be shown that the defendant was appreciably intoxicated. *Steinkrause v. Eckstein, supra*.

The case of *Wolf v. Evans*, (1933) 211 Wis. 601, 604, has no bearing whatever on this question. The proof in that case was that the driver of an automobile had consumed some near-beer in a roadhouse and this appears to have been the only evidence of intoxication except that some witnesses testified that her breath smelled alcoholic but others testified just as positively to the contrary. Significantly, the court pointed out that "There was no proof that the beverage drunk by Mrs. Baker was beer as distinguished from 'near-beer'. \* \* \*" The instruction complained of pointed out to the jury that the Volstead act was at that time the law of the land and that it prohibited the sale of any liquor containing more than one-half of one per cent of alcohol so that it would be presumed that the liquor (near-beer) which the driver had consumed was nonalcoholic and nonintoxicating in the absence of proof to the contrary. But the rule there laid down is no longer applicable, since the Volstead act is no longer in effect and since it is

common knowledge that almost all beer now sold is in fact intoxicating whereas near-beer has almost disappeared from the market. The rule of *Briffitt v. State, supra*, is therefore again in force and the rule of *Wolf v. Evans, supra*, is obsolete.

Even if the beverage consumed was claimed to be near-beer this would raise no presumption that it was nonintoxicating since it is common knowledge that near-beer is practically always fortified with grain alcohol before being consumed. If the offender was intoxicated in fact, that should be sufficient proof that what he drank was intoxicating.

WAP

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*Police Regulations — Dogs — Words and Phrases — Domestic Animals* — Chickens are included within term "other domestic animals" as found in sec. 174.01, Stats.

June 3, 1942.

EDWIN W. HUNTER,

*District Attorney,*

Eagle River, Wisconsin.

You have requested our opinion as to whether chickens constitute "other domestic animals" within the meaning of sec. 174.01, Wis. Stats., which reads:

"Any person may kill any dog, that he knows is affected with the disease known as hydrophobia, or that may suddenly assault him while he is peacefully walking or riding and while being out of the inclosure of its owner or keeper, and may pursue to and upon the premises of the owner or elsewhere, and kill any dog found killing, wounding or worrying any horses, cattle, sheep, lambs or other domestic animals."

Chickens are undoubtedly included within the broad sense of the word "animal." If you will consult Webster's

New International Dictionary, with particular reference to the definition of the words "bird," "fowl," "chicken," and "animal", you will have little difficulty in arriving at the conclusion that a bird is a highly developed animal, and that a chicken is a domesticated bird. By logical processes we would then deduce the conclusion that a chicken is a domesticated animal.

That a chicken is regarded as an animal in the broad sense of that word is likewise established by the definition found in Bouvier's Law Dictionary, Vol. 1, p. 195, where "animal" is defined as follows: "Any animate being which is not human, endowed with the power of voluntary motion."

The question as to whether chickens are included within the term "other domestic animals" rests upon the construction of those words in the light of the other language in the section, the purpose of the section, and the application of established rules of statutory construction. There are several cases to be found in 3 Corpus Juris p. 16 under the title of "Animals" which relate to the construction of particular statutes in which the word "animal" is used. The language of such statutes is not uniform, nor is the statutory purpose the same in all cases. Consequently it is dangerous to rely upon any textual statement to the effect that a particular kind of animal is or is not an animal within the accepted legal meaning of that term. Actually, the legal meaning of the word varies in accordance with its statutory use.

The supreme court has held that a dog is not an "other domestic animal," within the meaning of sec. 174.01, Stats., and in so doing has limited the meaning of the term to something less than its broad sense. As a matter of common knowledge it must be recognized that, in a broad sense, a dog is an animal and that it is domesticated.

It would appear that the object of sec. 174.01 is to afford protection to the owner of certain types of domestic animals in the event that he destroys a dog which is found killing, wounding or worrying those animals. By specifically referring to horses, cattle, sheep and lambs, it is evident that it was the statutory purpose to include at least those domestic animals commonly found upon farms which

farmers use as beasts of burden or for purposes of food or for purposes of farm income through sale of the animal itself or the things which it produces. Viewed in this light, we can find no distinction between chickens and the other animals referred to. Chickens are commonly found upon farms, they are used for food, they are sold for food purposes, and their eggs are both eaten and sold. It is impossible to think of any valid argument that would exclude chickens from the operation of the statute and at the same time give full effect to the statutory purpose.

As a matter of authority the case of *Holcomb v. Van Zylen*, 174 Mich. 274, 140 N. W. 521, holds that turkeys are included within the term "other domestic animals" in a statute of the same character as sec. 174.01, Wis. Stats. The language of the statute there in question was almost identical with that used in the one under consideration. We refer you to that case for a fuller discussion of the problem and for a reference to other cases bearing on the general question.

In view of what we have said we are of the opinion that chickens are included within the term "other domestic animals".

JWR

*Prisons — Prisoners — Probation* — Under sec. 57.01, subsec. (1), Stats., court has no power to fix period of probation but such period is fixed by law at not less than minimum nor more than maximum term for which probationer might have been imprisoned, by sec. 57.03 (2). Court's action in fixing different period of probation from that fixed by sec. 57.03 (2) is extrajudicial and void — or at most advisory to department of public welfare — and period of probation will be that fixed by law and not that attempted to be fixed by court. XXVII Op. Atty. Gen. 300 disapproved in part.

First clause of sec. 57.01 (2), which gives court power to sentence probationer at any time during period of probation, applies only to cases where sentence was originally withheld under sec. 57.01 (1), not to cases where sentence was imposed and execution stayed, and applies only to cases where department of public welfare has revoked probation and returned probationer to court for sentence under sec. 57.03 (1).

During period of probation under sec. 57.01 department of public welfare has exclusive jurisdiction to revoke such probation or to discharge probationer from further supervision, under sec. 57.03 (1) and (2). Upon expiration of such period of probation, probationer may be returned to trial court, which then has jurisdiction under sec. 57.01 (2) to discharge probationer or to extend probation for such further period as court may then fix or, in case sentence was originally withheld, to sentence probationer and commit him to institution to which he is sentenced. But this jurisdiction cannot be exercised until expiration of maximum period for which probationer might originally have been sentenced as prescribed by statute under which such probationer was convicted or by repeater statute, whichever is applicable.

Department is not required to revoke probation upon first violation, however slight, but may exercise sound discretion in that regard, since sec. 57.03 (1) says board "may" revoke, not "shall". XV Op. Atty. Gen. 158 disapproved in part.

June 5, 1942.

A. W. BAYLEY, *Executive Secretary,*  
*Department of Public Welfare.*

You submit a request for an opinion with reference to the following facts:

On January 28, 1937, A, aged 25, was convicted of violating sec. 343.56, Stats. The court sentenced him to a term of one to three years in the state prison, stayed execution and placed him on probation "for a period of one to three years," on condition that he make restitution and pay the costs of prosecution.

During December, 1939, arrangements were made with the court for A to appear for consideration whether his probation should be further extended in view of the fact that he had not made restitution or paid the court costs in full. On February 1, 1940, the case was brought before the court but the original presiding judge was not present and another judge who was holding court at that time postponed taking action, indicating that the matter should be taken up at a later date when the original presiding judge was present.

On November 26, 1940, the court ordered the probation of A extended to January 8, 1942. On this extension, he still failed to pay the court costs and make restitution, whereupon arrangements were made for his return to court for further consideration. On January 8, 1942, A was brought into court, at which time he was represented by counsel who contended that the original one- to three-year sentence had expired on January 28, 1940, notwithstanding the fact that execution had been stayed (an erroneous view — see XXX Op. Atty. Gen. 278), and that the extension of probation ordered by the court on November 26, 1940, was void because the court had lost jurisdiction. Thereupon the court entered the following order:

"Now, therefore, it is ordered that the defendant above named ('A') be and the same is hereby refused further probation and the state department of public welfare is hereby ordered to proceed in accordance with the record, file and proceedings in the matter in accordance with this order of the court."

The point to which you wish us to give consideration is: What action the department of public welfare may now take with reference to this man. The legal questions involved are: (1) Is A still on probation, notwithstanding the attempt by the court to limit the period of probation and its failure to take further action until long after the expiration of the period so fixed? (2) Is the department of public welfare compelled to revoke A's probation at this time? This necessitates a consideration of the history and effect of the statutes applicable to the case, since probation is wholly statutory and the courts have no inherent authority in that regard. *Drewniak v. State ex rel. Jacquest*, (1942) 239 Wis. 475, 484.

Sec. 57.01 (1) provides that "whenever any adult is convicted of a felony," with certain exceptions not material here, the court "may \* \* \* by order suspend the judgment or stay the execution thereof and place the defendant on probation, stating therein the reasons for the order, which shall be made a part of the record, and may impose as a condition of making the order or of continuing the same in effect that the defendant shall make restitution or pay the costs of prosecution, or do both." This section was originally enacted by ch. 541, Laws 1909, as sec. 4734a of the revised statutes, which provided that "said court may suspend the sentence or stay the execution thereof and place the defendant on probation *in the manner hereinafter provided*, giving his reasons therefor, which shall be made a part of the record." The provision empowering the court to impose the condition that the defendant make restitution or pay the costs or both was introduced into the law by an amendment to sec. 4734c (the forerunner of present sec. 57.02) by Laws 1919, ch. 30, sec. 5, and later removed to its present position at the end of sec. 57.01 by Laws 1919, ch. 615, sec. 2. Hence, it is apparent that under the law as enacted in 1909, the court's power was limited to placing the defendant on probation and that it had no power to prescribe the conditions or the period thereof. Examination of early probation files of the board of control shows that the trial courts generally so interpreted the law and did not then attempt to fix the period of probation, although there were a few exceptions.

Under sec. 57.01 (1) as it has existed since its origin in 1909, there have always been two methods of probation available to the court: (1) withholding sentence (i. e., suspending the judgment) and placing the defendant on probation or (2) imposing sentence, staying execution and placing defendant on probation.

The conditions of probation were prescribed by revised statutes sec. 4734c (also enacted by Laws 1909, ch. 541) which read as follows:

“Whenever the defendant has been placed on probation under this act *the effect of such order of probation shall be to place said defendant under the control and management of the state board of control of Wisconsin reformatory, charitable and penal institutions, and he shall be subject to the same rules and regulations as apply to persons paroled from said institutions after a period of imprisonment therein.*”

By a series of amendments this section was reduced to its present form as sec. 57.02 (2). As the law now stands, all persons placed on probation under sec. 57.01 are, by sec. 57.02, made subject to the control and management of the board of control (state department of public welfare) and to the rules applicable to parolees, except in cases arising in Milwaukee county.

Sec. 57.03 was originally enacted by Laws 1909, ch. 541, as revised statutes secs. 4734g and 4734h. Sec. 4734g was in substance approximately the same as present sec. 57.03 (1), 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, order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, 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 court or 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."

Sec. 4734*h* originally provided as follows:

*"Whenever it is the judgment of the board of control that a person on probation has satisfactorily met the conditions of his probation, they shall cause to be issued to said person a final discharge from further supervision, provided that the length of such period of probation shall not be less than the minimum nor more than the maximum term for which he might have been imprisoned."*

That section was revised by Laws 1919, ch, 615 (a revisor's bill) to be sec. 57.03 (2), which now reads as follows:

*"Whenever, in the judgment of the board the probationer has satisfactorily met the conditions of his probation, he shall be discharged from further supervision, and said board shall issue to him a certificate of final discharge; but the period of probation shall not be less than the minimum nor more than the maximum term for which he might have been imprisoned."*

In order that the present statutes may be fully understood, it has been necessary to quote in part the form in which they were originally enacted in 1909, since the original form of a statute is frequently much more indicative of the legislative intent than are subsequent revisions.

*"\* \* \* 'We should be in danger of doing injustice to the revised statutes, if we did not bear in mind, in construing them, that where a new provision is substituted for an old one in somewhat different terms, a change of language does not always indicate an intent to change the rule, but to express the same rule in shorter and more comprehensive words. In this way brevity is sometimes gained, but at some expense of perspicuity.' "* *Harwood v. Lowell*, 4 Cush. 312, quoted in *Mundt v. Sheboygan & Fond du Lac R. R. Co.*, (1872) 31 Wis. 451, 463.

Applying this rule, it is apparent that under sec. 4734*a* (now 57.01 (1) ) as originally enacted the power of the sentencing court was limited to placing the defendant on

probation in one of the two ways above cited. The *legal effect* of the order of probation was not within the jurisdiction of the court to determine but was determined by law. That is, under sec. 4734c (now 57.02 (2) ), the probationer became subject to the control and management of the board of control and to the same rules and regulations applicable to persons paroled under the parole laws. Under sec. 4734g (now 57.03 (1) ), the power to revoke the probation was vested in the board of control, which power was undoubtedly exclusive—that is, the court had no authority to interfere with the board's discretion in that regard. *Ex parte Sheehan*, (1935) 100 Mont. 244, 49 P. (2d) 438, 440.

Under sec. 4734h (now 57.03 (2) ), the board of control had a similar exclusive power to *discharge* the probationer from further supervision. A reading of sec. 4734h makes it perfectly apparent that the legislature intended to vest in the board of control the sole discretion to determine when the period of supervision should terminate, limited only by the proviso that it should be not less than the minimum nor more than the maximum term for which the probationer might have been imprisoned. It might be argued that this latter proviso was a limitation upon the power of the *court* to fix the period of probation but such argument is patently unsound. In the first place, sec. 4734a (now 57.01 (1) ) *did not by its terms empower the court to fix the period of probation*. In the second place, the limitation on the period of probation fixed by sec. 4734h (now sec. 57.03 (2) ) was in the form of a *proviso* and as such is presumed to limit only the clause which it follows and not some other more remote clause. See *State ex rel. Holt Lumber Co. v. Bellew*, (1893) 86 Wis. 189, 195. So, it is perfectly plain that the proviso must be regarded simply as a limitation on the discretion of the board of control granted by sec. 4734h (now 57.03 (2) ). (The board of control soon developed a rule of thumb whereby probationers were discharged after a period of probation equal to the sentence imposed, but this was not always followed. See, e. g., case no. 232, where a probationer sentenced to three years was discharged after a little more than two years.)

The *court's* authority was somewhat enlarged by the amendments of 1919, above noted, which empowered the

court to require as a condition of probation that the defendant make restitution or pay the costs of the prosecution, or do both. *But the court still had no power either to discharge the probationer from further supervision or to revoke his probation.* Neither did the court have any power to fix the term of probation. That was specifically fixed by the proviso in revised statutes sec. 4734*h* (now 57.03 (2) ).

So the law stood until 1931, at which time the legislature, by ch. 150 of the laws of that year, enacted subsec. (2) of sec. 57.01, which reads as follows:

“Such adult may be returned to such court on the original charge for sentence, *at any time within such period of probation;* and upon the expiration of *such period* he may be sentenced, discharged, or continued under probation *for an additional period to be then fixed by the court,* subject to like return, discharge, sentence, or further probation thereafter.”

This subsection was copied from sec. 57.05 (2). Sec. 57.05, which relates to probation of *minors*, had an independent origin as revised statutes sec. 4725*a*, enacted by ch. 426, Laws 1907, two years before sec. 4734*a* (now 57.01 (1) ). Originally the court was empowered to suspend sentences of minors convicted of certain felonies and place them on probation under the guidance and control of some reputable and suitable adult person (*not under the board of control*) “for such period of probation not exceeding six months *as the court may fix.*” (The court’s power under that statute to fix the period of probation of minors has now been extended, so that the period may be not more than the maximum for which the defendant might have been imprisoned, instead of six months as formerly.) Sec. 57.05 (2) was originally subsecs. 2 and 3 of sec. 4725*a*. It will be observed that in the case of *minors* it was necessary that the court be authorized to fix the period of probation and to revoke the same or grant a final discharge, *since the probationer was not subject to the jurisdiction of the board of control.* (By an amendment in Laws 1919, ch. 30, sec. 4, the court was given the option of placing the minor in the custody of the board of control or of an adult person, as now provided in sec. 57.05 (1) ).

The use of the term "*such* period of probation" in sec. 57.01 (2) is therefore due to the fact that it was copied from sec. 57.05 (2) and cannot be regarded as an implied grant of power to the courts to fix the term of probation under sec. 57.01 (1), especially since such a construction would amount to an implied repeal of the proviso in sec. 57.03 (2) whereby the term of probation is fixed at "not \* \* \* less than the minimum nor more than the maximum term for which he might have been imprisoned." Such implied repeals are, of course, not favored and occur only in cases of repugnancy or irreconcilable conflict between the old and the new enactments. *McLoughlin v. Malnar*. (1941) 237 Wis. 492, 496-497, and cases cited.

What, then, is the significance of subsec. (2) of sec 57.01, when construed *in pari materia* with sec. 57.03? It consists of two distinct parts, the first of which provides:

"Such adult may be returned to such court on the original charge for sentence, at any time within such period of probation; \* \* \*."

Before the enactment of sec. 57.01 (2), it had been clear that if the court imposed sentence and then stayed execution and placed the defendant on probation, this wholly exhausted the jurisdiction of the court over the case and that from then on the probationer was subject to the exclusive jurisdiction of the board of control. On the other hand, if the court withheld sentence and placed the defendant on probation, then he was likewise subject to the jurisdiction of the board of control, but the court also retained sufficient jurisdiction so that if the board ordered his probation revoked he must be brought before the court for sentence, pursuant to sec. 57.03 (1). It is obvious that it was this latter jurisdiction with which the legislature was concerned when it enacted the first clause of sec. 57.01 (2). Sec. 57.01 (2) provides that the probationer "may be returned to such court *on the original charge for sentence*," but if he has already been sentenced, there is no occasion to return him to the court *on the original charge*, nor for the court to again pass sentence. Such language is appropriate only to a case where sentence has been *withheld*. Moreover, it is unlikely

that the legislature intended to upset entirely the practice under sec. 57.03 (1) without specifically repealing that section. So, by construing the first clause of sec. 57.01 (2) as applying only to cases of *withheld* sentences and having no application to cases of *imposed* sentences (with execution stayed), the intent of the legislature is most probably effectuated.

The second clause of sec. 57.01 (2) provides:

“\* \* \* and upon the expiration of such period [of probation] he may be sentenced, discharged, or continued under probation for an additional period to be then fixed by the court, subject to like return, discharge, sentence, or further probation thereafter.”

By its terms, this clause applies only upon the *expiration* of the period of probation. As the law was formerly under sec. 57.03 (2) the probationer became a free man after the expiration of the maximum period for which he might have been imprisoned (see *Ex parte Slattery*, (1912) 163 Cal. 176, 124 Pac. 856) unless sooner discharged or unless the board of control revoked his probation. Sec. 57.01 (2) now grants the court authority, on the expiration of such period, to extend the term of probation, discharge the probationer or, in case sentence has been withheld, pronounce sentence thus in effect revoking probation. Compare *King v. Commonwealth*, (1923) 246 Mass. 57, 140 N. E. 253. The result is that the department of public welfare may still discharge the probationer under sec. 57.03 (2), but if it does not do so it may return him to the court at the time when his probation would otherwise expire.

It may be noted that in XXVII Op. Atty. Gen. 300 this office ruled that under sec. 57.01, subsecs. (1) and (2) the court is authorized to provide for a period of probation greater than the maximum time during which the offender could be imprisoned. This opinion apparently gave no consideration to the provisions of sec. 57.03 (2) and is therefore incorrect as to sec. 57.01 (1), although probably correct as to subsec. (2).

We now turn to the case which you have submitted:

Sec. 343.56, under which A was convicted, provides for a minimum of one year and a maximum of seven years' imprisonment. Applying sec. 57.03 (2), the period of probation is at least one to seven years as a matter of law—and may be one to twenty-five years under sec. 359.14 if A was convicted as a repeater—regardless of the extra-judicial, or at most advisory, attempt by the court to limit the period of probation to a term of not less than one nor more than three years. The two subsequent occasions on which the probationer was brought before the court for consideration of the extension of the period of probation were premature and hence *coram non judice*, since the court had no jurisdiction in the matter at that time, the seven-year period of probation not having expired. The maximum period of probation would not in any event expire before January 28, 1944 (1962, if a repeater), subject to the power of the state department of public welfare under sec. 57.03 (2) to grant him a discharge prior to that date if, in the judgment of the department, he had satisfactorily met the conditions of his probation. But according to your letter, he is in default for the reason that he has not fully complied with the requirement that he make restitution and pay the costs. XV Op. Atty. Gen. 158. Accordingly, the department of public welfare has jurisdiction at this time to revoke his probation and order him imprisoned to serve his full sentence of one to three years, pursuant to sec. 57.03 (1).

But is the department *compelled* to revoke probation because the probationer is in default, as ruled in XV Op. Atty. Gen. 158? Sec. 57.03 (1) says the board “may”—not “shall”—order probation revoked whenever it appears that the probationer has violated the regulations or conditions of his probation. The board of control never considered itself bound to revoke upon the occurrence of any violation, however slight, but used some judgment and discretion in each case, having in mind the reformatory purpose of the law. The rule laid down in XV Op. Atty. Gen. 158 is not warranted by the language of sec. 57.03 (1), since it reads “shall” for “may”, and must be disapproved to that extent.

Apparently it is the desire of the court that A's probation be revoked and your department may, of course, give consideration to the court's desires. But it should be pointed

out that the matter of revoking probation is vested exclusively in the department, which is not required to abide by the wishes of the court if it does not see fit to do so.

In October, 1941, a prisoner applied to the Wisconsin supreme court for a writ of *habeas corpus* under the following circumstances: He had been sentenced and placed on probation upon condition that he leave the county. On the advice of the probation officer that such condition was illegal he remained at his home in the county, whereupon the court ordered him brought in for determination as to revocation of his probation. After a hearing the court ordered his probation revoked and committed him to the Green Bay reformatory pursuant to his previously imposed sentence. The writ of *habeas corpus* was sought to test the legality of such commitment. This office appeared in the supreme court and took the position that the trial court had no jurisdiction to revoke probation in such a case but that such jurisdiction was vested exclusively in the department of public welfare by sec. 57.03. The court agreed with that position and ordered the prisoner discharged from custody. *State ex rel. Promer v. Kramer*, decided October 10, 1941. No opinion was filed in that case and hence it does not appear in the reports, but it is referred to here to substantiate the view that the department is not obliged to follow the recommendation of the trial court that probation be revoked. Compare *Ex parte Sheehan*, (1935) 100 Mont. 244, 49 P. (2d) 438, a case on all fours with the *Promer* case and decided under a similar statute.

WAP

*Appropriations and Expenditures — Insurance — State Insurance* — Money in possession of stewards of state institutions managed by department of public welfare pursuant to sec. 20.175, subsec. (3), Stats., and money collected by such institutions but not yet remitted may be insured against burglary or theft, but such insurance must be obtained from state insurance fund under ch. 210, Stats., purchase from private insurance companies being forbidden by sec. 210.01, Stats.

June 12, 1942.

A. W. BAYLEY, *Executive Secretary,*  
*Department of Public Welfare.*

You state that each of the institutions under the jurisdiction of your department maintains a contingent fund which includes cash as well as a checking account under sec. 20.175, subsec. (3), Stats., and also carries money from the institution to the bank from time to time. The stewards of some of these institutions have expressed concern over the fact that no burglary or messenger insurance has been provided covering them against loss of such money by theft and have inquired whether or not such insurance, if taken from a private concern, would be reimbursable by the state.

It seems clear that the state has an insurable interest which would justify expending state moneys to insure these funds against burglary and theft. See XX Op. Atty. Gen. 494 at 496 and the opinions there cited.

But such insurance must be taken from the state insurance fund, not from a private insurance company. Sec. 210.01, Stats., as amended by ch. 158, Laws 1937 provides as follows:

“No officer or agent of this state, and no person or persons having charge of any public buildings or property of the state, shall pay out any public moneys or funds on account of any insurance against loss by fire, tornado, or any other risk upon property, or loss or damage from any cause to property, or shall in any manner contract for or incur any indebtedness against the state on account of any such insurance upon any of the public buildings, furniture, fixtures or property of any kind whatever belonging to the state except in the manner hereinafter provided.”

It is elementary that money is property. As this office has previously pointed out, the expression "property of any kind whatever belonging to the state" as used in the above statute is a broad and all-inclusive term. V Op. Atty. Gen. 405. Likewise the expression "loss or damage from any cause to property," introduced into sec. 210.01 by the 1937 amendment is a broad and all-inclusive term and we are informed that it has been construed by the insurance department as authorizing the writing of comprehensive insurance on automobiles owned by the state, which insurance, of course, includes loss by theft.

You are therefore advised that theft insurance on cash in the possession of the stewards of the institutions managed by your department may be obtained, but only from the state insurance fund under ch. 210, Stats.

WAP

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*Corporations — Auto Dealers — Criminal Law — Wilful failure by automobile dealer to perform contract with retail buyer is ground for revocation of dealer's license under sec. 218.01, subsec. (3), par. (a) 6, Stats., but does not constitute criminal offense.*

June 12, 1942.

HOWARD H. MOSS,

*District Attorney,*

Janesville, Wisconsin.

In your letter you submit the following facts for our consideration:

"In April of 1941 'A' placed an order with 'B' for a 1941 series 60 special Cadillac. At that time 'A' also traded to 'B' as a part payment a car that he then owned. About the last of June, 1941, 'B' delivered the new series 60 special Cadillac to 'A' and the total balance remaining unpaid was then paid by 'A' to 'B'. On July 1, 1941, 'A' found this series 60 special Cadillac to be defective and shortly thereafter

it was returned to 'B' and he also realized it was defective. Shortly after that 'A' and 'B' had a conversation about this and a contract resulted wherein an order was signed that 'B' was to obtain a 1942 Cadillac series 60 special for 'A'. It further appears that there were to be no extra charges to 'A', other than partial payment of any federal taxes that may incur on the transaction. While awaiting delivery of this 1942 Cadillac 'B' loaned 'A' a 1940 LaSalle which he is at the present time using."

You also state that "B" retains the full purchase price paid to him for the first car. "A" believes that "B" never ordered the 1942 Cadillac but "B" has shown you a letter wherein he did order the car. You inquire whether there is any criminal offense involved and state that in your opinion the transaction has resulted in a civil right of action only.

If it is true that "B" ordered the 1942 Cadillac pursuant to his agreement, then it is clear that no offense of any kind has been committed. It seems highly probable that he did order the car and that the reason for its nondelivery is the federal automobile rationing program, although you do not so state. Only by ordering the 1942 car could "B" avoid losing the profit on the defective 1941 model, so it is reasonable to believe that he placed the order. However, the letter which he showed you to that effect could have been fabricated, so that in the absence of confirmation from the manufacturer or distributor it will be assumed for purposes of this opinion that no such order was placed.

Sec. 218.01, Stats., provides for the licensing by the banking commission of automobile manufacturers, distributors, dealers, salesmen and finance companies. Subsec. (3) of that section provides in part as follows:

"(a) A license may be denied, suspended or revoked on the following grounds:

"\* \* \*

"6. Wilful failure to perform any written agreement with any retail buyer."

Subsec. (8) provides as follows:

"Any person, firm or corporation violating *any of the provisions of this section* shall be deemed guilty of misde-

meanor and upon conviction thereof shall be punished as follows:"

Penalties for violations of subsecs. (2) and (7) only are then provided.

It will be noted that subsec. (8) provides that a violation of *any* provision of sec. 218.01 is a misdemeanor, but the specific penalties provided apply only to subsecs. (2) and (7). Of course the penalty for violating any provision of sec. 218.01 other than subsecs. (2) and (7) would be covered by sec. 353.27 which 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."

The question is, therefore, whether the doing of an act which is ground for revocation of license under subsec. (3) (a) of sec. 218.01 is made a misdemeanor by subsec. (8) and therefore punishable under sec. 353.27. In view of the doctrine of strict construction of penal statutes, it would seem that the answer is in the negative. The legislature has not fixed any specific penalty for the conduct mentioned in subsec. (3) (a) but has merely provided that such conduct shall be ground for denial, suspension or revocation of licenses. The banking commission has always considered that the acts denounced by subsec. (3) (a) are not made criminal thereby (though some are crimes under other statutes) and this construction seems clearly correct.

You are therefore advised that even if "B" wilfully failed to order a new car for "A" he is not guilty of any criminal offense. If "A" still believes that "B" did so, he may complain to the banking commission (division of consumers credit) rather than to the criminal courts.

WAP

*Courts — Public Officers — County Court Reporter* — Sec. 253.33, subsec. (4), Stats., applies to all county court reporters appointment of whom must be justified by sec. 253.33 (exclusive of exception by subsec. (1) ).

Where appointment is so justified under sec. 253.33, reporter is entitled to fees provided by sec. 253.33 (4) and county board has no power to prescribe functioning of or duties of such reporter, as those powers are vested in county judge by sec. 253.33 (2).

Reporter's shorthand notes constitute property of court.

June 13, 1942.

HONORABLE ROBERT V. BAKER, *County Judge*.

Kenosha, Wisconsin.

In your letter of May 22 you state:

"I have been asked for an opinion on section 253.33 of the Wisconsin statutes for 1941, and would appreciate your interpretation thereof in the following particulars:

"Section 253.33 (4) reads: 'Transcript of Testimony. Such reporter shall furnish to any party a transcript of the testimony taken by him in any matter or proceeding mentioned in this section upon being paid therefor at the rate of five cents per folio.'

"First: Does this section apply to reporters who are regularly employed as county court reporters, or only those who are called in by the judge for particular hearings?

"Second: In Kenosha county, where a full-time county court reporter is paid a regular salary by the county board, do the fees for copies of transcript of testimony belong to the reporter, or can the board require such fees to be turned over to the county treasurer?

"Third: Do the shorthand notes of the reporter belong to the county or to the reporter?

"Fourth: If such transcript fees do belong to the reporter, is it in his regular line of duty to write up such testimony during working hours, or can the board require that such transcripts be written up outside of office hours?"

It is difficult for us to give categorical answers as we do not understand your Kenosha county court reporter setup. As quite often happens when one gets digging around in questions such as these, other questions occur which need to

be answered before much by way of a determination can be made with respect to the questions submitted. As you no doubt know, we do not give opinions to county officers other than the district attorney. Ordinarily our volume of work is such as to make it necessary for us to adhere rigidly to this rule. In this instance, however, as we are in a position to do so, we have decided that we ought to respond to your request. We accordingly set forth such conclusions or views as occur to us.

All of your questions seem to imply a full-time county court reporter, the office with respect to which was set up by the county board, which board in turn prescribes the duties of the reporter. Sec. 253.33 (1) provides as follows:

“This section does not apply to any county court provided with a phonographic reporter under any law existing on May 4, 1903.”

So far as we have been able to determine, sec. 253.33 is the only statute governing the appointment, duties and compensation of county court reporters unless the reporter's position and appointment can be grounded upon an appointment under some other law justifying same and which existed on May 4, 1903. We have searched the various special acts of the legislature and have been able to find only one act, namely ch. 64, Laws 1891, dealing with the county court of Kenosha county. That act is not material in relation to the questions which you submit. It would seem, therefore, that your county court reporter setup must be grounded upon sec. 253.33 or upon some general power of the county board whereby it can be inferred that the board has power to appoint a full-time county court reporter, fix the salary and prescribe the duties. We know of no such general statute which would justify the conclusion that the county board possesses any such power. If there is any such statute we would like to have it directed to our attention. Our present thought upon the subject is that the county court reporter setup must be grounded upon sec. 253.33 or upon some law which authorized the setup and which existed on May 4, 1903. If the setup is predicated upon some law which existed on May 4, 1903, by the express language

of sec. 253.33 (1) the provisions of sec. 253.33 would not be applicable to such county court reporter setup. In such situation it would seem that one would have to go to the law which justified the setup to solve reporter compensation questions in relation to that setup.

We do not mean to imply by the foregoing that it is impossible to have a full-time reporter under sec. 253.33, Stats. A county judge in some of the more populous counties may be convinced of the need of a full-time county court reporter. When that occurs the county judge would appear to be authorized to employ a reporter all working days in a calendar month and month after month. Certifications provided by sec. 253.33 (3) would be made to the county board upon such basis. We presume that where such has occurred the reporter is known as a full-time reporter. The county board would be obliged to pay the reporter pursuant to the provisions of sec. 253.33 (3). The maximum salary which the county board could pay on the basis of such certifications would appear to be \$260 for thirty-day months and \$270 for thirty-one-day months. If your county court reporter's so-called salary exceeds this maximum we do not know how to justify the setup unless it can be brought within the exception provided by sec. 253.33 (1).

In answer to your first question, it is our view that sec. 253.33 (4) applies to all county court reporters, the appointment of whom must be justified by sec. 253.33 (exclusive of the exception by subsec. (1) ).

In answer to your second question, where the appointment is so justified under sec. 253.33, the reporter is entitled to the fees provided by sec. 253.33 (4). We have previously so ruled. XXIII Op. Atty. Gen. 111.

In answer to your third question, we have not been able to find any authority, but upon principle it would seem that as the reporter is a mere arm of the court his shorthand notes would constitute property of the court as distinct from personal property the ownership of which is in the reporter.

In answer to your fourth question, we are of the view that if the county court reporter setup is grounded upon sec. 253.33, the county board has no power to prescribe the functioning of or the duties of the court reporter. Those powers belong to the county judge by the express language of sec. 253.33 (2). We may add that we are of the impression that circuit court reporters customarily write their transcripts during what might be termed "office hours" and at times when the circuit judges do not have immediate need for their services in the court room.

For other opinions of this office which you may find of some help on the general subject, see Op. Atty. Gen. for 1912, pp. 237 and 888.

NSB

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*Courts — Public Officers — Circuit Court Reporter —*  
Power and duty of counties to furnish all or part of supplies and equipment of circuit court used by circuit court reporter can be grounded upon inherent power of circuit court to require counties to furnish court with all supplies deemed by said court reasonably necessary for its functioning as court.

XVI Op. Atty. Gen. 818 overruled in so far as it conflicts with foregoing.

June 13, 1942.

DONALD W. GLEASON,

*District Attorney,*

Green Bay, Wisconsin.

You have requested us for an opinion as to whether the county has either (1) the duty or (2) the power to provide the official circuit court reporter with supplies which would include shorthand notebooks, pencils, paper supplies for making transcripts, (this would include original and copies of bills of exceptions) carbon paper, typewriter, etc.

You have concluded that said questions must be answered in the negative. Your conclusion is, in the main, grounded

upon the argument which is set forth in the second paragraph of our letter which we addressed to all circuit court reporters, attached to this opinion and identified as Exhibit A.

For reasons which appear in the letter referred to, we concluded to circularize the various circuit court reporters for a determination of certain factual questions which we deemed material if not essential to a proper solution of the problem. The circuit court reporters have generously responded to the request. From the responses, it appears clear that the practice has existed unchallenged in most, if not all, of the counties throughout the state of furnishing the official circuit court reporter with all or a part of the supplies in question and that this practice is so long established that "the memory of man runneth not to the contrary."

As might be expected, there is no uniform practice as to the *extent* to which the various supplies are furnished by the various counties throughout the state. In some instances there is no uniform practice as to such extent in the various counties in the same circuit. In general, it may be said that there is an almost universal, state-wide practice of all counties furnishing the official reporter with pencils, pen and ink, reporter's notebooks, blotters and all paper supplies needed in transcribing the judge's instructions to juries, the court's findings, conclusions and decisions and all like work of the reporter with respect to which he receives no folio remuneration from litigants. Typewriters and accessories are almost without exception furnished by the county in the county seat of the judge's residence and where the bulk of the work throughout the circuit is usually performed both by the circuit judge and his reporter. In a great many instances a typewriter is furnished the court reporter in every county in the circuit. Where not furnished, the clerk of courts makes one available for the use of the court reporter when needed.

It is also fair to state that there is no general practice of furnishing the court reporter with paper supplies for the transcribing of originals and copies for getting out bills of exceptions,—work for which the reporter receives folio compensation from litigants. There are, however, quite a number of counties which furnish such supplies.

It further appears from these responses that in those rare instances where counties have demonstrated a penurious recalcitrance in respect to furnishing the court reporter with supplies, deemed by the circuit judge reasonably necessary to enable the court to perform its function, the circuit courts or judges have ordered the counties to furnish such needed equipment. This latter procedure has without exception put an end to the matter in such counties.

So much for the existing and long uninterrupted practice. What of the justification for it? If authority cannot elsewhere be found for same (we have difficulty putting our finger upon any section or sections of the statutes which authorize the practice) we are convinced that the power and duty of the county to furnish all or a part of such supplies can be grounded upon the inherent power of the circuit court or judge to require counties to furnish the court with all supplies reasonably necessary for its functioning as a court. The circuit court necessarily has a wide discretion in this regard. But when the circuit court decides that a particular county is not meeting its duty with respect to these matters and is thus handicapping the court in its functioning as a court, we are of the view that said court has full power to require counties to furnish the court or its reporter with all supplies deemed reasonably necessary to the efficient functioning of the court as such.

While you did not cite us to it, we invite your attention to an opinion in XVI Op. Atty. Gen. 818, in which it was held that a county is not required to furnish supplies to a circuit court reporter nor to furnish him with a typewriter for use in his office. That opinion gives no consideration to the inherent power of the circuit court in relation to such matters. In so far as it conflicts with the conclusion herein reached, we are of the opinion that it is unsound in analysis and must be and is overruled. We are always reluctant to overrule a prior opinion of this office of long standing and hence entitled to the weight of subsequent legislative acquiescence (see *Union Free High School District of Montfort v. Union Free High School District of Cobb*, 216 Wis. 102) in those situations where the overruling opinion amounts to a reinterpretation of previously construed statutes. We do so only where we are of the view that the prior

opinion is so obviously wrong as to necessitate reversal. The conclusion herein reached is not grounded upon any reinterpretation and overruling of a previous statutory construction. It is grounded upon the inherent power of the circuit court. The prior opinion, therefore, does not stand as a controlling obstacle to the conclusion herein reached.

NSB

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Exhibit A

April 8, 1942.

Dear Sir:

We have under consideration a request for an opinion as to whether the county has either (1) the duty or (2) the power to provide the official circuit court reporter with supplies which would include shorthand notebooks, pencils, paper supplies for making transcripts, (this would include original and copies of bills of exceptions) carbon paper, typewriter, etc.

The argument against the county's having either such power or duty is grounded upon sec. 59.07 (7), Stats. You will note that the circuit court reporter is not mentioned in the cited section. It is, therefore, urged upon the authority of *Towsley v. Ozaukee County*, 60 Wis. 251, that there can be no duty to furnish such supplies; that counties have only such powers as are specifically granted; that there is no other specific grant of this power and that it therefore follows that the county has no power to furnish all or any part of the supplies of the nature herein set forth.

It is amazing that questions such as this can arise after all these years of statehood,—but it has arisen and we shall have to undertake to resolve it. The question impresses us as one where perhaps “a page of history is worth a volume of logic”. Administrative interpretation of the challenged power in the various counties throughout the state is undoubtedly of the utmost significance, particularly if that in-

terpretation dates back to existing practices so long established that the "memory of man runneth not to the contrary."

It is our thought that the practice has existed unchallenged in most, if not all, of the counties throughout the state of furnishing the official circuit court reporter with all or a part of the supplies in question and that this practice has existed literally since the inception of statehood.

In reaching a conclusion with respect to the question, we do not wish to give undue weight to a supposed "long continued existing practice or administrative interpretation" throughout the various counties of the state if no such long continued practice or administrative interpretation has existed. To that end we are writing the various circuit court reporters throughout the state to determine whether the various counties in their circuit do furnish them with all or any part of the supplies in question and for such knowledge as they may possess as to how long such practice has existed in these counties.

If the administrative practice is as we suspect it to be, it is our thought that this practice should not be upset unless we can say that it is clearly wrong and that there is no legal authority for such practice. We do have some difficulty putting our finger upon any specific statutory provision which authorizes such purchases. However, sec. 20.66 does not seem to contemplate that the court reporter is to furnish these supplies out of his own salary or fees. The reporter seems to be entitled to "expenses" and those expenses, except in one instance, are not limited to traveling expenses.

There is an obvious limitation upon how far the argument grounded upon sec. 59.07 (7) is valid in setting the boundaries of county power. It will be noted that there is no reference at all in the section with respect to furnishing light, heat and equipment for the courtroom, yet we presume no one would deny that the county not only has power to furnish such services and equipment but is under a duty to furnish same. We find no specific reference in the statutes with respect to either the county's duty or power to furnish a library in conjunction with the functioning of the

court,—yet this is a power which has been traditionally exercised by counties since time immemorial.

There is much inherent power in the circuit judge to require counties to furnish an adequate courtroom with all necessary facilities, such as jury room, proper seating capacity, acoustical qualities, etc. Indeed, a constitutional court of general jurisdiction has inherent power to protect itself against any action by the county that would unreasonably curtail its powers or materially impair its efficiency. *In re Court Room, et al.*, 148 Wis. 109, 121. See *In Re Janitor of Supreme Court*, 35 Wis. 410. It would seem entirely logical that the circuit judge possesses inherent power to require the county to furnish the court with all supplies reasonably necessary for its functioning as a court. Perhaps the practice, which we suspect exists in the various counties, is grounded upon such inherent authority in the circuit judge and the corresponding duty of the county to comply with such reasonable request of the circuit judge.

It is possible that your circuit judge can shed some light upon these latter observations. If you care to take the matter up with him we shall appreciate such observations as the judge cares to make. We shall appreciate your advising us as soon as convenient as to the existing practice in the various counties in your circuit with respect to the furnishing of all or any part of the supplies in question and such information as you can give us with respect to how long that practice has existed.

Very truly yours,  
JOHN E. MARTIN  
Attorney General

*Taxation — Forest Crop Lands* — Acreage canceled from entry of forest crop lands in March should not be included in following apportionment and payment made to towns under sec. 77.05, Stats.

Cancellation of forest crop land entries completed prior to April 20th in any year shall exclude such acreage from next payment of state contributions under sec. 77.05.

June 17, 1942.

CONSERVATION DEPARTMENT.

You state that the conservation commission canceled the entry of certain forest crop lands in March, 1942, under the provisions of sec. 77.10, Stats., and you inquire:

“(1) Shall the acreage canceled from entry in March, 1942, be included in the apportionment and payment to towns now to be made under 77.05?”

“(2) What is the final date in any tax year when cancellation of county forest crop lands shall exclude such acreage from the next payment of state contribution under 77.05?”

Sec. 77.05, Stats., directs the commission to pay each town treasurer 10¢ per acre on each description of land certified by the county treasurer as prescribed in said section. The lands to be certified by the county treasurer include “the legal descriptions in each town on which the owner has paid the acreage share pursuant to subsection (2) of section 77.04, and also on acreage share previously returned delinquent and subsequently paid, *except on lands on which an order of cancellation has been issued by the conservation commission pursuant to subsection (1) of section 77.10.*”

If the clause “except on lands on which an order of cancellation has been issued” be construed as referring to all lands required to be certified by the county treasurer, it follows that lands for which entries have been previously canceled are not to be included either in the certification or in the apportionment and payment.

There is a general rule of construction to the effect that a modifying clause is construed as being confined to the last

antecedent. If such rule were applied to sec. 77.05 (1), it would restrict the effect of the quoted exception to "acreage shares previously returned delinquent and subsequently paid." The rule of construction, however, has no application where the context and punctuation indicate that the legislature intended a different result. It was stated in *Service Investment Co. v. Dorst*, 232 Wis. 574, 577, that the use of a comma between the last antecedent and the modifying clause tends to indicate that the modifying clause should refer to "all the preceding clauses and not only the last antecedent one." The punctuation used in sec. 77.05 (1) falls within the rule of the cited case.

The context of the law as a whole also indicates that the legislature intended the exception to apply to all lands to be certified by the county treasurer for payment of the state's contribution. No reason is apparent why the legislature might have desired to authorize payment of the state contribution for forest crop lands on which the owner had paid the tax before the delinquent date but to withhold similar contribution where the tax had been paid by the owner after the delinquent date. The fundamental requirement is merely that the owner shall have paid the acreage tax prior to the certification. See XX Op. Atty. Gen. 41.

Furthermore, sec. 77.10 provides that when the entry on the forest crop lands is canceled "*none* of the provisions of this chapter shall *thereafter* apply to them except section 77.07 so far as it may be needed to collect any previously levied severance or supplemental severance tax." This provision read in connection with the exception contained in sec. 77.05 (1) expressly prohibits payments out of the state treasury for lands on which the forest crop classification has been canceled under sec. 77.10.

If the cancellation occurs more than five years after the date of entry of such lands the owner must pay "all real estate tax that would ordinarily have been charged against such lands had they not been subject to the provisions of this chapter" with interest, and the conservation commission is required to deduct from such taxes "all moneys paid by the state on account of such lands under the provisions of subsection (2) of section 20.07" with interest. See sec. 77.10 (2). The requirement that the conservation commis-

sion deduct such moneys indicates that the state is to be fully reimbursed for contributions made to towns. Thus, where cancellation is ordered by the commission more than five years after the date of entry, it would be contrary to the spirit of the statutes that any payment be made to towns for which the state could not be reimbursed out of the real estate tax paid by the owner. In such cases there would be no purpose to be served in performing a double transaction by making a payment to the town treasurer and then proceeding to recoup the same out of taxes paid by the owner.

BL

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*Public Officers — Assistant District Attorney — Justice of Peace* — Offices of assistant district attorney and justice of peace are incompatible.

June 24, 1942.

CONNOR HANSEN,  
*District Attorney,*  
 Eau Claire, Wisconsin.

You have inquired whether the offices of assistant district attorney and justice of the peace are compatible.

You state that in your county the main duty of the assistant district attorney is to substitute for the district attorney when the latter is absent, although the assistant assumes some of the regular duties of the district attorney at other times. The position of assistant district attorney is authorized in sec. 59.45 of the statutes and the duties are therein described as follows:

“\* \* \* The assistant district attorneys so appointed shall have full authority to perform all the duties of the district attorney, except the signing of indictments and informations. \* \* \*”

Sec. 59.49, which forbids a district attorney to hold any judicial office, does not in terms apply to an assistant district attorney. In addition to the restrictions imposed by sec. 59.49, the district attorney is also subject to the common law rule of public policy which prevents the simultaneous incumbency of incompatible offices. The rule is illustrated in *Martin v. Smith*, 239 Wis. 314, *State v. Jones*, 130 Wis. 572 and *The State ex rel. Knox v. Hadley*, 7 Wis. 700. In *State ex rel. Stark v. Hines*, 194 Wis. 34, the offices of municipal judge and city attorney were held incompatible. Such offices are analogous to those of justice of the peace and district attorney.

You state that in your county the jurisdiction of justices of the peace over criminal cases has been transferred to another court. The district attorney, however, is required by sec. 59.47 (1) to prosecute or defend civil actions in which the state or county is interested or a party. Such duty is accordingly one which an assistant district attorney is authorized to perform by the portion of sec. 59.45 above quoted. The duty of a justice of the peace to decide impartially a civil action in which the county is interested is inconsistent with the duty of an assistant district attorney to represent the interests of the county in such a case. As is stated in *State v. Jones*, 130 Wis. 572, 575:

“\* \* \* It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. \* \* \*”

The fact that there are other justices of the peace who might try cases involving the county would not warrant an exception to the rule against the holding of incompatible offices. Where the terms of the statute give the county a certain number of judicial officers for the trial of civil causes, this number cannot be reduced by one officer's rendering himself ineligible through the holding of an incompatible office. Such was the ruling in *State ex rel. Knox v. Hadley*, 7 Wis. 700.

Duties which are incompatible with those of a justice of the peace when performed by a district attorney would be equally incompatible if performed by a substitute in his

absence. If the position of assistant district attorney is a public office, the rules of the common law prevent the incumbent from holding an incompatible office. While it has not been directly held by the courts of this state that the position of assistant district attorney is an office, the position is one which is authorized by statute and its duties fixed thereby. In the absence of a holding that the position constitutes an employment rather than an office, we are of the opinion that it would be inadvisable for the same person to attempt to act both as justice of the peace and assistant district attorney.

BL

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*Taxation — Motor Fuel Tax — Refunds* — No refund is authorized by statutes to foreign or domestic interstate operators of motor vehicles for motor fuel tax paid on excess of gasoline purchased in this state over amount used in operating vehicle on public highways of this state. No provision authorizes or provides for reciprocity with other states in enforcement or application of motor fuel tax law.

June 24, 1942.

JOHN M. SMITH,  
*State Treasurer.*

You ask whether interstate operators of motor trucks or busses who purchase gasoline in Wisconsin are entitled to a refund of the tax paid on the amount thereof that is in excess of the gasoline needed and used to cover the mileage traveled in this state. The question, as we understand it, arises in reference to interstate motor carriers, both domestic and foreign, and relates to the motor fuel purchased for use in propelling their motor vehicles.

The motor fuel tax is imposed by sec. 78.02, subsec. (1), Wis. Stats. 1941, on "all motor fuel sold, used or distributed in this state." Under sec. 78.08, Wis. Stats. 1941, the operator of every motor vehicle which comes into Wisconsin

having in its tank more than 20 gallons of motor fuel that was purchased outside of the state and is for use in operating the vehicle must report to you in the same manner as a wholesaler and pay the tax on so much of said fuel as is used within this state. Such operator therefore must pay the tax if the gasoline in the tank and brought into the state exceeds 20 gallons, on the amount thereof that is used in operating the vehicle on the highways of this state, regardless of whether or not a motor fuel tax or other tax has been paid thereon to some other state. Obviously such operator pays the tax imposed by sec. 78.02 (1), Stats., on all purchases of gasoline for operating the vehicle that he makes while in the state, because it is "motor fuel sold" in this state.

The purchases in this state would be occasioned by the capacity limitation of the vehicle's fuel tank or because intentionally only an insufficient supply was in the tank upon entering the state so as to avoid payment of the Wisconsin tax on a larger amount where a tax had already been paid thereon in the state where purchased. But the gasoline purchased in Wisconsin might not all be used up in operating in Wisconsin and the question is whether or not a refund could be made to the operator for the tax on the excess of the amount of gasoline purchased in Wisconsin over the amount thereof used in operating the vehicle on the highways of this state.

Subsec. (1) of sec. 78.02, Stats., specifically grants an exemption from this tax to motor fuel (a) exported or sold for export from this state, (b) sold to the United States government or any of its agencies or sold to post exchanges or concessionaires upon any federal military reservation in this state, and (c) to class 2 motor fuel (which does not include gasoline) when not sold for use or used to operate motor vehicles on the public highways of this state. Subsec. (2) then grants an exemption from the tax to motor fuel for industrial purposes other than the operation of a motor vehicle upon the highways of this state. Very clearly, then, the gasoline purchased by an interstate motor vehicle operator in this state is not exempt from the tax imposed by sec. 78.02 because it does not come within any of the specifically mentioned exemptions.

Sec. 78.14, Wis. Stats. 1941, provides for refunding of motor fuel taxes. Subsec. (1) thereof provides for refund of the tax paid upon motor fuel which is destroyed by fire, lightning, storm, flood or accident if the tax has been paid. Subsec. (2) provides for reimbursement and refund of the amount of tax paid on motor fuel used for certain purposes therein specified. They are the operating or propelling of stationary gas engines, tractors for agricultural purposes, motor boats and airplanes or use for cleaning or dyeing. The subsection then says "or for any commercial use or purpose other than operating a motor vehicle upon the public highways of this state." This last quoted language standing by itself would be sufficient to authorize refund of the tax on the excess of the gasoline purchased in the state by an interstate motor vehicle operator over the amount thereof used in operating the vehicle on the public highways of this state. But, then comes the last sentence in the subsection which specifically covers the situation and expressly precludes such a refund, in the following language:

"Provided, however, that no refund shall be claimed by or allowed to any person on account of any motor fuel carried from this state in the ordinary fuel tank of a motor vehicle."

Of similar import is the proviso in sec. 78.30, Stats., in reference to the exemption of motor fuel exported from this state. The section provides as follows:

"Said motor fuel license tax shall not be imposed on motor fuel when exported or sold for exportation from the state of Wisconsin to any other state or nation. *Provided, however, that the motor fuel carried out of this state in the ordinary fuel tank of a motor vehicle shall not be, or be construed to be, motor fuel exported from this state within the meaning of this section.*"

The foregoing express statutory provisions in our opinion preclude a refund being made to the operator of an interstate motor vehicle for the tax paid on the excess of the gasoline purchased in this state over the amount thereof used to operate the vehicle on the public highways of this state. Such excess is, of course, carried out of this state in

the fuel tank of the vehicle. By the proviso in sec. 78.30, Stats., it cannot be treated as gasoline sold for export and exempt from tax. By the express provision in sec. 78.14 (2) it is precluded from being made the basis for a refund. However, by proper attention to practicalities and regulation of the amount of gasoline in the tank when entering or leaving the state, any payment of a duplicate tax to Wisconsin can be entirely eliminated, or reduced to relative insignificance.

You also ask if there can be adjustments with other states in the application of our statutes and the statutes of those states to the foregoing situation. Sec. 78.29 is the only provision in our statutes in reference to reciprocity with other states in reference to motor fuel taxes. This statute relates only to the interchange of information and nothing more. In the absence of some specific authority in the statute for reciprocity between the states in reference to the enforcement or application of tax statutes no such authority is vested in your department as the administrative officials who enforce the motor fuel tax laws of this state.

HHP

*Bridges and Highways — Contracts* — State highway commission has authority, under sec. 84.06, subsec. (2), par. (a), Stats., to enter into contracts with counties for performance of highway construction or reconstruction which provide for counties being compensated at maximum unit price rate of compensation — overall maximum compensation for job.

County highway committees have power to enter into such contracts on behalf of county.

County is not entitled to extra compensation merely because contract proves to be improvident one.

Commission may not increase compensation rates provided for in contract except pursuant to terms of some provision in contract authorizing some subsequent adjustment.

June 25, 1942.

WM. E. O'BRIEN, *Chairman,*  
*State Highway Commission.*

In your letter you state:

“When it has been deemed feasible and advantageous to have state highway construction performed by county forces, contracts have been entered into with the counties pursuant to section 84.06 (2) (a) of the statutes. Formerly it was the practice to provide in such contracts that the county be reimbursed its actual cost for labor, materials, etc., plus an allowance for the use of county owned equipment on the basis of agreed rental rates. Beginning in 1940, at the request of Governor Heil, the larger contracts entered into with counties for performing state highway construction were changed in form to provide that reimbursement to the counties was limited not only to the actual cost plus an allowance for the use of equipment but that the reimbursement was also limited to predetermined and agreed fixed unit prices for the quantities of work performed. Such contracts provide in effect that the county will be reimbursed for labor and material and for the use of equipment at the agreed rental rates except that the equipment rental so determined will be reduced as required so that the total reimbursement to the county will not exceed the amount computed from the quantity of work performed at the predetermined fixed agreed unit prices. The intent in arriving at the agreed maximum unit prices to be al-

lowed for the quantities of work performed was to allow a unit price slightly below the average unit prices bid by contractors on current work and to reflect the fact that for day labor work certain elements, such as profits, bonds, bidding expenses, and other items, are not incident to the work as they are on private contract work.

“One of the first contracts of that nature entered into with a county was entered into with Forest county on state project No. 7148, the Oneida county Line-Hiles road, on state trunk highway No. 32. A copy of that contract is attached for your information. Before that contract was entered into, representatives of the county held conferences in the executive office and also with the state highway commission, and when the contract was prepared and presented for the signatures of the county officials its terms were again explained to those officials so that there would be no question as to the intent of the contract. The contract was carried to completion and the county was reimbursed in accordance with the terms of the contract.

“Representatives of Forest county recently called on the state highway commission to determine whether the county could receive an adjustment and additional compensation for their work in connection with that contract due to the fact that the cost to the county of such work was such that the county received only a very small allowance for the use of its equipment. The maximum for which the county could be reimbursed on the basis of the agreed fixed unit prices for the quantities of work performed was \$25,053.18. The actual cost to the county for labor and materials and the machinery allowance at the agreed rental rates, as reported by the county, and the adjustment in the machinery allowance necessary to reduce the total to the maximum allowance reimbursement of \$25,053.18, are as follows:

	Labor and Materials	Machinery Allowance at Agreed Rates	Total
Total per county reports	\$23,492.96	\$19,073.44	\$42,566.40
Reduction of machinery allowance to equal maximum reimbursement ---		17,513.22	17,513.22
Final settlement -----	\$23,492.96	\$ 1,560.22	\$25,053.18

“The foregoing example is presented for the purpose of illustrating the provisions of the form of contract which we have endeavored to describe. As all contracts of this nature entered into with any county are practically uniform in

their provisions, and as we are receiving requests from counties for adjustments and for additional compensation not contemplated in the terms of such contracts, we believe it advisable, for our guidance, to have a definite understanding as to the legality of such contracts and whether their terms may be subject to abrogation or alteration after the work has been performed. We therefore request your opinion in answer to the following questions with reference to these contracts.

"1. Does the state highway commission have authority, under the statutes, to enter into such contracts with counties?"

"2. Do county highway committees and commissioners have authority under the statutes to enter into such contracts with the state highway commission?"

"3. Are the terms of such contracts enforceable to the extent that the county might receive no allowance whatever for the use of its equipment or even to the extent that the county might not be reimbursed in full for its expenditure for labor and materials?"

"4. After the contract has been entered into, does the state highway commission have authority to make any additional allowance to a county for the work included therein in addition to the allowance provided for in such contract?"

In answer to question 1, we are of the view that the state highway commission has authority, under the statutes, to enter into such contracts with counties. Sec. 84.06, subsec. (2), par. (a) of the statutes provides:

"If the commission shall find that it would be more feasible and advantageous for highway purposes to have any such improvement performed by the county in which the proposed highway improvement is located and without bids, the commission may, by arrangement with the county highway committee of such county, negotiate for and, if possible, obtain a contract satisfactory to the commission to have the work done by the county forces and equipment and in such contract may authorize the county to provide for the purchase, delivery and storing of materials and the necessary rental of small tools and equipment. In such instance the contract shall be entered into between such county and the state and shall not be based on bids. Such contract may be entered into on behalf of the county by the county highway committee and on behalf of the state by the commission. Every such contract is excepted from all provisions of chapter 15 and section 289.16, but no such contract in which the total indebtedness to be incurred thereby as

therein estimated exceeds five thousand dollars shall be valid or effectual for any purpose until it shall have indorsed thereon in writing the approval of the governor."

This subsection contains no limiting language which would prohibit the commission from entering into such a contract with a county. It provides for the commission's negotiating with and obtaining if possible "a contract satisfactory to the commission". If the type of contract in question was the one desired by the commission we find nothing in the statutes to prohibit the use of same. It is true that bids are not required or permitted when the commission contracts with the county, pursuant to the authority conferred by said subsection. That fact, however, cannot be construed as any implied limitation of the power of the commission to contract to have the work done at a maximum contract price for the performance of same.

In answer to question 2, the power to enter into such contracts on behalf of the county is lodged by said subsection in the county highway committee—not in the county highway commissioner. The county highway committee's power to enter into such a contract may or may not be subject to the control of the county board. The statute does not make favorable county board action a condition precedent to entering into such a contract. It is possible that county boards may prohibit their county highway committees from entering into such contracts either with or without the consent of the board. But in the absence of some such prohibitive resolution of the county board, it is our opinion that county highway committees have power to enter into such contracts under said subsection.

In answer to question 3, we are of the opinion that the contract compensation must control even though the contract proves to be an improvident contract from the standpoint of the county. There is nothing in the statutes and no principle of general law which would entitle a county to recoup losses occasioned by entering into a contract such as the one in question merely because the contract proved to be an improvident one.

In answer to question 4, it is our opinion that the state highway commission is without authority to make any additional allowance to the allowances provided for in the contract itself. Any increase in compensation, after the contract is entered into, must be an increase based upon increases permissible by the terms of the contract itself or other documents referred to in the contract and which are a part of it. See *State ex rel. Lathers v. Smith*, 238 Wis. 291 (1941).

NSB

*Bridges and Highways — Gravel Pits* — Sec. 83.07, subsec. (2), Stats., does not authorize county highway committee to condemn additional lands for county-owned gravel pit for purpose of operating pit commercially as well as for its own use. County's liability to adjoining property owners for damage by dust and cave-ins is that of one proprietor to another, and governmental immunity for negligence does not attach where pit is operated both for use of county and for sale of gravel to others.

July 2, 1942.

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

You state that Juneau county owns a gravel pit in the village of Necedah and has operated the same for a number of years for the purpose of obtaining gravel for county highways and for the sale of gravel to the state and towns for highway purposes. Also at times the county has permitted a private contractor to operate the pit under an agreement whereby the county is paid at a certain rate per cubic yard for gravel so removed.

The county now wishes to acquire adjoining property to add to this gravel pit and you inquire first whether the county may obtain the same in condemnation proceedings under sec. 83.07, subsec (2), Stats.

Sec. 83.07 (2) reads:

"In case the county highway committee or town board shall deem it desirable to acquire any lands or the right to take stone, gravel or clay or other material, from private lands for use of the public in the execution of the committee's or board's duty, or to acquire the right of access to or from any lands, or the right of drainage across any lands, said committee or board may purchase such lands or right and take title thereto in the name of the county or town, as the case may be, and the cost thereof shall be paid out of the public funds provided for the improvement of highways."

Procedure to be followed in exercising the power conferred by sec. 83.07 (2) in those instances where the county

highway committee is unable to acquire the needed land or right to take gravel by contract with the owner, is set forth in other subsections of sec. 83.07 and calls for no discussion here.

It is to be noted in sec. 83.07 (2) that the authority of the committee to acquire land or the right to take stone, gravel, or clay or other material from private lands "for use of the public" is limited to those situations which involve the execution of the committee's duty.

If it is proposed to operate the additional property and to exercise the right to remove gravel therefrom so as to obtain gravel for county highways, it is clear that the matter would fall within the execution of the committee's duty, and condemnation would be proper under the provisions of sec. 83.07 (2). If, however, it is proposed to operate the property so acquired as a commercial pit was some use of the gravel by the county, it would appear equally that the undertaking would not fall within the execution of the committee's duty, and sec. 83.07 (2) would, therefore, be inapplicable.

Moreover, you call attention to the fact that a portion of the adjoining property here sought to be acquired consists of a village street. The general rule seems to be, particularly as to municipalities, that property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication. 29 C. J. S. 861-862.

Certainly there is no language in sec. 83.07 (2) which intimates that the county highway committee has the power to acquire for gravel pit purposes lands which are already devoted to a public use such as a village street.

You also inquire as to the liability of the county to adjoining property owners for dust damage and for damages caused by pit caving in.

It is well established that a county, while acting in a governmental function, is not liable for the negligence of its agents, officers or servants. *Crowley v. Clark County*, 219 Wis. 76. The rule is otherwise where the county is acting in a proprietary capacity. *Young v. Juneau County*, 192

Wis. 646. This case is of particular interest here, since we believe it concerns the very gravel pit under discussion. At any rate it appeared in the complaint that Juneau county was the owner of a gravel pit in the village of Necedah, and was engaged in removing gravel for its use and for sale by means of a steam shovel. Because of known defects in the engine, sparks escaped therefrom and set fire to the property of the plaintiff. Juneau county demurred to the complaint, partly on the ground that the county was not liable for the negligence of its agents and employees engaged in the discharge of a governmental function. The demurrer, however, was overruled, and the court held that notwithstanding the governmental character of the county, its relation to the adjoining owner, under the circumstances, was that of one proprietor to another, and not that of governor and governed. See also *Necedah Mfg. Corp. v. Juneau County*, 206 Wis. 316, *Blake v. Madison*, 237 Wis. 498, and article in 1941 Wisconsin Law Review 540, entitled, "Municipal Liability for Tort in Wisconsin—A Survey."

We therefore concur in your conclusion that the liability of the county to the adjoining proprietor under the circumstances here is the same as that of any private concern or individual, and is ruled by the general law of negligence.

WHR

*Corporations — Public Utilities* — Term “public utility” as used in sec. 196.80, subsec. (1), par. (d), Stats., comprehends company owning and operating street railway or interurban railway and sale by such company of its trackless trolley system requires consent and approval of public service commission.

July 6, 1942.

R. W. PETERSON, *Chairman,*  
*Public Service Commission.*

Attention Edward T. Kaveny, *Secretary.*

In your letter you state:

“There has been filed with this commission a contract entered into between Wisconsin Gas & Electric Company and Henry P. Bruner, providing for the sale by the company to him of the property constituting the Kenosha trackless trolley system. This contract does not state that it is made subject to this commission’s consent or approval; nor has any formal application for such consent or approval been made to the commission. However, the filing of the contract was apparently made to elicit an opinion or determination by the commission as to whether such consent or approval is required by law.

“Accompanying the contract is an opinion of the company’s counsel in which it is said:

“No public official authority is required by Wisconsin Gas & Electric Company. It is to be noted that section 196.80 (1) (d) calls for commission consent to the sale or acquisition of any public utility plant or property of such size as to constitute an operating unit or system. This restriction applicable to public utility property has never been extended to street railway property.”

“This commission is in doubt as to the correctness of the opinion of the company’s counsel as above stated. It is therefore requesting your opinion as to whether under the provisions of section 196.80, statutes, the contract above referred to is valid without its consent and approval.”

Your letter was accompanied by a memorandum on the construction of sec. 196.80, subsec. (1), par. (d). The memorandum was very helpful to us in our study of the question. We accordingly incorporate the memorandum in this opinion for the benefit of those who will have occasion to

appraise the soundness of the conclusion herein reached. The memorandum follows:

*“Memorandum on Construction of Section 196.80 (1) (d)”*

“Section 196.80 was formerly section 196.535, statutes, and was originally enacted as chapter 366, Laws 1925. Its provisions may be ascertained from the 1927 statutes. In effect the act provided a new and simplified procedure for the merger or consolidation of two or more public utility corporations, one of which might be the owner of all of the capital stock of the others. The bill which became said chapter 366 was amended after its introduction to make the procedure thereby afforded specifically applicable to any public utility even though it might be the owner of a street or interurban railway. So that, as finally enacted, the bill applied to ‘Any public utility or any public utility owning or operating a street railway or interurban railway.’ (See section 196.535 (1) (a) and (b) Wisconsin statutes 1927.)

“By the enactment of chapter 219, Laws 1929, subsection (b) of section 196.535 became subsection (c) of the same section which had been renumbered by the revisor of statutes so as to be section 196.80. Said chapter 219 also enacted subsections (b) and (d) of section 196.80, both of which pertain to the acquisition of *property* and not to the merger of corporate entities.

“An investigation of the legislative history of the Bill 18,A. (which became said chapter 219, Laws 1929), makes it fairly certain that the sponsor of the bill (Assemblyman Barber) was interested only in putting some sort of check on the indiscriminate acquisition of the property and plant of one utility by another—particularly in the case of telephone utilities. It seems probable, also, that in drafting Bill 18,A., for Mr. Barber the legislative reference library may have more or less slavishly adopted the language of existing subsections of said section 196.80, and so made the check or limitation provided by the bill applicable not only to public utilities generally but specifically to public utilities which might own or operate street or interurban railways.

“Whatever may be the proper effect of this legislative history, the fact remains that the words ‘or any public utility owning or operating a street railway or interurban railway’ in subsection (d) of said section 196.80 appear to have neither purpose nor effective meaning unless the subsection was intended to apply to the sale, acquisition or lease of such railway property. Obviously, if a legislative check or limitation is applicable to ‘any public utility’ it applies without additional verbiage for that purpose to a public utility which happens to own a street or interurban rail-

way, even if it be true that a legislative privilege or prescribed procedure which applies to 'any public utility' does not apply to a public utility which owns or operates any such railway.

"By section 195.02, statutes, street and interurban railways are included within the definition of the term 'railroad' rather than within the term 'public utility.' And by section 193.01 trackless trolley systems are railroads.

"The term 'public utility' otherwise than under a statutory definition, is doubtless broad enough to include street or interurban railways. As defined in section 196.01 the term as used in chapter 196, statutes, clearly does not include such railways 'unless the context requires otherwise.'

"May it not be forcefully contended that the context of section 196.80 (1) (d) clearly implies that the term 'public utility' as used in that subsection includes a street or interurban railway? If not, how is it possible to give any meaning or effect to the words, 'or any public utility owning a street railway or interurban railway' in said subsection (1) (d)?"

Sec. 196.01 (1) and (6) in so far as material provides:

"(1) As used in chapters 196 and 197, *unless the context requires otherwise*, 'public utility' means and embraces every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every town, village or city that may own, operate, manage or control any toll bridge or any plant or equipment or any part of a plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. No cooperative association organized under chapter 185 for the purpose of producing or furnishing heat, light, power or water to its members only shall be deemed a public utility under this definition. (Emphasis ours.)

"\* \* \*

"(6) 'Railroad' has the meaning attributed to it by section 195.02."

It seems clear to us that sec. 196.01 is deliberately so phrased and worded as to eliminate from consideration of the question of whether a company is a public utility as defined by said section, any question of whether the public utility aspects of a company's total business activities constitute a preponderance of the company's total business ac-

tivities. To illustrate: Company A conducts a public utility as defined by said section. This activity is a major part of the company's total business activities. The company would be a public utility as defined by the section. Company B conducts a public utility. This activity is a minor portion of the company's total business activities and does not constitute a preponderance of the total business activities of the company. Company B is nevertheless a public utility under the act.

Sec. 196.80 (1) (d) provides:

*“Any public utility or any public utility owning or operating a street railway or interurban railway may sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system.”* (Emphasis ours.)

What is the significance of the italicized language of said subsection “or any public utility owning or operating a street railway or interurban railway”? We must presume that the legislature intended to accomplish something by the use of such language. A public utility, as defined by sec. 196.01 (1), Stats., would clearly be a public utility if it also owned or operated a street railway or interurban railway as a part of its total business activities. Therefore, if the language is to be given any effect at all it must operate to increase the scope of the definition of the term “public utility” for purposes of applying the said subsection of the statutes. When the legislature uses the term “public utility plant or property” thereafter in said subsection, such term necessarily refers to public utility plant or property within the increased scope of the term “public utility” as used in said subsection. A company which owns or operates a street railway is a public utility within the scope of the definition of that term in said subsection.

The same terminology “or any public utility owning or operating a street railway or interurban railway” appears in the three preceding paragraphs of subsec. (1), sec. 196.80. As you point out in your memorandum, pars. (b) and (d) of subsec. (1), sec. 196.80 were enacted by ch. 219, Laws 1929. It further appears from that memorandum that sec. 196.80 was originally enacted as ch. 366, Laws 1925. It seems significant that the words “unless the context requires other-

wise," which is now a part of the definition of the term "public utility" (sec. 196.01 (1) ), were enacted in 1929 (the same year that the particular subsection of sec. 196.80 under consideration was enacted) by sec. 227, ch. 504, Laws 1929. This would seem to be a legislative recognition of the fact that it had increased the scope of the meaning of the term "public utility" as defined by sec. 196.01 in various sections or subsections of the statutes and that the definition of the term in sec. 196.01 ought to be sufficiently broadened to conform to the increased scope of the term where so used,—where "the context requires otherwise".

We conclude that the sale of this trackless trolley system does require consent and approval of the commission.  
NSB

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*Public Officers — Clerk of Municipal Court — Ch. 18, Laws 1909, provides that clerk of municipal court of Kenosha county should pay fines and penalties into county treasury quarterly. County treasurer is entitled to retain 50% of fines and penalties paid to him for quarter ending October 1, 1941, arising out of violations of ch. 85, Stats. There is no substance to contention that ch. 206, Laws 1941, effective September 1, 1941, amending sec. 59.20, subsec. (8), and increasing county treasurer's fee from 10% to 50%, shall be construed to permit retention of only 10% of fines which were imposed prior to effective date of law.*

Increase in fee provided for by ch. 206, Laws 1941, does not conflict with provisions of art. X, sec. 2 of Wisconsin constitution.

July 8, 1942.

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

You have related the following statement of facts to us and have requested our opinion as to whether the settlement between the state and county was made upon a proper basis.

"Section 59.20 (8) was amended by chapter 206, laws of 1941, so as to permit the county treasurer to retain for the county fifty per cent of the fines and penalties levied by courts under chapter 85 as fees.

"Previous to the enactment of said chapter 206, it was the county treasurer's duty to remit all but ten per cent of all fines and penalties in violation of state statutes. The act became effective September 1, 1941.

"In October of 1941 the clerk of the municipal court turned over to the county treasurer the fines and penalties collected by her for violation of said laws during the preceding quarter namely, for the months of July, August and September. This was in accordance with chapter 18, laws of 1909, which created the municipal court of Kenosha county, and which provides by section 13 thereof that the clerk shall render an account to the county treasurer quarterly of said fines and penalties. The state treasurer's office demanded and received from the county treasurer ninety per cent of the fines and penalties collected by the clerk during the months of July and August but permitted the treasurer to retain fifty per cent of those collected in September under the theory that the act having become effective September 1, such date should be used in making the accounting.

"The matter has just come to my attention and I am of the opinion that the county treasurer should have retained fifty per cent of all the fines and penalties collected under chapter 85 for the entire preceding quarter instead of for only the month of September."

Sec. 59.20 (8), Wis. Stats., provides:

"The county treasurer shall:

"(8) Retain 10 per cent for fees in receiving and paying into the state treasury all moneys received by him for the state for fines and penalties, except that 50 per cent of the fines and penalties under chapter 85 shall be retained as fees, and retain such other fees for receiving and paying money into the state treasury as are prescribed by law."

As you point out, prior to the enactment of ch. 206, Laws 1941, which became effective on September 1, 1941, the treasurer was permitted to retain only 10% of fines and penalties collected under ch. 85.

It appears from the provisions above set out that the fee is intended to compensate the county treasurer for receiving the money on behalf of the state and for paying it into

the state treasury. Under ch. 18, sec. 13, Laws 1909, the clerk of the court renders a quarterly account to the county treasurer of the fines and penalties assessed in that court. The amounts collected by the clerk for the quarter ending October 1 were not payable by him to the county treasurer until October 1. At the time they became payable the county treasurer was required to receive them and he was, of course, required to pay them into the state treasury at the time provided by law.

The law which was in effect at the time the quarterly payment became payable to the county treasurer provided that he should receive a fee of 50% of the amount paid to him for receiving and thereafter paying it into the state treasury. It is clear beyond doubt that the county treasurer was entitled to a fee of 50% in accordance with the provisions of the law for receiving the money and paying it over.

It has been suggested that it would amount to a retroactive operation of ch. 206 to permit the county treasurer to collect the increased fee for the months of July and August since it did not become effective until September 1. This view fails to recognize the nature of the statute. It does not purport to divide fines and penalties between the county and the state as of the time of imposition. As we have pointed out it is a statute providing a fee for services to the county treasurer. The treasurer could not be paid 10% of the fines imposed during the months of July and August. He was not entitled to anything until he performed services in receiving and paying out the fines and penalties turned over to him by the clerk. He had received nothing on September 1 and was entitled to receive nothing. Had the law providing for payment of such fines and penalties into the county treasury been repealed prior to October 1, the county treasurer would have received nothing by way of a fee since no moneys would then have been payable to him. Neither the clerk nor the county had anything in the nature of a vested interest in the amounts collected by the clerk of the court as they accrued. Nor did the treasurer's fee accrue as the fines and penalties accrued. They accrued only when services were performed and those services were not performed until after the increase in the fee became effective.

While the question is not raised in your request, it has been suggested to us that the increase in the fee made by ch. 206 is unconstitutional upon the ground that under art. X, sec. 2 of the Wisconsin constitution the clear proceeds of all fines are to be paid into the common school fund. It is said that the result of paying such a large fee to the treasurer is to extract such a substantial amount as practically to nullify the constitutional provision.

In our opinion the claim is without substantial merit. Cases bearing upon the subject are: *The State v. De Lano*, 80 Wis. 259; *The State ex rel. Guenther, State Treasurer, v. Miles, County Treasurer*, 52 Wis. 488; *Dutton v. Fowler*, 27 Wis. 427.

JWR

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*Automobiles — Bankruptcy — Mortgages, Deeds, etc. —*  
When motor vehicle department receives appropriate evidence of sale of registered vehicle free of incumbrance in bankruptcy proceedings, department should issue certificate of title to purchaser in accordance with terms of such sale.

July 8, 1942.

MOTOR VEHICLE DEPARTMENT.

You submit the following statement of facts:

The owner of an automobile for which you have issued a certificate of title and of registration has been adjudged bankrupt. The automobile is subject to a chattel mortgage which is shown on the certificate of title issued by you, but which is not recorded in the county in which the car was situated as provided in sec. 241.10, Stats. The automobile, as we understand it, was in the possession of the bankrupt until his property was taken over by the trustee in bankruptcy.

You inquire whether, if the car is sold free of incumbrance in the bankruptcy proceedings, you shall issue a

certificate of title without showing the unrecorded chattel mortgage. Sec. 85.01, subsec. (3), Stats., requires that the certificate of title issued by your department "shall show any mortgage, conditional sales contract or other lien on the vehicle." Sec. 85.01 (8) provides that when ownership of the vehicle "shall pass by judicial decree or sale, or by operation of law, the new owner shall be entitled to a certificate of title upon filing appropriate evidence thereof." It is not a function of your department to determine the validity of the incumbrances. The motor vehicle department is under no duty to perform the functions of a court. As an administrative agency, it is required to make a record of the ownership of vehicles registered by it and to issue certificates indicating what its records show with respect to such matters. Such records are primarily for identification, for purposes of law enforcement, policing, and taxation. The certificate issued is not conclusive evidence of the state of the title to the vehicle. It does not affect the right of a court to determine the true state of the ownership. *Celina Mutual Casualty Co. v. Baldrige*, (Ind. App. 1937) 5 N. E. (2d) 991, repealed on other grounds 10 N. E. (2d) 904; *Abraham v. Hartford Fire Ins. Co.*, 215 Ia. 1, 244, N. W. 675; *Higginbotham v. Higginbotham's Trustee*, 253 Ky. 218, 69 S. W. (2d) 329; *Amick v. Exchange State Bank*, 164 Minn. 136, 204 N. W. 639; *Bolton-Swanby Co. v. Owens*, 201 Minn. 162, 275 N. W. 855; *Braham & Co. v. Steinar-Hannon Motor Co.*, 97 Pa. Super. 19.

Where the sale of a vehicle is made pursuant to an order duly issued in bankruptcy proceedings, the motor vehicle department is required by sec. 85.01 (8) to issue a certificate of title to the new owner upon the filing of appropriate evidence of the sale or decree. If the proceedings seem to be regular on their face, the motor vehicle department has no duty to question the validity of the action taken by the bankruptcy court or its officers. If the order of the court or of the referee is for a sale of the vehicle free from incumbrance, the motor vehicle department need not challenge the authority of the court to make such an order. If there are parties claiming adverse rights, they have the burden of taking the necessary steps to establish or protect such rights.

The Wisconsin courts have recognized that a trustee in bankruptcy proceedings takes complete title to the property of the bankrupt together with "all the rights of any creditor for the benefit of the estate." *Sparks v. Kuss*, 195 Wis. 378; *Hickcox v. Schmidt*, 198 Wis. 624.

Following the Wisconsin law relating to unfiled chattel mortgages a federal court held in *Lake View State Bank v. Jones*, 242 Fed. 821, that a trustee in bankruptcy takes title to the personal property of the bankrupt which is situated and kept in Wisconsin, free and clear of the rights of a mortgagee under a chattel mortgage which is not filed as required by the Wisconsin statutes.

If you are supplied with evidence of a sale of a vehicle duly made in bankruptcy proceedings, free and clear of incumbrance, you should issue the purchaser of the vehicle a certificate of title in accordance with the terms of the sale.  
BL

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*Automobiles — Insurance* — Foreign insurance carriers must be licensed by insurance commissioner in order to qualify under sec. 85.09, subsec. (6), Stats., as "an insurance carrier authorized to transact business in this state". Lloyds must be licensed by commissioner in order to qualify under same section. Domestic companies are not required to be licensed and hence qualify under said section until such time as commissioner takes some affirmative action directed at compelling company to cease doing business. Sec. 203.55 relates only to fire insurance and has no bearing upon whether company is qualified under sec. 85.09 (6).

July 9, 1942.

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

In your letter you state:

"Section 85.09 (6), Wisconsin statutes, concerning motor vehicle liability insurance, states that 'the policy of lia-

bility insurance must be issued by an insurance carrier authorized to transact business in this state'.

"The department would like an expression from you concerning the question as to whether or not the department may accept certificates of financial responsibility from a company unlicensed to do business in this state.

"We also desire an expression concerning the authority vested in a company holding a permit from the insurance department."

For purposes of answering your questions, insurance companies may be divided into two classes (1) foreign and (2) domestic. The foreign insurance company is required to be licensed under sec. 201.32 and sec. 201.34, Stats., and in our view is not "authorized to transact business in this state" within the meaning of sec. 85.09 (6), Stats. without such license.

There is a special provision, sec. 201.33, relating to Lloyd's Association. Said section, in so far as material, provides:

"Lloyd's association may be admitted to transact insurance other than life insurance upon the same terms and conditions as insurance companies of other states of the United States. \* \* \*"

By said section Lloyds are placed upon the same footing, so far as license requirements are concerned, as any foreign insurance company or corporation. It is true that there are some requirements of other insurance companies which Lloyds do not need to meet and that there are requirements with respect to Lloyds which other foreign companies need not meet, but it is equally true that Lloyds are not "authorized to transact business in this state" within the meaning of sec. 85.09 (6), Stats. until they have met the requirements of sec. 201.33 and have obtained a license from the commissioner of insurance to transact business in the state by virtue of having met the statutory requirements.

We do not know what you mean by "we also desire an expression concerning the authority vested in a company holding a permit from the insurance department." The insurance department does not issue permits to insurance companies as such. It has a practice of annually licensing do-

mestic companies, although it seems doubtful that a domestic company is required to be licensed. *N. W. Nat'l. Ins. Co. v. Freedy* (1930) 201 Wis. 51. It is our understanding that there is one domestic mutual (probably the one you have in mind) with respect to which the commissioner has not issued any license for the current license year. The commissioner has, however, taken no steps to take the company over for purposes of reorganization or liquidation. It is doing business at the present time by what might be termed at the "sufferance" of the insurance commissioner pending a further investigation into its affairs. But as this company is not required to be licensed in order to transact business in the state (*N. W. Nat'l. Ins. Co. v. Freedy*, (1930) 201 Wis. 51), it is authorized to transact business in this state within the meaning of sec. 85.09 (6), Stats., until such time as the commissioner takes some affirmative action directed at compelling the company to cease doing business.

Perhaps what you have in mind by your latter question is the so-called "permit" which the commissioner of insurance issues to an insurance agent under sec. 203.55, Stats., for the procuring of insurance in an unlicensed company where the agent shall make an affidavit, filed with the commissioner, that he is, after diligent effort, unable to procure the amount of insurance required to protect the property described in the affidavit from companies in this state. This section has a very limited scope and application. An agent receives a permit to so "procure" insurance as distinct from "solicitation" of insurance for a person desiring insurance only when it appears that companies authorized to transact business in the state refuse to write the insurance because of the hazardous nature of the risk. To the very limited extent that an authorized agent is permitted to "procure" such insurance in a nonlicensed company, that company, when it writes such insurance, may be said to be authorized to transact that particular business in the state. *Ferm v. Moore*, 201 Wis. 273. The department issues the so-called permit under sec. 203.55 only with respect to fire insurance and not with respect to automobile casualty insurance, such as you are concerned with under sec. 85.09 (6), Stats. The department has never interpreted sec. 203.55, Stats., to be applicable to any insurance other than

fire insurance. The legislative history of this section supports the departmental interpretation. The history of this section, up to 1930, is gone into in considerable detail in *Ferm v. Moore*, 201 Wis. 273. The section appears to have been enacted originally in 1911. It was definitely limited in application to fire insurance by the express wording of the section prior to the 1933 revision of the insurance laws (see sec. 201.49, statutes 1931) but was placed in that part of the statutes dealing with insurance corporations generally. Sec. 201.49, Stats. 1931, was renumbered sec. 203.55 and was revised and reworded somewhat by sec. 129, ch. 487, Laws 1933, and placed in that section of the insurance laws dealing with the subject of "fire insurance". The 1933 revision of the section did not, by express language, limit the section to fire insurance as previously but the said section was lifted from the general insurance provisions to the fire insurance provisions by said revision.

Bill No. 50,S., became ch. 487, Laws 1933. The bill announces at the beginning thereof:

"The absence of a revisor's note at the end of a section of this bill is to be understood as indicating that the section makes no change in the law."

The revisor's note with respect to sec. 129 is as follows:

"Note: Old (6) should be amended to require the bond as a condition precedent to obtaining the license. That is the more usual way of getting such security. Revocation is provided for in old (1) and (8). The section is renumbered because it relates only to fire insurance. Old (1) is made 200.03 (6)."

In view of the legislative history of said section it would be difficult for us to conclude that the department is wrong in limiting the application of the section to fire insurance. We think the departmental interpretation is clearly correct and that sec. 203.55 has no material bearing in relation to your problem.

NSB

*Automobiles — Law of Road — Motor Vehicle Operator's License* — Under sec. 85.08, subsec. (31), Stats., at expiration of two years immediately following date of expiration of revocation period or at expiration of one year immediately following expiration of date of suspension period, person whose license has been revoked or suspended is entitled to license regardless of whether such person ever filed proof of responsibility during such period or whether, having filed during such period, such proof was maintained throughout unexpired portion of such period.

July 9, 1942.

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

In your letter you state:

"In Volume 28, of Opinions of the Attorney General of the state of Wisconsin, on page 491, the following quotation appears:

"A person whose driver's license has been suspended because of his conviction for an offense enumerated under section 85.08, subsec. (10), paragraphs (a) to (j), must file proof of financial responsibility before his license can be renewed regardless of how many years may have expired from the date of his conviction, and must maintain such proof of financial responsibility for a period of three years from the date of filing thereof.'

"On page 492 of the same volume, there appears the following quotation:

"\* \* \* Hence it is our opinion that where an individual elects to file proof of financial responsibility, whether within the three year period after the entry of a civil judgment against him or at any time after his conviction for an offense enumerated in sec. 85.08, subsec. (10), paragraphs (a) to (j), inclusive, such proof of financial responsibility must be kept on file for three consecutive years.'

"In 1941, the Wisconsin legislature amended sec. 85 of the Wisconsin statutes in many ways. One of such amendments concerns the filing of financial responsibility and the periods for which such financial responsibility were to be filed. May we, at this time, request an expression from you as to whether or not the 1941 amendment to section 85 of the Wisconsin statutes alters your opinion of August 3d, 1939, reported in Volume 28 of the Attorney General's Opinions.

“The department particularly desires information concerning the subject of whether or not financial responsibility must be filed consecutively for the periods enumerated in the new law, namely, two years after revocation of a license, and one year after suspension of a license.

“The department also desires information concerning the subject of whether or not it is necessary for a person whose driving privileges have been revoked or suspended to file financial responsibility at all, providing said person does not operate a motor vehicle during the term of suspension or revocation and also the term set by statute for filing financial responsibility.”

The rule announced in XXVIII Op. Atty. Gen. 489, 491, with respect to filing and maintaining proof of financial responsibility is the rule applicable to offenses committed or causes of action which arose prior to September 1, 1941, the date when ch. 206, Laws 1941 became effective. See XXXI Op. Atty. Gen. 111. We therefore limit our discussion to filing and maintaining proof of financial responsibility in respect to suspensions or revocations to which the provisions of ch. 206, Laws 1941, are applicable, namely those arising out of the operation of a motor vehicle since September 1, 1941.

With reference to sec. 85.08, statutes 1941, subsec. (25) provides the situations in which revocation of license is mandatory with certain discretionary exceptions noted in (25c). Subsec. (26) provides:

“Any person whose license has been duly revoked is not entitled to apply for a new license until the period of such revocation has been terminated, and then only upon such person’s meeting with the following requirements:

“(a) The filing of financial responsibility as required by section 85.09 as specified in subsection (31) of this section; \* \* \*.”

Subsec. (27) provides for mandatory suspension of license in the case of certain convictions. Subsec. (27k) provides for suspension for a year where a judgment for damages arising out of the negligent operation of a motor vehicle has been recovered against a licensee and further provides for lifting the suspension during such period while

proof of ability to respond in damages is filed. Subsec. (27m) provides for suspension in other cases which call for exercise of discretion on the part of the commissioner. Subsecs. (29), (30) and (31) provide as follows:

“(29) Any person whose license has been duly suspended may regain such license after the period of suspension has terminated upon meeting the following requirements:

“(a) The filing of proof of financial responsibility as required by section 85.09 as specified in subsection (31) of this section;

“(b) The filing of application for reinstatement of his license; and

“(c) The demonstration of ability to satisfactorily operate a motor vehicle or any other tests which the commissioner may deem necessary.

“(30) No license shall be suspended for a period of more than one year. After revocation the department shall not grant a new license until the expiration of one year after the date of such revocation.

“(31) The department shall not issue a new license to any person whose license has been revoked at any time during the 2 years immediately following the date of expiration of such revocation, unless such person shall have filed financial responsibility in the amounts, form and manner specified in section 85.09 for that time of such 2-year period during which he is granted a license; nor shall the department reinstate an operator's license which has been suspended at any time during one year immediately following the date of expiration of such suspension, unless such person shall have filed financial responsibility in the amounts, form and manner specified in section 85.09 for that time of such one-year period during which such license is reinstated.”

Subsec. (31), immediately above quoted, appears to be the controlling section in relation to your problems. By express language it provides that no license shall be issued “to any person whose license has been revoked at any time during the 2 years immediately following the date of expiration of such revocation, unless such person shall have filed financial responsibility \* \* \* *for that time of such 2-year period during which he is granted a license*”. The language

is identical with respect to suspensions except that the length of the period is "at any time during one year immediately following the date of expiration of such suspension". We do not find anything in the foregoing language indicating a legislative intent that financial responsibility must be filed consecutively for the period enumerated, namely, two years immediately following the date of expiration of the revocation period or one year immediately following the date of expiration of the suspension period. On the contrary, the language indicates rather a legislative intent that for a two-year period immediately following the date of expiration of the period of revocation or for a one-year period immediately following the expiration of the period of suspension, a person whose license has been revoked or suspended shall not be granted a new license during such periods unless he shall have filed responsibility *for that time during such periods* as he operates a car and is granted a license therefor. The legislative intent would seem to be that at the expiration of two years immediately following the date of expiration of the revocation period, or at the expiration of one year immediately following the expiration of the date of the suspension period, a person whose license has been revoked or suspended is entitled to license regardless of whether such person ever filed proof of responsibility during such period or whether, having filed during such period, such proof was maintained throughout the unexpired portion of such period. The statute prescribes the conditions upon which one whose license has been revoked or suspended may obtain a license during the two- or one-year period immediately following the expiration of the revocation or suspension period. That is all that it does. It does not authorize the commissioner to extend said two- and one-year periods. It is apparent from the foregoing that both of your questions must be answered in the negative.

The old law contained no such provision as sec. 85.08 (31), Stats. 1941. The decision in XXVIII Op. Atty. Gen. 489 was grounded upon sec. 85.08 (19), statutes 1939. The comparable provision in the 1941 law is sec. 85.09 (15) which provides:

"The commissioner shall upon request cancel any bond or cancel any certificate of insurance, or the commissioner shall direct and the state treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this section as proof of financial responsibility, or waive the requirements of filing proof of financial responsibility in any of the following events:

"(a) At any time after one year in the case of a suspended license, and at any time after 2 years in the case the license was revoked, from the date such proof was required when during such period preceding the request of the person on whose behalf such proof was filed, has not been convicted of any offense for which the penalty is suspension or revocation of his license.

"(b) In the event of the death of the person on whose behalf such proof was filed, or the permanent incapacity of such person to operate a motor vehicle.

"(c) In the event the person on whose behalf financial responsibility was filed surrenders his license, certificates of registration and registration plates to the commissioner.

"(d) Whenever a person applies for a license or the reinstatement of a license or the registration of a vehicle within 2 years in the case of a revoked license and one year in the case of a suspended license after the date of termination of such revocation or suspension, such granting or reinstatement of a license or registration shall be refused unless such applicant shall establish and maintain proof of financial responsibility for the remainder of the period for which such filing is required."

It will be noted that the language is quite different from that contained in sec. 85.08 (19), statutes 1939.

We find nothing in the language of sec. 85.09 (15), statutes 1941, which requires a different conclusion from the one herein reached. In fact, the language supports the conclusion.

NSB

*School Districts — Tuition* — School district in which pupil maintained as public charge resided and attended school in years 1939 to 1941 may recover tuition from county or municipality of pupil's legal settlement. County or municipality paying tuition may then be reimbursed as provided in sec. 40.21, subsec. (2), Stats. 1941.

District's right to recover indigent tuition is grounded upon indigent pupil residing and attending school in district, and in such case claim is not against county in which district is located if pupil has legal residence in municipality outside that county but is against county or municipality of legal settlement.

July 10, 1942.

HERBERT W. JOHNSON,

*District Attorney,*

Sturgeon Bay, Wisconsin.

You ask whether a county is liable to a school district located in the county for the tuition of a pupil maintained as a public charge who attended school in such district during the years 1939-1940 and 1940-1941, and, if so, whether the county may be compensated for the tuition paid in the manner prescribed by sec. 40.21, subsec. (2), Stats.

Subsec. (2) of sec. 40.21, Wisconsin statutes for 1939, gave to a school district a right of action to recover from the proper county or municipality for tuition of an indigent pupil *residing in the district and attending school therein*. *Madison v. Dane County*, 236 Wis. 145. Although that subsection was repealed by ch. 122 and ch. 264, Laws 1941, neither of the repealing acts "specially and expressly" limited, abrogated or did away with rights of action accrued thereunder. Under such circumstances sec. 370.04, Stats., which preserves rights of action accrued under repealed statutes, is applicable. *Garland and another v. Hickey and others*, 75 Wis. 178; *Miller v. C. & N. W. R. Co.*, 133 Wis. 183; *Whaley v. State*, 200 Wis. 267; *Halbach v. State*, 200 Wis. 145; *Milwaukee v. Krupnik*, 201 Wis. 1.

Subsec. (2) of sec. 40.21, statutes for 1941, provides that when any school district is compensated for tuition of indi-

gent pupils under subsec. (2) of sec. 40.21, statutes for 1939, the compensating county or municipality shall recover its payments out of school aids thereafter becoming due to the district. The legislature apparently contemplated attaining approximately the same result as if the right of the school district to compensation had been abrogated in the first instance, so that the question of whether the school district still has a right of action seems almost academic. However, since the legislature saw fit to accomplish its purpose by providing a method of reimbursement for payments made by counties, cities, villages or towns rather than through abrogating the right of the school district to recover, the remedies prescribed by the statutes may be followed.

The right of the school district to recover tuition from the municipality in which the indigent pupil has his legal settlement is purely statutory and may be enforced only in strict accordance with the terms of the statutes. See *Milwaukee Co. v. City of Sheboygan*, 94 Wis. 58, 63-64.

You state that in the case reported the pupil lived outside of the school district in which he attended school. Sec. 40.21 (2), statutes 1939, gives the district the right to recover only in connection with pupils who resided in the district during the period of school attendance. You also specified that the pupil had no legal settlement in your county but you do not state whether he had a legal settlement in any town, city or village elsewhere in the state. In the latter case, even if the pupil resides in the district during the period of school attendance, the school district would have no claim against the county in which the school is located but only against the municipality or county (depending upon whether the local or county system of poor relief prevails) in which the pupil had his legal settlement.

BL

*Indians — Tuberculosis Sanatoriums* — County may accept federal aid for its share of cost under sec. 50.07, subsec. (2), Stats., of maintaining indigent resident Indians in county tuberculosis sanatorium.

July 18, 1942.

BOARD OF HEALTH.

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

You have called our attention to the provisions of sec. 50.07, subsecs. (2) and (3), Stats., relating to county tuberculosis sanatoriums and which, among other things, provides that a person who is unable to pay for his care may be admitted and maintained at the charge of the county, and that in such cases the state is chargeable with the support of the patient to the extent of \$7.00 per week.

It appears that in some of the less wealthy northern counties there is a reluctance to admit tuberculous patients because of the financial inability of these counties to pay the county's share of the cost of maintenance. In these same counties there is a relatively large number of resident Indians with tuberculosis, and who require sanatorium care. The federal government, through the U. S. Indian bureau, has offered to reimburse these counties for the county's share of the cost of sanatorium care for the Indians.

You inquire whether the counties may legally accept such federal aids, and if the state can then contribute the \$7.00 per week provided for indigent cases under sec. 50.07 (3) (a).

While the Wisconsin statutes contain no express provisions authorizing counties to accept aids or donations from the federal government or others for this purpose, it is to be noted, nevertheless, that sec. 59.01 empowers the county to purchase, take and hold real and personal estate for public uses. Language similar to this was construed as authorizing the county to accept property devised to it under a will in the absence of any statute prohibiting such acquisition, in the case of *Bloss v. Jackson County*, 170 Mich. 607, 136 N. W. 589. This principle seems to be generally accepted. 20 C. J. S. 995 and 15 C. J. 532.

In this connection reference is made to XXVIII Op. Atty. Gen. 596, where it appears that a county had accepted \$47,539.00 in cash and \$30,000.00 in securities in a bequest made by a citizen of the county for purposes of aid in the construction of an addition to a county tuberculosis sanatorium. The legality of accepting the gift was not passed upon in that opinion, but it at least shows that the practice of accepting donations to aid the county in the discharge of its functions in operating tuberculosis sanatoriums is not without precedent in Wisconsin.

It is therefore our conclusion that counties may accept federal aids reimbursing them for their share of the expense of maintaining resident Indians in county tuberculosis sanatoriums. However, we do not believe that this in any way changes the obligation of the state to contribute to such maintenance at the rate of \$7.00 per week as provided in sec. 50.07 (3) (a), which contains this language:

“For each such patient whose support is chargeable against said county, seven dollars per week.”

The support of these patients is at all times “chargeable against said county” and it is immaterial so far as the state is concerned whether or not the county is later reimbursed by the federal government. The liability of both the county and the state arises upon admission of such patient in accordance with procedure outlined by statute, and this is in no way changed by the subsequent donation to the county by the federal government.

Attention is called here to XXXI Op. Atty. Gen. 124, which contains a comprehensive discussion of the procedure which must be followed in indigent tuberculosis cases in order to charge the state with the \$7.00 per week contribution above mentioned. It was ruled there that the state board of health may not provide allowance of state funds for care of a patient in a county tuberculosis hospital unless the county judge has made a determination that the support of such patient should be a public charge, as required by section 46.10 (1a) and sections 50.03 (2) and 50.07 (2), Stats. We mention this because in your request for an opinion you ask whether the county could legally make the con-

tract with the federal Indian bureau to accept federal aid in the amount of the county's share of maintenance. In view of the above opinion, it is clear that no contract between the county and the federal authorities can be accepted as a substitute for the procedure provided by statute. The liability of the state and the authority of its officers to reimburse the county is entirely dependent upon compliance with the statute, although, as indicated above, the state is not concerned with the fact that the county may thereafter receive federal aid for its own share of the cost involved in these cases.  
WHR

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*School Districts* — Powers and duties of school district and board are limited to property under control of district.

District may rent school building furnished by federal government on federal lands where additional facilities are required to accommodate children of district.

Obligation of district to furnish school facilities for children of families residing in federal housing project on government-owned lands within district is same as its obligation to other children of district.

July 18, 1942.

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

Our attention is called to a proposed federal housing project in one of the defense areas of Wisconsin. Among other things, the federal government proposes to erect a suitable school building equipped for some 300 children. This school will be erected on federal property and, in this connection, you ask the following questions:

“1. May the school district involved spend money in employing teachers and operating this school if said school is on government property?

“2. Can the state and county legally apportion aids for such school under the above circumstances?

"3. Can the above two matters be properly adjusted if the federal government erects the school building and leases it and some six acres of property in connection therewith to the school district involved?

"4. Is the school district legally required to expend money for the education of children which are housed on government property?

"5. In case the federal government should see fit not to lease the property and building involved to the school district, is there any obligation on the part of the district to contribute funds to the education of the children in question?"

Sec. 40.16, Stats., sets forth the powers and duties of the school board and in a revisor's note to this section it is said to be limited to property under the control of the school board. Subsec. (1) provides that subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district.

Obviously a building belonging to the federal government and located on lands owned by the federal government would not be subject to the control of the school board in the absence of some agreement with the government to that effect. It is not "property" of the district within the meaning of sec. 40.16 (1).

It follows from the foregoing that the district would not be authorized to spend money in the employment of teachers or for operating a school over which it had no control. The statutes relating to public schools nowhere contain any language which either expressly or impliedly authorizes the expenditure of public funds for the operation of schools owned and controlled by the federal government or any other agency, public or private, except the district itself.

We believe this disposes of the first two questions asked.

However, in considering your third question, we see no legal objection to an arrangement whereby the school building and grounds are leased by the federal government to the district, either with or without compensation, but so as to give the district and its school board the control necessary for completely independent operation of the school.

Sec. 40.04 (5) authorizes the annual common school district meeting "To vote a tax to purchase or lease suitable sites for school buildings, to build, hire or purchase school-houses or teacherages or outbuildings, and to furnish, equip and maintain the same."

Language similar to this, in subd. 5, sec. 430, 1898 Stats., was construed in the case of *Dorner v. School District*, 137 Wis. 147, to be sufficiently broad to authorize a common school district to rent rooms from a parochial school for the purpose of maintaining a common school therein, where the schoolhouse of the district was wholly inadequate for the number of pupils in the district.

Not only is it the right of the district to provide additional schoolrooms when needed, but sec. 40.05 (2) imposes this duty upon the district under penalty of forfeiting the right to share in the apportionment of moneys which the district would otherwise receive from the public school fund as provided by law.

We therefore conclude that it would be entirely proper for the district to rent the facilities which the federal government proposes to provide, and, of course, it is immaterial that the rent may be a nominal amount, or nothing at all, provided that the district is given such control of the premises as is commonly accorded to a lessee.

In regard to your 4th and 5th questions as to whether the school district is legally required to expend money for the education of children housed on government property, we call attention to art. X, section 3, Wisconsin constitution, which provides among other things that district schools shall be free and without charge for tuition to all children between the ages of four and twenty years.

The ownership of the land in the district upon which the children reside is immaterial so long as the children have a bona fide home there, and it does not appear that their primary purpose in being in the district is to enjoy the advantages of the school there. *State ex rel. School District v. Thayer*, 74 Wis. 48, *State ex rel. Smith v. Board of Education*, 96 Wis. 95.

So far as we are informed here, the lands in question were not acquired by the federal government pursuant to

art. I, sec. 8, U. S. constitution, which grants congress the power,—

“To exercise exclusive legislation \* \* \* over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; \* \* \*.”

This being true, the incidents of the federal government's ownership of these lands are the same as that of any private individual, except, of course, that the lands are exempt from taxation under sec. 70.11 (1), and subject to the further proviso that the state may not interfere with the use of such land for governmental purposes or with the government's right of disposal thereof. See XXVIII Op. Atty. Gen. 259 and cases discussed there.

Consequently, the obligation of the district to furnish educational facilities to the children residing with their parents on such lands is the same as its obligation to other children in the district.

WHR

*Education — Vocational Education — Insurance* — Local schools of vocational and adult education have insurable interest in machinery and equipment purchased and paid for originally by local schools for defense training program but with respect to which they are reimbursed 100 per cent by allocation of federal defense training funds, title and ownership to which is vested in state board of vocational and adult education subject to control of United States office of education.

July 18, 1942.

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

By way of a preliminary statement you advise:

“\* \* \* the title to all machinery and equipment purchased by local schools of vocational and adult education on the defense training program vests in the state board of vocational and adult education. The local schools buy the equipment and are reimbursed by federal defense training funds through the state board one hundred per cent for expenditures made. Insurance premiums are paid out of local funds of the local boards of vocational and adult education.”

You submitted three queries to the United States director of vocational training for defense workers at Washington, D. C. The queries appear in the United States director's letter to you which follows:

“We have your letter of June 24, 1942, posing the following three questions with respect to insurance by your local vocational schools of equipment used by them in the national defense training program, the premiums for such insurance to be paid out of the schools' own funds:

“1. If our local schools of vocational and adult education which have the custody and use of this equipment carry insurance on it and pay the premiums out of their own local funds, could they collect the insurance in event of loss?

“2. If the answer to (1) above is 'Yes', would they be obligated to use the insurance money to replace, so far as possible, the machinery destroyed?

“3. Where does the ultimate ownership of this equipment, either on original purchase or by such replacement as indicated in (2) above, rest?”

"The questions presented require in part consideration of the policy of this office and in part determination of the law of your state relating to insurance contracts. As to the latter, we cannot, of course, undertake to give you an authoritative reply although we may outline certain general principles. Your own legal adviser would have to inform you of the applicability of such principles in your state. Moreover, the answers may depend to some extent upon the particular language of the insurance policy which the schools may procure. With such qualifications your questions may be answered as follows:

"1. As a general principle of insurance law one whose interest in property is limited to its possession and use may nevertheless procure insurance to the extent of the full value of the property and recover such full value in the event of loss. Of course, care must be exercised that the descriptive coverage of the insurance policy is not restricted to the limited interest held by the applicant for the insurance. However, so much of the proceeds of the recovery as exceeds the specific interest of the assured is held in trust for the real owners to the extent of their interest. (*Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Johnston v. Charles Abresch Co.*, 123 Wis. 130, 101 N. W. 395; *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648).

"2. In the event of recovery by the local school of the full loss the proceeds will be held subject to the direction of the state board of vocational education as owner of the equipment, consistent with the plan theretofore approved by the U. S. office of education. We may observe, incidentally, that insurance policies frequently give the insurance company the option of replacing the articles lost or damaged with articles of similar quality and value, in lieu of paying the cash equivalent.

"3. The 'ultimate ownership' of the equipment, either on the original purchase or by replacement effected through insurance, is in the state board of vocational education subject to the control of the U. S. office of education."

You now inquire of us whether, under Wisconsin law, assuming title and ownership to be as stated in the United States director's letter, the local schools of vocational and adult education have an insurable interest in the property. Two of the three cases cited by the United States director in support of the general principle of insurance law that one whose interest in property is limited to its possession and use may nevertheless procure insurance to the extent of the full value of the property, are Wisconsin cases.

It is our view that the cases cited support the view that the local schools have an insurable interest under Wisconsin law. Further, the Wisconsin cases cited, while not directly in point, are as persuasive upon the local law upon the question as any that we have been able to locate. The rule that one must have an insurable interest in property before he can insure such property arises out of the concept that in the absence of such an interest, the contract is a mere wagering or gambling contract as distinct from an insurance contract and hence condemned as a matter of public policy. For A to insure B's property when A has no interest in it in effect permits A to gamble with B's property. B's loss is A's gain. Such contracts tend to promote incendiarism and other public evils. 32 C. J. 1110.

There is, of course, a complete lack of any such elements involved in the local schools of vocational and adult education insuring the equipment in question. Absence of such elements can only support the view that such schools have an insurable interest in the equipment. It is our view that the local schools have an insurable interest in the equipment; that they may insure the equipment as such to the extent of its value; that when so insured, in the event of loss, they are entitled to recover against the insurance company the value of the property as distinct from the value of their use and custody interest in it and that the sum recovered in excess of the latter would be held in trust for the real owners to the extent of their interest.

In taking out insurance of this type it is important that there be a broad coverage clause such as there was in *Johnson v. Charles Abresch Co.* (1904) 123 Wis. 130, 134, as follows:

“\* \* \* ‘to stock consisting chiefly of carriages, buggies, wagons, cutters, sleighs and other vehicles and parts of the same, manufactured and in process of manufacture, and all materials and supplies used in or appertaining to its business, *either its own or held by it in trust or on commission, or in storage or for repairs, or sold but not removed.*’ \* \* \*”

Thus in *Tischendorf v. Lynn Fire Mutual Ins. Co.* (1926) 190 Wis. 33, while it was held that the insured had an in-

insurable interest in the property which entitled him to insure the property for its value, the policy coverage was limited to property which the insured owned and, as he did not own the property he was not insured. Insurable interest is one thing,—policy coverage is another.  
NSB

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*Military Service — Taxation* — Six per cent maximum interest limitation provided by par. (4), sec. 500 of soldiers' and sailors' civil relief act of 1940 (54 Stats. 1186, Oct. 17, 1940, ch. 888) (50 USCA App. 560) is applicable to delinquent real estate taxes falling due during period of military service of owner regardless of whether or not he had filed affidavit under par. (2) of said section to suspend or postpone sale of property for taxes.

July 18, 1942.

RALPH M. IMMELL,  
*Adjutant General.*

Section 500 of the soldiers' and sailors' civil relief act of 1940, (54 Stat. 1186, Oct. 17, 1940, C. 888) (50 USCA. App. sec. 560) provides:

“Taxes on realty; sale of property to enforce collection; redemption of property sold; penalty for nonpayment; notice of rights to beneficiaries of section

“(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

“(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or

assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

“(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

“(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

“(5) \* \* \*”

You request an opinion as to whether the maximum interest provisions of par. (4), limiting interest to the rate of 6% per annum on delinquent real estate taxes which fall due on property owned by a person in military service while he is in such service, apply whether or not he has filed an affidavit as prescribed in par. (2) of the section.

Par. (4) says that “whenever any tax or assessment shall not be paid when due” it shall bear interest at the rate of 6% per annum. But, nothing in the paragraph itself defines the taxes to which it applies. What is encompassed by the use of these words “tax or assessment” in par. (4) is thus determined by the provisions of par. (1) setting forth the scope and limitations of the section. Thus the “tax or assessment” covered by par. (4) is any general or special tax or assessment that falls due during military service on real property owned at the time the tax falls due by a person

who is then in military service, which property was owned by him at the commencement of his military service and was occupied by him or his dependents for dwelling, agricultural or business purposes at the time of the commencement of his military service and is still so occupied by his dependents or employees when the tax falls due. There is nothing either in par. (1) or in par. (4) that in any way limits the benefits of par. (4) to situations where an affidavit has been filed under par. (2) or that requires the filing of any affidavit as precedent thereto. The benefits of par. (4) are absolute if a tax falls due in a situation which is within the scope of the section as set out in par. (1).

While par. (2) relates to the same taxes that are the subject of par. (4) because its applicability is likewise limited by the provisions of par. (1) defining the scope of the section, it is concerned with an entirely different subject than par. (4). It covers the matter of sale of real estate for nonpayment of taxes and provides that if a person in military service files an affidavit containing the information therein prescribed, with the collecting officer, which in this state is the county treasurer (except perhaps in some special instances the treasurer of the local municipality), then the property may not be put up for and sold for nonpayment of taxes unless and until an order has been obtained from a court granting leave so to do upon application made to the court by the collecting officer. The benefits of par. (2) are, of course, available only in respect to such taxes as meet the specifications of the scope of the section as set out in par. (1) but in addition are operative only to instances where the affidavit specified in par. (2) is filed. There is nothing in par. (2) that ties it into or makes it a part of par. (4).

Both pars. (2) and (4) operate upon and are limited to the same taxes, but in respect to different phases of the collection thereof. The effect of filing the affidavit under par. (2) is to stay the sale of the property for the nonpayment of the taxes during the effective period of the act, unless and except where it is sold pursuant to permission of the court. Whether or not such affidavit is filed is of moment only in respect to the holding of the sale of the property and

is entirely unrelated to and without affect upon the interest which accrues on the tax.

Where an affidavit is filed then, of course, the interest during delinquency is by par. (4) limited to 6% per annum, regardless of whether the sale of the property is withheld or a sale is held upon leave of court. If no application is made to the court for leave to sell and the sale is suspended, the owner may redeem by paying the amount of the taxes plus 6% interest at any time during the period of redemption. Likewise, even though a sale is had upon leave of court, he may still redeem his property from the certificate of sale by making payment during the redemption period of the amount of the tax plus interest thereon at 6% up to the time of redemption.

On the other hand, where no affidavit is filed as provided in par. (2) and there is no postponement or suspension of the sale but the property is put up and sold at the tax sale in regular course, under par. (4) the delinquent interest is limited to 6% per annum. The owner thus may redeem his property from the delinquent tax or the tax certificate at any time before expiration of the right of redemption by paying the amount of the tax plus interest thereon at that rate from January 1, of the year in which the tax fell due.

The soldiers' and sailors' civil relief act of 1940 was enacted by congress pursuant to the war power, U. S. constitution, art. I, sec. 8, and in our opinion is a valid exercise thereof and the supreme law of the land which, during the period of its operative effect, supersedes all state laws to the extent that they conflict with it. *Konkel v. State*, (1919) 168 Wis. 335, 170 N. W. 715; *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15; *Kuehn v. Neugebauer*, (1919) Court of Civ. Appl. Texas, 216 S. W. 259; *John Hancock Mut. L. Ins. Co. v. Lester*, (1920) 234 Mass. 559, 125 N. E. 594.

HHP

*Taxation — Tax Collection* — Amendment of sec. 74.19, subsec. (3), Stats., by ch. 426, Laws 1933, going into effect October 1, 1941, does not relieve county of accountability on excess rolls of prior years.

July 22, 1942.

M. J. McDONALD,

*District Attorney,*

Balsam Lake, Wisconsin.

Our attention is directed to the fact that sec. 74.19, subsec. (3), in the 1939 and prior statutes provided that where there was an excess roll, that is, where the amount of delinquent taxes returned exceeded the amount due to the county for taxes of that year, the amount of the "excess when collected, with the interest and charges thereon, shall be" paid over to the local municipality, and that this statute was amended by ch. 426, Laws 1933, going into effect on October 1, 1941, so that it no longer contains such a provision. You then ask if the deletion thereof has the effect of relieving the county from liability to account for such excess when it collects in the future on excess rolls returned before such effective date of ch. 426, Laws 1933.

Of course, the result of the changes that were made in the statutes by ch. 426, Laws 1933, taking effect on October 1, 1941, are such that as to future tax rolls and settlements thereon the scheme is entirely revamped and there will not be any excess rolls. The whole idea of excess and non-excess completely disappears. Commencing with the 1941 taxes collected or returned in 1942, it is merely a matter of accounting for and distributing the actual collections and the methods therefor are set out in sec. 74.03, Stats. 1941.

There is nothing in ch. 426, Laws 1933, that in any way indicates that it was intended to be retroactive and have any effect in this respect as to taxes that had already been returned. As you say, it is well established that statutes are not to be given retroactive effect unless expressly so declared therein or necessarily implied therefrom. Not only is there nothing in that enactment which states that it is in-

tended to have retroactive effect, but it is not required that it be given that application in order to effectuate its purpose.

It is therefore our opinion that the going into effect on October 1, 1941 of ch. 426, Laws 1933, as amended, does not relieve the county from the accountability for collections of the excess on excess rolls returned prior thereto.

HHP

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*Taxation — Tax Collection* — Practice of local municipality retaining unpaid taxes and not making return thereof at annual settlement is condemned as of doubtful validity. County treasurer should accept subsequent return thereof but on condition that it is in trust for local municipality.

July 22, 1942.

AARON G. MURPHY,  
*District Attorney,*  
Kewaunee, Wisconsin.

From your request for opinion we take it that a city in your county did not return the delinquent 1938, 1939 and 1940 taxes to the county at the respective annual settlements between the local treasurer and the county treasurer for the taxes of those years, but retained them itself and paid him the full amount of the taxes due the county and state. This apparently was in some way bound up with extensions by the city of the time of payment of said taxes pursuant to sec. 74.03 or sec. 74.037, Wis. Stats. At the March 1942 settlement and return of the roll of 1941 taxes that are payable in 1942 the city tendered the county treasurer a list of the then unpaid delinquent taxes of the years 1938, 1939 and 1940.

You ask what should have been the proper action of the county treasurer when these delinquent taxes were so returned to him and whether it is legal for him to accept the same.

We find nothing in the statutes as they existed during the years involved or as they now exist which authorizes, sanctions or even contemplates the retention of delinquent taxes by the city and not making return thereof to the county treasurer at the time of the settlement each year, except possibly in the instance of postponements under sec. 74.03, Stats. 1937 and 1939.

Possibly the fact that under sec. 74.03, Stats. 1937, the postponed taxes are not then delinquent contemplates a later return of the delinquent postponed taxes after they have been declared delinquent, but surely not later than the following year, for the last sentence of subsec. (2) prescribes that the land shall be sold for nonpayment thereof at the time and place of the tax sale in the *next* succeeding year. But, sec. 74.03 (2) (c), Stats. 1939, specifically requires that taxes postponed under that section are to be returned to the county treasurer in trust on August 15.

But sec. 74.03, Stats. 1937 and 1939, is not applicable here for it merely authorizes the city to extend all or a part of so much of the taxes as were levied for city purposes. As the extensions here involved were of all of the taxes and not just the city taxes therein, such actions could only be an exercise of the power and authority given by sec. 74.037, Stats. That statute always has contained the provision, as it does now, that all taxes extended thereunder which are not paid when local treasurers are required to settle with the county treasurer in March of each year shall be returned delinquent to the county treasurer. For a discussion of the effect on this section of the Daus law, ch. 426, Laws 1933, which went into effect October 1, 1941, see our opinion in XXX Op. Atty. Gen. 370.

While the provisions of secs. 74.17 and 74.19 in the 1937 and 1939 statutes do not specifically set the date for return of delinquent taxes, the general theme of the tax collection statutes is that the statement is to be made at the time of each annual tax settlement. Of course, so far as the return of 1941 taxes, payable in 1942, is concerned, the provisions of sec. 74.17, Stats. 1941, specify the return of the tax roll to the county treasurer on or before the first Monday in March together with a statement of the taxes remaining unpaid. In reference to the conflict of dates for the return in

this section with the date set out in sec. 74.037, Stats. 1941, see XXX Op. Atty. Gen. 370, 374. Certainly the present scheme of accounting and distribution of tax collections set forth in the present statutes of 1941, and particularly in sec. 74.03, Stats. 1941, does not contemplate or permit the local municipality to withhold unpaid taxes and not return them to the county treasurer. In fact, the local treasurer could not make the affidavit provided in sec. 74.19, Stats. 1941, if any taxes are withheld. In addition the provision in sec. 74.19 (3), Stats. 1941, in respect to retaining personal property taxes, demonstrates that the scheme of the statutes is contrary to withholding of unpaid taxes and requires special provision for a withholding of personal property taxes.

While it seems to us that this practice by the city in the past is one that at best is of such doubtful validity as to raise serious question in respect to the effect thereof on the subsequent collection and sales for nonpayment of such taxes, nevertheless we find nothing that would prohibit the county treasurer from later accepting a return of such taxes as are then delinquent. However, they, of course, could not enter into the settlement in March of 1942 in respect to the 1941 taxes then collected or in process of collection, or the settlement in subsequent years, under sec. 74.03, Stats. 1941. We believe the county treasurer may properly and should accept the returns by the city of such of the back year taxes as are delinquent and not previously returned, but upon condition that he does so in trust for the city, which shall be liable for and reimburse the county for any expense or costs that it may incur in subsequently selling the lands therefor, and that he will account for such amounts only as are collected over and above the expenses incurred.

HHP

*Taxation* — Where federal government filed declaration of taking under 40 USCA sec. 258a prior to May 1, 1942, real estate acquired by it was not assessable for 1942 taxes.

Personal property used in constructing ordnance works upon real estate owned by United States government but over which state had not surrendered exclusive jurisdiction under provisions of secs. 1.02 and 1.03, Wis. Stats., is taxable by state. Neither location nor use is sufficient to exempt property from taxation.

July 22, 1942.

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

You have requested an opinion from us as follows:

"1. The United States war department has taken certain lands totaling approximately 10,500 acres, located in the townships of Merrimack and Sumpter, Sauk county, where they are now in the process of erecting a powder plant. The petition to condemn these lands was filed in the month of January, 1942, by the office of the United States district attorney, in the United States district court at Madison. Thereafter, and in accordance with the provisions of section 632 of the Second war powers act of 1942, the United States government took possession of said lands, by declaration of taking, as of March 1, 1942, although no judgment granting the petition for condemnation was filed until the 6th day of May, 1942. The occupants of the lands were removed during the month of March, together with the buildings thereon, for the most part, which buildings were taken and sold by the United States war department.

"Are these lands taxable by the taxing units of the state of Wisconsin for the current year 1942?"

"2. Immediately following the taking of the lands the government commenced the construction of the Badger Ordnance Works. There was brought on to the territory machinery and equipment of contractors to whom the work was let. Numerous of these contractors come from without the state of Wisconsin; their equipment was present on the plant location on May 1st, 1942. There are other contractors from within the state of Wisconsin whose equipment was on the area on May 1st, 1942. The taxing authorities

are clear as to the right to tax the equipment of these contractors, except for the one question: Are they exempt from taxation because the equipment is being used upon federal owned lands?"

1. We have expressed the opinion that the status of real estate for purposes of taxation is to be determined as of May 1. If it is exempt as of that day it is not taxable, otherwise it is. XXVIII Op. Atty. Gen. 523.

Was the property in question owned by the U. S. government on May 1 and therefore exempt under the provisions of sec. 70.11 (1), Stats.?

The United States government acquired title in fee simple absolute to the lands in question by filing a declaration of taking under the provisions of 40 USCA, sec. 258a, which reads in part as follows:

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage."

You do not refer to this statute in your request.

Since the declaration in each case was filed prior to May 1, the land was exempt as property owned by the United States government on May 1, 1942.

2. The personal property used upon the real estate in question by contractors in the construction of the Badger Ordnance Works is not exempt from taxation. The federal

government has not acquired exclusive jurisdiction over such property under the provisions of secs. 1.02 and 1.03, Wis. Stats. Since it has not acquired such exclusive jurisdiction, the personal property used thereon is within the jurisdiction of the state for tax purposes and is taxable the same as any other property. *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155. The fact that such personal property was used by contractors in erecting the Badger Ordnance Works would not exempt it under the rule laid down by the case just cited.

JWR

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*Taxation — Tax Collection* — Sec. 74.205, Stats., does not authorize county to waive interest and penalties upon county-owned tax certificates upon particular pieces of property.

July 27, 1942.

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

Under date of July 14, 1942, the county board of Walworth county adopted a resolution canceling the interest and penalties upon the delinquent general real estate taxes for the years 1931 to 1938, inclusive, upon one particular piece of real estate, and for the years 1934 to 1938, inclusive, on another piece of real estate, for which the county holds the tax certificates. Such action was taken purportedly under sec. 74.205, Wis. Stats. 1941, in response to formal petitions filed by the respective property owners with the county board on the ground that the properties were grossly overassessed during the years for which the interest and penalties were thus canceled and waived.

The two pieces of property in question are in the same local municipality. The tax returns of that municipality for

all of the years involved were excess rolls and the county's equity therein had been completely satisfied, except for the taxes of 1938.

You have requested our opinion as to the validity of such action by the county board under the above circumstances.

Sec. 75.61, subsec. (2), Stats. 1941, is the provision of the statutes expressly designed to cover the situation in question. As you point out, there has been no action taken by the governing board of the local municipality which, except for the year 1938, has the sole pecuniary interest in the taxes on the properties in question. If the amount which would be payable under the resolution of the county board is reasonable and proper it is because the value of the property is such that had it been assessed during the years in question at its proper assessed value the taxes upon the property with interest and penalties to date would be in the amount payable under this resolution. In view of the fact that sec. 75.61 (2), Stats. 1941, is designed to and specifically covers the situation it is our view that any proceedings for relief as to these particular pieces of property only should and must be taken under that statute and that the existence of that statute as a special statute that covers the exact situation is operative to preclude any of the other general statutes being applicable thereto.

Prior to 1939 there existed in the statutes sec. 75.60, authorizing the county treasurer, county clerk and district attorney to compromise illegal taxes. It was held in XXII Op. Atty. Gen. 303, XXIV Op. Atty. Gen. 32 and 803, that excessive assessed valuation of real estate did not constitute a basis for compromise under this section. Sec. 75.60 was repealed by ch. 503, Laws 1939.

Sec. 75.015, Stats. 1941, provides as follows:

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

This statute was enacted by ch. 172, Laws 1937. On its face and standing alone it would preclude the waiver and

cancellation of interest and penalties on the 1937 and 1938 taxes that accrued during the first two years after delinquency, and thus the resolution here involved would be invalid on that score.

However, sec. 74.205, Stats. 1941, provides as follows:

“Waiver of interest and penalties. By a vote of two-thirds or more of the members-elect, the governing body of any county, or city of the first class may, but is not required to, waive the payment of all or any part of the interest, penalty, publication, redemption or other fees upon the original amount of delinquent real estate taxes, other than special assessments, for the years, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938 for which such county or city holds tax certificates not pledged as security, provided the full amount of such original tax thereon is paid on or before April 1, 1943.”

There is thus a conflict between the provisions of sec. 75.015 and sec. 74.205. In the statutes of 1939, sec. 74.205 was applicable only to taxes for the years 1931-1936, inclusive, and the date within which the taxes had to be paid in the event of action thereunder was fixed at October 1, 1940. However, by ch. 160, Laws 1941, sec. 74.205 was amended to include therein the taxes of the years 1937 and 1938, in addition to the years 1931 to 1936 previously in the statute, and the date within which the taxes would have to be paid in the event of action thereunder was changed to April 1, 1943. Thus, sec. 74.205, Stats. 1941, is the later enactment and in relation to sec. 75.015 is the more special of the two. On both of these scores it would then be controlling to the extent that it conflicts with sec. 75.015.

The resolution then is valid if it is authorized by sec. 74.205, Stats. 1941. Your suggestion that because it does not fix a period of time within which the reduced amounts must be paid in redemption of the county-owned tax certificates the resolution is invalid under sec. 75.01 (1m) is not correct. That section merely provides that the county board “may” require that the rate of interest fixed thereunder shall apply only on condition that the certificates are redeemed within a period fixed by the board. It does not require that it do so and furthermore the situation that is cov-

ered by sec. 75.01 (1m) is something entirely different.

It is our opinion that the authority of the county board under sec. 74.205, Stats. 1941, is limited to general action waiving the payment of all or such part as it may decide of the interest and penalties upon the amount of delinquent real estate taxes of a particular year or years mentioned therein and on all of the county-owned tax certificates of said year or years, and that the county is not authorized thereunder to waive interest and penalties on particular or individual pieces of property only. It is the underlying pattern of the tax collection statutes that all persons who stand in the same position should be treated alike and that there should be no favoritism or discrimination among the taxpayers. Had the legislature intended by the provisions of sec. 74.205 to grant the county board authority and power to waive interest and penalties only on particular tax certificates and on individual items of property and not on all other county-owned tax certificates of the same year it would have used different language than it did in sec. 74.205, Stats.

For the foregoing reasons it is our conclusion that the resolution in question is invalid and illegal.

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*Taxation — Tax Sales* — Resolution of county board that county tax deed land be sold at minimum price except to owners, mortgagees and lienholders, who shall have privilege to buy their land by payment of all taxes and charges against it, is valid.

July 27, 1942.

RALPH W. STELLER,  
*District Attorney,*  
Hayward, Wisconsin.

You have requested an opinion as to the validity of a resolution adopted by the county board of Sawyer county in September, 1936, which provided:

“\* \* \* that no county-owned tax deed land be sold at a price less than \$1.25 per acre except to applicants who held title or mortgages or mechanics' liens to said land prior to the issuance of the tax deed to the same to the county, said applicants being privileged to regain title to their lands upon payment of all taxes and charges against the same.”

You state that in the summer of 1941 a certain taxpayer, which had permitted a great amount of its land to remain tax delinquent for a period of five years and on which the county had taken a tax deed, apparently having knowledge that another purchaser was ready to buy the land from the county at a figure in excess of the amount that it could pay under resolution and get a deed back to its land, came in as the former owner of the land and purchased the same under the resolution by paying to the county the taxes and charges against the same. Accordingly, it must be assumed that the resolution was still in force and effect at that time and that the tax deed was taken by the county subsequent to the passage of the resolution.

At the time of the adoption of said resolution the applicable statute was sec. 75.35, Stats. 1935, which provided as follows:

“The county board may, by an order to be entered in its records prescribing the terms of sale, authorize the county clerk or the county treasurer to sell and assign the tax certificates held or owned by the county, and also, the county clerk to sell and convey by quitclaim deed, duly executed and delivered by such clerk under his hand and the county seal of such county, any such lands for which a deed had been executed to such county as provided in the next section.”

By ch. 5, Laws 1941, effective upon its publication February 27, 1941, sec. 75.35, Stats., was amended by deleting therefrom all of the language pertaining to the sale of county-owned tax deed land so that said section is no longer applicable thereto. Said ch. 5, Laws 1941, so amended sec. 59.67 (2), Stats. that the authority for the sale by the county of county tax deed land is now derived from that section. Prior to this amendment, sec. 75.35 contained provisions specifically dealing with the sale of county-owned

tax deed lands and sec. 59.67 (2) dealt with the sale of county-owned lands generally. There thus existed more or less of a duplication which ch. 5, Laws of 1941, eliminated by consolidating and combining the provisions into sec. 59.67 (2), Stats. 1941, which provides, so far as here material,

“The property of the county shall be held by the county clerk in the name of the county. The county board may, by resolution or ordinance, direct the county clerk to sell and convey or contract for the sale and conveyance of any real estate of the county, whether acquired by tax deed or otherwise, not donated and required to be held for a special purpose, and all deeds, contracts and other agreements made in pursuance thereof on behalf of the county by the county clerk under his hand and the county seal and acknowledged by him shall be valid and shall convey or contract for the future conveyance of all the right, title, interest and estate which the county may then have in and to the land involved.  
\* \* \*”

This resolution meets the requirements of sec. 75.35, Stats., as it existed when the resolution was adopted, for what the resolution does is to establish the prices for the sales of the county-owned tax deed lands and therefore it is one “prescribing the terms of sale” thereof, within the meaning of that phrase as construed in *Smith v. Board of Supervisors of Barron County*, (1878) 44 Wis. 686. It likewise comes within the language of sec. 59.67 (2), Wis. Stats. 1941, as that statute provided when the sale in the instant case took place in 1941.

Neither is it subject to condemnation as setting up an improper or unreasonable classification. The class of persons generally accorded the privilege of buying at the amount of the taxes plus charges was not fixed and closed so as not capable of being added to. When the resolution was passed the persons who would fall within that class in respect to the property here involved was not closed because it would be open until and was only closed and fixed when the county subsequently took the tax deed.

The classification is reasonable and germane to the subject of the resolution which is the effecting of the collection or realization by the county of tax revenues through sale of

tax deed property. It in effect preserves to those who have an interest in the property the right to redeem it by paying the amount of taxes and charges thereon and thereby escape losing it to some person who is a complete stranger to it so far as proprietary interest is concerned. The effect is to induce the owners, mortgagees and lienholders to make payment to the county of the taxes and charges on the property so that it will not be sold to others. This is both a reasonable and meritorious objective and one that is consistent with giving those who have an interest in property every opportunity to retain or regain their property so as not to lose it for nonpayment of taxes.

It is therefore our opinion that the resolution above is valid.

HHP

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*Taxation — Tax Sales* — Resolution of county board directing county treasurer not to sell or assign county-owned tax certificates to other than former owners of land and lienholders thereon is invalid as not authorized by sec. 75.35, Stats., and wholly ineffective.

July 27, 1942.

RALPH W. STELLER,  
*District Attorney,*  
Hayward, Wisconsin.

You have requested an opinion as to the validity of a resolution adopted by the county board of Sawyer county in August 1941, which provided:

“\* \* \* that the county treasurer for Sawyer county, Wisconsin, be and he is hereby instructed and ordered not to assign any tax certificates to any person, firm or corporation, except to former owners and lienholders on the land described in said certificates sought to be assigned,  
\* \* \*”

The following are the provisions of the 1941 statutes that were in force when this resolution was adopted and applicable thereto:

"75.34 (1) The several county treasurers, when no order to the contrary shall have been made by the county board, shall sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest thereon at the rate specified in the certificates; but every such sale shall include all certificates in the hands of such treasurer on the same lands.

(2) No county board shall, at any session thereof, sell, convey or transfer, or order or direct the sale, conveyance or transfer of any tax certificates owned or held by the county at less than the face value thereof unless such board shall have previously directed the county clerk to give notice of their intention so to do by publication thereof for four successive weeks in some newspaper published in the English language in such county and having a general circulation therein, and such notice has been so given. Any and all sales, conveyances or transfers of such tax certificates made in violation of these provisions shall be null and void."

"75.35 The county board may, by an order to be entered in its records prescribing the terms of sale, authorize the county clerk or the county treasurer to sell and assign the tax certificates held or owned by the county."

While there was some change made in sec. 75.35 by ch. 5, Laws 1941, the amendment there made was only in respect to the provisions dealing with the sale of county-owned tax deed lands and did not change or affect the provisions of these sections pertaining to the sale of county-owned tax certificates. The present provisions in respect to the latter remain the same as they have existed in the statutes for over forty years, except for renumbering and some minor matters not here significant. Said ch. 5, Laws 1941, eliminated the duplication that existed by sec. 75.35 containing provisions specifically dealing with the sale of county-owned tax deed lands and sec. 59.67 (2) having similar provisions covering the sale of county-owned land generally by consolidating and combining the provisions into sec. 59.67 (2), Stats. 1941, and then added language which authorized the

entrance into contracts for the sale and conveyance of county-owned land.

Sec. 75.34 (1), Stats., grants to the county treasurer the power and requires him to sell and assign county-owned tax certificates to anyone who pays him the face amount thereof. But it specifically provides that such power and duty may be taken away by a valid order of the county board. In discussing this provision the court in *Smith v. Board of Supervisors of Barron County*, (1878) 44 Wis. 686, said at page 692:

“\* \* \* The authority of a county treasurer to sell tax certificates belonging to the county is specifically conferred by statute, and is not derived from the board of supervisors, although his power to sell may be taken away by a proper order of such board; but without such order his power to sell is plenary, subject only to the terms of sale fixed by the statute, which are, the amount of such certificates, and interest thereon at the rate of twenty-five per cent. per annum, or to the terms as prescribed by an order of such board entered in its minutes.”

The order of the county board to have such effect must be a valid one. Such an order would be one directing the treasurer not to sell or assign any or certain designated certificates or one directing and authorizing him to sell all or certain certificates at specified amounts, which could be less than the face value only if the provision of sec. 75.34 (2), Stats., is complied with. Of course, the order would be effective to take away or define the treasurer's power or duty to sell only in respect to the certificates covered by the order.

The power of the county board to make the “order to the contrary”, if it authorizes sales in departure from the statutory authority of the treasurer given by sec. 75.34 (1), Stats., is conferred by sec. 75.35, Stats. 1941. In construing sec. 1, ch. 138, Laws 1861, which was substantially the same as sec. 75.35, the court in *Smith v. Board of Supervisors of Barron County*, *supra*, said at page 693:

“\* \* \* the word ‘terms’ here used, refers solely to the amount or sum to be paid on the principal, less than the whole amount of the principal, and to the interest less than

the twenty-five per cent., and perhaps may refer also to the number of certificates to be sold to one person, and confers no further power or discretion upon the board of supervisors in respect to such sales."

We do not find that this decision has ever been overruled or criticized. Over the years no change has been made by the legislature in these statutes that indicates any intention on its part that the language of sec. 75.35, Stats., should be construed to the contrary and this may be taken as legislative acquiescence therein. Accordingly, the limitation in the resolution of sales of certificates to former owners and holders of liens on the land covered by the certificate does not constitute a "term" of sale and therefore the resolution is invalid as not within the provisions of sec. 75.35, Stats., limiting the order to "prescribing the terms of sale."

Furthermore, the resolution presents a question as to its validity because of the classification it sets up in limiting the sale of certificates to former owners of the land and lien holders thereon. This classification precludes addition to those in the class and thus sets up a closed class. Such classification is not based on any consideration or distinction that is germane to the purpose of the resolution which is the effecting of collection by the county on the tax certificates it holds through the medium of making a sale thereof. Rather than holding out an inducement to purchasers so that the county will effect collection and get its money it has the opposite effect. The former owners of the property and lien holders thereon have an interest in the property and under sec. 75.01 (1) have the absolute right to redeem the property from the certificate by paying the taxes, plus interest, which is the same amount that would be payable in purchase of the certificates under the resolution. In fact, were they to acquire the tax certificates by purchasing them under this resolution the legal effect would be that they paid the taxes and the same would operate as a redemption.

Our court has held that the purchase of land at tax sale or the acquisition of tax certificates by one who is the owner and 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 obtain-

ing a tax 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; *Marwalt Realty Co. v. Greene*, (1937) 224 Wis. 1, 271 N. Y. 648.

Thus such resolution violates the accepted rules of classification that it must be based upon substantial distinction, be germane to the purpose, cannot rest on existing circumstances only nor preclude additions to those included in the class and, therefore, is invalid as setting up an arbitrary and unreasonable classification. *Kiley v. C. M. & St. P. R. Co.*, (1909) 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

In XVI Op. Atty. Gen. 398 it was held that a resolution of a county board attempting to limit sale or assignment of county-owned tax certificates to persons holding prior tax certificates or mortgages on the property is without authority of law and void. In XXII Op. Atty. Gen. 635 it was held that the county may not limit the sale of its tax certificates to owners of the real estate covered thereby. It was ruled in an opinion, XXV Op. Atty. Gen. 216, that the county board could not authorize the sale of county-owned tax certificates upon condition that certain drainage district bonds outstanding upon the lands be surrendered and canceled, as such condition is without support or authority in the statutes.

It is therefore our opinion that the resolution in question is invalid and without force and effect.

HHP

*Minors — Child Protection* — Order of juvenile court committing child to custody of person other than parent under sec. 48.07, Stats., and erroneously purporting to charge county other than that of child's legal settlement may be corrected under proper circumstances.

If no other valid provision is made for payment of cost of such child's care, county of its legal settlement is liable by force of statute.

Licensed child welfare agency receiving custody of such child may recover directly from county chargeable in manner in which other claims are recovered.

August 24, 1942.

JOHN A. MOORE,  
*Acting District Attorney,*  
Oshkosh, Wisconsin.

The following is a brief resume of facts reported by you. On April 19, 1941, the judge of the juvenile court of W county found certain children then within the county to be dependent and neglected and ordered that said children be committed to the custody of a child welfare agency at the cost and expense of W county. Thereafter the children's board of W county petitioned for vacation of the order and for entry of a new order on the ground that the legal settlement of the children was in F county rather than in W county. An order to show cause based on such petition was served upon the district attorney of F county fixing a date for hearing before the judge of the juvenile court of W county. Following the hearing the judge vacated that part of the order of April 19, 1941, relating to legal settlement, and on March 5, 1942, entered an order making the cost and care of the children a charge on the city of F located in F county, where the court found that the children were legally settled. There appears to be no question but that the legal settlement of the children was, at all times involved, in F county.

You desire to know the extent of the liability of the two counties for the care of the children and the method by which liability may be enforced.

For purposes of this opinion, we assume that the first order was merely erroneous, and not void. If there was a lack of jurisdictional requirements so that the order was void, it would, of course, be a nullity and could be expunged by the court at any time without respect to the statutory requirements relating to reopening, appealing from, or modifying orders or judgments. See *State ex rel. Wall v. Sovinski*, 234 Wis. 336, and cases therein cited.

Sec. 48.01, subsec. (5), par. (am), Stats., gives to the juvenile court of a county in which a child is present but not residing jurisdiction in neglect and dependency proceedings concurrent with the court of the county in which the child resides. The opinion was given in XXIX Op. Atty. Gen. 159 ✓ that under the provisions of said section the juvenile court of a county in which a child is present may hold the county of the child's legal settlement responsible for its care. Assuming, therefore, that jurisdictional requirements as to procedure were met and the juvenile court of W county had authority to enter an order charging the proper county with the care of the child found to be dependent, but that the order was erroneous with respect to the question of legal settlement, the provisions of sec. 269.46 (1) provide a method for correcting the error. That section provides in part:

"The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding."

While W county was apparently not a "party" to the proceeding in which the erroneous order was entered, it has been held in *Langlade Realty Co. v. Magee*, 156 Wis. 457, that the statutory relief authorized in sec. 269.46 (then sec. 2832, Stats. 1913) is available for the benefit of a person who is not a party of record but who was a real party in interest. See also *Lampson v. Bowen*, 41 Wis. 484. Since the erroneous order purported to make W county liable for the care of the children, W county had a real interest so as to be entitled to relief from the error according to the provisions of sec. 269.46.

We do not give an opinion upon the authority of the children's board of W county to apply for relief from the error on behalf of the county. Even if the board's legal capacity might have been questioned, such an objection does not go to the cause of action (*Weirich v. Dodge*, 101 Wis. 621, *Murray v. McGarigle*, 69 Wis. 483) and is waived unless taken by appropriate procedure (*Martin v. Smith*, 239 Wis. 314).

In addition to the provisions of sec. 269.46, it may be noted that sec. 48.07 authorizes the judge of a juvenile court to modify the "terms" of a commitment of a delinquent, neglected or dependent child. The court may under sec. 48.07 (6) (a) order a parent to pay a part or all of the keep of a committed child. It would seem, therefore, that the question of chargeability for support is one of the "terms" of the commitment which the statute authorizes the court to modify in accordance with changing conditions.

Since that portion of the order purporting to charge W county with the cost of the care of the children was vacated on the ground of mistake within a year after the entry of the order, W county is relieved of whatever force the original order may have had as against it.

F county was apparently never served in the manner required by sec. 262.09 (1), so as to make it a party to the proceedings before the juvenile court of W county, neither does the order purport to charge F county, but rather the city of F within F county. In XXI Op. Atty Gen. 643 the question whether service of notice upon a county is necessary in order to charge it with the support of a child committed to custody was discussed. No opinion was given there as to whether determination of legal settlement is binding upon the county in the absence of notice but it was stated that it would be better practice to serve such notice.

It was held in *Coyle v. Richter*, 203 Wis. 590, that a judgment affecting a city's interest is not binding upon it unless it is a party. As a general rule if a party is not brought into court by the proper notice the judgment is void as against him. *Godfrey v. Wright*, 151 Wis. 372. The statutory method prescribed for service is usually essential to sustain a valid judgment against a governmental subdivision. *Mariner v. Town of Waterloo*, 75 Wis. 438. If binding judg-

ment against the county were a necessary condition precedent to its liability, it is doubtful whether judgment rendered without legal notice to the county would suffice.

The legislature could, if it chose, impose liability upon a county with respect to the expense of maintaining indigents without any notice or opportunity to be heard in individual cases, since the whole matter of poor relief is of statutory origin and counties "have no private powers or rights as against the state." *Holland v. Cedar Grove*, 230 Wis. 177, 189. Whether the legislature has chosen to reach such a result through the enactment of a particular statute is a question of interpretation. Sec. 48.06 specifically provides that in proceedings to establish juvenile delinquency, neglect or dependency the person having custody or control of the child shall be summoned and "summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary." No mention is expressly made in either sec. 48.06 or 48.07 of service upon the county to be charged.

Sec. 48.07 (6) (a) provides in part:

"Whenever a child is committed by the court to custody \* \* \* and *no provision is otherwise made* by law for the support of such child, compensation for the care of such child, when approved by order of the court, shall be a charge upon the county \* \* \*."

The phrase "when approved by the court" is shown by its position and by the punctuation used to refer to the word "compensation" so that the court's approval was apparently intended to relate to the reasonableness of the compensation.

Under this statute, the question whether the public shall be chargeable for the support of a child committed to the custody of one other than the parent does not await an affirmative decision of the judge as, for example, does chargeability of the public for the support of a person admitted to a tuberculosis sanatorium under sec. 46.10 (1a). Sec. 48.07 (6) (a) provides that liability for the support of a dependent child is in the first instance upon the county unless the judgment or the law provides otherwise. It is therefore the statute rather than the judgment which establishes such

liability. If the court fails to order that the parents shall be chargeable with the support of the child, the statute makes the cost a charge upon the county.

It is pointed out in XXIX Op. Atty. Gen. 159 that the county referred to by the statute is the county "of legal residence." Accordingly, when a child is found by the proper juvenile court to be neglected and dependent and is committed to the custody of a person other than his parent, the county of his legal settlement becomes liable, by force of statute, for such compensation for the child's support as is approved by order of the court. Under the statute the only circumstances which are made conditions precedent to the existence of county liability are (1) a valid order of commitment of a delinquent, neglected or dependent child to the custody of a person other than a parent; (2) existence of the child's legal settlement in the county; (3) absence of other provision for the child's support. These comments are not to be construed as indicating that the juvenile court has no jurisdiction to determine the question of legal settlement if the facts are before it, nor that it would not be preferable practice for it to do so. In such a case it would also be preferable practice to summon the counties involved to participate.

Since there is no question but that the legal settlement of the children is in F county, the conditions prescribed by statute have been met and a statutory liability arises. The attempt to charge the expense of the care of the child upon the city of F was unauthorized by statute and accordingly is a nullity. The statute specifically provides that the liability shall be upon the county rather than upon the city. See XXIX Op. Atty. Gen. 159. A finding that the legal settlement of the children was in the city of F, which is located in the county of F, is equivalent to a finding that the legal settlement was in the county. In the words of the statutes "no provision is otherwise made by law" for the support of the children than by the county of their legal settlement.

You submit the further question of what method may be followed for enforcement of the claim.

As we understand it, the children were committed to the care of a licensed child welfare agency. Sec. 48.07 (6) (b),

Stats., gives such an agency a right of recovery against the county chargeable. Such subsection reads:

“(b) Except as otherwise provided in paragraph (a) of this subsection, a licensed child welfare agency into whose care and custody a child has been committed by a juvenile court shall be entitled to recover from the county chargeable for the support of such child, a reasonable sum to be agreed upon by the juvenile court and such agency, for his care and maintenance in an institution and not exceeding seven dollars per week if boarded in a family home, less in either case any amounts received pursuant to paragraph (a) of this subsection. Such amounts shall be payable as are other claims against the county and an amount sufficient to pay all such claims shall be appropriated annually by the county.”

The fact that such amount is made “payable as are other claims against the county” would make applicable secs. 59.76 and 59.77, relating to the filing and payment of claims against the county.

You have referred to the procedure described in sec. 49.03 (8a) and ask whether the claim, if disallowed, may be prosecuted before the department of public welfare. The fact that a particular type of public assistance is in substance a form of poor relief does not of itself mean that it is subject to sec. 49.03 (8a), relating to determination of disputes by the public welfare department. If the statutes governing the specific type of assistance provide for a different method of adjustment of claims, sec. 49.03 would not apply. So long as the claim for care of a dependent child remains in the hands of the licensed welfare agency which receives custody of the child, it is clear that the procedure outlined in sec. 49.03 could not be applicable. That procedure is available only for claims by “one municipality or county against another municipality or county.” Sec. 48.07 (6) (b) contemplates that the child welfare agency shall recover directly “from the county chargeable” through the use of the same machinery that is available for general claims against a county.

If W county, not being responsible for the expense of maintaining the children, pays the child welfare agency for such care, it does not do so at the behest of any statutory

provision. Its claim against F county, if any, would be as the successor to the agency.

It is true that the opinion in XIX Op. Atty. Gen. 441 indicates that aid to dependent children is a form of relief and that the procedure in sec. 49.03, Stats., is applicable for recovery of claims by one county against another. Assuming that such opinion is valid as applied to cases where custody of a dependent child is given to a person other than a licensed child welfare agency, the opinion did not purport to go farther than to hold that provisions of sec. 49.03 are applicable to claims relating to dependent children where they are not superseded by specific provisions inconsistent therewith. The provisions of sec. 48.07 (6) (b) relating to recovery of claims for the care of dependent children by licensed welfare agencies are specific and as to such claims they prevail over the provisions of sec. 49.03 relating to settlement of disputes involving poor relief as between counties and municipalities.

The claim of the child welfare agency having the custody of the children being governed by sec. 48.07 (6) (b) rather than by sec. 49.03, the question arises as to the effect of the payment of such claim by a county other than the one chargeable. When one person discharges the obligation of another he may have a right under appropriate circumstances to recover from such other either on the theory of subrogation to the rights of the creditor (*Leonard v. Bottomley*, 210 Wis. 411, *Reddington v. Franey*, 131 Wis. 518) or on the theory of quasi contract or implied promise to pay (*Hanson v. Martin*, 192 Wis. 40, *Grossbier v. Chicago, St. P., M. & O. R. Co.*, 173 Wis. 503). In order that the right to recover shall exist, however, the person discharging the obligation must be put under some duty to do so or must have made the payment to protect some interest of his own. No right of recovery exists in favor of one who pays the debt of another as a mere volunteer. *Bank of Baraboo v. Prothero*, 215 Wis. 552, *Marshall & Usley Bank v. Hackett, Hoff & Thiermann*, 213 Wis. 426, *Supervisors of Portage Co. v. Supervisors of Waupaca Co.*, 15 Wis. 361. In the last case the county in which a prison was located paid the sheriff for the expense of maintaining a prisoner sent from an adjoining county. It was held that the county making

the payment could not recover of the county from which the prisoner was sent although the latter was originally legally liable for the maintenance of the prisoner. The decision was based upon the fact that the payment by the county which was not legally liable was gratuitous and voluntary. The foregoing case, however, is not identical with the facts reported by you. The payment by W county may have been made under a mistake of law as to its liability. There had been an order issued by its juvenile court holding it chargeable, and even though the order was erroneous it furnished color for the belief that W county was under obligation to make the payment. Such circumstances may be sufficient to take the payment out of the voluntary class. The Wisconsin court has recognized that a payment induced through the mistaken belief that it was obligatory or that it was necessary in order to protect the payor's interest may entitle the payor to be subrogated to the rights of the creditor. *Schuetz v. Schuetz*, 237 Wis. 1, *Iowa County Bank v. Pittz*, 192 Wis. 83.

The supreme court determined in *Holland v. Cedar Grove*, *supra*, that the determinative powers of the department of public welfare under sec. 49.03 are limited to finding whether the person receiving relief was a poor person and where he had his legal settlement. Under sec. 48.07 the question whether a child is entitled to care at public expense is predicated only (1) upon a finding of the juvenile court that he is delinquent, neglected or dependent, (2) upon an order committing him to the custody of a person other than his parents, and (3) the absence of other provision for his support. Certainly the legislature did not intend to give the department of public welfare authority to supersede the decision of the juvenile court as to these matters by a finding that the committed child was not entitled to be supported at public expense. You state that there is no dispute as to the fact of legal settlement. Even if it be conceded that there are cases involving the support of children committed to custody by a court which may be brought before the department of public welfare under sec. 49.03 as stated in XIX Op. Atty. Gen. 441, the questions involved in the case reported by you are not ones which that department is authorized under the decision of the *Holland* case to deter-

mine. Indeed, the *Holland* case, having been decided since the opinion in XIX Op. Atty. Gen. 441, might well furnish grounds for modification of that opinion.

The liability of F county to W county rests upon legal and equitable principles rather than upon statute alone and should be enforced through filing the claim as prescribed in secs. 59.76 and 59.77. If disallowed, action may be then brought in the proper court, which would have jurisdiction to determine legal and equitable questions such as the right to subrogation, whereas the department of public welfare would have no such authority. *Holland v. Cedar Grove, supra.*

BL

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*Public Health — Slaughterhouses — Sec. 146.11, Stats.,* has no application to building where animals are not killed but carcasses are dismembered for use as animal food, since term "slaughterhouse" implies killing of animals.

August 27, 1942.

BRUCE DIMMITT, *Assistant Sanitary Engineer,*  
*Board of Health.*

You have requested an opinion as to the application of the slaughterhouse law, sec. 146.11, Stats., to a building on a farm where no animals are killed but where carcasses are dismembered for the purpose of preparing animal food.

Sec. 146.11 applies to "slaughterhouses" and the "business of slaughtering." We are unable to find any definition of the word "slaughterhouse" which does not include as a necessary element the killing of animals. Since no animals are killed in the building in question it follows that it is not a slaughterhouse and sec. 146.11 has no application.

WAP

*Municipal Corporations — Towns — Garbage Dumping*  
— In order to transport garbage into town and there dispose of same resident of city must first secure permit under sec. 60.72, subsec. (1), Stats., notwithstanding that city has permit so to do and that city owns dumping ground located in town.

August 27, 1942.

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

You state that it is claimed that the permit secured by a municipality, pursuant to sec. 60.72, Stats., is for the use of the municipality and not of individual residents of the municipality. You inquire whether under sec. 60.72, Stats., a resident of a city may transport his garbage from the city to a city-owned dump located in a town, and dispose of his garbage at the dump, without first having secured a permit so to do from the town board.

Sec. 60.72, subsec. (1), Stats., provides as follows:

“No person or municipality shall transport any garbage, rubbish or other refuse into or within any town for the purpose of dumping or otherwise disposing of the same until such person or municipality shall have first secured a permit so to do from the town board. This section shall not apply where the city or village owns its own dumping or disposal ground and confines its dumping or disposal to such grounds; provided, that such disposal shall be conducted in a sanitary manner satisfactory to the state board of health.”

In enacting the above quoted statute the legislature apparently recognized that promiscuous hauling and disposal of garbage might result in unsightly and unhealthy conditions, and therefore might create a nuisance. In order that towns could protect themselves against such undesirable conditions the legislature granted them the power to grant or to withhold a permit for transporting or disposing of garbage within their boundaries. Since haphazard hauling and disposal of garbage was the evil intended to be eliminated, quite irrespective of by whom it was done, it is our opinion that in the first sentence of the above quoted statute the

legislature used the words "person or municipality" advisedly and that the express mention of both shows that neither was employed in a sense that included the other. Therefore the issuance of a permit under sec. 60.72 (1), Stats., to either an individual person or a municipality to haul and dispose of garbage within a town does not license the other to engage in similar activities without securing a permit.

This result obtains notwithstanding that the city resident hauls his garbage to a city-owned dump located in a town and there disposes of the same. It is true that the second sentence of the above quoted statute makes inapplicable under certain circumstances the requirement in the first sentence for securing a permit. However, the said second sentence is a proviso. Compare *Pabst Brewing Co. v. Milwaukee*, (1912) 148 Wis. 582, 586. It is well established that a proviso is construed strictly, so as to take no case out of the enacting clause that it follows which does not fairly come within its terms. 59 C. J. 1089, *United States v. Dickson*, (1841) 40 U. S. (15 Pet.) 141, 165.

A strict scrutiny of said proviso readily reveals that the word "its" contained therein refers in each instance that it is used back to either the word "city" or "village," or, in other words a municipality. Sec. 67.01 (1), Stats. Thus, for all intendments and purposes, said proviso is to be read as though it made the first sentence of sec. 60.72 (1), Stats., inapplicable where a city or village owns a dumping ground and such city's or village's dumping or disposition of garbage is confined to such grounds. In other words, the proviso carves out a special exception in favor of certain municipalities, but in no way has this exception been extended to individuals.

It is our opinion, therefore, that under sec. 60.72 (1), Stats., a city resident must secure a permit from a town board before transporting garbage into or within any town for the purpose of dumping or otherwise disposing of the same, notwithstanding that the city within which he resides has a permit so to do and notwithstanding that the city owns a dumping ground located in the town.

MLS

*Insurance — State Insurance — Municipal Corporations — Municipal Law — Public Officers* — Board of water commissioners of city may not contract with privately operated companies for insurance upon water department property after common council of such city has voted to insure in state insurance fund under sec. 210.04, Stats., unless common council votes to terminate insurance which it previously authorized.

August 31, 1942.

MORVIN DUEL,

*Commissioner of Insurance.*

You have inquired whether the board of water commissioners of a city may insure water department property in privately operated insurance companies after the common council of such city has voted to insure in the state insurance fund.

In XXX Op. Atty. Gen. 405, the opinion was given that no board or committee in charge of county property may insure such property in a privately managed insurance company after the county board has voted to insure in the state insurance fund. Much of the reasoning in that opinion is applicable by analogy to the question which you submit.

The authority of a board of water commissioners is defined under section 66.06, subsec. (10), Stats., which says that such board is "to take entire charge and management of such utility, \* \* \* and to supervise the operation of the utility *under the general control and supervision of the \* \* \* [common] council.*"

Assuming that the foregoing provision empowers a city board of water commissioners to contract for insurance on water department property without authorization by the common council, action of the common council within the scope of its authority under sec. 210.04, Stats., supersedes the right of the board of water commissioners to take contrary action.

Section 210.04 (1) authorizes the common council of a city to vote to insure in the state insurance fund under the provisions of that section. The subsection further provides that after such a determination has been made by the coun-

cil, "no officer or agent of any \* \* \* city \* \* \* having charge of *any* public \* \* \* property" of the city "shall contract for or pay out any money or funds for insurance \* \* \* upon property," except upon certification by the commissioner of insurance. Subsec. (2) provides that after the vote of the council, "the clerk thereof shall report to the commissioner of insurance each policy of insurance which shall then be in force upon *any* property \* \* \* belonging to the \* \* \* city \* \* \* whether under the control of such \* \* \* council or *any other board, officer or agent*". Subsec. (3) provides that after such a decision by the council, "the insurance on *all* property of \* \* \* such \* \* \* city \* \* \* shall be provided for" through the state insurance fund.

These provisions indicate that the decision of the common council to insure city property in the state insurance fund is to be binding on all other officers of the city. The legislature has indicated no intent to constitute a municipally owned water department as a separate corporate entity. Sec. 66.06 deals with the board authorized to manage a utility acquired by a city as a department or agency of such city. Such a board is among the officers and agents bound by action of the common council under sec. 210.04 (1).

Subsec. (8) of sec. 210.04 is not in conflict with the other provisions of the section. It was intended to provide a means of terminating the insurance which was taken under the authorization of the preceding subsections, and is primarily an incident to the scheme of insurance as previously set up. The right to terminate a contract ordinarily rests in the contracting parties rather than in a third entity. It seems probable that, in specifying the agency which should have the right to terminate the insurance by the phrase "its board or council", the legislature intended to refer to the agency which was authorized to make the original determination to insure in the state insurance fund. Reducing the language of the first part of subsec. (8) to the phraseology applicable to cities, it reads: "Any \* \* \* city \* \* \* may terminate its insurance in the 'state insurance fund' by a majority vote of its \* \* \* council". The reference in subsec. (8) to a vote of "its board" obviously pertains to termination of insurance taken by mu-

municipal entities whose chief governing body is designated as a board rather than a council.

You have also asked the question whether the water commission may withdraw from the state insurance fund and place insurance in a private company if the same is certified by the commissioner of insurance under sec. 210.04, subsec. (1). As was pointed out in XXX Op. Atty. Gen. 405, the insurance commissioner has no authority except such as emanates from the statutes. In view of the various provisions above quoted, which indicate the legislative intent that after a vote by the common council city property may not be insured otherwise than in the state insurance fund, it appears that the only certification which the insurance commissioner is authorized to make with respect to premiums is as prescribed in subsec. (3), that is, certification of the amount of premium due the state treasury for the benefit of the state insurance fund. The reference in subsec. (1) to certification by the insurance commissioner must be read in the light of the remaining provisions of the law. Subsec. (1) does not purport to contain a scheme of authorization with respect to the functions of the commissioner. The terminology there used has reference to his functions as defined in the provisions enacted for that purpose. The insurance commissioner has no power to authorize payment of premiums for insurance taken contrary to the provisions of sec. 210.04, Stats.

BL

*Indigent, Insane, etc. — Poor Relief — Insurance — Fire Insurance — Lien held by county under sec. 49.26, subsec. (4), Stats., does not of itself give county lien upon proceeds of fire insurance policy issued to owner of property. County's lien may be protected by means of loss payable clause in insurance policy.*

August 31, 1942.

L. A. KOENIG,

*District Attorney,*

Phillips, Wisconsin.

You inquire whether the county has a lien upon proceeds of a fire insurance policy on a building upon which the county has a lien for old-age assistance under the provisions of section 49.26, subsec. (4), Stats. The question arises, as we understand it, in connection with the administration of the estate of a beneficiary of old-age assistance, the proceeds of the insurance policy being in the hands of the administrator and being insufficient to pay all claims against the estate.

It appears to be well settled that a lien upon real estate does not of itself give the lienor any right to the proceeds of a fire insurance policy carried on such property by the owner. In 1 Couch on Ins., sec. 3, pp. 7-10, it is said:

"It is well settled that insurance is a personal contract, whatever the subject-matter thereof may be. And this though the insured is designated as 'for account of whom it may concern.' Consequently the obligation to pay is one which does not run with the property, whether it be real estate or personalty, unless assigned with the consent of the insurer, or unless by express stipulation of the parties it is made to run with the subject-matter, or the contract be so framed as to inseparably attach the risk to the property, \* \* \* But *neither a mortgagee nor any other lien creditor can claim under a policy written for a mortgagor or owner of property, unless there is an express agreement permitting it.* \* \* \* These principles grow out of the fact that it is not the thing that is insured, but rather that any right under the contract appertains to the person, the theory being that the intention is to avert any loss or damage that the insured might sustain because of a risk insured against." (Emphasis ours.)

If, however, the owner of property agrees to take out insurance for the benefit of another who has an interest in the property, such other has an equitable lien on the proceeds of the policy even though the owner takes the policy in his name alone. *Connors v. Aaron*, 207 Wis. 115; *Houston Canning Co. v. Virginia Can Co.*, 211 Ala. 232, 100 S. 104, 35 A. L. R. 912; *Lindley v. Orr*, 83 Ill. App. 70; *Cromwell v. Brooklyn F. Ins. Co.*, 44 N. Y. 42, 4 Am. R. 641; *Farwell v. Johnson*, 121 Misc. 556, 201 N. Y. S. 327. Whether such an agreement exists in a particular case is, of course, dependent upon the facts. The mere payment of premiums by one other than the insured is, as a rule, not sufficient to give such other a lien upon the proceeds. See 2 Couch on Ins., sec. 351, p. 1038.

You call attention to the fact that, under regulations of the federal social security board and the state pension department, county administrators are required to budget, within the amount allowed to an old-age assistance beneficiary, a sum sufficient to cover insurance premiums. What rights exist under such facts as between the county and the old-age assistance beneficiary, where the proceeds of the policy are still in the hands of the insurer or of the beneficiary and no rights of third parties have intervened, are not here dealt with. Such questions would seem to be largely academic, in view of the fact that a transfer of the fund might be required under the provisions of section 49.26 (1). For the same reason it would seem to be beyond the scope of this opinion to determine in what other situations, if any, equity will recognize a claim for lien against the proceeds of insurance where there is concededly no legal lien at law.

Although a statutory provision creating a lien on real estate might extend the lien either expressly or impliedly to the proceeds of a fire insurance policy, contrary to the general rules above quoted, section 49.26 (4) makes no such provision. It gives the county a lien upon real estate only. The proceeds of a fire insurance policy are personal property inuring to the beneficiary by force of contract. The statutes provide a separate method of securing payment of the county's claim out of the personal property of a beneficiary of old-age assistance. It was ruled in XVII Op. Atty. Gen. 751 that the county has no preference over other

claimants with respect to personal property, if such property has not been assigned to the county in the manner authorized by section 49.26 (1).

If the county desires to establish its right to the proceeds of a fire insurance policy in advance of the time when it becomes payable, so as to give the county's claim precedence over the claims of third persons, further steps are necessary beyond the mere filing of a certificate to perfect the statutory lien on the insured real estate.

The steps discussed in *Connors v. Aaron, supra*, whereby the proceeds of a policy are impressed with an equitable lien through an agreement between the insured and the lienee to insure for the benefit of the latter, do not always provide adequate protection. If the property owner fails to comply with the agreement, the equitable lien on the proceeds of the policy is subject to destruction by the intervention of the rights of third parties who have no notice of the lien.

The supreme court, in *State Bank of Chilton v. Citizens Mut. F. Ins. Co.*, 214 Wis. 6, describes three ways in which one having a mortgage interest in property may protect that interest (p. 11) :

“(1) under a simple loss payable or option mortgage clause, the mortgagee may be simply an appointee of the insurance fund;

(2) by virtue of the standard mortgage clause, often referred to as the subrogation clause \* \* \*

(3) by a policy procured by and issued to the mortgagee.”

See also *Keith v. Royal Ins. Co.*, 117 Wis. 531.

It seems probable that the legislature, in giving the lien, intended the county to have the power to protect its interests in the manner usually employed by persons having similar interests in property. The provision for a lien in favor of the county was substituted by ch. 7, Laws Special Session 1937, for the earlier provision that the county judge might require the old-age assistance beneficiary to transfer his entire property, both real and personal, to the county. Under the earlier provision, after a transfer was effected, the proper county officer was empowered “to sell, lease or

transfer such property, or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property." Such power to deal with the property as a whole was doubtless ample to authorize carrying insurance on the real estate, so that the proceeds would be payable into the general fund held and managed by the county. As pointed out in *Goff v. Yauman*, 237 Wis. 643, 647:

"\* \* \* The provision in sec. 49.26 (1), Stats. 1935, which authorized the county judge to require a transfer of the beneficiary's property, was rendered unnecessary and inapplicable to real estate in Wisconsin by the amendment enacted by ch. 7, Laws of Sp. Sess. 1937; and by sec. 49.26 (4), Stats., created thereby there was substituted for the transfer of title, which could theretofore be required, the statutory lien provided in sub. (4) as the means of securing the repayment of the old-age assistance benefits. *There is nothing in this legislation that indicates, even by implication, that the legislature intended the present law to be less comprehensive and effective in its application to secure such repayment than was the law for which it was substituted.*" (Emphasis ours.)

The method of protection described in *Keith v. Royal Ins. Co.*, *supra*, p. 538, as "far the most common" is by a simple loss payable clause in the insurance contract. Since the usual means of providing security for a mortgagee as described in *State Bank of Chilton v. Citizens Mut. F. Ins. Co.*, *supra*, do not involve an assignment of the policy itself (see *Cary Mfg. Co. v. Acme Brass & Metal Works*, 215 Wis. 585), it will not be considered here whether a fire insurance policy upon which no loss has become payable falls within the class of "property" which the county judge may require to be transferred under section 49.26 (1), Stats.

BL

*Appropriations and Expenditures — Conservation Commission — Claims — Damages* — Conservation commission may compromise claim arising under written lease for fish ponds by paying agreed amount of money in lieu of fish which it was orally agreed lessor was to receive at termination of lease, fish having been destroyed by disease, and such claim approved by conservation commission should be audited by secretary of state.

State is not liable for services rendered to it in absence of contract or in absence of compliance with civil service law and no such claim should be compromised or audited.

State is not liable for damages arising out of negligent acts of its officers or agents and no such claim should be compromised or audited.

August 31, 1942.

FRED R. ZIMMERMAN,

*Secretary of State.*

Attention C. A. Nickerson, *Auditor.*

You have asked for our advice on the auditing of a certain claim presented to your office by the conservation commission.

The claim arose out of the following circumstances: On September 19, 1938, the claimant leased certain premises to the conservation commission for fish rearing purposes. The lease was for three years and the consideration expressed in the lease was "one dollar and other valuable considerations."

Although not expressed in the lease it appears that the other "valuable considerations" were that the lessor was to become the owner of all fish in the ponds at the expiration of the lease. Some 20,000 trout were placed in the ponds during the period of the lease. It is estimated that they were worth not less than \$1.00 each, but the fish became infected with a disease known as furunculosis (red spot) so that very few fish survived the lease period and those that did were of no value because of the disease.

The claimant also performed services in caring for the fish, which services he estimated to be of the reasonable

value of \$485.00, although it is not claimed that there was any contract of employment, either under the lease or otherwise.

The voucher as presented for payment is in the sum of \$775.00 and is described as being in full settlement for all claims arising under the lease, and also for services rendered in caring for the fish, storage of fish foods, and "alleged damage to ponds and all other claims arising from said lease or in any way appertaining thereto."

You inquire if the secretary of state may authorize payment of this claim or whether it is a claim requiring legislative action.

Undoubtedly the conservation commission is authorized to lease ponds for the propagation and rearing of fish. Sec. 23.09, subsec. (7), par. (f), Stats. Its appropriation statute, sec. 20.20, is couched in very broad language and suggests no substantial question as to the authority of the commission to pay rental for the leasing of a fish rearing pond. See also XXIX Op. Atty. Gen. 217.

It would follow that the commission might properly settle a dispute arising under the agreement in question and the settlement arrived at could be paid just the same as though its terms were expressly a part of the original agreement. Contracts of the state with individuals are to be construed in the same manner and have the same binding effect on the parties thereto as the contracts of private parties and whatever is essential to enjoyment of the thing granted will necessarily be implied. 59 C. J. 183. See also *Sholes v. State*, 2 Pin. 499. The state is bound to observe the same rule of conduct in performance of its contractual relations with its citizens as it requires them to observe, and, like an individual, it is liable for breach of contracts. 59 C. J. 187.

It is true that the contractor cannot recover damages for breach of the contract until the claim has been presented to the legislature and been denied. Sec. 285.01, Stats. This provision, however, does not require, so far as we are able to determine, that a claim must be presented to the legislature followed by allowance and payment or disallowance and a lawsuit under sec. 285.01 in cases of disagreement arising under the contract where the state agency making the contract is able to reach a settlement satisfactory to

both parties. The state, through its various agencies and officers, is a party at all times to many hundreds of contracts and it is inevitable that disputes and differences of interpretation should be constantly arising. As a practical matter these are usually settled without resort to the legislature or the courts. To require that they must be submitted to the legislature, even though a reasonable compromise is acceptable to both parties, would practically place state business at a standstill and would discourage any reasonable person from contracting with the state.

However, in so far as the claim in question purports to be in settlement for services and damages a different result suggests itself.

The claimant does not represent that he had any contract with the state either express or implied for services in feeding the fish or for storing fish foods, nor does he claim that any of such services were performed at the special instance or request of the state conservation commission or its agents. At the most, he was a mere volunteer as to these matters, and the state cannot be charged with any liability therefor which would properly form the basis for any compromise, however nominal.

Secs. 14.71 (1) and 16.29 (2), Stats., also make it clear that before the commission may legally employ one there must be a compliance with the civil service law, ch. 16. This was not done.

Likewise as to any claim for damages. It is well settled that tort claims arising out of the negligent acts of its officers or agents do not render the state liable. *Holzworth v. State*, 238 Wis. 63. Moreover, there is no contention here that there was any negligence on the part of the state or its officers or agents which would form the basis for a claim for damages even though there were no immunity on the part of the state.

It is impossible to tell from the face of the voucher what part, if any, of the \$775.00 was considered by the commission to represent consideration for the lease and what part, if any, was allocated for services or damages, or both. It may well be that the commission considered that there was no liability either for services or damages and that the compromise figure approved relates entirely to the considera-

tion for the lease, which consideration the claimant had failed to receive. If such is the case, we would suggest that the voucher be resubmitted in such form as to eliminate any indication that the payment called for is in settlement for services or damages for which there is no liability.

In closing we cannot refrain from commenting briefly on the unwise procedure followed in the making of this lease. While at times there may be good reasons for reciting a consideration of "one dollar and other valuable considerations" in a recorded deed conveying real estate where the parties do not wish to make the actual consideration public, we do not believe that this practice should be followed by the state in the making of unrecorded leases. It opens wide the door for fraud, collusion and disappointment. The parties to such an oral agreement may forget or die. The rights of the claimant here rest almost entirely on the memory and truthfulness of the employee of the conservation commission who negotiated the lease. While an oral agreement to pay a consideration in addition to that expressed in the instrument is valid, *Kickland v. The Menasha W. W. Co.*, 68 Wis. 34, the practice is not to be recommended.

WHR

*Statistics — Vital Statistics — Birth Certificates* — Court order requirement of sec. 69.26, Stats., with respect to furnishing copy of illegitimate birth records, applies to all illegitimate birth records and is not limited to records of those births that occur after October 1, 1907, and is applicable to delayed illegitimate birth records as well as to such records made at time of birth.

September 4, 1942.

BOARD OF HEALTH.

Attention Carl N. Neupert, M. D., *Assistant State Health Officer.*

In your letter you submit two questions as follows:

“Question # 1: Is a court order required for issuing a copy of an illegitimate birth record in every case or in only those occurring subsequent to Oct. 1, 1907?”

“Question # 2: Given a young man who submits proof of birth to obtain a birth certificate to enable him to enter the air corps—the information he submits discloses that the birth was illegitimate. He has submitted the material, fees for establishing of delayed birth and a certified copy and requests such a copy. Would the copy constitute a certified copy of a delayed birth certificate or of an illegitimate birth record, requiring a court order to issue a certified copy of the material as submitted by him.”

Sec. 69.26 provides as follows:

“The physician or midwife in attendance when any birth occurs shall file a certificate of birth, properly and completely filled out, giving all the particulars required by sections 69.01 to 69.59, inclusive, with the local registrar of vital statistics of the district in which the birth occurred within 5 days after the date of birth. All certificates for illegitimate births subsequent to October 1, 1907 shall be kept in a separate file and shall be subject to public inspection only upon court order, except for obtaining proof of heirship. A copy of an illegitimate birth record shall be furnished only upon the order of any county judge or judge of the juvenile court. All bills or charges for professional services rendered by the physician or midwife in attendance upon a birth shall be unlawful if the birth certificate, properly filled out, is not reported as herein provided.”

We are of the view that a court order is required for issuing a copy of an illegitimate birth record in all cases and that the court order requirements are not limited to illegitimate births occurring subsequent to October 1, 1907. This conclusion seems fairly clear in the light of the legislative history of sec. 69.26. The illegitimate birth feature of the section was first enacted by ch. 41, laws of 1935. As originally enacted the section read:

*“\* \* \* The certificates for illegitimate births shall be kept in a separate file and shall be subject to public inspection only upon court order, except for obtaining proof of heirship. A copy of an illegitimate birth record shall be furnished only upon the order of any county judge or judge of the juvenile court. \* \* \*”*

It will be noted that the furnishing of a copy, as originally enacted, related to all illegitimate birth records and that the copy provision was in no sense limited as to births that occurred subsequent to October 1, 1907.

Sec. 69.26 was amended by ch. 259, sec. 2, Laws 1941, to read as it now reads. The amendment limited the separate filing requirements and the public inspection provisions to “illegitimate births subsequent to October 1, 1907” but contained no such amendatory limiting provisions with respect to the then existing law regarding the furnishing of copies of illegitimate birth certificates. We must presume that the legislature was content with the all-inclusive features of the existing law with respect to furnishing copies of illegitimate birth certificates by its failure to amend or limit the all-inclusive features of this provision. The limiting features of the 1941 amendment relate only to the filing and inspection provisions of illegitimate birth records and cannot be given a scope or effect beyond the subject matter to which they relate.

We are of the view that a court order is required when you furnish a certified copy of what you term a “delayed” illegitimate birth record. You are asked to furnish a certified copy of a record. You have no such record. Accordingly information is furnished your department which justifies its issuing a “delayed” birth record. This delayed birth

record then becomes an official record. If the delayed record thus established is an illegitimate birth record, we cannot see why the provisions of sec. 69.26 are not applicable to it. The subject matter of the section concerns illegitimate birth records. The regulatory feature is with respect to copies of illegitimate birth records as such and a delayed illegitimate birth record would seem to be quite as much within the sweep of the regulatory feature of the section as one made at the time of birth.

It may well be that it is difficult for an applicant to understand why he has to have a court order to get a certified copy of the record from your department and with respect to which he has furnished the information whereby the record is made—but the statute does not create any exceptions. It is beyond our province to create legislative exceptions by construction where the legislature has not created any.

NSB

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*School Districts — Transportation of School Children —*  
Under sec. 40.34, subsec. (2), Stats., when school district votes to suspend its school, parents residing in district may send their children to any school they choose but school district which has closed its school is under no obligation to furnish transportation unless (1) nearest school which child may attend is more than two miles from place of residence of said child and (2) child attends that nearest school.

September 4, 1942.

LAVERN G. KOSTER,  
*District Attorney,*  
Arcadia, Wisconsin.

You request our opinion upon the following statement of facts:

“School district ‘A’ has suspended school. School districts ‘B’ and ‘C’ maintain schools. Schools maintained by districts ‘B’ and ‘C’ are the nearest district schools to sus-

pended district 'A'. School district 'D' is farther distant from the suspended school than either school districts 'B' or 'C'. Children of school age residing in the suspended school district 'A' and more than two miles from schools 'B' and 'C' wish to attend school 'D'. The following questions have been raised with regard to this statement of facts:

"(1) Has the school board of the suspended school or the parent of the school child the right to determine which school shall be attended by such child?

"(2) Is the board of school district 'A' compelled to supply transportation to and from the school located in district 'D'?

"(3) Have the voters of the school district 'A' authority to supply transportation to school district 'D'. And in the event that they have such authority is the school district 'A' entitled to state aid on account of such transportation?

"(4) If the facilities for seating and instruction in schools maintained by school districts 'B' and 'C' are adequate, and the children of school age attend school district 'D', and the schools located in both districts 'B' and 'C' and 'D' are more than two miles distant from the residence of the children can transportation be supplied to school district 'D'?

"(5) Does that part of section 40.34 (2) which reads as follows, 'and shall provide transportation to and from school for all children residing more than two miles from the *nearest* district school or federal school which they may attend,' mean that the school board must only provide transportation to and from the *nearest* school, which is adequate and which is more than two miles away, or does the quoted portion mean that if any school that the children attend is more than two miles from the place of residence, the school board is bound to furnish transportation, no matter where that school may be."

You have concluded:

"\* \* \* that the parents have a right to determine which school the children shall attend, if a school has been suspended in a district. It is further my opinion that the portion above quoted obligates the school board to supply transportation to and from school for all children residing more than two miles from the school which they could attend. That is if the child went to the school in district 'D' there would be no obligation on the part of the district to supply transportation, because of the fact that the schools located

in districts 'B' and 'C' are adequate and the children could attend such schools. \* \* \*"

We think there is no question but that the parents have a right to determine the school that the children shall attend. Right to determine the school is one thing. Right to transportation to the school determined upon is another. In order for the parents to be entitled to transportation the school determined upon must meet the requirements of sec. 40.34, subsec. (2), Stats., which in so far as material, provides as follows:

"The board of any district which has suspended school shall pay the tuition of all children of school age residing in the district who attend other district schools \* \* \* and shall provide transportation to and from school for all children residing more than 2 miles from the nearest district school or federal school which they may attend, and the district shall receive the regular state and county aids which the district would be entitled to if it were in operation and the regular state aid on account of such transportation; and in the event such districts shall provide such transportation for all such children residing more than 2 miles from the nearest district school or federal school which they may attend \$100 additional state aid."

You do not state which of schools B, C, or D is nearest the residences of the pupils. Conceivably it may be B in some instances, C in some and D in some. We take it that all are more than two miles in distances from the residences of the pupils involved. You give us relative distances as to these schools in relation to the suspended school. We cannot see that those distances are material. The only basis for believing that those distances might be material would seem to be a provision in sec. 40.34 (1) which reads as follows:

"\* \* \* 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. \* \* \*"

As to this section, it might be urged that as "over two miles from the schoolhouse" in the case of the consolidated

school district obviously refers to that schoolhouse, the same language in the same sentence in relation to "a district which has voted to close its school" must refer to "over two miles from the schoolhouse" of the school in the closed district. Such argument is not impressive. In the case of the consolidated school, the section obviously refers to a going school. In the case of the closed school why cannot the distance requirement apply equally well to a going school, that is, distance of the school which the child attends from the place of residence of said child? Distance of residence from school attended is of import in relation to any transportation problem and costs involved therein. Distance of a closed school from the school which the child attends is of no significance in relation to such matters.

It seems quite clear to us that the mileage provision in sec. 40.34 (1) in the case of a closed school relates to distance of the going school which the child attends from that child's place of residence. This conclusion is fortified by the express language of sec. 40.34 (2) which further specifically deals with the transportation obligations of a district in relation to closed or suspended schools. The language, repeated in said subsection, is "and shall provide transportation to and from school for all children residing more than two miles from the nearest district school \* \* \* which they may attend." This language marks the obligation of the district which has closed its schools with respect to transportation of pupils. As to each pupil, we cannot see where there can be more than one school which meets the requirements of "residing more than two miles from the nearest district school \* \* \* which they may attend."

If the parent desires transportation at the expense of the district he must send his child or children to the nearest district school from place of residence that they may attend. The nearest district school may be lacking in facilities to handle any additional pupils. In such case the nearest district school that the pupil *may* attend would be the next nearest district school and so on.

It seems fairly certain that a school district which has closed or suspended the school of the district is under no obligation to furnish transportation unless (1) the nearest

school which the child may attend is more than two miles from the place of residence of said child and (2) the child attends that nearest school.

NSB

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*Appropriations and Expenditures — National Forest Income* — Sec. 20.07, subsec. (10), Stats., with reference to apportionment of 25 per cent forest revenue received from federal government, requires same apportionment as is required by sec. 500, Title 16 USCA, namely, apportionment with respect to each forest. Prior error in apportionment may be corrected in next or subsequent apportionments.

September 4, 1942.

FRED R. ZIMMERMAN,  
*Secretary of State.*

Attention C. A. Nickerson, *Auditor.*

In your letter you state:

“We request your advice as to the proper method of distributing the national forest income under section 20.07 (10), and the correction of any errors that may have occurred in such distribution.

“There are two national forests in Wisconsin, and 25% of the annual income of each is turned over to the state by the United States to be distributed as provided by section 20.07 (10). For the past two years we have apportioned the total income from the two forests among the counties containing national forest lands, instead of apportioning the income from each forest to the counties having lands therein. We believed that this was in accordance with the provisions of section 20.10 (7) but recently our attention was called to the federal statutes providing for the distribution, which appears to require the income from each forest to be divided among the counties in which it is located. A copy of the federal statute, as submitted to us, is attached.

“Will you kindly advise us whether, in your opinion, our procedure has been wrong, and, if so, can the error be corrected in the next apportionment, or out of the next two or

three apportionments if it appears that correcting it in one year would seriously inconvenience the counties which have been overpaid if our distribution was erroneous?"

The federal statute to which you refer is sec. 500, Title 16, USCA. It 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: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further*, That there shall not be paid to any State for any county an amount equal to more than 40 per centum of the total income of such county from all other sources. May 23, 1908, c. 192, 35 Stat. 260; March 1, 1911, c. 186, sec. 13, 36 Stat. 963; June 30, 1914, c. 131, 38 Stat. 441."

This section of the federal law does not seem to have been amended in any material respect since 1914. It clearly governs proper distribution of 25 per cent of the annual income received from each national forest. Sec. 20.07, subsec. (10), statutes of Wisconsin, is not clear as to the proper method of distribution. Your prior construction was a possible construction. But when sec. 20.07 (10), statutes of Wisconsin, is read in connection with the federal law above quoted it seems clear that the apportionment contemplated by the state statute is that provided by the federal statute. There does not appear to be any room for argument with respect to proper construction of the federal statute. It requires apportionment with respect to *each* forest.

We conclude that your prior method of apportionment was wrong. We can see no reason why you should not undertake to correct your past error in the next or subsequent apportionments with a view of causing as little inconvenience or revenue problem to those counties who have been overpaid by past apportionments as is possible and consistent with a reasonable corrective apportionment period.

NSB

*Taxation — Tax Collection — Semiannual Payment of Taxes* — Under 1941 statutes embodying changes made by ch. 426, Laws 1933, taking effect October 1, 1941, municipality has option given by sec. 62.21, Stats., to return unpaid special assessments to county in March for credit or in trust.

September 17, 1942.

HOWARD MOSS,

*District Attorney,*

Janesville, Wisconsin.

You have asked whether, in view of the changes in the tax collection procedure made by ch. 426, Laws 1933 (commonly referred to as the Daug's law), taking effect on October 1, 1941, which are embodied in the 1941 statutes and applicable to the 1941 taxes collectible in 1942, a municipality can return delinquent special assessments to the county treasurer for credit or can only return them in trust.

The objective of the Daug's law was the adoption of a system of semiannual payment of real estate taxes, and the changes it made in the statutes were to effect the same by fitting it into the statutes and accommodating them thereto. That part of the previous scheme of distribution of tax collections on a priority basis which provided for such a distribution of the collections by the local treasurer and a final settlement between the local municipality and the county, at the time of the return of delinquent taxes to the county treasurer in March, would not lend itself to the operation of this semiannual payment plan, but would produce undesired results.

Under the statutes prior to the Daug's law taking effect, the local treasurer in March made a distribution among the interested governmental units, on a prescribed priority basis, of the general taxes he had collected, returned the tax roll and the delinquent taxes to the county treasurer, and settled with the county for the amount payable to it in respect to taxes in that roll. In such settlement the local treasurer received credit for the cash paid to the county and the delinquent taxes returned for credit, or for just the delinquent taxes returned for credit if no cash was paid as the

case might be. As the county would not participate in the distribution unless and until the other interested units were paid in full, any unpaid balance of the amount due the county would be received by it out of and as collections were made by it on the delinquent taxes. Where the delinquent taxes returned for credit were less than the amount due the county the difference would be paid in cash and that roll would be designated as a nonexcess roll, for all collections by the county treasurer on the delinquent taxes would belong to the county. But, if the total delinquent taxes returned for credit exceeded the amount payable to the county, then because the county would first satisfy the amount due it out of its collections of such taxes, and thereafter the collections thereof would be payable to the local municipality in payment of the excess, that roll would be called an excess roll.

But, if under the semiannual payment plan all of the taxpayers in a municipality, or even a substantial portion thereof where there was just a moderate amount of delinquency, by the payment of the required amount in January postponed the balance of their taxes to July, it would be fairly, and in the case of a large delinquency absolutely, certain that the county would receive no cash in the settlement in March on return of the tax roll. It was practically assured that every roll would be excess and probably grossly so. One of the considerations behind adoption of the semiannual payment plan was that it would tend to reduce delinquencies and thus relieve the financial position of the counties resulting from the predominance of excess rolls. Thus, such modifications were made in the statutes in respect to the distribution and the settlement in March as were made necessary by the adoption of the semiannual payment plan.

The provision for a priority distribution by the local treasurer at the time of the return of the tax roll and of delinquent taxes in March was changed to provide instead for a prorata distribution between the interested units of government by him at that time. Sec. 74.03, subsec. (5), Stats. 1941. Then a provision was inserted, sec. 74.03 (8), Stats. 1941, providing for a distribution in August by the county treasurer of the collections made by him up to and including

July, upon a priority basis that is substantially the same as the previously existing basis for the March distribution by the local treasurer. This August distribution thus includes and effects a distribution of the payment made of the second instalments that were not paid in January but postponed until July, and, theoretically, with the March prorata distribution accomplishes substantially the same result as if both instalments had instead been paid to the local treasurer before return of the tax roll and a distribution made thereof at that time on the priority basis.

This subsec. (8) also provides that if the unpaid taxes in the roll which are uncollected on July 31 exceed the balance due the county such excess shall not be paid to the local municipality out of collections until after the amount due the county has been fully satisfied out of future collections. While perforce of the fact that all rolls will at the time of the return thereof necessarily be excess rolls if there are any unpaid taxes returned, the previously existing differentiation between rolls as excess or nonexcess upon the basis of their status at the time of their return has been eliminated and no longer exists as to rolls returned under the provisions of the 1941 statutes, the same consequence arises, however, if on July 31 the unpaid taxes in the roll exceed the amount payable to the county from the total taxes in that roll. The roll although excess when returned may thus become a nonexcess roll if the amount of unpaid taxes on July 31 does not exceed the amount payable to the county at that time.

Under the previous statutes there was a settlement in March between the local municipality and the county through their respective treasurers in respect to the taxes in the roll, as the result of which the rights and liabilities in respect to the amounts collected and as to future collections were then determined. Whether the March settlement under the present statutes has the same finality and the August settlement is merely supplementary thereto, or the March settlement is a preliminary one and the August settlement has the same finality as the one in March previously had, is in our opinion not here material. Some support may be given to the view that the March distribution and return of unpaid taxes is a preliminary settlement and the final

settlement is postponed until and is the August settlement, by the fact that the provision previously in sec. 74.19 (1), which said the local treasurer should "be credited by the county treasurer" with the delinquent taxes returned, is no longer there and section 74.17 now says the "taxes included in the return shall be accepted by the county treasurer for collection pending settlement thereon as provided in subsection (8) of section 74.03." But, whatever may be the changes effected by the Daug's law in this respect, they arise, like the changes in reference to the basis of the March distribution, out of an accommodation of the provisions in the statutes to the operation of the semiannual payment plan.

Regardless of the above mentioned changes and the foregoing considerations thereof, the local treasurer is required to make return of the tax roll and the unpaid taxes in March the same as before, except in some minor respects that are unimportant to the question here considered. He includes the same unpaid taxes that he returns for credit that he always did and as before, except, of course, that sec. 74.17 now calls for the setting forth of the postponed real estate taxes and the delinquent real estate taxes separately in the return. So far as the local treasurer is concerned his personal accounting with the county treasurer is the same. He returns the unpaid taxes, including unpaid special assessments, for credit the same as before, regardless of whether the county receives them as a present credit or for credit upon the August distribution as the final settlement if they are unpaid on July 31.

Under secs. 62.20 and 62.21 unpaid special assessments are included in the tax roll, some of which can only be returned in trust and so are not included in the unpaid taxes returned for credit, while as to others the local municipality has an option whether to return them for credit or in trust. No change was made by the Daug's law in the provisions of secs. 62.20 and 62.21, Stats., or in any other statutes relating to the return of special assessments. Thus, the rights of a local municipality in respect to the return of unpaid special assessments under sec. 62.21 and the methods of returning them remain the same as previously. When the tax roll and the unpaid taxes are returned by the local treasurer in March the local municipality may then have those special

assessments in respect to which it has an option returned either in trust or for credit, and how they are returned at that time controls their treatment thereafter. If they are returned for credit then the collection made thereon by the county treasurer up to and during July, and the amount unpaid thereon on July 31, enter into the settlement by the county treasurer in August under sec. 74.03 (8), Stats. 1941.

To give the words "special assessments" in the provisions of sec. 74.03 (8) the effect and meaning of including all unpaid special assessments returned by the local municipality—those returned in trust as well as those returned for credit or in lieu of cash—would make them all returned for credit and result in an implied repeal of the provisions of sec. 62.21, Stats. giving a local municipality the option of returning them in trust. Such implied repeal must be avoided if possible by giving the provisions of both secs. 62.21 and 74.03 (8), Stats., effect without conflict, which can easily be done by restricting the words "special assessments" in sec. 74.03 (8) to only those returned for credit. In addition it seems clear that this was the intent of the legislature, for there is nothing in the Daugs law that in the slightest way indicates any intention to upset the existing scheme of returning unpaid special assessments. As before stated, the purpose of the Daugs law was to adopt the semi-annual payment plan and make only such changes in the statutes as related to adoption thereof and fitting it into the existing statutes. To give the words "special assessments" in sec. 74.03 (8) an all-inclusive application would throw the entire scheme out of joint.

It is therefore our opinion that under the provisions of the 1941 statutes a municipality has the right and option given by sec. 62.21, Stats., to return unpaid special assessments for credit or in trust the same as before the Daugs law went into effect.

HHP

*Insurance — Taxation* — Dividends received by domestic insurance companies on share certificates issued by federal savings and loan associations are to be included in gross income upon which license fee imposed by sec. 76.34, subsec. (1), Stats., is computed.

September 18, 1942.

MORVIN DUEL,

*Commissioner of Insurance.*

You have requested an opinion as to whether dividends on share certificates issued by federal savings and loan associations are to be included in the gross income upon which the license fee of domestic insurance companies is computed under sec. 76.34, subsec. (1), Stats.

Sec. 76.34, Stats., provides in part as follows:

“Every company, corporation or association transacting the business of life insurance within this state \* \* \* shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

“(1) If such company, corporation or association is organized under the laws of this state, it shall pay as a license fee \* \* \* three and one-half per centum upon its gross income from all sources for the year ending December thirty-first, next prior to said first day of March, excepting therefrom interest required to provide and maintain reserves according to the laws of this state, income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities.”

Gross income is by statute defined to include “all dividends derived from stocks” (sec. 71.02 (2) (b), Stats.). Therefore, unless there is an express exemption or an implied constitutional immunity from taxation with respect to such dividends, they must be included in the gross income upon which such said license fee is computed.

Federal savings and loan associations were created under the home owners loan act of 1933, as amended, to provide for local mutual thrift and home financing institutions

(12 USCA, sec. 1464 (a)). Subsec. (h) of the act (12 USCA, sec. 1464 (h)) provides in part as follows:

“\* \* \* no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income, greater than that imposed by such authority on similar local mutual or cooperative thrift and home financing institutions.”

This expressed partial exemption extends by its very terms only to the association, its property and income. This provision does not inhibit state taxation to a certificate holder of income from the share certificates of the association, *Comm'r of Corp.'ns and Tax'n v. Flaherty*, (1940) 306 Mass. 461, 28 N. E. (2) 433, cert. den. (1941) 312 U. S. 680, 85 L. ed. 1119, 61 S. Ct. 450, and so does not prohibit the inclusion in the measure of the tax imposed by sec. 76.34 (1), Stats., of the income of insurance companies from dividends on association share certificates held by them, unless, of course, such a tax amounts to a tax on the association itself. However, the theory, which once won a qualified approval, that a tax on income is legally and economically a tax on its source is no longer tenable. *Graves v. New York ex rel. O'Keefe*, (1939) 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595. Therefore, as the tax is on the insurance company, a share certificate holder, the said partial exemption is of no moment here.

Nor are the dividends in question exempt from state taxation, or from being used as a measure thereof, by reason of an implied constitutional immunity. It is fundamental that the doctrine of implied constitutional immunity from state taxation applies, if at all, to the federal government and its instrumentalities, and to the income therefrom. However, the federal savings and loan associations are private institutions and not instrumentalities of the United States government. *Texas Unemployment Compensation Commission v. Metropolitan Bldg., etc.*, (1940) 139 S. W. (2) 309, cert. den. (1940) 311 U. S. 701, 85 L. ed. 454, 61 S. Ct. 140.

But even if we were to assume, *arguendo*, that such associations were instrumentalities of the United States govern-

ment, still the doctrine of implied constitutional immunity from state taxation would not prevent the lawful taxation of the dividends received by the associations' share certificate holders, nor would it prohibit the inclusion of such dividends in the measure of an otherwise lawful tax. In *Northwestern Mutual Life Insurance Co. v. Wisconsin*, (1918) 247 U. S. 132, 62 L. ed. 132, 38 S. Ct. 444, it was held that the tax imposed by sec. 76.34 (1), Stats., was not invalid as casting a burden on interstate commerce, because the gross receipts from interstate business were only used as a measure of the value of a franchise lawfully taxable. However, in *Northwestern Mutual Life Insurance Co. v. Wisconsin*, (1927) 275 U. S. 136, 72 L. ed. 202, 48 S. Ct. 55, the said tax was held void in so far as it was measured by interest from United States bonds, because (1) United States bonds were absolutely immune from taxation, and (2) since *Gillespie v. Oklahoma*, (1922) 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171, it has been settled that where the principal is absolutely immune no valid tax can be laid upon the income therefrom, and (3) since the tax imposed was measured by gross income, and not net income, it amounted to a direct charge upon the interest income from the bonds and so to an imposition on the bonds themselves.

In recent years the United States supreme court has consistently restricted the boundaries of immunity enjoyed by one government against taxation by the other. In line therewith the court, in *Helvering v. Mountain Producers Corp.*, (1937) 303 U. S. 376, 387, 58 S. Ct. 623, 82 L. ed. 907, expressly overruled the *Gillespie* case, *supra*, and in a series of decisions has made it clear that the doctrine that a tax on income is a tax on its source no longer obtains. See *Graves v. New York ex rel. Keefe*, *supra*. Further, in so far as the implied constitutional immunity is concerned, the court is now of the view that whether a tax is laid upon gross receipts or net earnings is no longer a controlling distinction. *James v. Dravo Contracting Co.*, (1937) 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208; *Silas Mason Co. v. Tax Commission*, (1937) 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233.

Thus, we see that the doctrines relied upon by the court in the second *Northwestern Life* case no longer prevail. In their stead the court has adopted the following test as to

whether a tax on the income received by persons from United States instrumentalities is exempt from state taxation by reason of an implied constitutional immunity, viz., whether or not the tax causes an undue burden on the government such that it interferes with its essential governmental functions. *Helvering v. Mountain Producers Corp.*, *supra*; *Graves v. New York ex rel. Keefe*, *supra*.

Applying this test to recent cases, the court has sustained each of the following state impositions and has held that none of them cast a burden on the government tantamount to an unconstitutional interference with its functions: a tax on the gross receipts of an independent contractor from services rendered under a government contract, *James v. Dravo Contracting Co.*, *supra*; *Silas Mason Co. v. Tax Commission*, *supra*; a tax on the salary received by an attorney for the federal Home Owners' Loan Corporation, *Graves v. New York ex rel. O'Keefe*, *supra*; a tax on the salary received by an attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, *State Tax Commission v. Van Cott*, (1939) 306 U. S. 511, 83 L. ed. 950, 59 S. Ct. 605.

Applying this test instead of those employed in the second *Northwestern Life* case to the instant question, we cannot, in the light of the recent supreme court decisions, say that the tax imposed by sec. 76.34 (1), Stats., in so far as there is included in its measure the dividends on share certificates issued by federal savings and loan associations, is an unconstitutional exaction. It is a nondiscriminatory tax, measured by all gross income, save for certain specified exceptions, including dividends from all sources, and is imposed on all domestic insurance companies alike. It is not in form and, as already shown, it is not in substance a tax on the association or its property or income, nor is it paid by the association or the government from its funds. It is measured by income which has become the property of the tax-paying insurance company, and it is paid from its private funds. And there does not appear to be any basis for assuming that the economic burden of the tax, as applied to and measured by such dividends, is passed on to the government or the association so as to impose a burden on either tantamount to an unconstitutional interference with the function

of either. For these reasons, which were substantially those upon which the court predicated its holding in *Graves v. New York ex rel. O'Keefe, supra*, it is our opinion that the inclusion of such dividends in the measure of the tax imposed by sec. 76.34 (1), Stats., is constitutional.

In so holding we do not intend to overrule the second *Northwestern Life* case in so far as it holds that the income from government bonds cannot be taxed, or used in the measure of a tax. Whether the supreme court will go that far is at present conjectural. There is some suggestion in *James v. Dravo Contracting Co., supra*, that it will not, for at page 153 (302 U. S.) the court said that the doctrine of immunity with respect to government bonds involves vital considerations respecting the government's relations to investors and the government's ability to maintain its credit, which considerations are not involved in connection with contracts made for the services of independent contractors. What the supreme court will do with the question, by applying the new test with respect to implied constitutional immunity, only time will tell.

You are therefore advised that the dividends on share certificates issued by federal savings and loan associations are to be included in the gross income upon which the tax imposed by sec. 76.34 (1) is computed.

MLS

*Public Officers — State Registrar of Vital Statistics — Register of Deeds — Vital Statistics* — State registrar of vital statistics does not have to certify to county treasurers fees which registers of deeds are entitled to for filing certificates of births, deaths and marriages.

Register of deeds is not entitled, in addition to fee provided by subsec. (11b), sec. 59.57, Stats., for registering birth, death and marriage certificates, to fee for subsequent corrections to such certificates so registered.

October 7, 1942.

PAUL WEIS, *Acting Director,*  
*Bureau of Vital Statistics,*  
*State Board of Health.*

You have asked for our advice on several questions relating to chapter 69, Stats.

First, you inquire whether it is incumbent on the state registrar of vital statistics to certify to the treasurers of the several counties the fees which registers of deeds are entitled to for filing certificates of births, deaths and marriages.

Ch. 69, Stats., contains several provisions respecting the duty of the state registrar to certify to the county treasurer certain fees payable to certain persons. Under sec. 69.53 (6), Stats., it is the duty of the state registrar to annually certify to the treasurers of the several counties the number of births, deaths and marriages registered with it by local registrars, together with the names of such local registrars and the amounts due each therefor at the rates fixed in sec. 69.53, Stats. Further, under sec. 69.54 (4), Stats., it is the duty of the state registrar to certify to the treasurers of the several counties the number of births, deaths, marriages and accidents registered with local registrars by informants, together with the names of such informants and the amounts due each at the rate fixed therefor in sec. 69.54 (1), Stats.

However, nowhere in ch. 69, nor elsewhere, is there any duty imposed upon the state registrar to certify to the treasurers of the several counties the fees which registers of deeds are entitled to for filing such certificates. The pow-

ers and duties of public officers are purely statutory, and none exist save for those expressly created by legislative enactment, or those which by implication are necessary to the due and efficient exercise of those expressly granted. 46 C. J. 1031-2; *State v. Roden*, (1935) 219 Wis. 132, 262 N. W. 629; *Kasik v. Janssen*, (1914) 158 Wis. 606, 149 N. W. 398. No express duty has been imposed upon the state registrar in the respect in question, and there does not appear to be any express power or duty from which it can be implied that there exists a power or duty to make such a certification. The answer to your first question is therefore in the negative.

Second, you inquire whether the register of deeds is entitled to a fee, in addition to or separate from the "filing" fee, for subsequent corrections of the birth, death and marriage certificates after they have been filed by him.

Sec. 69.56, Stats., enacted by ch. 188, Laws 1909, provided in part as follows:

"(3) Such register of deeds shall receive from the county a fee of ten cents for the filing, indexing and correcting of each certificate so filed and indexed by him."

However, subsec. (11b) of sec. 59.57, created by ch. 334, Laws 1929, and as amended by ch. 288, Laws 1931, and ch. 312, Laws 1941, provides that the register of deeds shall receive the following fee:

"For registering any marriage, birth or death certificate, when recorded into regular bound volumes, or filed in special filing cases, securely locked, 20 cents, otherwise 10 cents, to be paid by the county.

In XXIV Op. Atty. Gen. 335 we ruled that the later enactment of subsec. (11b) of sec. 59.57, Stats., which treated of the same subject as did subsec. (3) of sec. 69.56, Stats., was tantamount to an implied repeal of said sec. 69.56 (3), Stats., and that therefore the fee of register of deeds for filing and registering marriage, birth and death certificates is to be determined by sec. 59.57 (11b), Stats., rather than sec. 69.56 (3), Stats.

Before the enactment of sec. 59.57 (11b), Stats., the register of deeds was not entitled to a separate fee for correcting certificates filed by him. Sec. 69.56 (3), Stats., provided that he shall receive "a fee of ten cents for the filing, indexing and correcting." The conjunctive word "and" joins the words filing, indexing and correcting into one continuation, the whole of which is prefaced by the phrase "a fee of ten cents for." This indicates that the legislature intended to provide but one fee of ten cents for the entire process consisting of filing, indexing and correcting birth, death and marriage certificates. Had it intended otherwise, it could easily so have provided.

Inasmuch as the fee provided in sec. 69.56 (3), Stats., was for the entire process of filing, indexing and correcting certificates, an implied repeal with respect to any inseparable part of the whole process effects a repeal of the whole thereof. The "correcting" phase of sec. 69.56 (3), Stats., being inseparable from the whole of the process to which it relates, as has been shown above, and the "filing" phase thereof having been impliedly repealed by the enactment of subsec. (11b) of sec. 59.57, Stats., it follows that the whole of subsec. (3) of sec. 69.56, Stats., has been repealed by implication by said enactment. Therefore, in legal contemplation, said subsec. (3) of sec. 69.56, Stats., is no longer in effect. The superseding provisions of subsec. (11b) of sec. 59.57, Stats., contain nothing with respect to a fee for correcting such certificates. It is well established that a public officer is entitled to no fees except those specifically provided for by statute. *McCumber v. Waukesha County* (1895) 91 Wis. 442, 65 N. W. 51; *Outagamie County v. Zuehlke*, (1917) 165 Wis. 32, 161 N. W. 6. There being no effective statutory provision providing a fee for such corrections, the answer to your second question must be, No.

MLS

*Appropriations and Expenditures* — Conservation commission, with approval of governor, may purchase forest land within region designated by sec. 20.20, subsec. (14), par. (a), Stats., notwithstanding that no map indicating proposed purchases has been prepared and notwithstanding that purchase might lie without boundaries of any map which might have been prepared.

October 8, 1942.

DIVISION OF DEPARTMENTAL RESEARCH.

Attention August Frey, *Director*.

You have requested that we advise you with respect to the construction of sec. 20.20, subsec. (14), par. (a), Wis. Stats., which reads as follows:

“20.20 State conservation commission. All moneys in the conservation fund are appropriated to the state conservation commission \* \* \* subject to the following allotments and such others as may be made from time to time by law:

“\* \* \*

“(14) \* \* \*

“(a) \$75,000 annually to be used to acquire and develop state forest lands within areas approved by the conservation commission and the governor and located within the region composed of Manitowoc, Calumet, Winnebago, Sheboygan, Fond du Lac, Ozaukee, Washington, Dodge, Milwaukee, Waukesha, Jefferson, Racine, Kenosha, Walworth, Rock and Outagamie counties.”

You inquire as to whether the conservation commission and the governor are required to approve areas within the designated region and as to whether lands may be purchased by the commission with the consent of the governor within the designated region notwithstanding that the commission with or without the governor's approval has established a proposed boundary within which purchases are to be made and the contemplated purchase lies without such boundary.

The language of the subsection specifically requires that purchases shall be “within areas approved by the conservation commission and the governor”. It is not subject to two

constructions and you are advised that the governor must approve areas in which lands are to be acquired. On the other hand, as we view the statute, approval by the governor of a recommended purchase within the region designated by the legislature would amount to the establishment of an area co-extensive with the land included within the purchase. There is no requirement that the commission either with or without the consent or approval of the governor shall establish boundaries within which purchases are to be made. The only boundaries contemplated by the law are those which the legislature has established. Within those boundaries the commission, with the approval of the governor, may acquire lands. When such lands are acquired, they necessarily are located within areas approved by the governor and the commission.

Even if the commission with or without the consent of the governor may have established boundaries for contemplated purchases, it has the same right to change those boundaries at any time as it had to establish them in the first instance, and the right to change them would necessarily include the right to change them by purchasing lands lying without the boundaries.

You are advised, therefore, that any lands purchased by the commission within the region designated by the legislature are within the law if the purchase is made subject to the approval of the governor.

JWR

*Social Security Act — Poor Relief — Old-age Assistance*  
— Term “income” is used in sec. 49.21 of old-age assistance law in sense of “means of support”. It includes veterans’ pensions, income from rental of part of one’s home, and money furnished by relatives for support.

October 8, 1942.

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

You ask three questions relating to the amount of old-age assistance which may be granted to an individual who receives some money from other sources. The questions all involve the interpretation of the following provisions in sec. 49.21, Stats.:

“\* \* \* The amount of such old-age assistance shall be fixed with due regard to the conditions in each case, but in no case shall it be an amount which, when added to the income of the applicant, including income from property, as computed under the terms of this act, shall exceed a total of forty dollars a month.”

*Question 1.* “Recipient receives \$25.00 per month from a veteran’s pension. Continuous need for medical service and nursing care bring the total budgetary need in excess of \$40.00. May the county pension department institute a grant in excess of \$15.00 per month? \* \* \*”

The answer is no. If the \$25.00 per month received from a veteran’s pension constitutes “income” within the meaning of sec. 49.21, Stats., the old-age assistance grant must be limited to \$15.00 per month. The fact that such limitation will make it necessary for the beneficiary to apply for relief for medical purposes can not have the effect of creating an exception to the statutory restrictions if the legislature has provided none. Circumstances which might have a bearing upon the wisdom of a statute are for the consideration of the legislature rather than of the officials charged with the administration of the law.

It has been stated in XXV Op. Atty. Gen. 250 and XXIV Op. Atty. Gen. 461 that the term “income” as used by the

legislature in sec. 49.21 is synonymous with "means of support." In XXVIII Op. Atty. Gen. 232 the definition was amplified to "means of support derived from any source." The last opinion expressly ruled that the term income covers such items as pensions from municipal police and fire departments, pensions paid to retired postal employees, and payments to a widow under war risk insurance contracts held by a husband.

The case of *Passaic Nat. Bank & Trust Co. v. Eelman*, (N. J.) 183 A. 677, 681, held that the pension paid to a retired policeman is "clearly 'income' ". Among other things, the court said, p. 679:

"A public pension, while not contractual in nature, is of kin to wages and salaries, in that it is payable in stated installments for the maintenance of the servant after his productive years have ended, and is basically a recompense for past services. It is fairly within the generic statutory class of income payable periodically to the judgment debtor.  
\* \* \*"

It seems clear that a pension received by an applicant for old-age assistance is a "means of support", and that it constitutes income within the meaning of sec. 49.21.

*Question 2.* "Continuous need for medical services bring the total budgetary need to \$52.00. The client receives \$12.00 per month income from the rental of a portion of her home. The full expense of taxes, insurance, and upkeep of the home are included on the expense side of the budget, and are approximately equal to the value of the rent received. Though the client resides in the lower portion of the house, can the items of cost in maintaining the home be offset in full against the amount of rent received so as to show no net income from rent, thereby establishing the OAA grant within the limitations of section 49.21?"

The answer is no. The language in XXIV Op. Atty. Gen. 461 indicated that the term "income" as used in sec. 49.21 referred to gross income. If that opinion were followed strictly the maximum old-age assistance grant in the case you describe would be limited to \$28.00 per month. The opinion in XXV Op. Atty. Gen. 250, however, modified or explained the language of the prior opinion, ruling that the

term "income" means gross income only when all of the gross income is available as means of support. In the latter opinion an example is given which is similar to the situation you have described. The following excerpt is from page 251 of Vol. XXV Op. Atty. Gen. 250:

"A person owns a two-flat building and lives in one flat thereof. He has no income excepting a rental of \$50.00 per month from the second flat. After payment of the expenses necessary in operating the building, such as taxes and insurance, there remains for the owner only \$10.00 per month. The administrative agency may allow assistance, but in determining the allowance the fact that the owner has a place of shelter should be considered."

In the case which you have described the \$12.00 per month received by the applicant is gross income. Such portion of the income as may be proportionately attributable to the maintenance of the part of the house on which the rental is paid might be deducted, since that portion of the income cannot be said to be available to the beneficiary as a means of support. The balance of the rental, however, is income within the meaning of sec. 49.21 since it is available for the support of the applicant. The fact that such portion of the income is applied against the cost of maintaining living quarters for the applicant does not remove it from the income classification, since lodging is an element of support.

*Question 3.* "Continuous need for extensive medical service and nursing care bring the total budgetary deficiency (estimate of needs) to \$50.00. The county pension department has instituted a grant of \$30.00 per month and two brothers of the client have contributed \$10.00 per month toward her care. The brothers have indicated that they will not contribute in the event the pension department reduces the grant below its present level. \* \* \*"

Sec. 49.11 of the Wisconsin statutes imposes upon certain relatives a legal obligation to maintain a poor person who, because of age, is unable to maintain himself. Such obligation, however, is not extended to persons bearing the relationship of brother or sister. As we understand it there is no contract or other circumstance in the case you report out of which enforceable liability arises against the brothers.

The cases of *Moore v. State Social Security Comm.*, 122 S. W. (2d) 391, 394, 233 Mo. App. 536 and *Price v. State Social Secur. Comm.*, 121 S. W. (2d) 298, 303, 232 Mo. App. 721 have held that donations by persons under no legal liability to the donee are not to be included within the income of the donee within the meaning of a provision of the old-age assistance law to the effect that the amount to be paid a beneficiary shall, "added to all other income and support", be sufficient to provide the recipient with a reasonable subsistence compatible with dencency and health.

In 1939, after the decisions in the above cited cases, the Missouri legislature amended the old-age assistance law so as to include within the purview of the statute all income or resources "whether such income or resources is received from some other person or persons, gifts or otherwise." See *Howlett v. Social Security Comm.*, (Mo. App.) 149 S. W. (2d) 806, and *Buettner v. Social Security Comm.*, (Mo. App.) 144 S. W. (2d) 864. By reason of such express enactment gifts made periodically have been regarded in Missouri, since 1939, as income within the meaning of the old-age assistance law.

In *Conant v. State*, 197 Wash. 21, 84 P. (2d) 378, the court held that one who "was supplied with the necessities of life (food, lodging and clothing) by her son-in-law and daughter" who were "willing and financially able to take care of her" had no income of her own, as that term was used in the Washington old-age assistance law. The court said, p. 29:

"The respondent has neither resources nor income and satisfies all of the other conditions of the statute; therefore, she is *in need*. She is so completely destitute as to require assistance, within the meaning of the old-age assistance statute. The fact that some kindly disposed stranger, or that some charitably motivated relative, is willing and financially able to pay for the clothing, lodging, and food of the respondent in no wise absolves the state of its duty or relieves it of its obligation to grant to her old-age assistance in a sum not less than thirty dollars monthly. If respondent were compelled to beg from door to door, or if she were dependent on some one of the many charitable associations for support, her *need* would be no greater than if compelled, as she now is, to accept the necessary relief of food, lodging, and

clothing gratuitously bestowed on her by a son-in-law and daughter (relatives who are not legally liable or responsible for her care)."

Other courts, however, have reached a different result. In *Wood v. Waggoner*, (S. D.) 293 N. W. 188, it was held that under the South Dakota old-age assistance law an applicant is not entitled to assistance if he is receiving voluntary support from a third person. The law there involved provides that assistance "when added to all income and support of the recipient" shall be sufficient to provide sustenance compatible with decency and health.

In *State v. Borge*, (N. D.) 283 N. W. 521, the court held that the term "income" as used in the law of that state includes all sources of livelihood. The court said, p. 526:

"\* \* \* Was it the intention of those enacting the amendment to omit from consideration in determining the need of the applicant any support which he or she might receive through donations or contributions, voluntary or otherwise, which the applicant might receive from relatives responsible under the law for the support of the applicant, or from other sources. It may be argued that income is not synonymous with support; that the former deals with gain resulting from capital or labor such as wages, salary, interest, profit, and rent, while the latter embraces anything that furnishes a means of livelihood. Cases dealing with the definition of income as used in connection with income tax statutes are of no assistance in construing this language, for the Old Age Assistance Act deals with an entirely different subject than the income tax statutes. Clearly it would be absurd to hold that under the Old Age Assistance Act sums received from annuities paid from capital, alimony and gifts or bequests received through wills or trusts would not be considered as income of an applicant, although these items are usually not considered as income of the recipient under the tax statutes."

The New York court held in *Bergman v. Buechler*, 292 N. Y. S. 882, 249 App. Div. 553, that weekly contributions received from relatives constituted income within the meaning of a law relating to the enforcement of judgments.

None of the cases cited can be regarded as conclusive authority in the interpretation of the term "income" as used in sec. 49.21, Wisconsin statutes. As stated in *Price v. State Social Security Comm.*, *supra*, (p. 303):

“In construing this section, it of necessity requires the construction or meaning of the words income and resources. Both sides have submitted many definitions of these words. The words have different meanings when used in various sentences in connection with different businesses, or in describing the condition of the national government or the various states making up our national government. We have found that the true and correct meaning in all instances must be determined from the particular instrument in which the words are used, and in relation to the subject discussed. The word income may be given a meaning when used in connection with one subject, and have an entirely different meaning when used in connection with another subject.  
\* \* \*”

From the cited cases, it is apparent that the term may be given different meanings even in statutes dealing with the same subject.

Since different courts have arrived at different results in the interpretation of statutes similar to the one here involved, and since the supreme court of Wisconsin has not had occasion to pass upon the question, we cannot state with absolute certainty that the provision of sec. 49.21 limiting the income of a person receiving old-age assistance to \$40.00 per month includes gifts within its scope, or that it does not do so.

We can try only to ascertain the legislative intent by reading the provision in connection with other parts of the law. The first sentence of sec. 49.21 reads:

“Any person who shall comply with the provisions of sections 49.20 to 49.39, *shall be entitled* to financial assistance in old age. \* \* \*”

Accordingly, if we construe the term “income” as excluding gifts, a person meeting the other conditions might demand assistance even while receiving gifts which were more than ample to provide for his maintenance. While the amount of the gifts involved in your question is only \$20.00 per month, the same principles with respect to construction of the law would apply if the gift were \$100.00 per month. We do not believe it was the intent of the legislature to give a right to public assistance to an individual who is also receiving voluntary contributions adequate to supply his

needs. The same reasoning was followed in the case of *Wood v. Waggoner, supra*, where it was stated that while the term "income" does not include gifts in ordinary usage the term, when used in connection with old-age assistance, must be read in the light of the general purpose of the law. The court there said, (p. 191) :

"\* \* \* Obviously, no amount is required to provide subsistence of the character described for one already receiving such subsistence through voluntary support. A grant to such a one could have no place in a program of relief to the needy, and such an interpretation would clearly outreach the revealed intention and spirit of the act. \* \* \*"

The cases holding that support by a relative does not constitute income arrive at that result on the ground that there is no legal liability on the part of the relative to furnish the support, and that if he does so it is in the nature of a voluntary contribution. Under such theory, there would be no question that support furnished by a relative legally liable therefor would constitute income. If, as has been pointed out in previous opinions, the term "income" is used in the Wisconsin statute in the sense of "means of support", it would matter little in practical effect whether the support came from a son who is liable therefor under sec. 49.11, Stats., or from a son-in-law, who is not. It seems unlikely that the legislature intended that a person receiving \$40.00 per month from a brother might receive an additional \$40.00 per month in old-age assistance, while one receiving the same amount from a son could not.

Accordingly, we believe that where contributions, even though voluntary in character, are repeated with sufficient regularity so that an applicant may rely upon them to furnish a means of support, they should be considered as a part of such applicant's income within the meaning of sec. 49.21. Under this interpretation, one who is receiving contributions of \$20.00 per month may receive no more than \$20.00 per month in the form of old-age assistance.

In view of the legislative exception in sec. 49.31 of medical and surgical care from the limitations on old-age assistance we express no opinion as to whether donations limited to such services should be considered as income within the meaning of sec. 49.21.

Neither does this opinion cover the case where an applicant desires to forego contributions from other sources, and to procure old-age assistance instead.

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*Taxation — Tax Collection* — Resolution of county board instructing county treasurer regarding to whom he shall sell tax certificates does not make county exclusive purchaser at tax sale under sec. 74.44, subsec. (1), Stats.

October 16, 1942.

CONNOR HANSEN,  
*District Attorney,*  
Eau Claire, Wisconsin.

On November 15, 1940, the county board of your county adopted the following resolution:

“WHEREAS, Eau Claire county is now in good financial condition and

“WHEREAS, outside companies have come to Eau Claire county and purchased the choice tax certificates, and

“WHEREAS, the sale of these certificates has increased the county bank balance on which the county is paying insurance.

“THEREFORE, Be It Resolved by the county board of supervisors of Eau Claire county, Wisconsin that the county treasurer be and he is hereby instructed not to sell any tax certificates only to those who hold prior certificates and to those who hold a mortgage interest on certain lands.

“Be It Further Resolved that a copy of this resolution be given to the county treasurer of Eau Claire county.”

In your request for an opinion as to the validity and effect of the resolution you state that it was not drafted by you and is still in force. Your particular concern is as to the validity of the limitation as to the sale of tax certificates to the holders of prior certificates or mortgage interest and

whether, if it is invalid, only the language in respect thereto is of no effect so that the remainder of the resolution is effective as a direction under sec. 74.44, subsec. (1), Wis. Stats., that the county treasurer shall be the exclusive bidder and purchaser at the tax sale, or the entire resolution is invalid because it is not severable.

At the very outset this resolution cannot be effective to make the county the exclusive purchaser at the annual tax sale as provided in sec. 74.44 (1), Wis. Stats., because it does not cover that matter. All that its language attempts to do is instruct the county treasurer regarding to whom he shall sell tax certificates. The annual tax sale is not a sale of tax certificates. It is a sale of the lands themselves upon which taxes are delinquent to the persons who offer to pay the unpaid taxes, interest and charges for the least quantity of each tract. Sec. 74.40, Wis. Stats. A tax certificate is a written document issued to the purchaser of lands at a tax sale evidencing that the person named in the certificate purchased the land described therein at tax sale and will be entitled to a tax deed thereto unless the certificate is redeemed within the time and as prescribed by the statute. Sec. 74.46, Wis. Stats. Bidding for and becoming the purchaser of land at tax sale is one thing. Sale of a tax certificate by the holder thereof after its issuance is something wholly different. Accordingly this resolution cannot be construed as an authorization or direction to the county treasurer to bid in and purchase lands at tax sales, and certainly not a direction to become the exclusive purchaser of lands sold at tax sale as provided for in sec. 74.44 (1), Wis. Stats.

But, even if it were possible, which it is not, to construe this resolution as purportedly adopted pursuant to sec. 74.44 (1), Wis. Stats., and as directing the county treasurer to bid in and become the exclusive purchaser of all lands sold at tax sale excepting lands bid in by the holders of prior tax certificates or mortgage thereon, it would be invalid. XXIV Op. Atty. Gen. 119.

This resolution was, however, an attempt to exercise the power of the county board in respect to the sale of county-owned tax certificates conferred by secs. 75.34 and 75.35, Wis. Stats. In a recent opinion to the district attorney of Sawyer county, we held that a similar resolution is invalid. XXXI Op. Atty. Gen. 289.

In addition, it is our conclusion that the language of this resolution is so confusing that it is impossible to determine what is meant and therefore the resolution is invalid for uncertainty. It says that the county treasurer is instructed "not to sell any tax certificates *only* to those who hold prior certificates and to those who hold a mortgage interest on certain lands." Does this language mean that the county treasurer is *not* to sell county-owned tax certificates to the holders of prior certificates or of a mortgage on the land described in the certificate, and, therefore, he can sell them to all other persons? Or, is this language to be read as instructing him to refrain from selling county-owned tax certificates solely to the holders of prior certificates or of a mortgage on the land described in the certificate, and to sell county-owned tax certificates to everybody? Possibly what was meant was that the county treasurer should limit the sale of county-owned tax certificates to those who hold prior certificates or a mortgage on the land described in the certificate, but that is not what the resolution says. But, regardless of which one of the above meanings was intended, the resolution would still be invalid under our recent opinion previously referred to.

HHP

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*Social Security Act — Poor Relief — Taxation — Tax Collection — Sec. 49.37, subsec. (4), Stats. 1939, does not change order of priorities for distribution of tax collections under sec. 74.15 (2), Stats. 1939.*

October 29, 1942.

JOHN OLTMAN,

*District Attorney,*

Shell Lake, Wisconsin.

You have asked our opinion as to the priority or order of payment of the old-age assistance tax of sec. 49.37, subsec. (4), Stats., in the March distribution of tax collections by the local treasurer pursuant to sec. 74.15, Stats. 1939.

Sec. 74.15 (2), Stats. 1939, since repealed by ch. 426, Laws 1933, taking effect on October 1, 1941, but which remained the same since prior to the enactment of the old-age assistance law by ch. 121, Laws 1925, except for the insertion of the words "then the equalization tax levied by the county for school purposes" by ch. 41, Laws 1931, provided:

"(2) Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, then the equalization tax levied by the county for school purposes, and shall then set aside all sums of money levied for school taxes, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then taxes for the payment of principal and interest on the public debt, then taxes for bridge purposes, then for fire purposes, then for streets and other public improvements, and lastly county taxes. \* \* \*"

The provisions of sec. 49.37 (4), Stats., as they have existed since ch. 458 Laws 1933, except for renumbering, are:

"(4) The county clerk shall charge the amount so determined to such city, town or village and shall certify the same to the city, town or village clerk. Each city, town or village shall annually levy a tax sufficient to meet such charges, and shall pay over to the county the amount so certified as hereinafter provided. Such tax shall be deemed a county special tax for tax settlement purposes but the town, city or village shall pay over to the county on or before the twenty-second day of March in each year the percentage of such tax actually collected, which percentage shall be determined by applying the ratio of collection of the entire tax roll of such town, city or village excepting special assessments and taxes levied pursuant to section 59.96 of the statutes to the amount of such county special tax so certified and levied. \* \* \*"

Leaving out of consideration this tax of sec. 49.37 (4), upon the basis of our opinions in XXII Op. Atty. Gen. 290 and 507 the order of priorities under sec. 74.15 (2) and related statutes for the March distribution was:

1. State taxes
2. State trust fund loan payments
3. State special charges

4. County school tax
5. Local school taxes
6. Town, village or city taxes
7. Other county taxes and county special charges.

As you point out, if sec. 49.37 (4) just said that the tax levied thereunder "shall be deemed a county special tax for tax settlement purposes," and stopped there, it would clearly place this tax in Number 7, along with other county taxes and county special charges. However, the section continues "but the town, city or village shall pay over to the county on or before the twenty-second day of March in each year the percentage of such tax actually collected" and then proceeds to specify that such percentage shall be determined by applying to such tax the ratio of the tax collections to the total in the tax roll. This last quoted portion would appear to be in conflict with the above quoted language preceding it and also with the provisions of sec. 74.15 (2).

Of course, under the rule that the more recent enactment takes precedence where there is an irreconcilable conflict, sec. 49.37 (4) would be controlling if its provisions cannot be harmonized with sec. 74.15 (2). But that would not solve the difficulty for there would still remain an internal conflict in the provisions of sec. 49.37 (4) itself. Applied literally the language that the tax "shall be deemed a county special tax for tax settlement purposes" would fit the tax into the distribution scheme set out by sec. 74.15 (2). This would reach, however, a result inconsistent with the literal effect of the subsequent language that the local municipality shall pay over the "percentage of such tax actually collected." Where an insufficient amount was collected to pay Items 1 to 6 in full there would be nothing left to apply under sec. 74.15 (2) to this old-age assistance tax as included in Item 7, yet under the percentage formula provision would require payment of a part of the tax.

The law does not favor conflicts and the resultant implied repeals. So it is the rule that if statutory provisions which appear to conflict are susceptible of any reasonable meaning that harmonizes them, they will be given that construction which reconciles them and avoids a conflict. There being ambiguity in sec. 49.37 (4), the objective must be to determine what the legislature intended to do by the amendment in 1933 and interpret the statute accordingly.

You suggest as a possible interpretation of sec. 49.37 (4), so as to give full force and effect to the provision that the local treasurer shall pay the percentage of the tax actually collected, that the local treasurer shall first set aside out of the total collections and pay over the percentage of this old-age assistance tax, determined by the use of the formula set forth. Then the remainder of the collections would be distributable as far as it would go in the order of priorities as above. If, after deducting the percentage of this tax and paying Items 1 to 6 in full, there still should be moneys left over, then the balance of this old-age assistance tax would share therein along with the other taxes and special charges included in Item 7. There is some force therein as giving effect to the language requiring the percentage payment and as also treating this tax as a special county tax in the distribution as to the balance.

Where the total collections amount to more than enough to pay out Items 1 to 6 in full such interpretation would give effect to both provisions. But where the collections were not sufficient to pay those items in full then this construction would give effect only to the provision for paying over the percentage of the tax actually collected. In construing a statute every word used should be given effect if possible and interpreted in the light of the situation that the legislature was attempting to meet. The ambiguity in sec. 49.37 (4) must be approached upon this basis.

The pattern of the old-age assistance system as first enacted by ch. 121, Laws 1925, and still existing in the statutes, in general is that it shall be administered by the county with the state paying one-third thereof and each local municipality reimbursing the county for the remaining two-thirds of the amounts paid out to its residents. From its inception the law has provided that the amount so chargeable to each municipality should be determined and certified to it by the county and that the local municipality should then annually levy a tax sufficient therefor. The statute which ultimately became what is now sec. 49.37 (4) prior to the enactment of ch. 458, Laws 1933, provided that such tax "shall be collected as are other taxes and paid into the county treasury." As a result during the early years of the depression in which tax delinquencies were large there was a

predominance of excess rolls. The levies by the local municipalities, being in Item 6 in the order of priorities, absorbed all the cash collections in a great number of instances and the county received no cash but only a return of delinquent taxes. The local municipality kept any cash there was for its own purposes, the county got no cash, and yet the county had to make cash payment of old-age assistance which really was an obligation of the local municipality. This meant that, even though the payment of old-age assistance was not a matter of county finance but purely one of the local municipality, the county had to provide funds to make old-age assistance cash payments for the local municipality which had kept any cash there was collected. It was to meet this situation that ch. 458, Laws 1933, was enacted.

Read in the light of the foregoing, sec. 49.37 (4) provides that this old-age assistance tax shall be treated as a county special tax in the March distribution of tax collections the same as previously but that, as between the county and the local municipality, the latter shall not retain cash for its share in the distribution of collections and return the delinquent taxes in settlement for all the county taxes and special charges in the tax roll, but that out of the cash available for retention by the local municipality there shall be paid to the county in cash not less than the percentage of the old-age assistance tax determined by the formula as actually collected. In other words, the local municipality is not permitted to retain cash for its taxes in the roll that are expendible by it for local purposes and at the same time make no payment in cash to the county in reimbursement for the amounts previously expended by the county for old-age assistance to residents of the municipality, which under the statutory scheme is likewise a burden or obligation on the local municipality and an expenditure for local purposes that would have been payable by the local municipality out of its own funds except for the advance thereof by the county for its account under the statutory arrangement. Instead the local municipality shall pay to the county in cash the percentage of the old-age assistance tax.

This amendment did not modify the order of priorities; but reduced the amount of cash collections available for application to the local levies to the extent of the cash required for payment of the prescribed percentage of this spe-

cial tax and reduced the balance due the county for special charges against which the local municipality could return delinquent taxes for credit, where there was sufficient cash available to the local municipality to pay such percentage. Where enough cash was left over after paying Items 1 to 6 to cover this required percentage collection, it made no change or difference in the amount of cash retained by the local municipality. But where no cash was available for application to the taxes in Item 7 or the amount thereof was not sufficient to pay this percentage of the old-age assistance tax then the local municipality retained less cash on the taxes in Item 6 to the extent necessary for payment of this percentage collection.

This interpretation of sec. 49.37 (4) harmonizes all of its provisions and it gives an effect thereto which meets the problem to which its enactment was directed and limits its effect and scope to that objective. In our opinion this is the intended application of sec. 49.37 (4). We are re-enforced in that conclusion by the fact that under date of March 5, 1934, the Wisconsin tax commission issued a memorandum to the county treasurers in reference to this section, in which it was stated as follows:

"For example, it is assumed that \$500.00 was included in the county clerk's apportionment for old-age pensions against the Town of X. The entire tax roll of the town for 1933, exclusive of special assessments and metropolitan sewerage taxes, totaled \$10,000.00 on which the town treasurer has collected \$6,000.00. Under this situation, the town treasurer is required to pay six-tenths of \$500.00 or \$300.00 to the county treasurer in cash at the settlement on March 22. The balance of the \$200.00 due on old-age pensions may be paid with delinquent taxes in the same way that delinquent taxes are returned for credit on other county taxes. There will, of course, be no cash available for payment on the old-age pension charge unless the local treasurer has collected enough on the tax roll to pay the state taxes, county school tax and local school levies in full."

This is an administrative interpretation by the state department which has supervision over these matters, made practically contemporaneously with the enactment of the amendment. Four legislatures have met since that time without taking any action indicating that this statute

is to be otherwise interpreted. This constitutes legislative acquiescence in the fact that this was a correct interpretation of the legislative intent in the enactment of such statute.

HHP

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*Corporations — Articles of Incorporation* — Under existing statutes corporation may, by vote of three-fourths of its common and of three-fourths of its preferred stock, amend its articles so as to accomplish following results provided amendment is not made to defraud minority:

(1) Reduce par value of preferred stock issue from \$100 to \$25 per share;

(2) Eliminate preferred stock issue, giving holders debentures instead;

(3) Eliminate obligation of accrued dividends which have not been declared.

October 31, 1942.

DEPARTMENT OF SECURITIES.

Attention Vern G. Zeller, *Director*.

You inquire whether the provisions of sec. 189.13, Stats., which direct the department of securities to register securities upon certain conditions, including the condition that the articles of corporation shall not be "contrary to law or unfair, inequitable or fraudulent", would prevent registration under the following circumstances: three-fourths, but not all, of both the common and preferred stock of a corporation is voted: (1) to reduce the par value of preferred stock from \$100 to \$25 per share in order to eliminate a deficit; (2) to eliminate a preferred stock issue giving the holders thereof debentures instead; (3) to eliminate the obligation as to accrued cumulative dividends on a preferred stock issue.

The relationship between a corporation and its stockholders, and between one stockholder and another, is contract-

ual. Rights of a stockholder under such a contract cannot be impaired without his consent. 18 C. J. S. 1147, sec. 477. The contract, however, includes not only the provisions of the corporate charter and by-laws, but those of the general statutes and law in existence at the time of the issuance of the stock. The rule is well stated in the following excerpt from *Peters v. United States Mortgage Co.*, 13 Del. Ch. 11, 14, 114 Atl. 598:

“A corporation, in the sale and issuance of its stock, assumes a contractual relation to the shareholder. For the terms of the contract, the rights of the stockholder and the obligations of the corporation, reference is to be made to the appropriate provisions of the certificate of incorporation and the law of the sovereign conferring the corporate franchise. Unless there be some provision in either the law or the corporate certificate reserving the power to do so, there can be no alteration in the terms of the contract under which the shareholder, as such, possesses his rights, without his consent. If, however, the right to change or alter the stockholder's contract be reserved in a proper way, then no shareholder can complain against a proposed change therein, for the very plain reason that one of the terms by which he holds his contract is that the same may be altered.”

It may be conceded that the amendments which you have described could not be made without unanimous consent of all the stockholders in the absence of some provision either in the articles of incorporation, by-laws, statutes or other part of the contract defining the stockholder's rights, which would permit such an amendment. For attempted amendments similar to those which you have described where unanimous consent was held necessary in the absence of other authorization by charter or statute, see *Johnson v. Tribune-Herald Co.*, 116 S. E. 810, 155 Ga. 204 (increasing par value of stock); *Romer v. Porcelain Products, Inc.*, (Del. Ch.) 2 Atl. (2d) 75 (changing dividend rights of preferred stock); *Einstein v. Raritan Woolen Mills*, 70 Atl. 295, 74 N. J. E. 624 (compelling surrender of common for preferred stock); *In re Newark Library Assn.*, 43 Atl. 435, 64 N. J. L. 217, reversed on other grounds 45 Atl. 622, 64 N. J. L. 265; and *Campbell v. American Zylonite Co.*, 122

N. Y. 455, 25 N. E. 853, 11 L. R. A. 596 (change in relative value of shares).

Amendments which could not otherwise be made in the absence of unanimous consent may of course be made in accordance with reserved power in the charter, articles of organization, by-laws, or statutes, on the ground that since those provisions are a part of the contract between the corporation and the shareholders, the shareholder is deemed to have consented in advance to such amendment. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Peters v. U. S. Mortgage Co.*, *supra*; *Nelson v. Keith-O'Brien Co.*, 32 Utah 396, 91 Pac. 30; *Cathcart v. Cathcart Van & Storage Co.*, 165 S. E. 58, 175 Ga. 196; *Johnson v. Bradley Knitting Co.*, 228 Wis. 566.

In the latter case the Wisconsin supreme court in referring to secs. 180.07 (1) and 182.13 (1), stated:

“These statutes are as effectively a part of the plaintiff’s certificates of stock and of the corporate charter as though printed therein. \* \* \*

“\* \* \*

“If these statutory provisions in effect at the time plaintiff acquired his stock are deemed to be conditions of the stock certificates and of the corporate charter, then the plaintiff consents in advance to the making of such changes as the statutes permit, and an exercise of the right by the state or by a prescribed majority to whom the power may be delegated is neither an impairment nor a breach of the contract. \* \* \*” (pp. 574, 577).

For the purposes of this opinion we will assume that the provisions of secs. 180.07 (1) and 182.13 were in effect at the time of the sale and acquisition of the stock involved by the proposed amendment. The questions you have submitted then resolve themselves largely into questions of statutory interpretation. Our supreme court dealt extensively with the interpretation of the above sections in *Johnson v. Bradley Knitting Co.*, *supra*, and in that case commented that decisions based upon construction of statutes of other states are not particularly helpful in interpretation of secs. 180.07 (1) and 182.13. See page 580.

In *Johnson v. Bradley Knitting Co.*, *supra*, the court commented that while our statutes are in derogation of the com-

mon law and must be strictly construed their provisions are unambiguous, and that "The legislature has set no limit upon the power to make amendments other than the required vote of three fourths of the common stock and three fourths of the preferred stock theretofore authorized and outstanding" (page 578). The question whether the interests of the minority stockholders are sufficiently safeguarded by the requirement of a three-fourths vote instead of a unanimous vote is one for the legislature. If it is true as the court has said that the legislature has placed no limit upon the power to make amendments, then, the legislative provision being a part of the contract, the stockholder must be deemed to have consented in advance to any amendment regardless of its nature so long as it is approved by the holders of three-fourths of its stock, and so long as the action was taken in good faith and not for the purpose of defrauding the minority. This opinion does not deal with the matter of fraud. It is assumed that the amendments discussed were made in good faith. In a case where that is not true the discussion here is inapplicable since the existence of fraud might nullify action which would otherwise be valid.

While the supreme court in the case of *Johnson v. Bradley Knitting Co.*, *supra*, stated that the legislature has set no limitation upon the power to make amendments, the amendments there approved were prospective in operation with the exception of the one relating to accumulated dividends, the acceptance of which was optional with individual stockholders and which is accordingly not a precedent for whether an amendment to operate retrospectively may be imposed without individual consent.

1. Reduction of par value of preferred stock from \$100 per share to \$25 per share

It was held in *Johnson v. Tribune-Herald Co.*, *supra*, that the par value of stock could not be increased without unanimous consent, there being in that case no provision for such change in the corporate articles or in the state law.

Unquestionably the matter of par value is one which may originally be dealt with in the articles of incorporation and

our statute provides that a corporation may by amendment, adopted by the proper vote, "provide anything which might have been originally provided in such articles."

In *Haggard v. Lexington Utilities Co.*, 260 Ky. 261, 84 S. W. (2d) 84, it was held that a statutory provision generally authorizing a corporation to amend its articles and to reduce its capital stock by a two-thirds vote enabled it to reduce the par value of preferred stock from \$100 to \$25.

In *Peters v. United States Mortgage Co.*, 13 Del. Ch. 11, 114 Atl. 598, it was held that statutory authority for a corporation to make "any other change or alteration in its charter of incorporation that might be desired" by a vote of a specified proportion of the corporate stock permitted changing the stock from par value of \$100 per share to no par, without unanimous consent.

In the note in 105 A. L. R. 1462 it was said:

"It is clearly the general rule that a corporation may, by virtue of general statutory authority to amend its charter, change stock originally issued at a stipulated par value into stock of no par value. \* \* \*"

The following cases were cited for the proposition: *Peters v. United States Mortgage Co.*, 13 Del. Ch. 11, 114 Atl. 598; *Public Service Comm. v. Consolidated Gas Co.*, 148 Md. 90, 129 Atl. 22; *Hood Rubber Co. v. Commonwealth*, 238 Mass. 369, 131 N. E. 201; *Olympia Theatres, Inc. v. Commonwealth*, 238 Mass. 374, 131 N. E. 204; *Jaques v. Missabe Elec. Co.*, 172 Minn. 303, 215 N. W. 185; *Grausman v. Porto Rican-Amer. Tobacco Co.*, 95 N. J. E. 155, 121 Atl. 895, affirmed in 95 N. J. E. 223; *Williams v. National Pump Corp.*, 46 Ch. App. 427, 188 N. E. 756.

Not all of the foregoing cases would constitute authority for the amendment which you have described, under a statute such as ours, since in some of the cases the change was made without any alteration in the relative values of the shares of the various stockholders and in some instances the governing statutes specifically authorized amendments changing the par value of stock.

We are of the opinion that, in so far as an amendment reducing the par value of preferred stock operates prospectively, it is authorized under the Wisconsin statutes to be

adopted by a three-fourths vote, and that minority stockholders must be deemed to have consented in advance to the making of such change in accordance with the statutory provisions. This discussion does not deal with the case where such a change would attempt to operate retrospectively so as to affect redemption or dividend rights which have already matured and vested, since we assume that such questions are not here involved. Where a stock holder's rights have matured so as to have given him the status of a creditor, as by the declaration of dividends, obviously such rights may not be defeated without his consent, by amendment of the corporate articles. See *Keller v. Wilson & Co.*, (Del.) 190 Atl. 115, 125, where it is said that the destruction of a debt is not a matter within the purview of a statute relating to amendment of a corporate charter.

2. Elimination of a preferred stock issue giving the holders thereof debentures instead

Sec. 180.07 (1) authorizes a corporation to increase or diminish its capital stock. Sec. 182.13 (1), Stats., authorizes it to provide for the redemption of preferred stock either by its original articles or by amendment. In an original provision for issue of preferred stock it might be provided that the stock should be redeemable by bonds or other form of debenture. Sec. 180.07 authorizes a corporation to provide anything by amendment which might originally have been provided in its articles.

Again we are assuming that the operation of the amendment is prospective and that it was not intended to apply to stock with respect to which the maturity date is past so that the redemption rights have become actionable.

In the case of *C. H. Venner Co. v. United States Steel Corp.*, (Cir. Ct. S. D., N. Y.) 116 Fed. 1012, 1013, which was cited in *Johnson v. Bradley Knitting Co.*, *supra*, the court approved an amendment under the New Jersey law to retire preferred stock by exchanging it for bonds, which amendment was opposed by a minority stockholder. The court said:

“\* \* \* There was no express provision when the corporation was formed that bonds might be issued to retire

stock, instead of purchasing it for cash. But the New Jersey act concerning corporations contains the provision so frequently found in constitutions and statutes, that 'the charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature.' This reservation of the right to alter a charter is as much a part of the contract entered into by the stockholders when they subscribe or buy into the corporation as is the most minute provision as to some detail of organization, specifically expressed. \* \* \*"

We are of the opinion that the retirement of preferred stock and the issuance of bonds therefor is one authorized under the Wisconsin statutes if approved by vote of three-fourths of the preferred and three-fourths of the common stock provided it is adopted in good faith.

A qualification should probably be noted in view of the distinction made in *Johnson v. Bradley Knitting Co.*, *supra*, with respect to *Koeppler v. Crocker Chair Co.*, 200 Wis. 476, 479, 228 N. W. 130. The distinction was based upon the fact that if there is a specific contract between the corporation and any particular shareholder which is not common to all shareholders of the same class, such agreement cannot be abrogated by a general amendment. The very fact that such a distinction was made in the *Johnson* case implies that alterations with respect to the terms of redemption or retirement of preferred stock may be made by amendment where such terms are originally fixed by the general corporate articles, rather than by special individual contracts.

3. The elimination of the obligation as to accrued accumulative preferred dividends.

This type of amendment involves additional questions to those heretofore discussed, in view of the fact that many courts have held that the right to accrued cumulative dividends on preferred stock is a vested right even before the dividends have been declared, and that such right cannot be impaired under general statutory authority to amend corporate articles at least unless it is entirely clear from the provisions of the statute that it was intended to authorize amendments to operate retroactively. The case of *Keller v.*

*Wilson & Co.*, (Del.) 190 Atl. 115, reversed the Delaware chancery decision reported in 180 Atl. 584. The opinion in the court of chancery was one of the authorities most extensively quoted in the respondent's brief before the Wisconsin supreme court in *Johnson v. Bradley Knitting Co.*, *supra*, with respect to the amendment providing the optional plan for cancellation of accrued dividends. The Delaware supreme court held that its statutes relating to amendment of corporate charters do not permit the abrogation of the rights of a share holder with respect to cumulative dividends accrued up to the time of the amendment, without the consent of the shareholder. It had previously been held in *Morris v. American Public Utilities Co.*, (Del. Ch.) 122 Atl. 696, that an amendment creating new classes of preferred stock and canceling accrued cumulative dividends could not disturb preferred stockholders' rights to accrued dividend preferences, because they were vested property interests in the nature of a debt. At the time of this decision the Delaware statutes authorized amendment of corporate charters in certain specified respects, "or by making any other change or alteration in its charter of incorporation that may be desired; Provided that such amendment, change or alteration shall contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment." The quoted provision, however, was followed by a paragraph regarding the nature of the vote required in order to change "preferences". (P. 700.) The latter provision was regarded as having a restrictive effect, and the court held that the right to accrued cumulative dividends was more than a "preference" and that the statute did not authorize an amendment which would impair such right. Thereafter a legislative amendment was adopted which was assumed by the Delaware chancery courts and by a federal circuit court to have changed the law of the *Morris* case, *supra*, with respect to amendments abrogating accrued dividends. The court in *Keller v. Wilson & Co.*, *supra*, however, said:

"The Chancellor, in his opinion herein, held that the amendment of section 26 (35 Del. Laws, c. 85, sec. 10) was purposely adopted to obviate the consequences of the *Morris* Case, from which a legislative intention was inferred to give

to the enactments a retrospective operation. A majority of the Court in *Harr v. Pioneer Mechanical Corporation* (C. C. A.) 65 F. (2d) 332, was of the same opinion. To the same effect is *Lowell v. United Milk Products Corporation et al.*, an unreported decision of the United States District Court for the Northern District of Ohio. Judge Learned Hand, in his dissenting opinion in the *Harr* Case, on the contrary, could find nothing in the amendment which ought to be construed retrospectively. With this conclusion we are in accord.

“By inference it may be said that the legislature intended the amendment to operate retrospectively, but with deference to the views of the learned Judges who are of contrary opinion, we think that if rights in the nature of a debt are to be destroyed by corporate action under subsequent legislation, the purpose and intent of the Legislature to give its enactment a retroactive operation and thus to destroy those rights, should be expressed in language so clear and precise as to admit of no reasonable doubt. It is one thing to confer a general power to accomplish a purpose in the future. It is quite another thing to say that the power may be exercised to destroy a right accrued and recognized as a vested right of property” (pages 125-126).

There are a number of jurisdictions which have made the distinction between preferences and so-called vested rights which was made by the case of *Keller v. Wilson & Co.*, *supra*, and which have denied the right to amend corporate articles so as to cancel or impair accrued cumulative dividends. See, for example, *Patterson v. Durham Hosiery Mills*, (N. C.) 200 S. E. 906, and the cases hereinafter cited in *McQuillen v. Nat. Cash Register Co.*, 27 F. Supp. 639. The case of *Harbine v. Dayton Malleable Iron Co.*, (Oh. App.) 22 N. E. (2d) 281, also held that while the Ohio statute permitted amendment so as to require the exchange of preferred stock for new stock with modified preferences, it did not permit the cancellation of accrued dividends. The court did not, however, find itself able to endorse the designation of the rights with respect to accrued dividends as “vested”. None of these cases, however, can be regarded as conclusive authority with respect to whether such action may be taken under the Wisconsin statute, in view of the fact that they all involve the interpretation of the laws of other states.

The case of *McQuillen v. Nat. Cash Register Co.*, 27 Fed. Supp. 639, reached the opposite result, and held that can-

cellation of accrued dividends might be accomplished by amendment adopted by two-thirds vote under the statutes of Maryland. The court said, pp. 645, 646:

“\* \* \* the same question, as affected by the statutes of some other States, has been the subject of considerable litigation in those other jurisdictions, notably New York, New Jersey and Delaware, and has been decided favorably to the dissenting stockholders. However, since the statutes of those other States are less broad than the Maryland statute, the decisions in those States are not controlling here. See especially *Breslav v. New York & Queens Electric Light & Power Co.*, 249 App. Div. 181, 291 N. Y. S. 932; *Id.*, 273 N. Y. 593, 7 N. E. 2d 708; *Morris v. American Public Utilities Co.*, 14 Del. Ch. 136, 122 A. 696; *Keller v. Wilson & Co.*, Del. Sup., 190 A. 115; *Lonsdale Securities Corporation v. International Mercantile Marine Co.*, 101 N. J. Eq. 554, 139 A. 50; but see *Harr v. Pioneer Mechanical Corp.*, 2 Cir., 65 F. 2d 332, certiorari denied 290 U. S. 673, 54 S. Ct. 92, 78 L. Ed. 581. See also 1 Md. Law Review 254.

“As we have seen, the Maryland statute expressly authorizes the insertion, by amendment, of any provision that might, at the time of the amendment, have been inserted in an original certificate of incorporation. Clearly, the disputed provision is of such type. Further, the Maryland statute expressly authorizes any amendment ‘which changes the terms of any of the outstanding stock by classification, reclassification or otherwise’, defines the word ‘terms’ as meaning contract rights of stockholders under the charter; and the unanimous consent requirement of the statute is expressly made inoperative when the charter contains an appropriate reservation, which the charter before us does contain. Thus, whether we treat as vested or not—see *Harr v. Pioneer Mechanical Corp.*, *supra*,—the right to accrued dividends, it is unquestionably a preferential ‘contract right,’ and, therefore, is embraced within the express provision of the Maryland statute defining the rights that may be abrogated, and in what manner.” (Emphasis supplied.)

While the Maryland law sustained more specific authorization than is to be found in the Wisconsin law, the court in the above case expressly stated that the provision referred to in the italicized excerpt covered an amendment canceling accrued dividends. Such statutory provision is similar to the last phrase of sec. 180.07 (1) of the Wisconsin statutes.

The case of *Keller v. Wilson & Co.*, *supra*, impliedly held that if the statute had there been interpreted as retroactive so as to permit the cancellation of accrued dividends, it would have violated the constitution; but that was on the basis of the fact that the law was not in existence when the corporation was formed and the stock issued. The language of both that case and the case of *Patterson v. Durham Hosiery Mills*, (N. C.) 200 S. E. 906, indicates that the constitutional question would not enter the picture if the law had been in existence "at the time the contractual relation was created by a purchase of \* \* \* stock" so that the purchasers "subjected themselves to an express or implied waiver, or consented in advance to an amendment which would \* \* \* destroy the right to the accumulated dividends." (200 S. E. 909).

In *Morris v. American Public Utilities Co.*, *supra*, it was made clear that the denial of the right to amend was based solely upon the interpretation of the statute rather than upon any constitutional inhibition. The court said (p. 703):

"\* \* \* If the articles of incorporation so provide, I know of nothing in the law which would forbid the members of a corporation to give to a majority of a class of stockholders the right to cancel obligations which the entire class might hold against the corporation, even though some of the class might refuse their assent to such procedure. If such a power is agreed upon, then its exercise would be no more than the assertion of a stipulated right. \* \* \*"

In the absence of a constitutional question, the question is solely one of statutory interpretation upon which our court has pointed out in *Johnson v. Bradley Knitting Co.*, *supra*, that decisions based upon construction of statutes of other states are "not particularly helpful."

In cases holding that accrued dividends could not be canceled, the reasoning which would probably be most nearly applicable in the construction of the Wisconsin statutes is that in *Keller v. Wilson* and *Patterson v. Durham Hosiery Mills*, to the effect that cancellation of such dividends could not be considered as amendment of a charter, but was in substance the modification of a creditor's rather than a stockholder's right. The distinction of *Koeppler v. Crocker*

*Chair Co.* in *Johnson v. Bradley Knitting Co.*, *supra*, recognizes that a debtor-creditor relationship may not be modified under authority to amend a charter. Such reasoning as applied to accrued but undeclared dividends can be used only on the basis of doubtful analogy, however, because it is generally recognized that the right of a stockholder to dividends does not become a debt until after dividends are declared. See 18 C. J. S., secs. 463, 473, and also the discussion in *Morris v. American Public Utilities Co.*, *supra*, in 122 Atl. at 703.

Neither is a determination whether the right to accrued dividends is "vested" conclusive, since even the cases so holding seem to recognize that the corporate contract, which includes statutory provisions, might provide in advance for cancellation even of vested obligations by the vote of a certain percentage of stockholders. The question is whether the corporate contract is to be so interpreted.

In *Johnson v. Bradley Knitting Co.*, 228 Wis. 566, and *Milwaukee Sanitarium v. Lynch*, 238 Wis. 628, the Wisconsin supreme court made no distinction between vested rights and mere preferences. It is entirely possible that it might do so if a different set of facts were presented. Its language in the *Johnson* case, however, indicated that the legislature has placed "no limitations" upon the power to amend other than the required vote, and the existence of good faith. The fact that the statute as interpreted places no limitation on the power to amend was one of the grounds of the dissent in which it was stated:

"\* \* \* As well, in principle, may cancellation of preferred stock be authorized as destruction of the rights and privileges inherent in it by the terms of the certificates representing it. \* \* \*"

(page 589).

Circumstances existing in respect to particular cases are sometimes such as to modify general precepts and we would suggest that before making a determination in a specific case further details should be considered, such as the provisions of the articles of the corporation involved, and the dates of incorporation and of issuance and sale of the stock. As a general proposition, however, we believe that secs. 180.07 (1) and 182.13, Stats., as interpreted in *Johnson v.*

*Bradley Knitting Co., supra*, authorize the amendment of a corporation charter so as to cancel accrued but undeclared dividends where the action is taken in good faith and upon a proper vote.

BL

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*Courts — Municipal Court — Criminal Law* — Municipal court for Vilas county, not being court of record, has no jurisdiction to suspend execution of its sentences in criminal cases, except in cases of minors as provided in sec. 57.05, Stats. XXIX Op. Atty. Gen. 371 followed.

November 12, 1942.

EDWIN W. HUNTER,  
*District Attorney,*  
Eagle River, Wisconsin.

You request an opinion as to the right of the municipal court for Vilas county to suspend sentences for violation of such acts as are punishable in that court. The court was created by ch. 228 of the laws of 1895 as amended by ch. 130 of the laws of 1913 and ch. 131 of the laws of 1927.

The first question to be determined is whether it is a court of record. The statute creating it does not provide that it shall have a clerk, nor does it require that it have a seal. Subsec. (c) of sec. 6 as amended provides as follows:

“The municipal judge *may* provide a seal for said court and all papers, depositions, certificates, acknowledgments, examinations and other documents executed or signed by said judge, when sealed with the seal of the court shall be evidenced in all courts and places in this state, and shall have the same effect as the seal of a court of record.”

The conclusion is therefore inescapable that the municipal court for Vilas county is not a court of record. *J. C. Lewis Co. v. Adamski*, (1907) 131 Wis. 311, 313, 111 N. W. 495.

The court has the same criminal jurisdiction as a justice of the peace, except that its jurisdiction extends to all offenses not punishable by imprisonment in the state prison. Subsec. (b) of sec. 6 of the act provides in part that "the proceedings and practice of said court shall in all respects be governed, as far as practicable, by the laws relating to justices' courts in this state."

It is therefore considered that the conclusion announced in XXIX Op. Atty. Gen. 371 applies to that court, namely, that it has no jurisdiction to suspend the execution of its sentences except in cases of minors covered by sec. 57.05, Stats.

WAP

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*Bonds — Building and Loan Associations* — Bonds furnished to secure faithful performance of duties of special deputy commissioners of banking appointed to assist banking commission in liquidation of delinquent building and loan associations, required by banking commission acting under subsec. (2), par. (c) of sec. 215.33, Stats., to be furnished in form prescribed in subsec. (2) of sec. 19.01, Stats., for official bonds, may be canceled by mutual agreement between banking commission and bonding company.

November 16, 1942.

**BANKING COMMISSION.**

You have asked our opinion relative to the power of the banking commission and a bonding company to cancel by mutual agreement certain bonds covering a special deputy commissioner of banking in charge of the liquidation of two delinquent building and loan associations.

We understand that the deputy in question is at present bonded in the sum of \$10,000 with respect to the liquidation of one of the associations and in the sum of \$45,000 with respect to the liquidation of the other association, and that it is desired that these bonds be canceled and replaced with a.

new bond in the sum of \$35,000 securing the faithful discharge of the duties of the deputy in connection with both liquidations.

The bonds now outstanding are in the form prescribed by subsec. (2) of sec. 19.01 of the statutes. The question is raised as to whether the two bonds now outstanding may now be canceled in view of the provisions of subsec. (6) of sec. 19.01, which provides that with respect to official bonds, such bonds continue in force and are applicable to official conduct during the incumbency of the officer filing the same and until his successor is duly qualified and installed.

We are of the opinion that notwithstanding the provisions of subsec. (6) of sec. 19.01 the bonds in question may be canceled by mutual agreement between the banking commission and the bonding company.

Special deputy commissioners of banking to assist in the liquidation of delinquent building and loan associations are appointed by the banking commission pursuant to subsec. (2), par. (c) of sec. 215.33. That subsection provides that "the special deputy commissioner and assistants shall furnish such security for the faithful discharge of their duties as the banking commission deems proper". The form and amount of the bonds are thus in the discretion of the banking commission, and we understand that as a matter of practice the commission has adopted the bond form specified in subsec. (2) of sec. 19.01 for bonds required of public officers. However, the situation of a special deputy commissioner of banking appointed to assist in the liquidation of a delinquent building and loan association is necessarily different from that of a public officer elected or appointed to a term of office, the length of which term is fixed by law, and in which case it is provided by law that an official bond must be filed as a qualification for the office.

The sections of the statutes providing for various public offices and fixing the term thereof generally provide for the filing of an official bond and its approval by a specified officer. In such a situation it is of course logical that the statutes should provide that the particular bond filed and approved as a condition to qualification for office should remain in force during the entire term of such officer. In the present instance, however, the filing of the bond and its

amount and form are all in the discretion of the banking commission, and it would appear that the commission would have the power to cancel or modify any such bonds when in its opinion the conditions with respect to the employment had changed.

Where in the original stages of a liquidation large sums are on hand, subsec. (2) (c) of sec. 215.33 gives the commission the power to require an adequate bond. After the liquidation has proceeded for some time it would seem, as a necessary incident to the power granted the commission by this subsection, that the bond might be reduced in amount or canceled entirely and some other type of security furnished for the faithful discharge of the duties of the deputy. The purpose of the provisions of subsec. (2) (c) of sec. 215.33, above quoted, would seem to be to give the commission complete power and discretion with respect to the furnishing of bonds of its deputies so as to adequately protect the shareholders for whose benefit delinquent building and loan associations are liquidated, and we believe give the commission discretion in the matter of reducing the expense to such liquidations which ultimately falls upon such shareholders by reducing the amount of bonds required when the liquidation has progressed to a point where such procedure is indicated.

We thus conclude that the bonding company and the banking commission may by mutual agreement cancel the bonds in question.

RHL

*Public Lands — Liens* — Where state sells timber under contract providing for retention of title until said timber has been measured and paid for, employees of purchaser may not obtain lien thereon under sec. 289.18, Stats., until timber has been counted and paid for and title thereto has passed from state.

November 20, 1942.

COMMISSIONERS OF THE PUBLIC LANDS.

Attention T. H. Bakken, *Chief Clerk*.

Recently your department sold some timber under the provisions of sec. 24.39, Stats. A contract has been entered into with the purchaser which provides for the cutting of said timber and which specifies that the title to the timber shall remain in the state until it is scaled, measured or counted and paid for. You inquire whether the employees of the purchaser, as a result of labor expended by them in logging this timber, can obtain a lien thereon before the state receives full payment for such timber.

Your question is answered in the negative.

Sec. 289.18, subsec. (1), provides as follows:

“Any person who shall, by himself or by his beast or machine, or vehicle, perform any services in cutting, hauling, running, felling, piling, driving, rafting, booming, cribbing, towing, sawing, peeling or manufacturing logs, timber, stave bolts, heading, staves, pulp wood, cordwood, firewood, railroad ties, piling, telegraph poles, telephone poles, fence posts, paving timber, tan or other barks or in preparing wood for or manufacturing charcoal shall have a lien upon such material for the amount owing for such services, which lien shall take precedence of all other claims, liens or incumbrances thereon or sales thereof.”

In *Milwaukee v. McGregor*, 140 Wis. 35, 121 N. W. 642, it was held, at pages 37-38:

“\* \* \* the fact is that the people of the state, in their sovereign capacity, except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as ‘universal trustee’

for his people. So it has been said, "The most general words that can be devised (for example), any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions, either express or implied, apply to all private parties, but 'are not rules for the conduct of the state.' *Dollar Sav. Bank v. U. S. supra.* That has been applied in many ways. For examples: The state may sue as freely as an individual, but cannot be sued except by its consent. It may have the benefit of a general cost statute, but it is not liable for costs without express written law to that effect. It may plead the statutes of limitations the same as an individual, or recover interest as use or damages, but is not subordinate in adversary proceedings to the law on either subject, unless expressly named therein showing unmistakable legislative intent to that effect."

This case was approvingly cited in *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101, where the court said, at page 135:

"\* \* \* The above statutes do not, either expressly or by necessary implication, refer to the state, and it is a general rule that such statutes in general terms do not bind the state. *Milwaukee v. McGregor*, 140 Wis. 35, 121 N. W. 642; *U. S. v. Hoar*, 2 Mason, 311; *Jones v. Tatham*, 20 Pa. St. 398; Endlich, *Interp. Stats.* sec. 161; *Cole v. White Co.*, 32 Ark. 45; *Gilman v. Sheboygan*, 2 Black (U. S.) 510. In *Jones v. Tatham, supra*, the court said (page 411):

"Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied."

Our court had occasion to reaffirm this rule as recently as the case of *State ex rel. Martin v. Reis*, 230 Wis. 683, 284 N. W. 580.

"\* \* \* the most general words that can be devised affect not the sovereign in the least, if they may tend to restrain or diminish any of his rights and interests; \* \* \*." *Necedah Mfg. Corp. v. Juneau County*, 206 Wis. 316, at page 322, 237 N. W. 277.

It was said in *Wisconsin Brick Company v. National Surety Company*, 164 Wis. 585, page 587, 160 N. W. 1044:

“\* \* \* It was well understood that there could be no mechanic’s lien on a government building. *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816.”

In *Fulton v. State Annuity and Investment Board*, 204 Wis. 355, 236 N. W. 120, it was specifically held at page 360:

“\* \* \* A lien statute, no matter how inclusive, would not give a lien on state property without the express consent of the state through its legislature, \* \* \*.”

The log lien statute quoted above does not expressly or by implication purport to grant a right of lien on logs or timber owned by the state and under the foregoing decisions it must be held that persons employed by the purchaser of the timber could not obtain a lien on such timber until it had been scaled, measured, or counted and paid for, and title had passed from the state.

JRW

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*School Districts — Transportation of School Children —* Sec. 40.34, subsecs. (1) and (2), Stats., contemplates complete suspension of school work within district in so far as reference is there made to payment of state aids to district by reason of attendance of children of school age residing in that district at school in another district.

November 23, 1942.

JOHN CALLAHAN,  
*State Superintendent.*

You have inquired as to whether there may be a partial suspension of a school under the provisions of sec. 40.34, subsecs. (1) and (2), Wis. Stats.

By partial suspension you have in mind those cases in which schools assume to discontinue certain work or grades while at the same time continuing other work or grades. As an example, a common school district might discontinue all or a part of its high school work, while at the same time maintaining its grade school. No question is raised as to the propriety of any particular discontinuances, and we do not rule upon any such.

The language of the two subsections, so far as relevant, reads:

“(1) \* \* \* The board of every \* \* \* district which has voted to close its school \* \* \*.”

“(2) The board of any district which has suspended school shall pay the tuition of all children of school age residing in the district who attend other district schools \* \* \*.”

The language in question must be read as a whole and as so considered it is plain and unambiguous and cannot possibly refer to anything other than an entire suspension of school work in a district. And there is nothing in the history of the statute which would indicate that it was ever intended that it should have a different meaning. Prior to revision by ch. 425, Laws 1927, the section, so far as applicable, was numbered 40.16 and as it then read provided in part:

“40.16 (1) (a) \* \* \*

“(c) The school board of any district in which the electors have voted to suspend the school, shall provide for the payment of the tuition of all children of school age residing in the district who attend school in some other district \* \* \*.”

Here again the intent of the statute is clear.

It is our view that there can be no such thing as partial suspension of school constituted by a discontinuance of some work or grades in a school which is otherwise carried on under the quoted provisions of sec. 40.34, Stats.

JWR

*Corporations — Collection Agencies — Exemption of attorneys from licensing provisions of collection agency law, provided by sec. 218.04, subsec. (1), par. (f), Wis. Stats., does not extend to lay bill collector who is operating what is virtually independent collection agency business in lawyer's office. While lawyers may make use of lay employees in handling collections, relationship of attorney and client exists between attorney and claimant and attorney must assume full responsibility for activities of such lay employee and see that work is handled in accordance with canons of ethics and statutes applicable to attorneys.*

November 25, 1942.

**BANKING DEPARTMENT.**

Attention Frank H. Bixby, *Commissioner*.

You state that it has come to your attention that certain professional bill collectors formerly associated with licensed collection agencies and who have run afoul of the collection agency licensing law, or who, for other reasons, have been unable to procure a corporate surety bond required by the banking commission of licensed collectors or solicitors, have now become associated with practicing attorneys as managers of so-called "collection departments" in such law offices.

We are asked if these individuals come within the exemption to the collection agency licensing law granted to practicing attorneys by sec. 218.04, Stats.

Sec. 218.04 (1) (f) provides:

"'Collection agency' means any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness. It shall not include attorneys at law authorized to practice in this state and resident herein, banks, express companies, building and loan associations organized under the laws of Wisconsin, insurance companies and their agents, trust companies, or professional men's associations collecting accounts for its members on a nonprofit basis, where such members are required by law to have a license, diploma or permit to practice or follow their profession, real estate brokers, real estate salesmen and justices of the peace whose principal business is not collections."

Subsec. (2) of sec. 218.04 provides that no person shall operate as a collection agency or as a collector or solicitor in this state without first having obtained a license.

It is apparent from reading sec. 218.04 (1) (f), quoted above, that the legislature intended that the business of making collections should be regulated, either directly under sec. 218.04 or indirectly through agencies and licensed professions which are in turn subject to regulation.

We understand that some of these professional bill collectors, who were formerly associated with licensed collection agencies and who now operate out of law offices, take the position that since they are associated with a law office they come under the exemption to the collection agency licensing law given to lawyers by sec. 218.04 (1) (f) and that since the making of collections, at least until the collection gets into court, is not the practice of law, they are not subject to the canons of ethics regulating the practice of law and, in any event, since they are not licensed to practice law, they are immune from any attempted regulation by the board of state bar commissioners or the bar association.

We are unable to subscribe to the view that these people are "neither fish, flesh nor fowl" and hence immune from all regulation and we think it is clear that neither the statutes regulating collection agencies nor the statutes and canons of ethics regulating the practice of law permit a professional bill collector to operate what is virtually an independent collection agency by taking offices with an attorney and by placing his name on the lawyer's stationery under the heading "commercial department" or "collections" or under any other name or designation.

By this we do not mean to say that a lawyer is prohibited from making use of lay employees in the handling of collections incidental to his law practice. It is customary in many law offices to turn over many of the details in the handling of small collections to a trusted stenographer, bookkeeper or law clerk. However, the ethical attorney recognizes that he must assume the entire responsibility for the proper handling of such collection since an attorney who accepts a claim for collection binds himself personally to use proper care, skill and diligence to collect it and becomes liable for negligence or default of his agent or representative

to whom he turns the claim over for collection. 7 C. J. S. 982.

The seriousness of the lawyer's responsibility for the acts of a lay employee engaged in handling collections in his office is well illustrated by the following language from the case of *Grievance Committee of Rhode Island Bar Association v. Clifford*, (R. I. 1916) 97 Atl. 975:

"\* \* \* We would most strongly condemn the association in business of young lawyers with bill collectors and process servers, many of whom in their consideration of what is a legitimate use of the processes of the court are unrestrained by the standards which the lawyer should understand and by which the lawyer should be governed. As an incident of such relation the young lawyer frequently finds himself in a reprehensible position to which he has been brought by a weak or careless acquiescence in the recklessness of his associate."

There can be no intervention by a lay collector which would tend in any way to disturb the relationship of attorney and client that exists between the attorney and the claimant. Canon No. 35 of Canons of Professional Ethics of the American Bar Association provides in part:

"The professional services of a lawyer should not be controlled or exploited by any lay agency personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries." (Pp. 20-21.)

Also, it should be pointed out that Canon No. 33 provides, among other things:

"Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

See also sec. 256.45, Wis. Stats., which prohibits attorneys from splitting fees with laymen.

It is well recognized that canons of ethics, such as those referred to above, are binding on the legal profession.

“The canons of ethics adopted by a bar association, while they do not have the effect of statutes, are binding on attorneys. The authority of the canons of ethics is derived, not from the fact that they are approved by the bar associations, but because they are statements of principles and rules accepted and acknowledged by reputable attorneys and are recognized and applied by the courts in proper cases.” 7 C. J. S. 843.

Moreover there can be no solicitation of accounts for collection by the lay employee of an attorney. An attorney may not solicit business himself and cannot do so by an agent. This is prohibited by canon No. 27 of Canons of Professional and Judicial Ethics of the American Bar Association, and in addition the Committee on Professional Ethics and Grievances of this association has expressed the opinion that it is improper for a lawyer to send out an announcement to the effect that a layman “has become associated with his office and will hereafter have charge of all collection matters”. The committee said:

“\* \* \* In the first place, the language of the announcement would reasonably be construed as misrepresenting the lay associate to be a member of the bar. Second, the circulation of such notice is clearly an advertisement, designed to increase the volume of collection work to be done in John Doe’s office, and is contrary to both the letter and spirit of Canon 27. Further, the use of the name of a layman on the stationery of a lawyer, representing the former as conducting or managing a department of a lawyer’s professional activities, is improper because it too readily lends itself to the solicitation of employment or the use of it for advertising purposes by the layman so employed.” Canons of Professional and Judicial Ethics of the American Bar Association, Opinions of Committee on Professional Ethics and Grievances, p. 126 (published 1936).

You will doubtless appreciate that in the absence of more specific facts we can do no more than outline the general principles which we believe to be applicable to the handling of collections in a law office by a lay employee, and you are

advised that so long as such activity is conducted under the supervision of the attorney in a manner which conforms to the rules of ethics and laws applicable to attorneys, the situation is exempt from the collection agency licensing law, but that if the law office is being used merely as a blind or subterfuge for the operation of what is essentially a collection agency business, the lay collector or manager of such a business must be licensed and is subject to all of the statutes governing collection agencies as well as the rules of the banking commission pertaining thereto.

WHR

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*Automobiles — Law of Road — Motor Vehicle Operators' Licenses* — Upon expiration of restricted driver's license for occupational purposes issued under sec. 85.08, subsec. (25c), Stats., operator is not required to furnish proof of financial responsibility under sec. 85.08 (26), Stats., if there has been no violation of order of restriction so as to result in revocation.

November 25, 1942.

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

Our attention has been called to sec. 85.08, subsec. (25c), Wisconsin statutes, relating to licenses for occupational purposes where an operator of a motor vehicle has been convicted of operating such vehicle while under the influence of intoxicating liquor, and you inquire whether in such case he must file proof of financial responsibility after expiration of the year during which the restricted license was in effect and before he becomes eligible for an unrestricted license.

Sec. 85.08 (25c) reads:

“The revocation of an operator's license of a person convicted the first time in a period of a year for violating the state law or a county, city or village ordinance in conformity with the state law prohibiting a person from oper-

ating a motor vehicle while under the influence of intoxicating liquor may be stayed by the judge or magistrate in whose court such conviction takes place. 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, and if the judge or magistrate finds that such person has violated such order of restriction, he shall notify the commissioner who shall thereupon revoke all such operator's licenses. Such period of restricted operation shall be for one year. Before such convicted person may operate a vehicle pursuant to such restrictions he must be in possession of a restricted license issued by the department which shall be of a special color or form and shall show the restrictions; the department shall issue a restricted license upon receipt of the original license which shall be forwarded to the department by the judge or magistrate together with a copy of the order setting forth the restrictions. In the event that such judge or magistrate does not upon the facts see fit to permit such convicted person to retain such privileges he shall notify the commissioner who shall thereupon revoke such license. Any revocation under this subsection shall have the same force and effect as other revocations by the commissioner under subsection (25). Where a restricted license is issued and is not revoked during the year, the department shall upon application reissue the unrestricted license."

The provisions requiring the filing of proof of financial responsibility are to be found in subsecs. (26), (27k), (29) and (31) of sec. 85.08.

Subsec. (31) relates to the period during which financial responsibility, as defined in sec. 85.09, must be furnished following revocation or suspension of a license. Subsec. (29) requires the filing of proof of financial responsibility after a period of suspension and is not applicable here for the reason that there is no provision for suspension under subsec. (25c) concerning which you have inquired. Subsec. (27k), (a), (b) and (c), requires filing proof of financial responsibility after an accident resulting in a judgment and does not concern us here. Subsec. (26) calls for the filing of proof of financial responsibility where a license "has been duly revoked" and the problem, therefore, which is presented by your inquiry is whether a license "has been duly

revoked" in the case of a conviction for driving while under the influence of liquor followed by a stay of revocation and the granting of a restricted occupational driving license under subsec. (25c).

Subsec. (25c) provides at the outset for a stay of revocation where the court decides to order a restricted license. The word "stay" means the arresting of a judicial proceeding or process. Cyclopedic Law Dictionary (3d ed.). Hence if a stay is ordered the revocation does not become effective and, not becoming effective, no proof of financial responsibility is required under subsec. (26).

This conclusion is further strengthened by the language of subsec. (25c) where it is provided that if the provisions of the restricted occupational license are violated the judge or magistrate shall notify the commissioner "who shall thereupon revoke *all* such operator's licenses". If it be considered that the operator's regular license had been already revoked, then there would be outstanding only the restricted license, and therefore there would be no need to resort to the plural phraseology of "*all* licenses" and the legislature would probably have said instead "who shall thereupon revoke said restricted license".

Moreover the statutes here under consideration are penal in nature and under well recognized rules should not be enlarged upon by implication. Likewise we should state that our conclusion is in accordance with the administrative interpretation accorded the provisions in question by the motor vehicle department ever since the enactment of the present drivers' license law. This construction of the statute by the officials charged with its enforcement is entitled to great weight and we would be reluctant to disturb it in the absence of a clear showing that it is incorrect.

In XXXI Op. Atty. Gen. 69, at page 70, we said:

"Nowhere in subsec. (25c) is there any provision for carrying proof of financial responsibility during the period of the restricted occupational license arising out of the conviction for driving while under the influence of intoxicating liquor and, since the entire matter is statutory, there is no authority on the part of the commissioner to prescribe anything which is not provided for by statute."

If, as we said there, there is no provision for carrying proof of financial responsibility during the period of the restricted occupational license, there is even less reason for reading such a provision into the statutes for the period following the expiration of such restricted license.

You are therefore advised that no filing of proof of financial responsibility is required after the expiration of a restricted license ordered under subsec. (25c) of sec. 85.08 provided, of course, that there is no violation of the order of restriction resulting in revocation of all licenses of the operator in the manner specified in subsec. (25c).

WHR

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*Banks and Banking — Public Deposits — Municipal Corporations — Village Firemen's and Policemen's Fund —* Where provisions of sec. 62.13, Stats., relating to policemen's and firemen's pension funds in cities of second and third class are applicable to village by virtue of operation of sec. 61.65, Stats., such funds are subject to ch. 34, public deposits law.

December 16, 1942.

BOARD OF DEPOSITS.

Attention Bernice E. Coe, *Acting Executive Secretary*.

You have inquired whether the provisions of ch. 34, the public deposits law, are applicable to policemen's and firemen's pension funds of a village which, by virtue of sec. 61.65, Stats., is placed in the same classification as a second or third class city in so far as such funds are concerned.

Sec. 61.65 provides among other things that villages with a certain population shall, with reference to the police pension fund and firemen's pension fund, be governed by sec. 62.13 in so far as the same pertains to cities of the second and third class.

Sec. 62.13, subsecs. (9) and (10), makes provision for police pension funds and firemen's pension funds respec-

tively. The police pension fund is made up by contributions from the following: License receipts; fines for violations of city ordinances; fines imposed on members for violation of rules; deductions from salaries for time lost on account of sickness; rewards; gifts; receipts from sale of unclaimed property; earnings from the fund and by a contribution of  $3\frac{1}{2}$  per cent of the salary of each member of the department. Any excess of annual income over disbursements reverts to the principal of the fund until the fund equals \$150,000 for cities of the second class, \$100,000 for cities of the third class and \$50,000 for cities of the fourth class. Thereafter excess receipts are refunded to the city treasurer.

The fund is administered by a board of trustees consisting of the mayor, treasurer, comptroller and the chief and three active subordinates of the department.

Sec. 62.13 (9) (b) 2 is important here in that it provides that the city treasurer shall be ex officio treasurer of the board and, as such, shall be custodian of the fund and of all securities and property belonging thereto, also he is liable on his official bond for the performance of his duties on such bond.

The board has exclusive control and management of the fund. Sec. 62.13 (9) (a) 4 provides that temporary withdrawals may be made from the permanent fund to meet the current disbursements when no other funds are available but that such withdrawals shall be included in the next succeeding tax levy. Also it is provided here that if the annual income is insufficient for the pension requirements such deficits shall be included in the next succeeding tax levy.

Paragraph (c) of sec. 62.13 (9) provides that the members have a vested right in the fund so that no payments made thereto shall be diverted or used, temporarily or otherwise, for any purpose other than that provided by this subsection.

Sec. 62.13 (10), relating to the firemen's pension fund, is quite similar to subsec. (9), covering the police pension fund, and with an exception not material here, sec. 62.13 (10) (e) makes the provisions of (b) to (d) of subsec. (9) of the police pension fund law applicable to the firemen's pension fund. The firemen's pension fund is made up by

salary contributions of members of 3½ per cent plus receipts from taxation of fire insurance companies or agents, fines imposed on members for violation of rules, deductions from salaries for time lost on account of sickness, rewards, gifts and earnings of the fund.

Sec. 34.01 (1) provides:

“As used in this chapter: (1) ‘Public deposit’ shall mean moneys deposited by the state or any county, city, village, town, drainage district, power district, school district, sewer district, or any commission, committee, board or officer of any governmental subdivision of the state, or any court of this state, in any state bank, savings and trust company, mutual savings bank, or national bank in this state, *including private funds held in trust by a public officer for persons, corporations or associations of individuals.*”

Subsec. (5) of sec. 34.01 provides:

“‘Public moneys’ shall include all moneys coming into the hands of the state treasurer or the treasurer of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, *by virtue of his office without regard to the ownership thereof.*”

Sec. 34.05 (3) makes it the duty of the treasurer to deposit immediately upon receipt thereof the funds received by him by virtue of his office in the name of the municipality in the public depository designated by the governing board.

Sec. 34.08 (2) requires banks having any public funds on deposit to make quarterly payments to the board of deposits at the rate set by the board, which fund constitutes the state deposit guaranty fund for the payment to public depositors of losses arising out of the failure of public depositories to repay public deposits.

In the case of *Tesch et al. v. Board of Deposits et al.*, 237 Wis. 527, it was ruled that the foregoing provisions of ch. 34 were applicable to the policemen’s annuity and pension fund of the city of Milwaukee, which was created by ch. 589, laws of 1921. However, it is contended on behalf of at least one village that the *Tesch* case is inapplicable here for the rea-

son that sec. 62.13 is different from the provisions of ch. 589, laws of 1921, which was a special law designed for Milwaukee.

However, we are not persuaded that sec. 62.13 differs sufficiently from ch. 589, laws of 1921, in principle to bring the situation outside of the doctrine of the *Tesch* case. As in the *Tesch* case the treasurer of the municipality here is the custodian of the fund by virtue of statute and also the moneys fall within the definition of a "public deposit" set forth in sec. 34.01 (1) and this is true, as the court points out, even though the fund be considered a private one held in trust, since sec. 34.01 (1) applies not only to deposits by commission, or board, or officer of a governmental subdivision of the state, but includes also "private funds held in trust by a public officer for pensions, corporations or associations of individuals". The fund here under consideration meets all of the tests of a public fund expressed by the court in the following language in the *Tesch* case, at p. 531, as follows:

"Besides the above definitions which indicate the fund in question is a public fund, there are other factors pointing to that same conclusion. It is axiomatic that a municipal corporation cannot constitutionally assess and collect taxes for a private purpose. Collection of the fund is authorized by a public law; it is paid to a public officer; it is held in trust by him and by the board for whom he acts as custodian; it is deposited in a public depository; and although not usable for general governmental expense, is nevertheless a public fund. \* \* \*"

Apparently it is contended that the fund in question stands on a different footing from that of the Milwaukee policemen because it is provided in sec. 62.13 (9) (c) that the members of the fund "shall have a vested right in and to said pension fund so that no payments made thereto shall be diverted or used, temporarily or otherwise, for any purpose other than provided by this subsection".

In *State ex rel. McCarty v. Gantter*, 240 Wis. 548, in speaking of this provision, the court said at page 555:

"While this is a legislative declaration that members of the police department shall have a vested right in pension funds, it is only applicable to cities of the second and third

class and to cities of the fourth class having a population less than three thousand according to the last federal census. \* \* \*

Taken literally, this language would exclude villages from the provision of sec. 62.13 (9) (c) above quoted. However, the court in the *McCarty* case was considering the instance of a fourth class city with a population of over three thousand and did not have before it the provision of sec. 61.65, making the pension provisions of sec. 62.13 applicable to villages having a certain population in so far as the provisions of sec. 62.13 pertain to cities of the second and third class. Hence we do not believe that the language of the *McCarty* case can properly be said to apply here. We take occasion to say this because we do not want to be understood as ruling that the members of the fund in question do not have a vested right therein, under sec. 62.13 (9) (c).

But does it follow that the fund is exempt from the deductions required under the public deposits law merely because the members have a vested or contract right in relation thereto? We do not think so.

In the *Tesch* case our court held that ch. 34 did not create a tax but an exaction made under the police power and that the constitutional tests are whether the action was in a legitimate field for the exercise of the police power in the promotion of the public welfare and whether the means bear a reasonable relation to that end. These tests being met, it is immaterial that the contributors have a vested or contract right in the fund, since that right is subject to the valid exercise of the state's police power, just as are all other contract rights. This principle is stated in 16 C. J. S. 581 as follows:

"Since the very foundation of the police power is the control of private interests for the public welfare, a statute or ordinance is not rendered unconstitutional by the mere fact that private rights of person or property are subjected to restraint or that loss will result to individuals from its enforcement."

In the case of *Storen v. Sexton*, 209 Ind. 589, 200 N. E. 251, 104 A. L. R. 1359, cited by our court in the *Tesch* case, it was said at page 1371:

“\* \* \* Even though the members of the police and fire forces have some interest in the funds, since they contribute part of their salaries thereto, no reason is seen why the Legislature may not change and modify the statutes regarding the operation of the trusts by changing the character of securities in which they are to be invested, and by requiring that current funds in the hands of the treasurer shall be secured against loss, either by the public sinking fund or by insuring with private insurance companies at the expense of the fund.”

Nor do we believe that the legislature prohibited or intended to prohibit insurance of the fund under the public deposits law when it used the language “no payments made thereto shall be diverted or used, temporarily or otherwise, for any purpose other than provided by this subsection”.

If such language is to be taken literally it would, for instance, prevent the use of any money in the fund for carrying insurance on real estate owned by the fund or for paying taxes on the same, assuming that the fund were to acquire real estate through foreclosing a mortgage in which pension funds had been invested. Strictly speaking, the board in charge of the fund could not even purchase a postage stamp, since, technically, the money spent in purchasing the stamp would then be unavailable for pensions and the fund would be depleted to the extent of such diversion.

It would seem that the legislature did not intend to prevent expenditures from the fund which are made for the very purpose of preserving and conserving the fund itself. What the legislature was interested in was preserving the fund for the benefit of its beneficiaries from the danger, always present, that these moneys might be siphoned or diverted to other municipal purposes, leaving the contributors to the fund, and their widows and orphans “holding the bag”.

If anything, insurance under the public deposits law is in furtherance of the plain legislative policy expressed in the statutory language prohibiting diversion, since one of the very things which might well destroy the funds sought to be safeguarded would be the failure of a depository bank.

We therefore conclude that the funds in question are subject to the public deposits law, which conclusion makes un-

necessary any discussion of the further questions raised in your request.

WHR

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*Public Health — Barbers* — State board of health has no authority under sec. 158.02, subsec. (1), Stats., or otherwise to regulate opening and closing hours of barber shops.

December 17, 1942.

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

You state that a considerable number of barbers are now closing their barber shops during the day and working in defense industries and then, after the day's work is finished, opening their shops and engaging in barbering for an indefinite number of hours in the evening. You inquire whether the state board of health has any jurisdiction under ch. 158 to regulate the opening and closing hours of barber shops by a rule.

The powers of the board of health to make rules respecting barber shops are found in the two following provisions of the statutes:

158.02 (1) "The state board of health shall prescribe and enforce rules and regulations, consistent with this chapter, governing barber shops and schools teaching barbering, the examination and licensing of master and journeyman barbers and the registration of apprentices and students, and on all other matters upon which supplemental rules and regulations may be necessary in the administration of this chapter."

158.04 (12) "The state board of health may make other rules and regulations, and prescribe additional requirements as to sanitation in barber shops to carry out the purposes of this chapter."

No question of sanitation under sec. 158.04 (12) is involved, so that section need not be considered.

The rule-making power delegated by sec. 158.02 (1) is a power to make rules consistent with and necessary in the administration of ch. 158. It does not empower the board to enact substantive rules of law unrelated to the regulations contained in the statute.

It is a thoroughly established rule of administrative law in this state that when legislative powers are delegated to an administrative officer or board the legislation delegating such powers must contain a standard to guide the officer or board in exercising its powers. The rule is thus stated in *State ex rel. Wis. Inspection Bureau v. Whitman*, (1928) 196 Wis. 472, 505-506:

“\* \* \* The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of Chief Justice Marshall ‘to fill up the details;’ in the language of Chief Justice Taft ‘to make public regulations interpreting the statute and directing the details of its execution.’ It is legislative power of the latter kind which is oftentimes called the rule-making power of boards, bureaus, and commissions.”

Applying this test to sec. 158.02 (1) requires an examination of all of ch. 158 to determine whether the legislature has indicated that there shall be a law regulating the opening and closing of barber shops. No provision remotely suggesting such regulation is contained in the law. How such a regulation could be said to be necessary in the interpretation or administration of ch. 158 is difficult to imagine.

It has been held that, although powers delegated to boards of health to enable them to perform their functions in safeguarding the public health are to be liberally construed, nevertheless in determining whether powers derogatory to common-law rights are conferred, the rule of strict construction is applied. *Crayton v. Larabee*, (1917) 220 N. Y. 493, 116 N. E. 355, L. R. A. 1918E 432. It is clear that the

power to prevent the opening of barber shops during certain times of the day would be in derogation of the common-law rights of the shop owners, so that if the legislature intended the board to have such power it should have been delegated in clear and unmistakable terms.

Although a delegation of power to establish maximum hours of work under the "code" laws has been sustained, *State ex rel. Attorney General v. Noyes*, (1937) 223 Wis. 378, there is no indication in ch. 158 of a legislative intent to give the board of health power to establish a code of fair competition in the barber trade. That power, on the contrary, was specifically vested elsewhere by sec. 100.205, Stats. Whether such power may constitutionally extend to fixing the time of opening and closing of the shops is in any event doubtful since the decision in *State v. Neveau*, (1941) 237 Wis. 85.

WAP

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*Public Health — Basic Science Law* — Chiropodist who goes from place to place at regular or irregular intervals less frequently than once a week must obtain itinerant's practitioner's license under sec. 147.18, Stats.

December 17, 1942.

H. W. SHUTTER, M. D., *Secretary*,  
*Board of Medical Examiners*,  
Milwaukee, Wisconsin.

You have inquired whether a chiropodist who goes from town to town less than once a week is to be classed as an itinerant practitioner under sec. 147.18, Stats.

Sec. 147.18 reads:

"Itinerant practitioners of medicine, surgery or osteopathy or of any form or system of treating the afflicted shall obtain an annual license in addition to the regular license or certificate of registration, and shall pay therefor two hundred fifty dollars per annum. Persons practicing medi-

cine, surgery or osteopathy or professing or attempting to treat or heal ailments or injuries of the human body who go from place to place at regular or irregular intervals less frequently than once a week, are itinerant practitioners."

The question to be determined is whether a chiropodist is a practitioner "of any form or system of treating the afflicted" or if he professes or attempts "to treat or heal ailments or injuries of the human body" within the meaning of the above statute.

The practice of chiropody is defined by sec. 154.01 (1) 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."

It would appear that the practice of chiropody as above defined, encompasses "treating the afflicted" and treatment or healing "of ailments or injuries of the human body" within the meaning of sec. 147.18, quoted above.

The statutory definition of the practice of chiropody includes the word "treatment" and anyone who has ever suffered from abnormal nails, corns, callouses, bunions or the like, would have no difficulty in classifying the same under the heading of "affliction" or "ailment" as these words are defined, understood and commonly used.

This conclusion is further supported by sec. 154.02 and sec. 154.03. Sec. 154.02 requires, among other things, that an applicant for a license to practice chiropody must have professional training in a reputable school of chiropody in "anatomy and physiology of the feet, and diagnosis of the foot ailments and deformities which the chiropodist is authorized to treat, materia medica, chiropodial orthopedics,

bacteriology, pathology, histology, therapeutic chemistry, and minor surgery and bandaging pertaining to *ailments* of the feet, and the mechanical *treatment* of congenital or acquired deformities of the feet”.

Sec. 154.03 provides in part:

“Examination shall be both scientific and practical, and written in English, in anatomy and physiology of the feet, and diagnosis of the foot *ailments* and deformities which the chiropodist is authorized to treat, materia medica, chiropodial orthopedics, bacteriology, pathology, histology, therapeutic chemistry, and minor surgery and bandaging pertaining to *ailments* of the feet, not including any amputation, and the mechanical *treatment* of congenital or acquired deformities of the feet, and may be supplemented by oral and clinical examination. \* \* \*”

The underscored provisions of the above statute very plainly stamp the character of the chiropodist's practice as being within the field of a “form or system of treating the afflicted” and to consist of “treating or healing ailments of the human body” within the meaning of sec. 147.18, the itinerant practice statute.

In reaching this conclusion we are not unmindful of the fact that the provisions for licensing chiropodists are contained in ch. 154, which relates exclusively to chiropody and contains no restrictive provisions on itinerant practice such as that contained in sec. 147.18. However, we are of the opinion that ch. 147 and ch. 154 must be read and construed together since they are not only *in pari materia*, both relating to treating human ailments or deformities, but they were originally contained in the same chapter of the statutes.

The chiropody practice act was created by ch. 550, Laws 1917, which added to the statutes secs. 1435f-12 to 1435f-20 inclusive. At that time the medical practice act commenced with sec. 1435 and the chiropody provisions commencing with sec. 1435f-12 were merely added to it. Both were then a part of ch. 58. By a general revision of Title XV of the statutes relating to all phases of public health, effected in 1923 by ch. 448, the provisions respecting the practice of chiropody were set up in a separate chapter, ch. 154, where they have since remained. But even though now contained

in a separate chapter the provisions thereof are not self-executing and reference must be made to ch. 147 in order to make the chiropody act complete. This is illustrated by the fact that the chiropody act is administered by the state board of medical examiners assisted by examiners in chiropody appointed by said board, and resort must be had to ch. 147 to determine the membership, powers, duties and other provisions relating to the state board of medical examiners.

Ordinarily the privileges conferred under a particular license, such as a chiropodist's license, are not to be abridged by implication, but we do not have to resort to implication here, since the language implied in sec. 147.18 is very broad and certainly comprehensive enough to encompass the practice of chiropody in the absence of some express exception relating thereto, and, as above indicated, ch. 147 and ch. 154 are to be read and construed together. Thus the provisions of sec. 147.18 are deemed to be applicable to the provisions of ch. 154.

You are therefore advised that a chiropodist who goes from place to place at regular or irregular intervals less frequently than once a week must obtain an itinerant practitioner's license under sec. 147.18, Stats.

WHR

*Prisons — Prisoners — Public Officers — Sheriff —* Sec. 56.08, subsec. (6), Stats., contemplates that entire earnings of prisoner shall be paid to use of those dependent upon him.

Sec. 56.08 (7), requiring sheriff to turn over at end of each month balances earned by prisoners and not paid out under provisions of subsec. (6), has no application in case where only prisoner employed pursuant to provisions of that section has dependents. Subsec. (7) covers only cases where sheriff receives during course of month moneys earned by prisoners having no dependents.

If all prisoners employed have dependents, then there is no balance remaining as amounts required to be paid out pursuant to provisions of subsec. (6).

It is intent of these subsections that sheriff shall pay each week to use of dependents of prisoner amount earned by that prisoner, that moneys earned by prisoner having no dependents shall be paid to county, and that each month sheriff shall be required to pay to county treasurer all amounts due to county, namely, those amounts earned by prisoners in his custody which are not required to be paid to dependents.

December 17, 1942.

HENRY VAN DE WATER,  
*District Attorney,*  
Sheboygan, Wisconsin.

You state in your request for an opinion that a person in your county was committed to the county jail and that he has been employed under the provisions of sec. 56.08, Stats., during the time that he has been imprisoned. The person in question has a mother who is dependent upon him for support. The question is raised as to whether it is required by the provisions of sec. 56.08 that the entire amount earned by the prisoner be paid to the dependent.

In this connection you call attention to certain provisions of sec. 56.08, Stats., which read:

“(6) At the time of sentencing such convicted person the court shall take proof and determine what person or persons if any are actually dependent on such convicted person for support, and shall cause their names to be entered in the

docket, and in the commitment of such convicted person. The court shall at the same time designate and enter in said docket and commitment the name of a person to whom payments shall be made for the use of such dependent person or persons, as hereinafter provided. At the end of each week the sheriff shall pay over to said payee for the use of said dependents the earnings of such prisoner collected by him; and if the prisoner worked for the county the sheriff shall issue and deliver to the said payee for the use of said dependents an order on said county, for an amount equal to one dollar per day for the number of days of such labor, specifying in said order who earned said money and who are entitled to it for support, and such order shall be paid by the county treasurer from the general fund.

“(7) All balances of money collected by the sheriff by virtue of this section and not paid out pursuant to subsection (6) shall, at the end of each month, be deposited by the sheriff with the county treasurer, together with an itemized statement showing by whom the same were earned and by whom paid, and shall be the property of the county. The sheriff shall also render to the county board, at each session thereof, a sworn itemized statement of all money so collected, by whom earned, and by whom paid; and also of all sums paid out, to whom paid and for whom, including all orders drawn on said county as provided herein.”

You state in your request that there is difficulty in interpreting this language which arises out of, *first*, an opinion of this office in XIX Op. Atty. Gen. 400, in which it was said that subsec. (6) required that all moneys earned by a prisoner be paid over at the end of each week to the use of those found dependent by the court, and, *second*, the provision in subsection (7) that all balances collected by the sheriff and not paid out pursuant to subsection (6) should at the end of each month be deposited by the sheriff with the county treasurer. You state that an inconsistency is found between the opinion and subsection (7) in that, if subsec. (6) requires all moneys earned to be paid to the use of a dependent or dependents, there would be no balance remaining to pay over to the county and that subsec. (7) contemplates that there shall be a balance. From this it is inferred that a court committing a prisoner could determine the amount that should be paid to a dependent or dependents, and that the difference between the amount so paid and the amount so received by the prisoner as salary or wage should be paid over to the county.

The two subsections are to be read together in order to derive the legislative intent. Subsec. (6) makes no provision for distribution of the earnings of those prisoners who have no dependents. It is clearly the intention of subsec. (7) to cover those cases. If there were say, five prisoners, two of whom had dependents and three of whom had no dependents, the sheriff, under the provisions of subsec. (6) would be required to pay to the dependents of those prisoners having dependents the amounts earned by them. Such payments, as stated, are required to be made each week. The balances collected by the sheriff would be derived from the earnings of those prisoners having no dependents and the sheriff would be required to pay such balances over to the county treasurer at the end of each month, identifying the prisoners contributing to the balance, the amount contributed by each, and employers making payments.

Subsec. (7) applies only in those instances where there are balances in the sheriff's hands over and above the earnings required to be paid to dependents under the provisions of subsec. (6). There may or may not be such balances in the sheriff's hands at the end of any month, depending upon whether the prisoners in the county jail, employed pursuant to the section, have dependents.

In the case in question the whole amount of the compensation earned by the prisoner should be paid to his dependent mother and there is no balance, at least from his earnings, to be paid over to the county at the end of the month. If there is another prisoner in the county jail employed pursuant to the section who has no dependents, the sheriff can pay over the moneys earned by that prisoner at the end of the month and thereby discharge his duty under subsec. (7).

Your attention is called to the fact that the request in this case does not constitute full compliance with the practice relating to requests for attorney general's opinions. You have stated that there is no authority in point, and you have likewise called attention to the provisions applicable, and in this respect you have fully complied with the requirements. On the other hand, it is also required that the district attorney, in submitting a request for an opinion, shall state his conclusion and the reasoning upon which it is based. There has been no compliance with this requirement. May I respect-

fully request that in future cases you adhere to the rules. While in the particular case we have experienced no difficulty with the statute, it is very helpful to us, as a general rule, to have the benefit of a discussion by the district attorney in the first instance.

JWR

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*Vital Statistics — Birth Certificates* — Sec. 69.60, Stats., authorizes state registrar of vital statistics to file new birth records in cases of adoption or legitimation only in cases of persons born within this state.

December 21, 1942.

C. A. HARPER, M. D., *State Health Officer,*  
*Board of Health.*

You have submitted two requests for opinions which raise but one question, so that both requests will be answered together. In your first letter you inquire generally as to the power of the state board of health to issue birth certificates under sec. 69.60, Stats., in behalf of children born either in or out of wedlock in other states and subsequently adopted in this state. In your second letter you inquire specifically with reference to the case of an unmarried expectant mother who resided in Milwaukee and went to Chicago for her confinement. In Chicago she gave an assumed name and the child's birth was there recorded in the assumed name of the mother with the notation, "father unknown." This child now has been, or will shortly be, adopted in this state, and you inquire whether a birth certificate may be issued pursuant to sec. 69.60, Stats. In both cases the desire is to remove the stigma of illegitimacy from the birth records of the children involved, and to have them appear to be the legitimate children of the adoptive parents' own blood.

Sec. 69.60, Stats., was enacted in 1939, ch. 524, and reads as follows:

“(1) On being advised pursuant to section 322.05 of the adoption of any child whose birth has previously been registered or pursuant to section 245.35 of the legitimation of any child due to the subsequent marriage of the parents, the state registrar of vital statistics shall cause a new birth certificate to be filled out signed by himself or his authorized representative. In the certification to this new certificate, and over his signature, reference shall be made to this section of the statutes by number only. In all other respects the certificate shall be the same as other birth certificates, and shall contain nothing else to differentiate it therefrom.

“(2) In cases of adoption, all the names and statistical particulars entered on the new certificate shall refer to the adoptive parents. Where the question of legitimacy is asked, it shall be answered in the affirmative.

“(3) In cases of legitimation under section 245.35, the names and statistical particulars shall be entered as of the date of birth but as though the parents were married at that time. Where the question of legitimacy is asked, it shall be answered in the affirmative.

“(4) All other items not affected by the adoption or legitimation shall be copied as on the original, including the date of filing.

“(5) The new certificate shall then be filed in place of the original, and the original, together with all correspondence, affidavits, court orders, etc. pertaining thereto, shall be filed away from all public access. Copies of or access to these originals or any material pertaining thereto shall be obtained only on court order or at the discretion of the state registrar. Copies of the new certificate shall be issued under the same laws and rules as apply to the issuing of other certificates.

“(6) The state registrar shall send a copy of each such new certificate to the register of deeds and to the village clerk or city health officer where a copy of the original was filed. Such register of deeds and local registrar shall file this new record in their regular file, and impound the original which shall not be examined except upon court order or request of the state registrar.

“(7) This section shall be retroactive in that the state registrar may treat all such records now on file since October 1, 1907, in such manner, and so notify the registers of deeds and local registrars.”

Prior to the adoption of this section, the law provided that in any case of adoption of a child whose birth had previously been registered, the state registrar of vital statistics should add to the previous birth certificate the name and ad-

dress of the parents by adoption, the new name of the child, if any, and the court issuing the order and the date thereof. Sec. 69.60, Stats. 1937. It was also provided that, at the request of the adoptive parents, a new birth certificate might be issued by the state registrar bearing the new name of the child and of the adoptive parents, but without reference to the adoption, and the original birth registration should remain a part of the record of the department. Sec. 69.605, Stats. 1937.

It seems clear from a reading of the present sec. 69.60 as well as from a consideration of the former law that it applies only to cases of children born within this state, however desirable it might be that it should apply also to children born elsewhere. The former law, as noted above, provided only for amending the existing birth registration and issuing a new certificate based on the amended record. The obvious intent and purpose of the new law enacted in 1939 was to substitute a new birth registration in order that the true origins of the children involved might as nearly as possible be expunged from the public records after they had been adopted, or legitimated by the marriage of their parents. Plainly, that purpose cannot be achieved where the original record is on file in some other state.

In any case, it is quite clear that the statute does not authorize the recording of births occurring outside of this state. This is implicit throughout sec. 69.60. Subsec. (1) thereof refers to "the adoption of any child *whose birth has previously been registered.*" Subsec. (4) requires that "all other items not affected by the adoption or legitimation *shall be copied as on the original, including the date of filing.*" Subsec. (5) provides that the new certificate shall then be *filed in place of the original*, and the original shall be filed away from all public access. Subsec. (6) provides for notification by the state registrar to the proper local registrar, who is required to file a copy of the new certificate and impound the original record. Subsec. (7) indicates that the statute applies to such records "now on file."

It is, therefore, quite apparent that the statute cannot be applied to any case where there is no birth certificate presently on file in your office and in some local registrar's office in this state, even though it might be in some other state.

Moreover, if sec. 69.60 were held to apply to cases of children not born within this state, it would result in a duplicate registration—one in the state where the birth occurred, and another later in Wisconsin. This would result in a fictitious and wholly unwarranted increase in the birth rate from a statistical point of view. It would also make it possible for a child born outside the territory of the United States to acquire an official record of his birth within this country, and thus become *prima facie* eligible to all of the benefits accruing to such persons, without even attempting to comply with the federal laws on the subject. Such an intent should not be attributed to the legislature, at least in the absence of clear language to that effect.

You suggest that a change in the law may be desirable. It would seem that to bring about the results you desire it would be necessary to obtain reciprocal legislation in the several states. To this end the problem might well be submitted to the commissioners on uniform state laws. In the meantime, however, sec. 69.60 might be amended to include cases of children born in Wisconsin but adopted in some other state.

WAP

*Social Security Act — Poor Relief — Old-age Assistance*  
— Recipient of old-age assistance may receive medical or surgical assistance through regular channels if it is needed even though he is receiving less than maximum old-age assistance permitted by sec. 49.21, Stats.

Term "medical and surgical assistance" as used in sec. 49.31, subsec. (1), includes hospitalization.

Person receiving old-age assistance may not receive additional aid through regular relief channels for any purpose other than medical or surgical assistance.

December 22, 1942.

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

You inquire whether a recipient of old-age assistance must be receiving the maximum amount allowed by sec. 49.21, Stats., before he may receive supplementation through poor relief channels for (1) medical and surgical assistance (2) other or subsistence needs. You also ask as an incident to the first part of the question whether hospitalization is to be deemed medical or surgical assistance.

You have pointed out that it might be argued that the opinion in XXVI Op. Atty. Gen. 306 supports the view that a recipient of old-age assistance may not receive additional aid through poor relief channels for medical purposes unless he is receiving the maximum old-age assistance allowed by law. That opinion points out that one of the primary purposes of the old-age assistance law is to keep aged, dependent persons off the regular relief rolls as much as possible, from which it might be deemed to follow that a person who is qualified to receive old-age assistance may demand that he receive the maximum amount allowed by statute before being compelled to go to the regular relief channels for medical assistance.

Sec. 49.21 provides that any person who shall comply with the provisions of the statutes "shall be entitled" to financial assistance in old age. The section fixes the maximum amount which may be paid to such a person as old-age assistance but does not specify that he shall be entitled to the maxi-

mum grant in every case. The amount of the grant is left to the discretion of administrative agencies "with due regard to the conditions in each case."

If an aged dependent person is in need of surgical and medical assistance that fact is one of the conditions which may and should be considered in determining the amount of assistance to be paid within the maximum limitation provided by statute. XXVI Op. Atty. Gen. 306. It seems entirely possible, however, that the legislature may also have intended that one of the conditions which might be considered in determining the amount of assistance to be given is whether adequate medical or surgical care is available to the beneficiary through other sources. It seems reasonable to assume, as an analogy, that if an applicant for old-age assistance had received an adequate food supply through other sources, the administrative agency might consider that fact in determining how much assistance that applicant needs. If, as you point out is sometimes the practice, a county has agreements with its local medical societies whereby a lower rate is provided for relief cases than is charged of an individual, and if adequate medical or surgical assistance is available to the applicant for old-age assistance through that arrangement, it might be a condition such as the legislature intended the administrative agencies to consider in determining the amount of old-age assistance to be allowed.

Sec. 49.31 (1) reads:

"During the continuance of old-age assistance no beneficiary shall receive any other relief from the state or from any political subdivision thereof except for medical and surgical assistance."

By this section the legislature has set apart medical and surgical assistance as an exception to the restriction against receiving relief other than old-age assistance. Sec. 49.31 does not appear by its terms to deal alone with maximum grants. If a beneficiary is receiving old-age assistance in any amount, even though it is less than the maximum, the terms of the statute above cited appear to preclude him from receiving any other form of relief except that specifically excepted. It is logical to assume that the exception to the restriction is intended to apply in all cases in which

the restriction itself is applicable. If it had been intended that the exception for medical or surgical assistance should apply only to persons receiving the maximum assistance permissible, it would have been more logical to incorporate the exception into the section in which that maximum is fixed.

It was held in *Cleveland v. Industrial Comm.*, 232 Wis. 147, 286 N. W. 558, that the obligation of local relief authorities to relieve needy persons under sec. 49.03 was not obviated because the family had been receiving aid under sec. 48.33 (6) for dependent children. That section provides:

“Aid pursuant to this section shall be the only form of public assistance granted to the family for the benefit of such child, except medical and dental aid, \* \* \*.”

It was there held that whatever inhibition was imposed by the quoted provision was directed against action on the part of officers engaged in administering aid for dependent children which is the subject matter of the provision, and not against officers administering other forms of relief. Sec. 49.31 (1) differs from sec. 48.33 (6) in that the inhibition in the former section is directed against the recipient of the old-age assistance rather than against the administrative officers. It seems entirely consistent with the restrictive language, therefore, that the legislature intended to leave it to the discretion of the administrative officials to determine whether the public is better served under particular circumstances by having medical aid granted in the form of old-age assistance or in the form of poor relief.

In this connection you have also asked whether the term “medical and surgical assistance” as used in sec. 49.31 (1) includes hospitalization.

In *Park View Hospital Association v. People's Bank and Trust Co.*, 189 S. E. 766, 769, 211 N. C. 244, the court defined the term “medical services” as used in a statute fixing the order of priority for payment of debts of a deceased person so as to include hospital treatment. The court said:

“The words ‘medical services,’ as used in the statute, include all services rendered to the deceased, because of his illness, upon the advice of his physician, which were reason-

ably necessary for his care and comfort, and for his proper treatment by his physicians."

The construction of the same term may of course vary in different statutes, depending upon the subject matter, purpose and context of the law. The term "medical and surgical assistance" as used in some laws might be strictly construed so as not to include hospital care. Hospitalization, however, may be an essential part of proper medical or surgical treatment. To regard hospital service as something separate and apart from medical and surgical assistance so as to require it to be administered separately under the old-age assistance and relief laws might be very impractical, since the need for hospitalization usually arises in connection with and as a part of the medical treatment given under the advice of a physician. It is our opinion that the legislature intended the term "medical and surgical assistance" as used in sec. 49.31 (1) to include hospital care if that is a part of the treatment deemed essential by the physician in charge.

Your other question is whether a recipient of old-age assistance must be receiving a maximum grant in order for him to receive supplementation through poor relief channels for other or subsistence needs.

Sec. 49.31 provides that no beneficiary of old-age assistance shall receive other relief except for medical or surgical assistance. There being no exception in favor of "other or subsistence needs," a recipient of old-age assistance is not entitled to receive aid through poor relief channels for such purposes regardless of whether he is receiving the maximum or less than the maximum old-age assistance. It is true, as previously pointed out, that the inhibition of sec. 49.31 (1) is applicable to the old-age assistance beneficiary rather than to the officers administering the system. The legislature, however, has made it clear by that section that old-age assistance is to take the place of other forms of poor relief except medical and surgical assistance and it would be contrary to the manifest intent of the law to grant any other form of relief to a person receiving old-age assistance regardless of whether he is receiving the maximum.

BL

*Minors — Child Protection* — Compensation for care of child committed to industrial school under provisions of sec. 48.07, Stats., paroled under provisions of sec. 48.16, Stats., and placed in private home, may be made charge upon county of child's legal settlement when approved by order of court entering original order of commitment.

December 23, 1942.

DEPARTMENT OF PUBLIC WELFARE.

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

You request an opinion as to the authorization for a juvenile court to charge the county from which a fifteen year old girl was committed to the Wisconsin industrial school for girls, for her support, when she has been paroled and placed with a person not her parent. You state that the parolee was so placed as being most conducive to her proper adjustment, placement with others including relatives not having been satisfactory; that the child is a dependent, her parents being unable to contribute to her necessary expense; and that the individual with whom the girl is now living resides in a county other than that from which she was committed to the industrial school.

The answer to your question lies in par. (a), subsec. (6) of sec. 48.07, Stats. The pertinent provisions thereof state:

“Whenever a child is committed by the court to custody other than that of his parent and no provision is otherwise made by law for the support of such child, compensation for the care of such child, *when approved by order of the court, shall be a charge upon the county*, except in counties maintaining a county home for dependent children. \* \* \*.”

This provision is given equal effect, by the prefatory sentence in sec. 48.07, to cases where a child is either *delinquent*, neglected or dependent.

We have expressed the opinion that the words “shall be a charge upon the county”, used in the quoted language, refer to the county of residence or legal settlement, which, for the purposes of ch. 48, are identical. XXIX Op. Atty. Gen. 159.

Sec. 48.17, Stats., provides the charge to be made by the state in cases where children are committed to industrial

schools and are maintained in such schools. The section does not, however, refer to a case where a child has been committed to an industrial school and has been paroled and is no longer maintained there.

Sec. 48.16, Stats., provides for the parole of children committed to industrial schools and provides further that every paroled child shall remain in the legal custody of the board of control [state department of public welfare, sec. 58.36] until it reaches twenty-one years of age.

It is no doubt true that in the greater number of cases the state department of public welfare in placing children in its custody in private homes should and does take into account the ability of those maintaining such homes to stand the cost of caring and maintaining for the children so placed. On the other hand, the question here presented is whether the department may place a child in its custody in a private home and charge the county with the expense of maintaining the child where the person with whom the child is placed is not able to maintain it. Sec. 48.07 (6) (a), to which we have referred, is very broad in its terms. The child involved in the particular case has been committed to the custody of the state and by law that custody may not be surrendered until the child reaches twenty-one years of age. Secs. 48.07 (1) (b) and 48.16 (2), Stats. The child has therefore been committed by a juvenile court to custody other than that of its parents. No provision is made by law for the support of the child other than that made by sec. 48.07 (6) (a), Stats. That section therefore is applicable and if approved by order of the court committing the child, such reasonable compensation for its care as may be necessary is chargeable to the county of its legal residence or settlement.

JWR



## INDEX

APPROPRIATIONS AND EXPENDITURES	Page
Vocational education—state board may not direct expenditure of funds received from federal government for vocational aid except in compliance with restrictions and conditions of federal laws .....	30
Vocational education—each phase of program for which expenditures by state board are contemplated should first be submitted to federal security agency for approval before federal funds are utilized therefor .....	30
Council of defense, county—counties and towns may not appropriate funds, except those exercising village powers under 60.18 (12); cities and villages, including city of Milwaukee, may appropriate such funds .....	34
Athletic commission—emergency board may supplement appropriation under 20.48 .....	67
Student loans—appropriations under ch. 363, L. 1933, ch. 10, L. 1933 (Special Session), and ch. 17, L. 1935, are now controlled by provisions of ch. 17; loans are to be made under terms and provisions prescribed by department of public welfare without regard to limitations prescribed in ch. 363, L. 1933 .....	80
Refund—county treasurer may retain 7½% of amount of gift tax credit applied in payment of inheritance tax; nonretention results in overpayment refundable under 20.06 (2) .....	187
Money in possession of stewards of state institutions managed by department of public welfare pursuant to 20.175 (3) and money collected by such institutions not yet remitted may be insured, but such insurance must be obtained from state insurance fund .....	215
Conservation commission may compromise claim arising under written lease by paying agreed amount in lieu of fish which it was orally agreed lessor was to receive; such claim approved by commission should be audited by secretary of state .....	312
Conservation commission—state is not liable for services rendered to it in absence of contract or compliance with civil service law; such claim should not be compromised or audited .....	312
Conservation commission—state is not liable for damages arising out of negligent acts of its officers or agents; such claim should not be compromised or audited .....	312
National forest income—sec. 20.07 (10), Stats., requires same apportionment as is required by Title 16, sec. 500, USCA, namely, apportionment with respect to each forest; prior error in apportionment may be corrected in next or subsequent apportionments .....	322
Conservation commission—may, with approval of governor, purchase forest land within region designated by 20.20 (14) (a) notwithstanding no map indicating proposed purchases has been prepared and notwithstanding purchase might lie without boundaries of any map which might have been prepared .....	337

Articles of incorporation. See Corporations.

Assistant district attorney. See Public Officers—district attorney, assistant.

Athletic commission. See Appropriations and Expenditures.

Auto dealers. See Corporations.

Auto registration. See Automobiles, law of road.

## AUTOMOBILES

Page

Law of road—85.08 (27) (a), authorizing commissioner of motor vehicle department to suspend license of operator under certain circumstances, has no application to conviction for driving while under influence of intoxicating liquor resulting in restricted occupational operator's license under 85.08 (25c) .....	69
Law of road—under 85.08 (25) (b) it is duty of commissioner of motor vehicles to forthwith revoke license of operator upon receipt of record of his conviction for driving while under influence of intoxicating liquor, unless such operator has obtained stay order under 85.08 (25c); appeal to circuit court does not in and of itself operate as stay .....	69
Law of road—provisions of 85.09 (15) (a), as created by ch. 206, L. 1941, relating to releases of proof of financial responsibility by commissioner of motor vehicle department in cases involving suspension or revocation of drivers' licenses, apply only to offenses resulting in suspension or revocation that were committed after Sept. 1, 1941; provisions of 85.08 (19), Stats. 1939, still apply where offense was committed prior to Sept. 1.....	111
Law of road—owner of vehicle of 8,000 pounds or more who elects to pay motor vehicle registration fee on quarterly rather than annual basis may at any one time apply and pay for as many quarters less than full license year as he desires, but fee for each quarter must be one-fourth of annual fee plus one dollar .....	145
Law of road—beer is "intoxicating liquor" in meaning of drunken-driving statute notwithstanding its exclusion from definition of term as used in ch. 176 .....	199
When motor vehicle department receives appropriate evidence of sale of registered vehicle free of incumbrance in bankruptcy proceedings it should issue certificate of title to purchaser in accordance with terms of such sale ....	251
Foreign insurance carrier must be licensed by insurance commissioner to qualify under 85.09 (6) .....	253
Lloyds must be licensed .....	253
Domestic company is not required to be licensed and qualify under 85.09 (6) until commissioner takes action compelling company to cease doing business; 203.55 relates only to fire insurance .....	253
Law of road—under 85.08 (31) at expiration of two years following date of expiration of revocation period or at expiration of one year following date of expiration of suspension period, person whose license has been revoked or suspended is entitled to license regardless of whether he ever filed proof of responsibility during such period or whether, having filed, such proof was maintained throughout unexpired portion of that period .....	257
Law of road—upon expiration of restricted driver's license for occupational purposes issued under 85.08 (25c), operator is not required to furnish proof of financial responsibility under 85.08 (26) if there is no violation of order of restriction so as to result in revocation .....	378

## BANKRUPTCY

When motor vehicle department receives appropriate evidence of sale of registered vehicle free of incumbrance in proceedings, it should issue certificate of title to purchaser in accordance with terms of such sale .....	251
---	-----

**BANKS AND BANKING**

	Page
Deposits, public—questions with respect to operation of ch. 34, sec. 220.08 (13) and (14) and sec. 220.20, Stats., answered .....	191
Deposits, public—where provisions of sec. 62.13, relating to policemen's and firemen's pension funds in cities of second and third class are applicable to village by virtue of sec. 61.65, funds are subject to public deposits law..	381
Barbers. See Public Health.	
Basic science law. See Public Health.	
Beer licenses. See Municipal Corporations.	
Birth certificates. See Vital Statistics.	
Board of water commissioners. See Public Officers.	

**BONDS**

Surety bond under 215.33 (2) (c), required by banking commission to be furnished in form prescribed in 19.01 (2), may be canceled by mutual agreement between banking commission and bonding company .....	367
--	-----

**BRIDGES AND HIGHWAYS**

Relocation—where owner of land to be condemned cannot be ascertained service may be made as prescribed in 83.08 (2); if proceedings are otherwise proper and notice given should be held inadequate measure of damages to be paid true owner would not be affected but his right of action to contest award would not be limited to period prescribed by statute .....	6
Relocation—landowner may proceed to have his damages appraised immediately upon filing of award under 83.08 (2) even though there has been no actual entry upon his land .....	6
Relocation—after award is made, approved and filed highway authorities may take immediate possession of land	6
State highway commission may enter into contract with county for performance of highway construction or reconstruction providing for compensation of county at maximum unit price rate .....	236
County highway committee may enter into such contract on behalf of county .....	236
County is not entitled to extra compensation merely because contract proves improvident .....	236
Highway commission may not increase compensation rates provided for in contract except pursuant to terms of provision in contract authorizing subsequent adjustment	236
Gravel pit—sec. 83.07 (2) does not authorize county highway committee to condemn additional lands for county-owned pit for purpose of operating it commercially as well as for its own use .....	241
Gravel pit—county's liability to adjoining property owners for damage by dust and cave-ins is that of one proprietor to another and governmental immunity for negligence does not attach where pit is operated for use of county and for sale of gravel .....	241

**BUILDING AND LOAN ASSOCIATIONS**

Surety bond under 215.33 (2) (c), required by banking commission to be furnished in form prescribed in 19.01 (2), may be canceled by mutual agreement between banking commission and bonding company .....	367
--	-----

## CHARITABLE AND PENAL INSTITUTIONS

Page

Under 46.10 (7) claim of department of public welfare or of any county against estate, husband or wife of inmate of certain state and county institutions for per capita cost of his maintenance is no longer preferred claim; statutes of limitation are available as defense .....	63
Child protection. See Minors.	
Chiropracist. See Public Health, basic science law.	
Circuit court reporter. See Courts—reporter, circuit court.	
Circuit court reporter. See Public Officers—reporter, circuit court.	
City supervisor. See Public Officers—supervisor, city.	
Claims. See Appropriations and Expenditures, conservation commission.	
Clerk of circuit court. See Public Officers.	
Clerk of municipal court. See Public Officers.	
Collection agencies. See Corporations.	
Conservation commission. See Appropriations and Expenditures.	

## CONSTITUTIONAL LAW

Bureau of purchases has no authority to purchase and use multilith machine for state work .....	60
---	----

## CONTRACTS

State highway commission may enter into contract with county for performance of highway construction or reconstruction providing for compensation of county at maximum unit price rate .....	236
County highway committee may enter into such contract on behalf of county .....	236
County is not entitled to extra compensation merely because contract proves improvident .....	236
Highway commission may not increase compensation rates provided for in contract except pursuant to terms of provision in contract authorizing subsequent adjustment ..	236

## CORPORATIONS

Securities law—posting and selling by gasoline dealer at price set up to show and include net selling price per gallon, tax per gallon and cash redemption value per gallon of trading stamps given in connection with sale is not violation of law; same holds true where cash redemption value of stamps per gallon is not stated but is expressed in form of discount percentage .....	53
Securities law—posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure is not violation of law .....	53
Auto dealer—wilful failure to perform contract with retail buyer is ground for revocation of dealer's license but does not constitute criminal offense .....	216
Term "public utility" as used in 196.80 (1) (d) comprehends company owning and operating street railway or interurban railway; sale by such company of its trackless trolley system requires consent and approval of public service commission .....	244
Articles of incorporation—corporation may, by vote of $\frac{2}{3}$ of common and of $\frac{1}{2}$ of preferred stock, amend its articles	

CORPORATIONS—(Continued)

Page

so as to accomplish following results: (1) reduce par value of preferred stock issue from \$100 to \$25 per share; (a) eliminate preferred stock issue, giving holders debentures instead; (3) eliminate obligation of accrued dividends which have not been declared ..... 354

Collection agency—exemption of attorneys from licensing provisions of 218.04 (1) (f) does not extend to lay bill collector who is operating virtually independent business in lawyer's office; relationship of attorney and client exists between attorney and claimant and attorney must assume full responsibility for activities of employee ..... 374

Council of defense, county. See Appropriations and Expenditures.

County board. See Public Officers.

County board. See Public Officers—supervisor, city.

County clerk. See Public Officers.

County council of defense. See Appropriations and Expenditures—council of defense, county.

County court reporter. See Courts—reporter, county court.

County court reporter. See Public Officers—reporter, county court.

County pension director. See Public Officers—pension director, county.

County purchasing agent. See Public Officers.

COURTS

Forest or wild land area—meaning as used in 331.175 interpreted ..... 162

Reporter, county court—253.33 (4) applies to all reporters appointment of whom must be justified by 253.33 (exclusive of exception by subsec. (1) ); one so appointed is entitled to fees provided by 253.33 (4) and county board has no power to prescribe functioning of or duties of such reporter ..... 219

Reporter, county court—shorthand notes constitute property of court ..... 219

Reporter, circuit court—power and duty of county to furnish all or part of supplies and equipment of court used by reporter can be grounded upon inherent power of circuit court to require county to furnish court with supplies deemed by court necessary ..... 222

Contra ..... XVI 818

Municipal court for Vilas county, not court of record, has jurisdiction to suspend execution of its sentences in criminal cases, except in cases of minors as provided in 57.05 ..... 366

See ..... XXIX 371

CRIMINAL LAW

Sentence to state prison commences running on day of incarceration regardless of any statement made by court that credit be given for time served under previous sentence for same offense which was vacated by court when new trial was granted ..... 3

See ..... XXVII 329

Judgment—when convict on parole from state prison violates parole by committing misdemeanor for which he is

## CRIMINAL LAW—(Continued)

	Page
sentenced to county jail or house of correction state prison sentence is tolled from date of violation until he is returned to state prison; time spent in county jail or house of correction does not count toward service of such prison sentence .....	24
See .....	XXX 218
Lottery—scheme known as "Foto-Pay-Day" violates provisions of §48.01 .....	121
Wilful failure by automobile dealer to perform contract with retail buyer is ground for revocation of dealer's license but does not constitute criminal offense .....	216
Municipal court for Vilas county, not court of record, has no jurisdiction to suspend execution of its sentences in criminal cases, except cases of minors as provided in §57.05 .....	366
See .....	XXIX 371
Damages. See Appropriations and Expenditures, conservation commission.	
Daylight saving. See Weights and Measures, standard time.	
Death certificates. See Vital Statistics.	
Dentistry. See Public Health.	
Deposits, public. See Banks and Banking.	
Director of purchases. See Public Officers.	
District attorney. See Public Officers.	
District attorney, assistant. See Public Officers—district attorney, assistant.	
Dogs. See Police Regulations.	
Domestic animals. See Words and Phrases.	
Drunken driving. See Automobiles, law of road.	

## EDUCATION

Vocational education—state board may not direct expenditure of funds received from federal government for vocational aid except in compliance with restrictions and conditions of federal laws .....	30
Vocational education—each phase of program for which expenditures by state board are contemplated should first be submitted to federal security agency for approval before federal funds are utilized therefor .....	30
Vocational education—it is discretionary with local board whether tuition shall be charged for nonresident pupils	155
Vocational education—if local board requires payment of tuition for nonresident pupils those students serving as apprentices of residents may be exempted .....	155
Vocational education—minor apprentice may acquire residence other than that of parents so as to be entitled to attend school maintained by municipality in which master resides free of charge although parents reside in another municipality .....	155
Vocational education—adult apprentice is not entitled to attend school maintained by municipality in which contract is to be performed free of tuition charges unless he resides in that municipality or unless local board elects not to charge tuition .....	155
Teachers retirement—annuity board may disclose to third party accumulations to credit of member of retirement system and amount of monthly annuity such member is entitled to receive upon retirement .....	195

EDUCATION—(Continued)	Page
Vocational education—local school has insurable interest in machinery equipment purchased and paid for originally by local school for defense training program but with respect to which it is reimbursed 100% by allocation of federal defense training funds, title and ownership to which is vested in state board of vocational education subject to control of U. S. office of education .....	270
<b>ELECTIONS</b>	
Voting residence requirement of workers who have come into county to work on Badger Ordnance Plant discussed .....	136
Emergency board. See Appropriations and Expenditures, athletic commission.	
Exemption. See Taxation.	
Fire insurance. See Insurance.	
Firemen's fund, village. See Municipal Corporations, village firemen's fund.	
Forest crop lands. See Taxation.	
Forest fires. See Public Lands.	
Forest or wild land area. See Courts.	
Forest or wild land area. See Words and Phrases.	
Fraudulent advertising. See Trade Regulation.	
Garbage dumping. See Municipal Corporations, towns.	
Good time. See Prisons, prisoners.	
Gravel pits. See Bridges and Highways.	
Historical society—may not destroy or otherwise dispose of documents in its collection deemed to be of no historical importance. ....	131
<b>INDIANS</b>	
County may accept federal aid for its share of cost of maintaining indigent resident in county tuberculosis sanatorium .....	264
<b>INDIGENT, INSANE, ETC.</b>	
Poor relief—amounts collected by county from property transferred to county by recipient of old-age assistance or from proceeds of sale of real estate subject to lien for such assistance must be first applied by county officials as specified in 49.25 to full extent of assistance claim before being used to reimburse county for other forms of public assistance, whether amounts are recovered through proceedings in county court or otherwise; obligation is not affected by fact that agreement has been signed purporting to subordinate old-age assistance claim to claims of county for other forms of assistance .....	40
Poor relief—in case heirs refuse to probate estate of old-age pensioner and county pension director is appointed administrator, who is represented by district attorney as attorney, and there is surplus over county's claim under 49.26, these officers may be allowed fees for performance of probate services; in case of full-time pension director and district attorney such fees must be turned over to county .....	57

INDIGENT, INSANE, ETC.—(Continued)

Page

Re-examination of insane—under 51.11 (1) jurisdiction to re-examine sanity of inmate of central state hospital who was originally transferred there from penal institution and whose sentence to penal institution has expired is vested in judge of any court of record in county where such insane person resides or in county where department of public welfare adjudged him insane pursuant to 51.22; court in which insane person was originally sentenced to penal institution does not have jurisdiction to re-examine sanity under 51.11 (1); if no such proceeding is pending and no jury trial is desired, department of public welfare may re-examine such person's sanity pursuant to 51.11 (7) ..... 78

Poor relief—sec. 49.25 does not permit old-age assistance furnished wife of pensioner to be recovered from separate estate of husband, although both were pensioners... 151

Poor relief—lien held by county under 49.26 (4) does not of itself give county lien upon proceeds of fire insurance policy issued to owner of property; county's lien may be protected by loss payable clause in policy ..... 308

Industrial commission. See Industry Regulation.

Industrial commission. See Industry Regulation, safe employment and place.

INDUSTRY REGULATION

Sec. 101.01 (12), which defines term "public building" for purposes of state building code, applies to building owned by religious order and occupied by three or more sisters of that order who teach in parochial school.... 91

Master and apprentice—it is discretionary with local board of vocational and adult education whether tuition shall be charged for nonresident pupils ..... 155

Master and apprentice—if local board requires payment of tuition for nonresident pupils those students serving as apprentices of residents may be exempted ..... 155

Master and apprentice—minor apprentice may acquire residence other than that of parents so as to be entitled to attend school maintained by municipality in which master resides free of charge although parents reside in another municipality ..... 155

Master and apprentice—adult apprentice is not entitled to attend school maintained by municipality in which contract is to be performed free of tuition charges unless he resides in that municipality or unless local board elects not to charge tuition ..... 155

Safe employment and place—school district may obtain insurance against liability for accidental injuries to members of public caused by defective construction or maintenance of school building under 101.06; may not obtain insurance against injuries arising from any cause not covered by 101.06 ..... 176

See ..... XVIII 559

Inheritance taxes. See Taxation.

INSURANCE

State insurance—equipment to fight forest fires may be rented by conservation commission; may be insured with state insurance fund ..... 181

INDEX

415

INSURANCE—(Continued)

	Page
State insurance—money in possession of stewards of state institutions managed by department of public welfare pursuant to 20.175 and money collected by such institutions not yet remitted may be insured, but such insurance must be obtained from state insurance fund . . . . .	215
Foreign insurance carrier must be licensed by insurance commissioner to qualify under 85.09 (6); Lloyds must be licensed by commissioner in order to qualify under that section . . . . .	253
Domestic company is not required to be licensed and qualify until commissioner takes action to compel company to cease doing business; 203.55 relates only to fire insurance . . . . .	253
Local school of vocational education has insurable interest in machinery and equipment purchased and paid for originally by local school for defense training program but with respect to which it is reimbursed 100% by allocation of federal defense training funds, title and ownership to which is vested in state board of vocational education subject to control of U. S. office of education . . . . .	270
State insurance—board of water commissioners of city may not contract with privately operated company for insurance upon water department property after common council has voted to insure in state fund unless council votes to terminate insurance previously authorized by it . . . . .	305
Fire insurance—lien held by county under 49.26 (4) does not of itself give county lien upon proceeds of policy issued to owner of property; county's lien may be protected by loss payable clause in policy . . . . .	308
Dividends received by domestic companies on share certificates issued by federal savings and loan associations are to be included in gross income upon which license fee imposed by 76.34 (1) is computed . . . . .	329

INTOXICATING LIQUORS

Subsecs. (c), (d) and (e) of regulation 9 promulgated by state treasurer do not not subject permittee or licensee to penalty for any sale if such sale is otherwise in accordance with statutory regulation . . . . .	140
Municipalities may make more rigid closing requirements with respect to sale than those established by sec. 176.06 . . . . .	147
See . . . . .	XXVII
Applications for licenses for following license year filed after April 15 cannot be considered until after July 1; prohibition applies to granting of applications for renewal of existing licenses and to granting of applications of those not licensed . . . . .	179
Beer is "intoxicating liquor" in meaning of drunken-driving statute notwithstanding its exclusion from definition of term as used in ch. 176 . . . . .	199

Judgment. See Criminal Law.  
Justice of peace. See Public Officers.

Law of road. See Automobiles.

LIENS

Log liens—employees of purchaser of timber sold by state under contract providing for retention of title until tim-

LIENS—(Continued)

Page

ber has been measured and paid for may not obtain lien under 289.18 until timber has been counted and paid for and title thereto has passed to state ..... 370

Log liens. See Liens.  
 Log liens. See Public Lands.  
 Lotteries. See Criminal Law.

Malfeasance. See Public Officers.  
 Marriage certificates. See Vital Statistics.  
 Master and apprentice. See Industry Regulation.

MILITARY SERVICE

Six per cent maximum interest limitation provided by soldiers' and sailors' civil relief act of 1940 is applicable to delinquent real estate taxes falling due during period of military service of owner regardless of whether or not he had filed affidavit to suspend or postpone sale of property for taxes ..... 273

MINORS

Child protection—juvenile court of County B had concurrent jurisdiction notwithstanding retention of jurisdiction by juvenile court of County A in case in which child was adjudged delinquent by court of County A and was placed in foster home in County B at expense of County A and there committed further acts of delinquency; if it was error for juvenile court of County B to assume jurisdiction, such error did not affect jurisdiction of court but constituted error committed within jurisdiction ..... 133

Child protection—order of juvenile court committing child to industrial school, regular on its face, must be honored by superintendent of school until reversed or set aside by proper court action ..... 133

See ..... XXX 197

Child protection—if juvenile court was without jurisdiction to commit child to industrial school, proper remedies are by appeal, certiorari or habeas corpus; if court committed mere error in assuming jurisdiction and ordering child committed to industrial school, remedy is by appeal ..... 133

Child protection—order of juvenile court committing child to custody of person other than parent under 48.07 and erroneously purporting to charge county other than that of child's legal settlement may be corrected ..... 294

Child protection—if no other valid provision is made for payment of cost of care of child committed to custody of person other than parent county of its legal settlement is liable ..... 294

Child protection—licensed child welfare agency receiving custody of child under 48.07 may recover cost of care from county chargeable in manner in which other claims are recovered ..... 294

Child protection—compensation for care of child committed to industrial school under provisions of 48.07, paroled under provisions of 48.16, and placed in private home may be made charge upon county of child's legal settlement when approved by order of court entering original order of commitment ..... 404

**MORTGAGES, DEEDS, ETC.**

Page

When motor vehicle department receives evidence of sale of registered vehicle free of incumbrance in bankruptcy proceedings, it should issue certificate of title to purchaser in accordance with terms of such sale ..... 251

Motor fuel tax. See Taxation.

Motor vehicle operator's license. See Automobiles, law of road.

Municipal borrowing. See Municipal Corporations.

Municipal budgets. See Municipal Corporations, municipal borrowing.

**MUNICIPAL CORPORATIONS**

Municipal borrowing—67.12 does not authorize temporary borrowing by county to pay accrued claims for permanent improvements to fairgrounds, which claims were erroneously omitted from county budget adopted under 65.90 ..... 95

Beer license—retail Class "B" license issued to house manager of club may not be transferred to his successor .. 171

Beer license—beer may not be sold under license of house manager of club after his resignation even though sales are made by person holding operator's license ..... 171

Town—in order to transport garbage into town and dispose of it there resident of city must first secure permit notwithstanding city has permit so to do and city owns dumping ground located in town ..... 303

Municipal law—board of water commissioners of city may not contract with privately operated companies for insurance on water department property after common council has voted to insure in state insurance fund unless council votes to terminate insurance previously authorized ..... 305

Village firemen's and policemen's funds—where provisions of sec. 62.13, relating to pension funds in cities of second and third class are applicable to village by virtue of operation of 61.65, such funds are subject to public deposits law ..... 381

Municipal court. See Courts.

Municipal court, clerk. See Public Officers, clerk of municipal court.

Municipal law. See Municipal Corporations.

National forest income. See Appropriations and Expenditures.

Old-age assistance. See Indigent, Insane, etc.—poor relief.

Old-age assistance. See Social Security Act, poor relief.

Parole. See Prisons, prisoners.

**PEDDLERS**

Exception to itinerant merchant trucker law in 129.11 (2) (b) does not apply to dealer in seasonal fruits and vegetables who does not maintain established place of business throughout year ..... 153

Pension director, county. See Public Officers.

## PHYSICIANS AND SURGEONS

Page

- Fee fixed by 142.03 may not be paid to physician for filing verified report on patient's condition unless such physician has also examined patient personally under appointment made for that purpose by county judge .... 38
- Where application is made for hospital treatment at public expense under ch. 142, Stats., county judge is required to appoint physician to examine patient ..... 38

## POLICE REGULATIONS

- Standard time—under 175.09 (1), it was legislative intention to establish U. S. standard central time as standard time in state ..... 15
- Dogs—chickens are included within term "other domestic animals" as found in 174.01 ..... 201
- Policemen's fund, village. See Municipal Corporations, village firemen's and policemen's funds.
- Poor relief. See Indigent, Insane, etc.
- Poor relief. See Social Security Act.
- Prisoners. See Prisons.

## PRISONS

- Sentence to state prison commences running on day of incarceration in state prison under that sentence regardless of any statement made by court that credit be given for time served under previous sentence for same offense which was vacated by court when new trial was granted ..... 3
- See ..... XXVII 329
- Prisoner—when convict on parole from state prison violates his parole by committing misdemeanor for which he is sentenced to county jail or house of correction state prison sentence is tolled from date of violation until he is returned to state prison; time spent in county jail or house of correction does not count toward service of such prison sentence ..... 24
- See ..... XXX 218
- Prisoner—where received at Milwaukee county house of correction on Jan. 12, 1939 with sentence of three years, was paroled Oct. 14, 1940, subsequently violated his parole and was again received at institution July 19, 1941, with new sentence of one year on new conviction, must still serve so much of original sentence as remained unexpired at time he violated his parole; is entitled to have second sentence combined with first for purpose of calculating his good time allowance; good time will be calculated according to rates applicable to third and fourth sentence years ..... 65
- Prisoner—period of probation is fixed by 57.03 (2) at not less than minimum nor more than maximum term for which probationer might have been imprisoned; court has no power to fix period ..... 204
- See ..... XXVII 300
- Prisoner—first clause of 57.01 (2), giving court power to sentence probationer at any time during period of probation, applies only to case where sentence was originally withheld under 57.01 (1) and to case where department of public welfare has revoked probation and returned probationer to court for sentence under 57.03 (1) .... 204

INDEX

419

PRISONS—(Continued)

	Page
Prisoner—power of department of public welfare to revoke probation during period of probation or to discharge probationer from supervision and jurisdiction on expiration of probation period discussed .....	204
Prisoner—department of public welfare is not required to revoke probation upon first violation .....	204
See .....	XV
Prisoner—sec. 56.08 (6) contemplates that entire earnings shall be paid to use of those dependent upon him; 56.08 (7) has no application to case where only prisoner employed pursuant to that section has dependents; (7) covers only cases where sheriff receives moneys during month earned by prisoners having no dependents .....	393
Probation. See Prisons, prisoners.	
Public administrator. See Public Officers.	
Public building. See Words and Phrases.	
Public deposits. See Banks and Banking—deposits, public.	

PUBLIC HEALTH

Wisconsin general hospital—fee fixed by 142.03 may not be paid to physician for filing verified report on patient's condition unless such physician has also examined patient personally under appointment made for that purpose by county judge .....	38
Wisconsin general hospital—where application is made for treatment at public expense under ch. 142, Stats., county judge is required to appoint physician to examine patient .....	38
Dentistry—dental educational requirement of four years of 32 weeks each prescribed by 152.03 (1) relates to academic or school years; board of dental examiners may accept credentials of graduate who has received required 128 weeks of instruction even though such course has been completed in less than four calendar years ..	85
Slaughterhouse—sec. 146.11 has no application to building where animals are not killed but carcasses are dismembered for use as animal food .....	302
Barbers—state board of health has no authority under 158.02 (1) or otherwise to regulate opening and closing hours of barber shops .....	387
Basic science law—chiroprapist who goes from place to place at intervals less frequently than once a week must obtain itinerant's practitioner's license under 147.18 ....	389

PUBLIC LANDS

Forest fires—26.11 (1) contemplates that equipment for fire fighting is to be acquired by conservation commission by contract whenever possible and is to be commandeered only in emergency .....	181
Forest fires—equipment to fight fires may be rented under 26.11 (4) .....	181
Forest fires—26.14 (3), authorizing disbursements for emergency equipment, covers repair bills for damage to rented equipment .....	181
Forest fires—state is not liable for negligent acts of its officers or agents in operating commandeered equipment..	181
Log liens—employees of purchaser of timber sold by state under contract providing for retention of title until tim-	

PUBLIC LANDS—(Continued)	Page
ber has been measured and paid for may not obtain lien under 289.18 until timber has been counted and paid for and title thereto has passed to state .....	370
<b>PUBLIC OFFICERS</b>	
Board of water commissioners—may not contract with privately operated companies for insurance upon water department property after common council of city has voted to insure in state insurance fund unless council votes to terminate insurance previously authorized ....	305
Clerk of circuit court—is entitled to fees from naturalization proceedings in addition to salary fixed by county board .....	107
Clerk of circuit court—county board may not provide alternative compensation plans for office and permit clerk to choose which shall be applicable .....	107
Clerk of municipal court, Kenosha county—ch. 18, L. 1909, provides that clerk pay fines and penalties into county treasury quarterly; he is entitled to retain 50% of fines and penalties paid to him for quarter ending Oct. 1, 1941, arising out of violations of ch. 85, Stats. ....	248
County board—member elected from city ward to board may not under 62.09 (7) (d) sell insurance to city if annual premium exceeds \$300, irrespective of his share of commission thereon .....	93
County board—member elected from city ward to board does not violate 348.28 by selling insurance on city school buildings .....	93
County board—member elected from city ward to board violates 348.28 by selling insurance on city buildings other than schools if he is also member of common council of city from which he is elected .....	93
County clerk does not vacate office by enlistment in armed forces of U. S. ....	194
County clerk may offer himself as candidate for re-election while serving in armed forces of U. S. ....	194
County purchasing agent is not authorized to purchase equipment for offices other than those enumerated in 59.07 (7) .....	27
County purchasing agent—county officer appointed as agent may be paid compensation for so acting in addition to his regular salary as county official .....	27
Director of purchases—bureau of purchases has no authority to purchase and use multilith machine for state work .....	60
District attorney—may be allowed fees for performance of probate services in case where heirs refuse to probate estate of old-age pensioner and there is surplus in excess of county's claim under 49.26; such fees in case of full-time officer must be turned over to county .....	57
District attorney, assistant, and justice of peace—offices are incompatible .....	230
Justice of peace and assistant district attorney—offices are incompatible .....	230
Malfeasance—supervisor elected from city ward to county board does not violate 348.28 by selling insurance on city school buildings .....	93

PUBLIC OFFICERS—(Continued)

	Page
Malfeasance—supervisor elected from city ward to county board violates 348.28 by selling insurance on city buildings other than schools if he is also member of common council of city from which he is elected .....	93
Pension director, county—may be allowed fees for performance of services as administrator in case where heirs refuse to probate estate of old-age pensioner and there are funds in excess of county's claim under 49.26; such fees in case of full-time officer must be turned over to county .....	57
Public administrator—fees in estate pursuant to 72.17 (3) are payable until inheritance tax in estate has been determined by court .....	185
Register of deeds—fee, under 59.57 (1) (b), for recording conveyance of lands for highway purposes is 10¢ per folio and 3¢ for every necessary entry in tract index when kept; Wisconsin recorders association may not add highway conveyance form to standard forms mentioned in 59.57 (1) (a) or provide recording fee therefor other than that prescribed by statute .....	88
Register of deeds does not vacate office by enlistment in armed forces of U. S. ....	194
Register of deeds may offer himself as candidate for reelection while serving in armed forces of U. S. ....	194
Register of deeds—is not entitled, in addition to fee provided by 59.57 (11b), for registering birth, death and marriage certificates, to fee for subsequent corrections to such certificates so registered .....	334
Registrar of vital statistics, state—need not certify to county treasurers fees which registers of deeds are entitled to for filing certificates of births, deaths and marriages ..	334
Reporter, circuit court—power and duty of county to furnish all or part of supplies and equipment to court for use of reporter can be grounded upon inherent power of court to require county to furnish court with supplies deemed by court necessary .....	222
See .....	XV
Reporter, county court—253.33 (4) applies to all reporters appointment of whom must be justified by 253.33 (exclusive of exception by (1) ); one so appointed is entitled to fees provided by 253.33 (4) and county board has no power to prescribe functioning of or duties of such reporter .....	219
Reporter, county court—shorthand notes constitute property of court .....	219
Sheriff—under 56.08 (6) and (7) must pay each week to use of dependents of prisoner amount earned by that prisoner, and must pay each month to county treasurer all amounts due to county, namely those amounts earned by prisoners in his custody which are not required to be paid to dependents .....	393
Supervisor, city, on county board—may not under 62.09 (7) (d) sell insurance to city if annual premium exceeds \$300 irrespective of his share of commission thereon ..	93
Supervisor, city, on county board—does not violate 348.28 by selling insurance on city school buildings .....	93

PUBLIC OFFICERS—(Continued)	Page
Supervisor, city, on county board—violates 348.28 by selling insurance on city buildings other than schools if he is also member of common council of city from which he is elected .....	93
Vacancy—county clerk and register of deeds do not vacate offices by enlistment in armed forces of U. S. ....	194
<b>PUBLIC PRINTING</b>	
Bureau of purchases has no authority to purchase and use multilith machine for state work .....	60
<b>PUBLIC RECORDS</b>	
Annuity board may disclose to third party accumulations to credit of member of retirement system and amount of monthly annuity such member is entitled to receive upon retirement .....	195
Public utilities. See Corporations.	
<b>REAL ESTATE</b>	
Sec. 235.46 was intended to provide means of correcting defects in record title to real estate; affidavit filed under that section cannot take place of delayed birth certificate filed pursuant to 69.57 .....	73
Re-examination of insane. See Indigent, Insane, etc.	
Refunds. See Appropriations and Expenditures.	
Refunds. See Taxation, motor fuel tax.	
Register of deeds. See Public Officers.	
Registrar of vital statistics, state. See Public Officers.	
Relocation. See Bridges and Highways.	
Reporter, circuit court. See Courts.	
Reporter, circuit court. See Public Officers.	
Reporter, county court. See Courts.	
Reporter, county court. See Public Officers.	
Safe employment and place. See Industry Regulation.	
<b>SCHOOL DISTRICTS</b>	
Tuition tax—state superintendent should not certify for payment to school districts under 40.47 (6) tuition claims for payment of which sufficient taxes have been collected but which remain unpaid because municipal treasurer has failed to observe priorities accorded by 74.15 (2), Stats. 1939 or 74.03 (9), Stats. ....	115
District may obtain insurance against liability for accidental injuries to members of public caused by defective construction or maintenance of school buildings under 101.06; may not obtain insurance against injuries arising from any cause not covered by 101.06 .....	176
See .....	XVIII 559
Tuition—district in which pupil maintained as public charge resided and attended school in years 1939 to 1941 may recover tuition from county or municipality of his legal settlement; county or municipality may then be reimbursed as provided in 40.21 (2), Stats. 1941 .....	262
Powers and duties of school district and school board are limited to property under control of district .....	266
District may rent school building furnished by federal government on federal lands where additional facilities are required to accommodate children of district .....	266

SCHOOL DISTRICTS—(Continued)

	Page
Obligation of district to furnish school facilities for children of families residing in federal housing project on government-owned lands within district is same as its obligation to other children of district .....	266
Transportation of school children—when district votes to suspend its school parents residing in district may send their children to any school they choose but school district which has closed its school need not furnish transportation unless nearest school which child may attend is more than two miles from residence and child attends nearest school .....	318
Transportation of school children—sec. 40.34 (1) and (2) contemplates complete suspension of school work within district in so far as reference is there made to payment of state aids to district by reason of attendance of children of school age residing in that district at school in another district .....	372

Securities law. See Corporations.

Semiannual payment of taxes. See Taxation, tax collection.

Sheriff. See Public Officers.

Slaughterhouses. See Public Health.

SOCIAL SECURITY ACT

Poor relief—attorney general does not express opinion as to priority of purchase money mortgage executed by pensioner subsequent to filing of old-age pension liens where question is academic and of no present practical importance in administration of law .....	97
Poor relief—where daughter and son-in-law agree to support and maintain old-age pensioner for balance of his life if pension department will release property owned by pensioner from existing old-age pension lien, county pension administrative officers may release from lien but are not obliged to do so even though municipality having financial burden desires such release .....	97
Poor relief—term "income" is used in 49.21 in sense of "means of support"; it includes veterans' pensions, income from rental of part of one's home and money furnished by relatives for support .....	339
Poor relief—sec. 49.37 (4), Stats. 1939, does not change order of priorities for distribution of tax collections under 74.15 (2), Stats. 1939 .....	348
Poor relief—recipient of old-age assistance may receive medical or surgical care through regular channels if it is needed even though he is receiving less than maximum assistance permitted by 49.21 .....	400
Poor relief—term "medical and surgical assistance" as used in 49.31 (1) includes hospitalization .....	400
Poor relief—person receiving old-age assistance may not receive additional aid through regular relief channels for purpose other than medical or surgical assistance..	400

Standard time. See Police Regulations.

Standard time. See Weights and Measures.

State insurance. See Insurance.

State registrar of vital statistics. See Public Officers—registrar of vital statistics, state.

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION  
LAWS, LEGISLATIVE BILLS AND RESOLUTIONS, ETC.  
REFERRED TO AND CONSTRUED

Art.	U. S. Const.	Page	Laws 1913	Page
I	Sec. 8.....	269	Ch. 130 .....	366, 367
Amendment XIV .....		158	Laws 1917	
U. S. Stats.			Ch. 241 .....	34-36
38 Stats. at L.	441....	322, 323	382 .....	74
39	929.....	30	550 .....	391
	933.....	31, 32	Laws 1919	
	934.....	32	Ch. 30 .....	206, 210
	936.....	32	584 .....	89
40	450.....	16	593 .....	61
	451.....	16	615 .....	206, 208
41	305.....	200	Laws 1921	
46	1421....	281, 282	Ch. 242 .....	36
48	128.....	329	396 .....	34
	132.....	330	425 .....	74
49	1488....	30, 31	589 .....	383
53	1402....	330	Laws 1923	
54	885.....	194	Ch. 244 .....	15
	1178....	276	446 .....	8
	1186....	273, 276	448 .....	391
56	9.....	16	Laws 1925	
Wis. Const.			Ch. 121 .....	349, 351
Art. IV	Sec. 25.....	60, 63	366 .....	247
VIII	10.....	164, 165	Laws 1927	
X	2.....	248, 251	Ch. 131 .....	366, 367
	3.....	268	425 .....	373
Laws 1861			Laws 1929	
Ch. 138 .....		291	Ch. 69 .....	28
Laws 1889			187 .....	9
Ch. 390 .....		24	219 .....	247
Laws 1891			334 .....	335
Ch. 64 .....		220	468 .....	61
Laws 1895			504 .....	248
Ch. 228 .....		366, 367	Laws 1931	
Laws 1907			Ch. 41 .....	349
Ch. 426 .....		210	150 .....	210
Laws 1909			228 .....	335
Ch. 18 .....		248, 250	Laws 1933	
188 .....		335	299 .....	42
302 .....		74	363 .....	80-85
541 .....		206, 207		188
Laws 1911			426 .....	2
Ch. 337 .....		8		115-117

INDEX

425

Laws 1933	Page	Ann. Stats. 1889	Page
	277, 278	Sec. 4733	24
	279		
	324	Stats. 1898	
	349		
458	349-352	Sec. 430 5	268
487	256	4733	25
Bills 1933		Stats. 1911	
No. 50, S.	256	Sec. 1317m-5 7	8
Laws 1933 (Special Session)		2238a	74
Ch. 10	80-85	4725a	210
Laws 1935		4734a	206-210
Ch. 17	80-85	4734c	206-209
41	317	4734g	207, 209
		4734h	207-210
Laws 1937		Stats. 1913	
Ch. 29	19-20	Sec. 2332	295
158	215	Stats. 1917	
172	284	Sec. 1435	391
Laws 1937 (Special Session)		1435f-12 to 1435f-20	391
Ch. 7	152, 153	2238a	74
	310	Stats. 1919	
14	84	Sec. 764a	89
Laws 1939		Stats. 1921	
Ch. 216	86	Sec. 2238a	74
238	116	Stats. 1923	
332	54	Sec. 83.07	8
435	83	83.08 (2)	8
503	284	147.01 <i>et seq.</i>	391
517	116	154.01 <i>et seq.</i>	391
524	396	Stats. 1925	
Laws 1941		Sec. 40.16 (1)	373
Ch. 5	287, 288	Stats. 1927	
	290	Sec. 33.03 (6)	61
63	84	1435f-12	391
67	63	Stats. 1929	
122	262	Sec. 196.01 (1)	248
160	285	196.535	247
206	111, 112	Stats. 1931	
	248-251	Sec. 201.49	256
	258	Stats. 1933	
259	317	Sec. 77.04 (2)	19
264	262.	203.55	256
276	145		
312	335		
R. S. 1849			
Ch. 15, sec. 123	102		
R. S. 1878			
Sec. 669	28		
4733	24		



# INDEX

427

Stats.	Page	Stats.	Page
42.40	197	(7)	398-395
42.46	197	56.19 (3)	65, 66
42.47	197-198	57.01	204-207
44.01	132	(1)	204-212
46.10 (1a)	124-130	(2)	204-212
	265	57.02	206, 207
	297	(2)	207, 209
(7)	44-50	57.03	207-214
	63, 64	(1)	204-213
48.01 (2)	134	(2)	204-213
(5)	133-135	57.05	366, 367
	295	(1)	210
48.06	297	(2)	210, 211
(2)	297	58.36	50
48.07	294-297		405
	404	58.37	50
(1)	405	59.01	264
(6)	296-301	59.03 (3)	94
	404, 405	59.07 (7)	27-28
(8)	133, 136		225, 226
48.16	404, 405	(23)	76, 77
(2)	405	59.15 (1)	29
48.17	404		107, 110
49.025	42	59.16 (3)	194
49.03	299-301	59.20 (8)	249
(8a)	299	59.45	230, 231
49.10	44	59.47 (1)	231
49.11	341, 345	59.49	231
49.21	339-345	59.50	194
	400	59.51 (11)	90
49.25	40-52	59.57 (1)	88, 90
	151-153	(6)	90
49.26	41-50	(11b)	334-336
	57, 58	59.67 (2)	288
(1)	43, 51		290
	309, 311	59.76	299, 302
(4)	43	59.77	299, 302
	59	59.98	165
	97, 99	60.18 (12)	34, 35
	308, 309	60.72 (1)	303, 304
49.31	345	61.34 (1)	37
(1)	400-403	61.65	381, 385
(2)	97, 99	62.09 (1)	93, 94
49.37 (2)	97, 99	(7)	93, 94
49.38 (1)	51	62.11	36
49.50 (1m)	50	(5)	36
50.03 (1)	127		94
(2)	124-130	62.13 (9)	381-386
	265	(10)	381, 382
50.06	127	62.20	327
50.07 (1)	127	62.21	324-328
(2)	124, 127	65.90	95, 96
	264, 265	(5)	97
(3)	264, 265	66.05 (10)	150
51.11 (1)	78, 79		171-175
(7)	78-80		200
51.22	78-80	66.06 (10)	305, 306
53.11 (1)	65, 66	66.27	165
56.08 (6)	393-395	67.01 (1)	304

Stats.	Page	Stats.	Page
67.12	95, 96	75.37	166
(1)	96	75.61 (2)	284
69.01 <i>et seq.</i>	334	76.34 (1)	329-333
69.26	316-318	77.01 <i>et seq.</i>	165
69.53 (6)	334	77.02 (1)	165
69.54 (1)	334	77.04 (2)	228
(4)	334	(3)	19, 20
69.56 (3)	335, 336	77.05	228
69.57 (1)	73, 75	(1)	228, 229
(2)	73-75	(2)	228
(3)	74, 75	77.07	229
(4)	74	77.10	228, 229
69.60 (1)	396-398	(1)	229
(2)	396, 397	(2)	229
(3)	396, 397	78.02 (1)	232, 233
(4)	396-398	(2)	233
(5)	396-398	78.08	232
(6)	396-398	78.11 (6)	53-56
(7)	396-398	78.14 (1)	234
70.11 (1)	269	(2)	234, 235
(12)	282	78.29	235
70.58 (2)	21, 23	78.30	234, 235
70.62 (2)	165	83.07	8, 9
72.01 (2)	96	(2)	14
72.01 (3)	188		241, 242
72.17 (3)	185-187	(3)	13
72.20	187-190	83.08	9
72.75 4 (1)	188	(1)	10
74.03	1-3	(2)	6-15
	277	84.06 (2)	238-239
	278, 280	85.01 (1)	145-146
(5)	325	(3)	252
(8)	325-328	(8)	252
(9)	115-121	85.08 (25)	69-72
74.037	278-280		258
74.17	279	(25c)	69-73
	327		258
74.19	280		378-381
(3)	280	(26)	258
74.205	283-286		378-380
74.40	347	(27)	69-71
74.44 (1)	346, 347		258
74.46	347	(27k)	258
75.01 (1)	292		379
(1m)	285, 286	(27m)	259
75.015	285	(29)	71
75.14 (1)	103		259
	113		379
75.20	106	(30)	259
75.26	101-104	(31)	257-260
75.27	101-103		379
75.32	106	85.09	379
75.34 (1)	114	(6)	253-255
	290, 291	(15)	111, 112
(2)	290, 291		260-261
75.35	287, 291	85.13	199, 200
	289-292	85.137	111-113
75.36	101, 104	100.15 (1)	53-56
	113	100.18	53, 56

# INDEX

429

	Stats.	Page		Stats.	Page
	101.01 (12)	91, 92		(3)	306, 307
	(13)	177		(8)	306
	101.06	176, 177		215.33 (2)	367-369
	102.04 (1)	76		218.01 (2)	218
	102.21	77		(3)	216-218
	102.28 (2)	76		(7)	218
	106.01	155		(8)	217-218
	(5)	159		218.04 (1)	374, 375
	(6)	159		(2)	375
	(10)	158		220.08 (13)	191
	129.11 (1)	154		(14)	191, 192
	(2)	153, 154		220.20	191, 192
	139.06	143		235.16 (1)	88, 89
	139.27	143		235.46	73-75
	139.29	143		241.10	251
	139.295	143		253.32	186
	142.02	38, 39		253.33	219-222
	142.03 (2)	38, 39		(1)	219-221
	146.11	302		(2)	219, 222
	147.18	389-392		(3)	221
	152.03 (1)	85-87		(4)	219, 221
	154.01 (1)	390		256.45	376
	154.02	390		262.09 (1)	296
	154.03	390, 391		262.12	9
	158.02 (1)	387, 388		(3)	9
	158.04 (12)	387		262.14	9
	174.01	201-203		269.46	295, 296
	175.09 (1)	15-17		(1)	295
	176.01 <i>et seq.</i>	199		271.41 (2)	39
	176.01 (2)	199, 200		285.01 <i>et seq.</i>	185
	176.05 (8)	179		285.01	313
	(21)	180		289.18 (1)	370
	176.06	147-151		310.14	45
	(1)	149		311.05	45
	(2)	149		313.16	45
	(3)	148, 150		313.17	45
	(4)	150		313.20	45
	(5)	150, 151		316.24	48
	176.18	149		316.25	45
	176.43 (1)	148, 149		331.175 (1)	162-170
	(2)	142		(2)	166-170
	(2a)	142		331.18	167
	176.70 (1)	144		343.11	3
	180.07 (1)	356-365		343.511	101
	182.13 (1)	356-365			166
	189.01 <i>et seq.</i>	53-57		343.512	166
	189.13	354		343.56	205, 213
	196.01 (1)	246-248		348.01	121
	(6)	246		348.28	93-95
	196.80 (1)	244-248		353.27	218
	201.32	254		359.05	4, 5
	201.33	254		359.07	4
	201.34	254			24-26
	203.55	253-256		359.14	213
	210.01	184, 185		370.01 (1)	72
		215, 216			168
	210.04 (1)	305-307		370.04	262
	(2)	306		371.08	118

Student loans. See Appropriations and Expenditures. Page  
 Supervisor, city. See Public Officers.

Tax collection. See Taxation.

Tax sales. See Taxation.

### TAXATION

Tax collection—74.03, in providing for payment of one-half taxes by January 31 refers to taxes on each parcel of land as separately assessed; does not require taxpayer owning more than one parcel to pay one-half aggregate taxes on all parcels .....	1
Forest crop lands—amounts received by town pursuant to ch. 29, L. 1937, were “on account of forest crop lands”; 20% is payable to county .....	19
Exemption—brooder equipment kept and used on farm in connection with hatching and raising chickens for sale from eggs produced on farm, where no custom hatching is done, is exempt .....	21
Motor fuel tax—sec. 78.11 (6) is not violated by posting and selling at price set up to show and include net selling price per gallon, tax per gallon and cash redemption value per gallon of trading stamps given in connection with sale of gasoline .....	53
Motor fuel tax—sec. 78.11 (6) is not violated by posting and selling at price set up to show and include net selling price per gallon and tax per gallon but cash redemption value of stamps per gallon is expressed only in form of discount percentage .....	53
Motor fuel tax—posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure results in violation of 78.11 (6) .....	53
Tax sales—where county does not take possession of lands on which it holds tax deed and does not bring any action to recover possession within period prescribed results are: county’s tax title is extinguished if possession of lands was held during prescribed period by former owner or persons claiming under him; or county’s title becomes absolute if lands are unoccupied during three years after execution and recording of deed and no action is brought to test validity .....	101
Tax sales—town may not, by payment of delinquent taxes, interest and penalties, compel county to convey to town tax deed or tax certificate held by county on lands located in such town .....	113
Inheritance tax—fees of public administrator in estate pursuant to 72.17 (3) are not payable until inheritance tax in estate has been determined by court .....	185
Inheritance tax—county treasurer may retain 7½% of amount of gift tax credit applied in payment of inheritance tax; nonretention by him of per cent results in overpayment in error refundable under 20.06 (2) ..	187
Forest crop lands—acreage canceled from entry in March should not be included in following apportionment and payment made to towns under 77.05 .....	228
Forest crop lands—cancellation of entries completed prior to April 20 in any year shall exclude such acreage from next payment of state contributions .....	228
Motor fuel tax—no refund is authorized to foreign or domestic interstate operators of motor vehicles for motor	

TAXATION—(Continued)

	Page
fuel tax paid on excess of gasoline purchased in this state over amount used in operating vehicle on public highways of state; no provision authorizes reciprocity with other states in enforcement of motor fuel tax law	232
Six per cent maximum interest limitation provided by soldiers' and sailors' relief act of 1940 is applicable to delinquent real estate taxes falling due during period of military service of owner regardless of whether he has filed affidavit to suspend or postpone sale of property for taxes	273
Tax collection—amendment of 74.19 (3) by ch. 426, L. 1933, going into effect Oct. 1, 1941, does not relieve county of accountability on excess rolls of prior years	277
Tax collection—practice of local municipality of retaining unpaid taxes and not making return at annual settlement is condemned as of doubtful validity; county treasurer should accept subsequent return but on condition that it is received in trust for local municipality	278
Where federal government filed declaration of taking under 40 USCA sec. 258a prior to May 1, 1942, real estate acquired by it was not assessable for 1942 taxes	281
Personal property used in constructing ordnance works upon real estate owned by U. S. government but over which state had not surrendered exclusive jurisdiction is taxable by state	281
Tax collection—sec. 74.205 does not authorize county to waive interest and penalties upon county-owned tax certificates upon particular property	283
Tax sales—resolution of county board that county tax deed land be sold at minimum price except to owners, mortgagees and lienholders, who shall have privilege of buying their land by payment of all taxes and charges against it, is valid	286
Tax sale—resolution of county board directing county treasurer not to sell or assign county-owned tax certificates to other than former owners of land and lienholders is invalid	289
Tax collection—under 1941 statutes embodying changes made by ch. 426, L. 1933, effective Oct. 1, 1941, municipality has option given by 62.21 to return unpaid special assessments in March for credit or in trust	324
Dividends received by domestic insurance companies on share certificates issued by federal savings and loan associations are to be included in gross income upon which license fee imposed by 76.34 (1) is computed	329
Tax collection—resolution of county board instructing county treasurer regarding to whom he shall sell tax certificates does not make county exclusive purchaser at tax sale under 74.44 (1)	346
Tax collection—sec. 49.37 (4), Stats. 1939, does not change order of priorities for distribution of tax collections under 74.15 (2), Stats. 1939	349

Teachers retirement. See Education.  
 Towns. See Municipal Corporations.

TRADE REGULATION

Fraudulent advertising—posting and selling gasoline at price set up to show and include net selling price per

TRADE REGULATION—(Continued)

Page

gallon, tax per gallon and cash redemption value per gallon of trading stamps given in connection with sale is not violation of 100.18; same holds true where cash redemption value of stamps per gallon is not stated but is expressed in form of discount percentage; posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure is not violation of 100.18 ..... 53

Trading stamps—posting and selling gasoline at price set up to show and include net selling price per gallon, tax per gallon and cash redemption value per gallon of stamps is not violation of 100.15; same holds true where cash redemption value of stamps per gallon is not stated but is expressed in form of discount percentage; posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure is not violation of 100.15 ..... 53

Trading stamps. See Trade Regulation.  
 Transportation of school children. See School Districts.

TUBERCULOSIS SANATORIUMS

Board of health may not approve allowance of state funds for care of patient in county tuberculosis hospital unless proper county judge has made determination that support of patient should be public charge, as required by 46.10 (1a), 50.03 (2) and 50.07 (2) ..... 124

Where application is made under 50.03 (2) for treatment at public charge and evidence is given which warrants necessary findings by county judge, grant of application should be construed as compliance with statutory requirements although it does not expressly recite that court determined chargeability for patient's support... 124

County may accept federal aid for its share of cost under 50.07 (2) of maintaining indigent resident Indian in county sanatorium ..... 264

Tuition. See School Districts.  
 Tuition tax. See School Districts.

Vacancies. See Public Officers.  
 Village firemen's fund. See Municipal Corporations.  
 Village policemen's fund. See Municipal Corporations, village firemen's fund.

VITAL STATISTICS

Birth certificate—sec. 235.46 was intended to provide means of correcting defects in record title to real estate; affidavit filed under that section cannot take place of delayed birth certificate filed pursuant to sec. 69.57 for purpose of showing age and citizenship ..... 73

Birth certificate—court order requirement of 69.26 applies to all illegitimate birth records; is not limited to those that occur after Oct. 1, 1907; is applicable to delayed illegitimate birth record as well as to such record made at time of birth ..... 316

Birth, death and marriage certificates—state registrar of vital statistics need not certify to county treasurers fees which registers of deeds are entitled to for filing certificates ..... 334

<b>VITAL STATISTICS—(Continued)</b>		<b>Page</b>
Birth, death and marriage certificates—register of deeds is not entitled, in addition to fee provided by 59.57 (11b) for registering certificates, to fee for subsequent corrections to such certificates so registered .....		334
Birth certificates—sec. 69.60 authorizes state registrar to file new birth records in cases of adoption or legitimation only in cases of persons born within this state .....		396
Vocational education. See Appropriations and Expenditures.		
Vocational education. See Education.		
 <b>WEIGHTS AND MEASURES</b>		
Standard time—under 175.09 (1) it was legislative intention to establish U. S. standard central time as standard time in state .....		15
Wisconsin general hospital. See Public Health.		
 <b>WORDS AND PHRASES</b>		
Public building—sec. 101.01 (12) applies to building owned by religious order and occupied by three or more sisters of that order who teach in parochial school .....		91
Forest or wild land area—meaning as used in 331.175 interpreted .....		162
Domestic animals—chickens are included within term “other domestic animals” as found in 174.01 .....		201
 <b>WORKMEN'S COMPENSATION</b>		
County is not required to carry insurance, but county board may provide for carrying it; sec. 59.07 (23) does not apply to this type of insurance .....		76
See .....	VIII	529

